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Rules against Restraints on Alienation and against Suspension of the Absolute Power of Alienation in Minnesota

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EARLY in the history of the common law the practice began of separating the beneficial enjoyment of property from the legal title to it. As the practice developed two distinct objects appeared. One was to create interests free from feudal burdens and restrictions; the other was to separate the management of the property from the beneficial interests in it, in order to secure impartial and competent management, to relieve beneficiaries of the burden of care, to keep the property intact for several contemporaneous beneficiaries, and to conserve it for successive beneficiaries. The former object was served by conveying to uses; the latter by creating active trusts.3

Conveyances to uses were more common in early times than active trusts. The feoff to uses was passive. The legal title was in him and this title satisfied the feudal requirements. But he was expected to obey the orders of the cestui que use in respect to the property, and to permit the cestui que use to occupy and dispose of it at will. He made legal title at direction of the cestui que use. In course of time the performance of these obligations could be enforced by the cestui que use through the Court of Chancery.
The Statute of Uses aimed to abolish these uses. It did not prohibit their creation, but provided that when one became seised to the use of another, the latter should have a legal title for the same estate that he had in the use. The statute "executed the use," and ended the duality of legal and equitable titles. There were no passive uses for about a century. Then a species of them was revived by chancery.

Before the statute a use on a use was void as repugnant. A feoffment to B to the use of C to the use of D was manifestly nonsense. The use was the beneficial enjoyment. C and D could not severally have the sole enjoyment concurrently. Therefore the use to D was void. The statute did not validate void uses. It executed only those that were good in chancery before the statute was enacted. So on a bargain and sale to C to the use of D the use to D was void because the bargain and sale was itself a use to C and the use to D was a second concurrent use. But about a century after the statute, chancery recognized and protected the second use. The chancery court took cognizance of the fact that since the statute the first use had a different purpose. It was raised not to give C the enjoyment of the land, but merely as a means of passing the legal title to him by force of the statute, and the second use was intended to give the beneficial enjoyment to D. In this way by a use on a use equity revived the old system of passive uses under the modern name of passive trusts.4

The English Statute of Uses was never construed to apply to active trusts. Such trusts were comparatively rare when the statute was passed, but they became of ever increasing frequency afterwards. The common law never hindered the creation of active trusts merely because they were trusts. An active trust for any purpose was valid provided that the purpose was not criminal or contrary to public policy. The separation of the equitable from the legal title to the property, was not of itself contrary to the policy of the common law.5

The early Minnesota statutes were framed on the theory that trusts were generally undesirable, and should be allowed only for certain purposes. The New York revisers, who drafted the statutes which Minnesota copied, in the notes to their proposed revision, said:6

51 Perry, Trusts, 6th ed., sec. 21; Bogert, Trusts 157.
63 New York, Revised Statutes, 2nd ed. 1830, 585.
"As the creation of trusts is always in a greater or less degree the source of inconvenience and expense, by embarrassing the title, and requiring the frequent aid of a court of equity, it is desirable that express trusts should be limited, as far as possible, and the purposes for which they may be created, strictly defined. The object of the Revisers in this section is to allow the creation of express trusts, in those cases and in those cases only where the purposes of the trust require that the legal estate should pass to the trustees. An assignment for the benefit of creditors, would in most cases be entirely defeated, if the title were to remain in the debtor, and where the trust is to receive the rents and profits of lands, and to apply them to the education of a minor, the separate use of a married woman, or the support of a lunatic or spendthrift (the general objects of trusts of this description), the utility of vesting the title and possession in the trustees is sufficiently apparent. After much reflection, the Revisers have not been able to satisfy themselves that there are any cases not enumerated in this section, in which, in order to secure the execution of the trust, it is necessary that the title or possession should vest in the trustees. Where no such necessity exists (as where the trust is to convey, or to make partition, etc.), it is obvious that without giving any estate to the trustees, the trust may as well be executed as a power."

It was in pursuance of this theory that the chapter on Uses and Trusts of the New York Revised Statutes of 1830 was framed. This Chapter was copied by Michigan in 1846, from Michigan by Wisconsin in 1849, and from Wisconsin by Minnesota in 1851. The pertinent sections as contained in General Statutes of Minnesota, 1913 are:

"6701. Uses and trusts, except as authorized and modified in this chapter, are abolished; and every estate and interest in lands shall be deemed a legal right, cognizable as such in the courts of law, except when otherwise provided by statute.

"6703. Every person who, by virtue of any grant, assignment, or devise, is entitled to the actual possession of lands, and the receipt of the rents and profits thereof, in law or equity, shall be deemed to have a legal estate therein of the same quality and duration, and subject to the same conditions, as his beneficial interests. But this shall not divest the estate of any trustee in any existing trust where the title of such trustee is not merely nominal, but is connected with some power of actual disposition or management, in relation to the lands which are the subject of the trust.

Minn., Revised Statutes of the Territory 1851, Ch. 44. These statutes, like the statutes of Michigan and Wisconsin, contained the broad authorization of trusts of real property now found in Minn., G. S. 1913, sec. 6710 (6); but this subdivision was omitted from the Revision of 1866, and was not reenacted until 1897, Minn. Laws, 1897, ch. 80.
"6704. Every disposition of lands, whether by deed or
devise, except as otherwise provided in this chapter, shall be made
directly to the person in whom the right to the possession and
profits is intended to be vested, and not to any other to the use of,
or in trust for, such person; and, if made to one or more persons
in trust for or to the use of another, no estate or interest, legal
or equitable, shall vest in the trustee.

"6705. Sections 6701-6704 shall not extend to trusts arising
or resulting by implication of law, nor be construed to prevent or
affect the creation of such express trusts as are hereinafter author-
ized and defined.

"6710. Express trusts may be created for any of the follow-

ing purposes:

1. To sell lands for the benefit of creditors.
2. To sell, mortgage, or lease lands for the benefit of
legatees, or for the purpose of satisfying any charge thereon.
3. To receive the rents and profits of lands, and apply
them to the use of any person, during the life of such person, or
for any shorter term, subject to the rules prescribed in chapter 59.
4. To receive the rents and profits of lands, and to accumu-
late the same, for either of the purposes, and within the limits pre-
scribed in chapter 59.

"6711. A devise of lands to executors or other trustees, to
be sold or mortgaged, when such trustees are not also empowered
to receive the rents and profits, shall vest no estate in the trustees,
but the trust shall be valid as a power, and the lands shall descend
to their heirs, or pass to the devisees of the testator, subject to
the execution of the power.

"6713. Whenever an express trust is created for any pur-
pose not heretofore in this chapter enumerated, no estate shall
vest in the trustee; but the trust, if directing or authorizing the
performance of any act which may be lawfully performed under
a power, shall be valid as a power in trust, subject to the pro-
visions in relation to such powers contained in chapter 61.

"6714. Whenever the trust is valid as a power, the land to
which the trust relates shall remain in or descend to the persons
otherwise entitled, subject to the execution of the trust as a
power."

The operation of these statutes upon an attempted trust pro-
duced according to the nature of the attempted trust, one of the
following results:

1. If the attempted trust were a passive one, for definite
beneficiaries, the legal title passed to the beneficiaries by operation
of the statute sections 6703, 6704. These sections re-enforced the
English statute of uses, which had been partially defeated by the
device of a use on a use. They comprehended all express passive
uses and trusts in lands and so included a use on a use. An at-
tempt to create an express passive trust of lands operated as a conveyance to the beneficiaries if they were definite enough to take legal title.  

2. If the attempted trust were an active one, for definite beneficiaries, and for a purpose specified in the four subdivisions of section 6710, an active trust for the purpose named was created.

3. If the attempted trust were an active one for definite beneficiaries, for a purpose not enumerated which purpose could be effected by a power, it passed no legal title in the property to anyone, but created a power in the trustee to carry out the purpose by section 6713. This must be the result when lands were devised to executors or trustees to be sold or mortgaged and the trustee was not also empowered to receive the rents and profits by section 6711.

4. If the attempted trust did not fit into any one of these three classes, it was wholly void by section 6701. When it was an active trust for definite beneficiaries, but for a purpose not authorized and which could not be performed under a power, it was necessarily void because all other trusts were abolished by the statutes. Only trusts for definite beneficiaries were authorized. Consequently all trusts, active or passive, for indefinite beneficiaries were void. They could not operate as conveyances to the beneficiaries because they were indefinite; as trusts, because such trusts were not authorized; as powers, because such purpose could not be effected by a power. Charitable trusts fell into this class. It is of the nature of a charitable trust that the beneficiaries are indefinite, and so charitable trusts were void.

But in 1897, Minnesota added a subdivision which was remodelled in the revision of 1905, is now subdivision 6 of section 6710 and in its present form reads:

"For the beneficial interests of any person or persons whether such trust embraces real or personal property or both, when the

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8Chaplin, Express Trusts (N.Y.) 5, 396-399; Thompson v. Couant, (1893) 52 Minn. 208, 53 N. W. 1145.
9Chaplin, Express Trusts (N.Y.) 26, 395-396; Randall v. Constans, (1885) 33 Minn. 329, 23 N. W. 530; Carson v. Cochran, (1892) 52 Minn. 67, 53 N. W. 1130
10Chaplin, Express Trusts (N.Y.) 400-402.
11Little v. Wilford, (1883) 31 Minn. 173, 17 N. W. 282; Lane v. Eaton, (1897) 69 Minn. 141, 71 N. W. 1031 (semble); 1 MINNESOTA LAW REVIEW 219.
12Minn., Laws 1897, ch. 80.
trust is fully expressed and clearly defined on the face of the instrument creating it. ."

The net result of the abolition of uses and trusts and the authorization of trusts by the four original subdivisions and this new subdivision is that active private trusts in real property may be created in Minnesota today for every purpose for which a trust might have been created under the common law. In fact so far as the purpose of trusts is concerned, the last subdivision seems broad enough in itself to authorize trusts in real property for any lawful purpose whatever when the beneficiaries are definite. "A trust may be created under subdivision 6 for any purpose whatever, provided, of course, it be not otherwise illegal."13

It is now unnecessary in Minnesota to mould an attempted trust into a power in trust, because of the broad authorization of trusts by subdivision 6, except in the one case of a devise of lands to executors or other trustees to be sold or mortgaged when such trustees are not also empowered to receive the rents and profits. Section 6711 provides that such a devise shall vest no estate in the trustee but the trust shall be valid as a power and the land shall descend to the heirs or pass to the devises or the executors subject to the execution of the power. Section 6713, which provides that whenever an express trust is created for any purpose not enumerated no estate shall vest in the trustee but the trust if directing or authorizing the performance of any act which may be lawfully performed under a power, shall be valid as a power in trust, is of no further use. There is no purpose for which an express trust is not authorized when the beneficiaries are definite, and the trust cannot be executed as a power when they are indefinite.

Authorized Purposes of Trusts of Personal Property

Prior to 1875, the chapter of the Statutes on Uses and Trusts like the statutes of New York, Michigan and Wisconsin did not expressly mention trusts of personal property. By the first section of the chapter (6701) uses and trusts except as authorized and modified in the chapter were abolished, and every estate and interest in lands declared to be a legal right, except when otherwise provided by statute. The only trusts provided by statute were of land and the rents and profits of land. The question was whether under these provisions, trusts of personal property were

13Y. M. C. A. v. Horn, (1913) 120 Minn. 404, 421, 139 N. W. 806.
abolished. In New York, Michigan and Wisconsin, it has been held that these statutes relate only to trusts of real property, and do not prevent the creation of trusts in personal property.

In Minnesota in 1875, trusts of personal property were expressly authorized by an act which is now subdivision 5 of section 6710.

"To receive and take charge of any money, stocks, bonds, or valuable chattels of any kind and to invest and loan the same for the benefit of the beneficiaries of such express trust *

In determining the effect of this subdivision the supreme court felt called upon to decide whether trusts of personal property were forbidden before its enactment. In Shanahan v. Kelly, the court said:

"The answer to the question depends upon whether all express uses and trusts, including charitable ones, in personal property, are prohibited by G. S. 1866, c. 43, Par. 1, except those therein enumerated. That all trusts, including charitable trusts in real estate, except as authorized by chapter 43, are abolished, and that the beneficiary of any authorized trust must be certain, or capable of being rendered certain, or the trust is void, is the settled law of this state.

Whether this statutory rule applies to trusts in personal property has not been directly decided. Prior to the enactment of Laws 1875, c. 53, it seems to have been the understanding of the bench and bar of the state that it did not. But since that time it has been assumed in the cases cited, in support of the rule, that all trusts in both real and personal property were abolished, except as authorized by the statute. It is true that in those cases the subject of trusts in real property was alone under consideration."

It is important, as will be seen farther on, to determine whether express trusts of personalty were possible before 1875. There are at least two cases in which they were directly sustained without discussion of the effect of the statutes and another in which they were impliedly sustained after discussion. In McClung v. Bergfeld an assignment of personal property on trust for the benefit of creditors was upheld against the claims of a subsequent creditor of the assignor. In Tullis v. Findley a gift of a promis-
sory note by a husband to his wife was held to be a nullity at law, but good in equity. The import of this decision was that the husband was trustee of the note for his wife. In Baker v. Terrell\(^2\) it was held that section 6706 of the chapter on Uses and Trusts, which prevents a resulting trust in favor of the person who pays the consideration for a grant made to another, had no application to personal property. The court said that:

"There can be but little doubt that the chapter of our statutes concerning Uses and Trusts relates to real property only."

It is unnecessary to discuss the later opinions of the court on this matter. They are reviewed at length in the recent case of Congdon v. Congdon,\(^2\) and in conclusion the court said:

"We have covered our previous decisions bearing upon the question when trusts of personal property were first regulated by statute in our state. The arguments of counsel show that an apparent view has grown up that prior to 1875 the common law as to private trusts in personalty was not in full force in this state. We think this view erroneous. In fact, our conclusion on this branch of this case is that the common law, from the birth of our state, was in full force up to the act of 1875; that our original statutes on uses and trusts related exclusively to real estate; that as to personal property the common law trusts prevailed, unmodified by statute, until 1875."

Since the view is now accepted that trusts of personal property were prior to 1875 allowed as at common law, the next question is what was the effect of the acts of 1875, and 1897\(^2\) as amended in 1905, being now section 6710 subdivisions 5 and 6 respectively, quoted above, authorizing trusts of personal property. The question first arose in Shanahan v. Kelly.\(^2\) There were bequests of sums of money to the executor to be paid for masses and to a bishop and his successors for the education of priests for his diocese. It was held that the bequests were on trust, and, conceding they were for a charitable use, that they were not authorized. The court said:

"It is obvious from the mere reading of chapter 43, as it now stands that, whatever may have been the rule prior to 1875, all express trusts, including charitable trusts, in personal property except as provided therein, are abolished, precisely as are trusts in real estate. There is no reasonable rule of construction which will exclude personal property from the trusts prohibited by the statute, and we so hold."

\(^1\)(1863) 8 Minn. 195.
\(^2\)(Minn. 1924) 200 N. W. 76, 86.
\(^3\)Minn., Laws 1897, ch. 80.
\(^4\)(1903) 88 Minn. 202, 92 N. W. 948.
This decision has since been followed, and is affirmed in *Congdon v. Congdon* in the following language:

"We are of the opinion that prior to the act of 1875 common law trusts as to personalty existed in this state. We construe the intent of the Legislature in this act to intend to abolish trusts in personal property, except as provided by statute, and that it intended to, and did, incorporate and ingraft the act of 1875 upon a statute then relating exclusively to real estate, and made that statute from that time abolish common law personal property trusts, except as therein authorized. Otherwise it was without purpose.

To say that it reaffirms the common law, which was then in force in the state, in part, gives no reason for its creation, because in that event it gave nothing and it took nothing away. We must construe a statute with reference to the object it was intended should be accomplished by it. In order to learn this object, it is proper to consider the occasion and necessity of the enactment. That construction must be applied that will best advance its object. Whatever is necessarily or plainly implied in a statute is as much a part of it as that which is expressed, and we think any fair and reasonable construction leads to the conclusion that this act intended to make a change in the law of the land. In fact, we must assume that the Legislature knew the existing law and that its purpose was to make some change. 36 Cyc. I145, b. True, the language is not strong in support of this construction, which is at least a reasonable one. This is consistent with the other decisions of this court, including *Shanahan v. Kelly*, 88 Minn. 202, 92 N. W. 948, *Y. M. C. A. v. Horn*, 120 Minn. 404, 139 N. W. 805; *Walso v. Latterner*, 140 Minn. 455, 168 N. W. 353; *L. H. Bell Estate*, 147 Minn. 62, 179 N. W. 650. This assumption, as it is termed in the *Shanahan Case*, might well, if necessary, be accepted as a rule of property.

In our opinion, this court in the cases cited intended to, and did, construe this statute the same as we now construe it. We affirm such construction. Such judicial construction is as much a part of the statute as if plainly written into it originally. 36 Cyc. 1143 (v) 91. Even an erroneous interpretation of a legislative enactment, acquiesced in for such length of time, ought not to be disturbed. Otherwise confusion, uncertainty, and bad law must follow."

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26(Minn. 1924) 200 N. W. 76, 85.

27Yet, as an original question, it is submitted that the decision was unfortunate and unnecessary. While the legislation on the matter has been ambiguous, the opinion that subdivision 5 was merely declaratory of the common law, seems more reasonable and consistent with public policy. The abolition of all personal property trusts and the express authorization of such trusts by subdivisions 5 and 6 result only, so far as trust purposes are concerned, in abolishing charitable trusts in personal property. The
Shanahan v. Kelly decided that subdivision 5 was then the only authority for express trusts of personal property, and that this subdivision authorized only trusts for definite beneficiaries. Subdivision 6 has been construed to the same effect.

What then is the net result of the abolition of trusts in personal property and the sanctioning of certain trusts by subdivisions 5 and 6? Subdivisions 5 and 6 are broad enough to embrace every private trust purpose possible at common law. Indeed subdivision 6 alone is broad enough to encompass them all, and the commissioners of the revision of 1905 recommended that subdivision 5 should be omitted from the revision for this reason.

In Congdon v. Congdon, it was argued that a trust to accumulate the income of personal property must be specifically authorized as is the trust to accumulate the rents and profits of land by subdivision 4. But the court held that a trust for accumulation is a trust for "the beneficial interests" of the persons named and that the purpose was authorized under subdivision 6.

Minnesota has abolished all express uses and trusts in real and personal property except such as are expressly authorized. But trusts are authorized for every purpose possible at common law except charitable purposes. The only charitable trusts allowed are such as are authorized by section 6710, subdivision 7 and by chapters 98 and 183 of the laws of 1915. These provisions relate to what may be called municipal trusts. A charitable trust of which a natural person is trustee is not possible. Thus the most desirable class of trusts, the class most favored by the common law as promoting the public good, is the only class abolished as courts had been struggling to save as many gifts as possible from the effect of the abolition of charitable trusts in real property by the original statutes (1 Minnesota Law Review 229). The construction put upon this legislation put charitable trusts of personal property into the same regrettable position. Would it not have been sufficient to say of this equivocal legislation that it was intended to remove any doubt as to the status of trusts of personal property, and hence was merely declaratory and not exclusive? There are plenty of precedents for such construction. The statute of Elizabeth relating to charitable trusts is itself an outstanding example. (Perry, Trusts, 6th ed., sec. 694.) The holding that by inserting subdivision 5, section 6703 (note 52), abolishing uses and trusts, theretofore only applicable to trusts of real property, acquired a new meaning, and abolished all other personal property trusts, was, to say the least, unnecessary.

See Note 13 and text.


(1) Minnesota (1924) 200 N. W. 76.

See 1 Minnesota Law Review 218 et seq., for discussion of these laws, and of gifts for charitable purposes as distinguished from trusts for these purposes.
the net result of all the legislation. New York,\textsuperscript{22} Michigan\textsuperscript{23} and Wisconsin\textsuperscript{24} have remedied this defect. Minnesota attempted to do so\textsuperscript{25} but the act was held unconstitutional because the title did not cover the subject matter,\textsuperscript{26} and the attempt has not been renewed.

It is characteristic of our statutes that the original language still prevails although the theory and purpose which that legislation was intended to serve, have long since been abandoned. Starting along with New York restricting trusts narrowly, the scope of the purposes has been so broadened that every private trust abolished by the first section, is now authorized under the law by the later sections. Only charitable trusts have been lost. The performance reminds one of the King of France and his men; but the King lost some of his best men in the excursion.

**Restrictions on Duration of Trusts at Common Law**

The common law rules restricting trusts are the rule against perpetuities and the rules against restraints on alienation. By the rule against perpetuities a limitation of property, real or personal, legal or equitable, which might continue as an executory (unvested) interest for more than twenty-one years after the termination of lives in being at its creation is void. If by the terms of its creation the interest must either vest or cease to exist as a possibility within that period it is valid.\textsuperscript{27} And if all the several interests are valid the trust is valid.\textsuperscript{28} If, for example, A devise property to B and his heirs on trust to collect the income and to pay it to C, a bachelor, for life, and on the death of C to the first child of C who attains twenty-five, because C might have a child an infant at C's death the limitation to the child might continue as an unvested interest for twenty-five years after the death of C, and it is consequently void in its creation. But if the ultimate gift be to the first child of C who attains twenty-one, the child will necessarily be ascertained within twenty-one years after the death of C or else there never can be such a child. Because the gift by

\textsuperscript{22}New York Consol. Laws of 1909, sec. 113, p. 3396.
\textsuperscript{24}Wisconsin, Statutes 1923, sec. 2081 (7).
\textsuperscript{25}Minn., Laws 1903, ch. 132.
\textsuperscript{26}Watkins v. Bigelow, (1904) 93 Minn. 210. 100 N. W. 1104.
its terms must either vest within twenty-one years after the death of a living person or become impossible, it is valid.

The common law rule is not satisfied by a power of alienation in the trustee. Assuming that the trustee in the first example above has power to alien the specific property which is the subject matter of the trust without the consent of the ultimate beneficiary but is to hold the proceeds of the sale on the same trust, the power of alienation of the beneficial interest in the trust fund might be suspended beyond the period allowed, and this is equally obnoxious to the common law. The rule requires that every interest be such that it must vest or cease within the period allowed. The rules against restraints on alienation avoid clauses inserted to make vested interests inalienable. The creation of a trust for persons in being does not of itself make any interest in the trust inalienable. Equitable interests are as fully alienable as corresponding legal interests. Express restraints on the alienation of equitable interests are void as a general rule. In states where spendthrift trusts are sanctioned restraints on equitable life estates are valid. This sanction has in two states been extended to restraints on equitable fees. It is generally assumed that where this sanction prevails it will not be extended to validate express restraints designed to continue beyond the period allowed by the rule against perpetuities. The effect of the rule against express restraints on alienation is to avoid the restraint. The interest is good and alienable notwithstanding the attempted restraint. There is another rule analogous to the rules against restraints on alienation that should be mentioned here. In the absence of a direction to the contrary, the beneficiary of a trust who has a vested and indefeasible absolute interest can so soon as he is sui juris compel the transfer of the possession of the property to himself. A direction that he shall not have it until some more remote time is in some jurisdictions void. It is deemed unreasonable and

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8 MINNESOTA LAW REVIEW 187.
8 MINNESOTA LAW REVIEW 195.
8 MINNESOTA LAW REVIEW 197.
8 MINNESOTA LAW REVIEW 197.
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Gray, Restraints on Alienation, 2nd ed., sec. 105 et seq.
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Gray, Restraints on Alienation, 2nd ed., sec. 105 et seq.
contrary to public policy that a person should be kept out of possession of property to which he has an absolute and indefeasible vested right solely for his own good. But this rule is not now followed in many states. Regarding the right of the creator of the trust to direct when the beneficiary shall have the possession, it is held that he can not compel the trustee to convey it to him until the time specified. This view does not necessarily mean that the beneficiary can not alien his interest. But so long as he retains it, the trustee may refuse to transfer to him the legal title before the time specified by the creator of the trust. The better opinion is however that even in these states a direction postponing the possession of the beneficiary beyond the period allowed by the rule against perpetuities would be held void. This is not to apply the rule against perpetuities, which destroys the interest, but is to adopt the period of the rule as the measure of permissible restraints.

To illustrate the operation of these rules, suppose A devise property to B and his heirs on an active trust for C for life, and then for D and his heirs. The interests of C and D are at once alienable and liable to claims of creditors. If D obtain a surrender of C's life interest, or it is terminated by C's death, so that D has a vested and indefeasible equitable fee, he can if, or when, he is sui juris compel B to transfer the legal title to him. If a clause be added providing C's life interest shall not be alienable, it is void in some jurisdictions, but is valid in most states. If a clause be added providing that D shall not alien, this restraint is void. If a clause be added that the trustee shall not transfer the property to D until D is forty years of age, this clause is in some jurisdictions void and D would be entitled to the possession so soon as C's life estate was out of the way, and D was sui juris. But in


7Gray Perpetuities, 3rd ed., secs. 121C-121ii; Gray, Restraints, 2nd ed., secs. 272b-272c; Kales, Estates and Future Interests, 2nd ed., sec. 737 et seq.
many jurisdictions today D could not get the possession until he attained the specified age, with the qualification that the restraint of the possession shall not endure more than lives in being and twenty-one years.

The common law has no rule restricting the actual duration of a trust. The combined result of the rule against perpetuities and the rules against restraints on alienation is to make all interests in trust vested, and alienable within lives in being and twenty-one years. These rules make trusts determinable but do not require their termination.

Restrictions on Duration of Trusts of Personal Property in Minnesota

It is now settled that prior to 1875, the chapter of the statutes on Uses and Trusts did not abolish trusts of personal property. Assuming that trusts of personal property could be created before

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32The statutory restrictions on the creation of express private trusts are contained in Minn., G. S. 1913, sections:

6710. Express trusts may be created for anyone of the following purposes:

1. To sell lands for the benefit of creditors.
2. To sell, mortgage or lease lands for the benefit of legatees, or for the purpose of satisfying any charge thereon.
3. To receive the rents and profits of lands, and apply them to the use of any person during the life of such person, or for any shorter term, subject to the rules prescribed in Chapter 59.*
4. To receive the rents and profits of lands and to accumulate the same for either of the purposes and within the limits prescribed in Chapter 59.**
5. To receive and take charge of any money, stocks, bonds or valuable chattels of any kind and to invest and loan the same for the benefit of the beneficiaries of such express trust; and the district courts of the state shall, upon petition and hearing, have power to appoint a trustee for the purpose herein set forth, requiring such trustee to give such bond for the faithful execution of such express trust as to the court may seem right and proper; and express trusts created under the provisions of this paragraph shall be administered under the direction of the court.
6. For the beneficial interests of any person or persons, whether such trust embraces real, or personal property, or both, when the trust is fully expressed and clearly defined on the face of the instrument creating it; Provided, that the trust shall not continue for a period longer than for the life or lives of specified persons in being at the time of its creation, and for twenty-one years after the death of the survivor of them, and that the free alienation of the legal estate by the trustee is not suspended for a period exceeding the limit prescribed in chapter 59.*
that time for any purpose authorized by the common law, were they subject to the common law rule against perpetuities? In New York, the common law rule against perpetuities was displaced by a more stringent statutory rule which provided that the absolute ownership of personal property could not be suspended for more than two lives in being. But this rule was not adopted in other states. In Michigan, it has uniformly been held that such trusts continued to be restricted by, and only by, the common law rule against perpetuities. In Wisconsin, it was said, in an early case, that the common law rule against perpetuities was repealed as to personalty—by implication of the statutory rules governing real property, and although this statement was questioned, it was upheld.

*The rules prescribed in chapter 59 are:

6664. Every future estate is void in its creation which suspends 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.

6665. The absolute power of alienation shall not be suspended by any limitation or condition whatever for a longer period than during the continuance of two lives in being at the creation of the estate except in the single case mentioned in section 6666.

6718. No person beneficially interested in a trust for the receipt of rents and profits of the lands can assign, or in any manner dispose of, such interest; but the rights and interest of every person for whose benefit a trust for the payment of a sum in gross is created, are assignable.

6720. When the trust is expressed in the instrument creating the estate, every sale, conveyance or other act of the trustee in contravention of the trust shall be absolutely void.

**The pertinent sections in chapter 59 are:

6687. Accumulation of rents and profits—An accumulation of rents and profits of real estate, for the benefit of one or more persons, may be directed by any will or deed sufficient to pass real estate, as follows:

1. If such accumulation is directed to commence on the creation of the estate out of which the rents and profits are to arise, it must be made for the benefit of one or more minors then in being, and terminate at the expiration of their minority.

2. If such accumulation is directed to commence at any time subsequent to the creation of the estate out of which the rents and profits are to arise, it shall commence within the time in this chapter permitted for the vesting of future estates, and during the minority of the persons for whose benefit it is directed, and shall terminate at the expiration of such minority.

6688. Directions for accumulation, when void—If, in either of the cases mentioned in Par. 6687, the direction for such accumulation is for a longer time than during the minority of the persons intended to be benefited thereby, it shall be void as to the time beyond such minority; and all directions for the accumulation of the rents and profits of real estate, except such as are herein allowed, shall be void.


**Dodge v. Williams, (1879) 46 Wis. 70, 1 N. W. 92.
in Becker v. Chester\(^{57}\) on the ground that whether the decision was right or wrong, it was then too late to disturb it.

In Minnesota, in Atwater v. Russell\(^{58}\) the common law rule against perpetuities was assumed to be applicable to personal property trusts. In Tower's Estate,\(^{59}\) it was again stated that the common law rule prevailed. But in Shanahan v. Kelly,\(^{60}\) the court decided that all express trusts in personal property were abolished by the statutes except as expressly authorized by the act of 1875,\(^{61}\) now subdivision 5 of 6710,\(^{62}\) and that a charitable trust for indefinite objects was not authorized by this subdivision. Whether such trusts as were authorized by subdivision 5 were subject to the common law rule against perpetuities or to any other restriction remained undecided.

This was the problem to which the court addressed itself in Young Men's Christian Association v. Horn.\(^{63}\) M transferred to defendant H on trust, personal property to keep the same invested and to pay the net income in perpetuity to the Y. M. C. A., a corporation, to be used in perpetuity in providing boys and young men, members of the association, with education along industrial lines. This was one of the purposes for which the Y. M. C. A. was organized.

The court felt called on to consider whether a trust of personal property may be created in perpetuity stating that "as the law is and has been from the beginning of the state, that express trusts except as authorized and modified by the statutes are prohibited, we must in determining the above question look exclusively to our statutes."\(^{64}\) The court stated that not only is the sanction for trusts of personal property purely statutory but also the restrictions on such trusts as are authorized are purely statutory. The common law rule against perpetuities as such was said to be abolished as to all trusts.

"Upon the enactment of subdivision 5, therefore, the question which now arises might then have arisen, namely, what was the effect of this addition to the statute? Did it merely restore the common law as to trusts in personality, with, among other things,

\(^{57}\) (1902) 115 Wis. 90, 91 N. W. 87.
\(^{58}\) (1892) 49 Minn. 57, 78, 52 N. W. 261.
\(^{59}\) (1892) 49 Minn. 371, 52 N. W. 27.
\(^{60}\) (1903) 88 Minn. 202, 92 N. W. 948.
\(^{61}\) Minn., Laws 1875, ch. 53.
\(^{62}\) Note 52.
\(^{63}\) (1913) 120 Minn. 404, 139 N. W. 806.
\(^{64}\) Young Men's Christian Association v. Horn, (1913) 120 Minn. 404, 407, 139 N. W. 806.
its limitations against perpetuities and likewise its exceptions to and qualifications upon such limitations? We cannot think that such was the intention of the legislature, for this would be to restore pro tanto the evils against which the trust statute was directed, and likewise the uncertainty and confusion which had long since become symbolized by the term 'common-law rule against perpetuities.'

The court next considered whether any restriction was to be found in the statutes themselves and decided that there was none. It held that under subdivision 5, a trust of this character was authorized without limit upon its duration. It pointed out that the trusts authorized by subdivisions 1 to 4 were expressly limited as to duration or qualified by certain specific restrictions, either by reason of their purpose or by the terms of their authorization. From this fact the court argues that no restriction is intended in subdivision 5 since none is expressed.

"An inhibition against a perpetuity, and in fact any provision as to duration, is a pure limitation, and any limitations upon power or authority must either arise from the limited terms of the grant, or else be superimposed upon a prior unlimited grant. If no limit is imposed, therefore, and if the terms of the grant do not of themselves import a limit, then the grant is without limit. Here the trusts authorized by subdivision 5 are limited as to purpose and property, but unlimited as to duration; for the general right to exist is granted, and no subsequent limitation upon such existence is imposed. It is true, as contended by the respondent, that the spirit of our laws is against perpetuities; but we think, nevertheless, that the legislature did not intend to place any limitation upon trusts of this kind, any more than upon those authorized by subdivision 7, as to which we have seen that no time limit is deemed to have been imposed. We have nothing to do with the wisdom of this lack of limit upon duration, and if it should lead to abuse the remedy would be with the legislature. By its terms, however, subdivision 5, though seemingly very broad at the first glance, should never be invoked as authorizing accumulations; nor does it authorize any restriction upon the alienation of the legal estate, for the very purpose of the trust thereunder requires investment, which is the same purpose for which the greater portion of all personal property is used, with the usual incidents of loss or dissipation, as well as gain. Since, therefore, the trust is only in the profits, the only evils which could arise therefrom would seem to be those which may arise from a perpetual direct endowment of

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*Young Men's Christian Association v. Horn,* (1913) 120 Minn. 404, 411, 139 N. W. 806.

*Note 52.

*Minn., G. S. 1913 sec. 6710 (7).*

*City of Owatonna v. Rosebrock,* (1903) 88 Minn. 318, 92 N. W. 1122.
a person or corporation in a very large sum. That such endowment might lead to evil results is readily imaginable, but that no such evils are now apparent would seem to follow from the fact that the legislature has let the subdivision stand so long without change, and, further, from the fact that direct endowments are of frequent occurrence, and often of manifest benefit to the community, to the state, and to humanity.76

The significance of the reasoning in *Y. M. C. A. v. Horn*, can scarcely be overstated. The decision might be rested on grounds other than the reasoning of the court but before attempting to distinguish between the decision and the reasons, it will be worth while to consider the implications of the reasons given for the decision. The decision is put on the ground that there is no restriction whatsoever on the duration of trusts under subdivision 5. Trusts under this subdivision may be created in favor of beneficiaries who are not in being at the time the trust is created. In *Re Trust Under Will of Bell*77 there was a bequest of personal property in trust to divide the income equally between the five children of the testator living at his death and the children of any child who should die, until the youngest of the children arrived at the age of forty years, when the principal was to be divided between all the testator's children or their descendants living at that time. The trust was upheld under subdivision 5.71 Now by the reasoning of the court in *Y. M. C. A. v. Horn* there is no rule in the state against interests in trusts of personal property remaining contingent indefinitely, no rule to render them void unless so limited that they must vest or become impossible within some period of time. Suppose then personal property to a trust company on trust to collect the income and pay it to the testator's eldest son for life, on that son's death to his eldest son for life, and so in succession forever.72 Under the reasoning of the court in *Y. M. C. A. v. Horn*, it seems to follow necessarily that such a trust is valid. This liberality in the law exists nowhere else except perhaps in Wisconsin.73 It savors of the days of indestructible estates tail in reality. The result is so shocking as to call for a re-examination of the decision in *Y. M. C. A. v. Horn*.

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6Young Men's Christian Association v. Horn, (1913) 120 Minn. 404, 414, 139 N. W. 806.
7Young Men's Christian Association v. Horn, (1920) 147 Minn. 62, 179 N. W. 650.
8In re Trust Under Will of Bell, (1920) 147 Minn. 62, 68, 179 N. W. 650.
9See Humbertson v. Humbertson, (1716) 1 P. Wms. 332.
10Notes 56, 57.
In Y. M. C. A. v. Horn there was a trust to pay the income in perpetuity to a corporation organized for charitable purposes. The interest of the corporation was vested from the time the trust was created. This trust does not violate the common law rule against perpetuities. By this rule, only an interest which may remain contingent more than lives in being and twenty-one years is void.74 Vested interests whether in trust or otherwise, are not affected by the common law rule against perpetuities.

If the trust in Y. M. C. A. v. Horn contravened any rule of the common law, it was the rule against restraints on alienation. The property itself was, as the court pointed out,75 freely alienable by the trustee who had the legal title for purpose of investment. The corporation had the equitable ownership of the property.

Suppose, in a common law jurisdiction, personal property assigned to a trust company to invest and to pay the income to B and his heirs, and the trust contained no other interest or restriction. B would be the equitable owner of the property and could if sui juris alien his interest or compel the trustee to turn the property over to him. Even if it were a term of the trust that B should not alien his interest or be entitled to the possession of the property until thirty years of age, B could, according to the English and the great weight of American authority, alien at once or he could, according to the English and some American cases, require the trustee to turn the property over to him. These cases proceed on the principle that it is contrary to sound public policy to permit restraints on the alienation of a fee, whether legal or equitable, or to keep a person out of possession of property to which he is absolutely and indefeasibly entitled.

Spendthrift trusts are allowed in most American jurisdictions but only when the restraint on alienation is imposed on an equitable life interest. Only two states allow such restraint on an equitable fee. Many American cases hold that if a time is fixed for termination of the trust, the beneficiary cannot compel the trustee to turn over the property before this time. These cases pay greater regard to the intention of the testator and hold that public policy does not require that this intention be defeated. But in the cases in which the intention of the testator has been given effect, the restraint whether on alienation or possession has not exceeded in time the period allowed by the common law rule against perpetuities; and

74Supra p. 324.
75Note 69 and text.
it is the accepted opinion that a restraint exceeding this period would be void. It is not the rule against perpetuities which avoids the restraint. The period allowed by this rule is taken as the limit of any allowable restraint. But the rule against restraints on alienation or possession avoids restraints which exceed this period. And it is the restraint which is avoided and not the interest created. The rule against perpetuities avoids any interest violating it. But the rules against restraints on alienation avoid only the restraint on the interest.\(^7\)

If property were given to a trust company, to pay the income to B and his heirs in perpetuity, with a provision that the beneficiaries should never have possession of the property or alien their interests, it is believed that these restrictions would be void in every common law jurisdiction. But the result would be not to destroy the interest of B but to destroy the restraints upon his interest and to entitle B to a conveyance of the property from the trustee immediately.\(^7\)

The suit in *Y. M. C. A. v. Horn* was to compel the trustee to pay over income alleged to be due. The decision was that the corporation was entitled to this money. Neither the common law rule against perpetuities nor the common law rules against restraints on alienation, assuming them in force, could defeat this claim. The former is inapplicable. The latter if applied would entitle the Y. M. C. A. to have the principal rather than destroy the corporation's right to the income.\(^8\) The right of the Y. M. C. A. to compel the trustee to turn over the principal was not in suit. The decision is not contrary to the common law rule against perpetuities or to any other rule of the common law. It was therefore unnecessary for the court to say that the common law rule against perpetuities is abolished. The opinion is mostly obiter. There is no case in Minnesota which necessarily involves holding that the rule against perpetuities is abolished as to personal property.

Assuming that the beneficial interest of the corporation was inalienable, and did not entitle it to the possession of the principal. the case may be distinguished on the ground that the corporation was organized for charitable purposes, and that the income was to be expended for one of these purposes. In common law jurisdictions property may be given to any trustee on trust for charita-
ble purposes, and a provision that only the income will be expended is valid. 79 And in Minnesota a gift may be made to a corporation organized for charitable purposes on condition that the gift be devoted to these purposes. 80 No good reason appears why the gift cannot be made on condition that only the income should be expended for these purposes. 81 Corporations organized for charitable purposes have power by their charters to receive gifts and to apply them in accordance with the terms of the gift. 82 If the corpus may be given to the corporation on these terms, there can be no objection to giving it to another as trustee to pay the income to the corporation for these purposes. The fund is no more inalienable for this reason. It is not a charitable trust but a trust for a definite beneficiary, the corporation. Yet the ultimate purpose of the trust is charitable. The corporation is to use the income for a purpose authorized by its charter. Thus the case may be distinguished from a perpetual trust for natural persons.

If Y. M. C. A. v. Horn may be distinguished on the above grounds, the question whether trusts authorized by subdivision 5 are subject to the common law rule against perpetuities is still open. That express private trusts of personal property are now abolished except as authorized by subdivisions 5 and 6 must be taken as settled. 83 The decision in Shanahan v. Kelly 84 and other cases 85 depend upon this reasoning. These decisions are affirmed in the Congdon Case. 86

But conceding that the legislation had this effect, it by no means follows that the trusts authorized by subdivision 5, are without restriction as to duration. It would be proper to hold that the trusts authorized continued subject to the same restrictions as all trusts of personal property were subject to before the act of 1875 87 was enacted. The trusts which were authorized by the original revised statutes in New York were not treated as new classes of

79 Perry, Trusts, 6th ed., sec. 737
80 Atwater v. Russell, (1892) 49 Minn. 57, 82, 51 N. W. 629; Lane v. Eaton, (1897) 69 Minn. 141, 146, 71 N. W. 1031; Watkins v. Bigelow, (1904) 93 Minn. 210, 224, 100 N. W. 1104.
81 This is referred to in the opinion Young Men's Christian Association v. Horn, (1913) 120 Minn. 404, 417, 139 N. W. 806; Wetmore v. Parke, (1873) 52 N. Y. 450; Lee v. O'Donnell, (1902) 95 Md. 538, 52 Atl. 979. See 3 MINNESOTA LAW REVIEW 39, 43.
82 Watkins v. Bigelow, (1904) 93 Minn. 210, 226, 100 N. W. 1104.
84 (1903) 88 Minn. 202, 92 N. W. 948.
85 Note 25.
86 (Minn. 1924) 200 N. W. 76, 85. Note 26 and text.
87 Now subdivision 5, sec. 6710 Minn., G. S. 1913. Note 52.
trusts but as old classes excepted out of the general abolition and continued with their common law incidents except insofar as they were modified by the statutes themselves. The court was probably influenced in *Y. M. C. A. v. Horn* by the accepted dictum that prior to 1875 express trusts of personal property could not be created in the state. If there could not be such trusts, there could not be a common law rule against perpetuities applicable to such trusts. So when trusts were authorized there would be no restriction upon them unless expressed. "Did it [subdivision 5] merely restore," the court asked, "the common law as to trusts in personalty, with, among other things, its limitations against perpetuities . . .?"

Since the court has now repudiated this dictum, the question is did the new subdivision continue the common law as to trusts in personalty with respect to those trusts which were not abolished.

The recent case of *Congdon v. Congdon* involved the question whether a trust could be created to accumulate personal property for lives in being and twenty-one years. The court decided that such an accumulation was possible under subdivisions 5 and 6. The trust, by its terms, could not continue beyond lives in being and twenty-one years. Therefore the question whether accumulation might be continued beyond that period was not involved. The court devoted a large part of its opinion to the question whether trusts of personal property were possible prior to the year 1875. Except for its bearing on the applicability of the common law rules

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58"One consideration which applies to all four classes relates to the question whether the Legislature, in adopting the Revised Statutes, abolished all trusts and simultaneously created four classes which should be permitted; or abolished all trusts except these four, leaving them standing, within their defined limits. The importance of the answer lies chiefly in the fact that under the latter view the principles previously established and applicable to such trusts would still apply, and the earlier English and New York cases would still be binding; while under the former view, the courts would have a freer hand to construe the statute, and determine the incidents of these trusts de novo. The doctrine on this subject is set forth in *Leggett v. Perkins*, 2 N. Y. 297 (307), where Gardiner, J., says: 'The statute in reference to express trusts is merely permissive. It creates nothing. The Legislature did not first annul all trusts and then proceed to a new creation. They abolished all except certain ones which they recognize as existing. The trusts preserved have their foundation in the common law, and their effect is to be determined by common law principles. Except that the statute restricts the purposes for which express trusts may be created, the authority of the donee is as absolute now as before the statute.' Chaplin, *Express Trusts* (N.Y.) sec. 395.

59(1913) 120 Minn. 404, 407, 139 N. W. 806.

60*Young Men's Christian Association v. Horn*, (1913) 120 Minn. 404, 411, 139 N. W. 806.

61(Minn. 1924) 200 N. W. 76.
to trusts of personal property, it is difficult to see why this is now more than an academic question. But the attention given to it suggests that the court was troubled whether there might not be under the reasoning of Y. M. C. A. v. Horn a trust to accumulate personal property without any limit as to duration. There is good reason for the question. Although in Y. M. C. A. v. Horn, the court stated that accumulations would never be taken to be authorized under subdivision 5, the reasoning in other parts of the opinion seems to negative that statement, and the Congdon Case holds accumulations authorized by subdivisions 5 and 6. If a trust for the purpose of accumulation is possible under subdivision 5, it must be as unrestricted in time as any other trust. The common law restrictions on trusts for accumulation are the rules against perpetuities and against restraints on alienation. In the Congdon Case, the court said:

"The act of 1875 abolished the common law trusts in personal property. There is no statutory limitation against directions for accumulations. The statute leaves the court free to apply the rules and principles of the common law to such trusts. The limitations in the real estate chapters are wholly inapplicable, and hence resort may still be had, in the interpretation and administration of such trusts so created, to the rules of the common law, in aid of the statute."

This sounds like a repudiation of the reasoning in Y. M. C. A. v. Horn, and would bear the inference that trusts authorized by subdivision 5, enacted in 1875, are subject to the common law rules against perpetuities and against restraints on alienation.

In view of the unfortunate consequences of following Y. M. C. A. v. Horn to the full extent of its reasoning, of the repudiation of the dictum that personal property trusts were abolished by the original statutes, and of the trend of the opinion in Congdon v. Congdon, it cannot be said that there are no restrictions upon trusts of personal property under subdivision 5. If there are restrictions, they are the common law rules against perpetuities, and against restraints on alienation.

Personal property trusts authorized by subdivision 6 are subject to the proviso:

Gray, Perpetuities, 3rd ed., secs. 671 et seq.
(Minn. 1924) 200 N. W. 86.
In 8 MINNESOTA LAW REVIEW 315, written before the Congdon Case was decided, the writer relying on the language of Y. M. C. A. v. Horn, suggested that the common law rules were probably abolished as to personal property, as well as to real property. This opinion is no longer held.
"That the trust shall not continue for a period longer than the life or lives of specified persons in being at the time of its creation, and for twenty-one years after the death of the survivor of them."\textsuperscript{96}

This proviso looks like an attempt to get back to the common law rule against perpetuities. The period of the rule is adopted as the permissible period for the duration of trusts. If the proviso was intended to state the rule, it is inaptly worded. The common law rule does not prescribe when a trust must terminate. Trusts may require long duration for two causes; because some interests may remain executory and because the settlor directs that it continue even if the interests are all vested. The rule against perpetuities ensures that there shall be no executory interests under the trust which might require continuance of the trust beyond the period allowed. Any limitation which might continue executory beyond the period, is void in its creation. Only limitations which by the terms of their creation are sure either to vest or to cease within the period, are valid. The rule ensures that at the end of the period, there will be only vested interests in the trust. And when the interests are indefeasibly vested, and the persons ultimately entitled have the present right of enjoyment, they can call for the possession of the property and terminate the trust. The rule makes trusts terminable, but does not require that they be terminated.\textsuperscript{97} But the proviso is "that the trust shall not continue" for a longer period. If taken literally, it is not the common law rule. If it means that trusts must be so limited by the terms of their creation that they cannot by any possibility require a longer period for vesting, it is the common law rule. The statutory rule against suspension of the power of alienation of real property operates in this manner. It requires that all interests be so restricted in their creation, that they must become alienable within the period allowed.\textsuperscript{98} Is a trust, which by its terms might exceed the period, void in its creation, or is it only void as to the part unaccomplished when the period expires? Does the proviso render the whole trust void or only the limitations in it which might call for a longer period for performance? If A bequeath property in trust for B, a bachelor, for life, and on his death to pay the principal to his children who attain twenty-five, the gift to the children would

\textsuperscript{96}For the history of this subdivision, see Y. M. C. A. v. Horn, (1913) 120 Minn. 404, 408-410, 139 N. W. 806.

\textsuperscript{97}Note 52.

\textsuperscript{98}Supra p. 327.

\textsuperscript{96}MINNESOTA LAW REVIEW 304.
be void in its creation by the rule against perpetuities. B's only child might be born just before B's death. The limitation is such that it might by its terms remain contingent more than lives in being and twenty-one years. It cannot be shown that it could not. Yet when B dies, all his children may be at least four years of age, and the trust could be wholly performed within a life in being and twenty-one years. Under the proviso, is the limitation to the children void at the outset because of the possibility that it might continue contingent too long, or does it await the termination of the period and fail only if not vested at that time? The latter construction would create great inconveniences. The children would not be entitled unless they reached twenty-five. If they all die under that age, the trust fails. Meanwhile the persons otherwise entitled, are kept out of enjoyment. This construction would make a rule without precedent in any jurisdiction.

Assuming that all the interests in the trust are vested, what is the effect of a direction that the trust continue indefinitely? Suppose a trust to pay the income to B and his heirs forever, and a direction that the beneficiaries shall never be entitled to the possession of the principal? The common law would hold the gift good, and the restriction void. What is the effect of the proviso? Will it avoid the gift or the restriction? If the latter, will it avoid it in toto or only for the excess? Can an inference be drawn from the form of the proviso that a trust of this kind is indestructible for the period allowed?

There has been one attempt at judicial construction of this proviso, and that is a surprising one. In *Y. M. C. A. v. Horn*, there was a "second trust" of real property with directions to convert the same into personalty at the earliest practical moment when such conversion could be made without a sacrifice of the value; to keep the proceeds of the sale invested and to pay in perpetuity all the net rents or income to the *Y. M. C. A.* for the maintenance, support and benefit of the Association. The court held that the second proviso in subdivision 6, that the free alienation of the legal estate by the trustee be not suspended for a period exceeding the period prescribed in chapter 59 (two lives in being), was satisfied by a power in the trustee to sell the subject matter of the trust. The further opinion was expressed that the first proviso as to the

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99(1913) 120 Minn. 404, 139 N. W. 806.
100Note 52.
duration of the trust was likewise satisfied by this power of sale in the trustee.  

"What then is the purpose of this limit upon duration? Can it be materially different from the purpose of the inhibitions against the restrictions upon alienation, and if the power and duty of sale in the trustee satisfies the latter, why not also the former?"  

The court intimates that there may be a perpetual trust of the proceeds of the sale, under subdivision 6 as it had already said there could be of personalty under subdivision 5. This reasoning completely eliminates the proviso as to the duration of the trust from the subdivision. The statement is obiter because the trust of the proceeds was finally held to be authorized by subdivision 5.  

The construction does such violence to the language of the subdivision that it can hardly prevail. The purpose of the proviso is clearly to put a limit of some kind to the trust itself.  

Trusts of personal property authorized by subdivision 5 are probably restricted by the common law rules. It would be undesirable to have a different rule for trusts authorized by subdivision 6. The proviso of subdivision 6 that trusts "shall not continue" is ambiguous. Taken literally, it would be an inconvenient rule. It would be without precedents for guidance, necessitating much litigation for its elucidation. In the meantime, there would be uncertainty in the law. In the interest of uniformity, simplicity, convenience, and certainty the proviso should be construed as an express reënactment of the common law rule against perpetuities.  

Trusts of personal property which by the terms of their creation can have no interests executory or inalienable beyond twenty-one years after the termination of some life or lives in being at their creation, are valid in Minnesota. That is to say they are valid if they comply with the common law rules against perpetuities and against restraints on alienation. The validity of trusts which transgress these rules is more uncertain, but insofar as they do not comply with the rule against perpetuities they are probably void.  

Restrictions on Duration of Trusts of Real Property in Minnesota  

Private trusts of real property are authorized by five subdivisions. Subdivision 1 authorizes trusts to sell land for benefit

101 (1913) 120 Minn. 404, 420, 139 N. W. 806.  
102 120 Minn. 404, 421, 139 N. W. 806.  
103 That the trust must be "one which can, without any contingency, be fully executed" within the period allowed, is suggested in Rong v. Haller (1909) 109 Minn. 191, 202, 123 N. W. 471.  
104 Note 52.
of creditors.105 There is no express restriction on the duration of trusts under this subdivision. Subdivision 2 authorizes trusts to sell, mortgage or lease lands for the benefit of legatees, or to satisfy any charge thereon.106 There is no express restriction on trusts authorized by this subdivision. Subdivision 3 authorizes trusts to receive the rents and profits of lands and apply them to the use of any person, during the life of such person, or for any shorter term.107 These trusts are expressly made subject to the rule against suspension of the absolute power of alienation. Subdivision 4 authorizes trusts to receive the rent and profit of lands for accumulation. These will be considered hereafter. Subdivision 6 authorizes trusts for the beneficial interests of any person or persons. This subdivision authorizes private trusts for every conceivable lawful purpose.108 It includes all the trust purposes authorized by the first five subdivisions, and some others, such as trusts to make partition, which were changed into powers by the original plan of the New York revisors. To strike the first five subdivisions out of the statutes would not hinder the creation of a trust for any purpose now authorized.

There may, however, be some differences as to the duration of trusts under subdivision 6, and under the other subdivisions. Subdivision 6 has two restrictions. "The trust shall not continue for a period longer than the life or lives of specified persons in being at the time of its creation, and for twenty-one years after the death of the survivor of them." This restriction is peculiar to this subdivision unless as before suggested it is a reënactment of the common law rule against perpetuities believed to be impliedly applicable to subdivision 5. The restriction has already been discussed in connection with personal property trusts.109 Its meaning is of course the same for trusts in real property. The other restriction in subdivision 6 is the rule against suspension of the absolute power of alienation. This rule, applicable to trusts under subdivisions 3 and 6, is found in chapter 59:

"6664. Every future estate is void in its creation, which sus-

105For the scope of this subdivision see Chaplin, Express Trusts, (N.Y.) sec. 397; Fowler, Real Property Law of New York, 3rd ed., 447.
106For the scope of this subdivision, see Chaplin, Express Trusts, (N.Y.) secs. 399-402; Fowler, Real Property Law of New York, 3rd ed., 448.
107For the scope of this subdivision see Chaplin, Express Trusts, (N.Y.) ch. 8; Fowler, Real Property Law of New York, 3rd ed., 450.
108Supra note 13 and text.
109Supra p. 337.
PENDS 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.

"6665. The absolute power of alienation shall not be sus-
pended, by any limitation or condition whatever, for a longer
period than during the continuance of two lives in being at the
creation of the estate, except in the single case mentioned in Par.
6666."

The rule against suspension of the power of alienation, the
manner of its operation, and the period allowed have already been
discussed in relation to future interests in real property which are
not in trust.110 The absolute power of alienation is suspended
when there are not persons in being by whom an absolute fee in
possession may be conveyed. Applied to trusts, every trust is void
in its creation which might suspend the absolute power of aliena-
tion for a longer period than during the continuance of two lives
in being at its creation.

A power of sale in the trustee obviates a suspension that might
otherwise invalidate a trust. The statutory rule against suspension
of the power of alienation applies only to real property. If the
real property- the subject matter of the trust is alienable, the rule
is satisfied. If the trustee is directed to sell the property, there is
equitable conversion and the problem becomes a problem of the
duration of a trust of personal property. This was distinctly held
in the second part of the trust in Y. M. C. A. v. Horn.111 Even if
the power of the trustee is discretionary it satisfies the require-
ment of the rule against suspension of the power of alienation.
There is no suspension of the power of alienation when there are
persons in being who can convey an absolute fee. The rule is
against the suspension of the power not against delay in the exer-
cise of the power.

In In re Tower's Estate,112 there was a devise of real and
personal property to trustees to pay the net income to the testa-
tor's wife and children, children of a deceased child to represent
the parent, until the distribution of the corpus which was fixed at
twenty-one years after the death of the last survivor of testator’s
children and grandchildren living at his decease, when the corpus
was to be distributed to all the testator's lineal descendants then

110 MINNESOTA LAW REVIEW 297 et seq.
111 Supra p. 338. See also Atwater v. Russell, (1892) 49 Minn. 57, 51
N. W. 629, 52 N. W. 26.
112 (1892) 49 Minn. 371, 52 N. W. 27.
living. The trustees were given power to sell the property as they deemed advisable. The court held that because of the power of sale in the trustees, the power of alienation was not suspended at all; that as to personal property, the common law rule prevailed and a trust therein may continue for one or more lives in being at the death of the testator and twenty-one years and a fraction. The court was there referring to subdivision 5; subdivision 6 had not yet been enacted. The court said:

"If the proceeds of lands converted into money by the trustees under a power of sale are thereafter to be held upon a trust valid as to such converted fund, the trust could be sustained as not in contravention of the statute forbidding the suspension of the power of alienation for more than two lives. . . . We conclude that the trust was not invalid because it was lawfully constituted as to the personalty and as to the lands also not in contravention of the statutes for the reason that they are convertible at any time by an authorized sale."

The holding in *In re Tower's Estate* presents a peculiar problem. The power of sale was discretionary, not mandatory. The real property was consequently not converted into personalty although it was at any time convertible. This is clearly brought out in cases in North Dakota and New York upon the same will. The court held that when the real property is convertible, there is no limit as to the duration of the trust except such as there may be under subdivision 5 which was at that time thought to be the common law rule against perpetuities. But why should trusts under subdivision 3, be restricted by a rule applied to subdivision 5? The former applies to trusts of real property; the latter to trusts of personal property. Until the trustee sells the land, the trust is a trust to receive the rents and profits of land. It is not a trust of personalty. There is no limit on the duration of trusts under subdivision 3. The only restriction according to *In re Tower*, is that the power of alienation of the legal estate shall not be suspended longer than two lives. Since the trustee has a discretionary power to sell, there is no suspension at all. The requirements of subdivision 3 are satisfied. But the property is not personalty, so how can it be brought under subdivision 5? The beneficial interests may still be inalienable under section 6718. The

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113The ultimate disposition is not stated in the Minnesota report but is found in Penfield v. Tower, (1890) 1 N. D. 216, 46 N. W. 413, and Lee v. Tower, (1890) 58 Hun (N.Y.) 606, 12 N. Y. S. 240, cases on the same will.
114Note 113.
115Note 52.
Supreme Court of Michigan held in a recent case that a discretionary power of sale in the trustee does not satisfy the requirements of subdivision 3; that the power must be mandatory thereby bringing the converted property under the common law rule against perpetuities which is applicable to personal property in Michigan.

Under the decision in In re Tower, the question may yet arise whether there may not be a trust of real property with a discretionary power in the trustee, which has no restriction whatever so long at least as it remains real property. The decision is that such a trust is subject to no restriction unless such as is applicable to subdivision 5. The court was not called on to decide whether there was a restriction on trusts authorized by subdivision 5, or if there were whether it was applicable to these convertible trusts under subdivision 3. The trust in question did not violate the common law rule against perpetuities assumed to be applicable to trusts under subdivision 5. It remains to be decided that such convertible trusts are void if they violate this rule. It is to be hoped that they will be so held; otherwise a trust of land to apply the income to B for life, his first son for life, and so on in succession forever, with a discretionary power in the trustee to sell, is valid, and the beneficial interests may be inalienable, so long as the land is not sold, and that may be forever.

The construction which the court in Y. M. C. A. v. Horn put on the first proviso in subdivision 6 would bring about the same result for trusts of real property under that subdivision. In this case, the power of sale in the trustee was mandatory. But In re Tower holds it is enough that it be discretionary to satisfy the rule against suspension of the power of alienation, and in the Y. M. C. A. Case the court intimated that the proviso as to duration of the trust added nothing. In the Tower Case, the court had said that there was a restriction on duration under subdivision 5, and intimated that it would apply to these convertible trusts of real property. The court in the Y. M. C. A. Case having said that there was no restriction on trusts under subdivision 5, must have realized that trusts like the one in the Tower Case under subdivision 3 would be unrestricted in duration. The court's construction of the proviso


\*\*\*\*(1913) 120 Minn. 404, 139 N. W. 805.

\*Supra pps. 338-39.
in subdivision 6 would bring about uniformity. Convertible trusts of real property under subdivision 6 would be as unrestricted as those under subdivision 3. As already said, this construction of subdivision 6 can hardly prevail.

Assuming that the trustee is not given a power to convey the real property which is the subject matter of the trust, how may a trust suspend the power of alienation?

At common law, only trusts that contain contingent limitations are avoided by the rule against perpetuities. If interests are created in the trust which might remain contingent beyond the period allowed, they are void. If, for example, land be put in trust for B, a bachelor, for life, remainder to his first child who attains twenty-five, the limitation to the child might remain contingent more than lives in being and twenty-one years. This limitation is void just as it would be if it were a limitation of the legal interest. But if the limitations are to B for life, remainder to his first child who attains twenty-one, the limitation to the child cannot continue contingent more than the period allowed and it is valid.

Vested equitable interests are as alienable as vested legal interests unless alienation is expressly restrained. A trust is not void at common law for the sole reason that it contains express restraints on the alienation of the interests created by it. The restraints themselves are either void, or if good at all, good only for the period that is permitted. The interests are not void because of them. Thus in the example of a trust for B, a bachelor, for life, remainder to his first child who attains twenty-one, B's interest is alienable at once, and the child's so soon as it vests. If to these limitations there be added restraints on alienation, the restraint on B's interest is void where spendthrift trusts are not sanctioned, or valid where spendthrift trusts are sanctioned, the restraint not exceeding the period allowed. The restraint on the child's interest is void almost everywhere, and does not affect the validity of the interest. The child would not be unable because of anything in the trust to alien his interest and to terminate the trust within the period. A disability arising from infancy does not suspend the power of alienation, within the meaning of the common law rules or the statutory rule.

The rule against perpetuities destroys all limitations which might not vest within the period allowed; and the rules against restraints on alienation either avoid all restraints, or at least such restraints as would continue beyond the period allowed. By the joint operation of the rules, alienability of all the interests is
secured within the period. The only limitations that can avoid a trust are such as might remain contingent beyond the period.

Under the statutory rule against suspension of the power of alienation, there are two causes for avoiding trusts. If the beneficiaries of a trust are not in being or ascertained, the power of alienation is necessarily suspended; and if the beneficiaries might not be ascertained within two lives in being when the trust is created, the limitations are void. In this respect the rule operates like the rule against perpetuities. But even if all the beneficiaries are in being and ascertained, they may be unable to alien because of other sections of the statutes which prevent the alienation of vested equitable interests in some trusts.

"6718. No person beneficially interested in a trust .for the receipt of rents and profits of lands can assign, or in any manner dispose of, such interest; but the rights and interest of every person for whose benefit a trust for the payment of a sum in gross is created are assignable.

"6720. When the trust is expressed in the instrument creating the estate, every sale, conveyance, or other act of the trustee, in contravention of the trust, shall be absolutely void."

These sections make vested interests in some trusts inalienable. The settlor does not need to put an express restraint on the alienation of them. This is a complete reversal of the common law rule. The common law held that these equitable interests were alienable, and could not be made inalienable; the statutes provide that they shall be inalienable. The result is that a trust of this kind suspends the power of alienation, although all the beneficiaries are in being and ascertained, and the interests vested, and if by its terms it might continue beyond the period allowed, it is void.

The New York Revised Statutes made trusts for the receipt of rents and profits of lands spendthrift trusts without any expression of intention to that effect by the settlors, long before such trusts were sanctioned to a limited extent by the common law to carry out an intention expressed by the settlor. This was one of the most important changes made in the law of trusts by these statutes. The revisors intended to restrict trusts quite narrowly. They said that the general objects of trusts to receive the rents and profits of lands, would be to apply them to the education of a minor, the separate use of a married woman, or the support of

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120Chaplin, Suspension of Power of Alienation, 2nd ed., sec. 186.
120aCalifornia enacted this section, but shortly repealed it, and provided that the beneficiary may be restrained by the instrument creating the trust. Cal., civil code, sec. 867.
a lunatic or spendthrift. Section 6718 referred, in the New York statutes, primarily to trusts created by subdivision 3. This subdivision as proposed and first enacted was "to receive the rents and profits of land and apply them to the education and support, or either, of any person during the life of such person, or for any shorter term, subject . . ." In 1830, the italicized words were struck out and the word use inserted in their place. As this subdivision was to authorize trusts for incompetents, it was logical to make the beneficial interests inalienable. But the subdivision in its broader form authorized trusts for anyone, and trusts for competent persons were also held inalienable under 6718. It followed that if the trust might last too long, it was void. There is good reason for believing that the revisors did not foresee the combined effect of the statutory inalienability and the statutory rule against suspension of the power of alienation.

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121 Supra p. 316.
123 Sec. 6712, Minn., G. S. 1913: "When a trust is created to receive the rents and profits of lands, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum necessary for the education and support of the person for whose benefit the trust is created, shall be subject in equity to the claims of his creditors, in the same manner as other personal property which cannot be reached by an execution at law." This section was obviously drafted with reference to sec. 6710 (3) in its original form. The two and 6718 had a common purpose.
125 The question of the application of the statutes against the suspension of the power of alienation to trusts of this character was the first question on the sections relating to real property in the New York Revised Statutes that came before the courts. This was in the well known case of Coster v. Lorillard. (5 Paige's Ch. 172, 14 Wend. 265.) In this case a testator devised certain real estate to trustees, consisting of a brother and twelve nephews and nieces, and to the survivor or survivors of them, in trust to receive the rents and profits and apply them to the use of the twelve nephews and nieces, in equal shares, during their joint lives, and to the survivor or survivors of them so long as any of them should live, and to convey the remainder of the estate, after the death of all of such nephews and nieces, in fee to such of their descendents as should be then in existence. The will came before Vice-Chancellor McCown of the first circuit for construction. He held that, as to the trusts for the lives of the twelve nephews and nieces, it was good even though inalienable, for the reason that the statutes against suspension of the power of alienation applied only to suspension caused by future estates. (5 Paige's Ch. 172, 187-196.) The reasoning by which this result was reached was that previously suggested. (Supra, p. 249.) He declined to make any decree as to the ultimate limitation over, because the proper parties were not before the court, but expressed the opinion that they were void as being too remote.
126 On appeal to the court of chancery, all three of the revisers, Butler, Spencer, and Duer, appeared, each representing different interests. All contended that the devise for the lives of the twelve nephews and nieces was not rendered invalid by the statutes against suspension of the power of alienation; Butler, because such statutes affected only future estates;
Section 6718 distinguishes between trusts with inalienable beneficial interests and trusts with alienable beneficial interests. These classes will be discussed in order.

What beneficial interests are made unassignable by section 6718? No person beneficially interested in a trust for the receipt of rents and profits of lands can assign his interest. Trusts for

(5 Paige's Ch. 172, 203-207) Spencer, because, even if applicable to present interests, the restrictions on alienation in such cases as this, if any there were, were imposed by law, "and if not legal, they do not exist; and if legal, they must prevail," and because the "restriction is an incapacity in respect to the character of the party which is not engrafted on the estate." (5 Paige's Ch. 172, 208-209.) Duer, because the incapacity to assign the beneficial interest in a trust for the receipt of the rents and profits and lands is personal and is not engrafted on the estate, the true construction of the statute being that the beneficial interest is not per se assignable, but may be made assignable by the testator, and that it had here been made assignable. (5 Paige's Ch. 172, 209-213.)

"The Chancellor, (Walworth) however, held that the statutes applied to all inalienable interests, whether present or future, and from whatever cause the inalienability arose. He held, however, that though the trust for the benefit of the nephews and nieces was subject to the statutes, it was not void, as the trust, properly construed, created a tenancy in common, and as to the individual interest of each, there was not a suspension for a greater length of time than the statutes permitted. (5 Paige's Ch. 172, 213, 218.) To the argument of the Vice-Chancellor that they prohibited suspension by future estates only, he answered by showing the consolidation of the proposed sections 15 and 17, drawing therefrom the conclusion that section 15 should be construed as including the interests intended to be covered by the two proposed sections, and in determining what interests were covered, he held as stated, that all inalienable interests were.

"On appeal to the Court of Errors similar arguments were repeated but the court held that the estates created were joint estates, were inalienable for more than the period permitted by the statutes, and were void for that reason. (14 Wend. 263.)

"Since the decision in this case it has been consistently held that trusts for the receipt of the rents and profits of land are subject to the statutory rules against the suspension of the power of alienation. (Douglas v. Cruger, 80 N. Y. 15; Herzog v. Title Guarantee and Trust Company, 177 N. Y. 86; Farmers' Loan and Trust Co. v. Kip, 192 N. Y. 266; In re Walkerly, 108 Cal. 627, 650, 41 Pac. 772, 776; Casgrain v. Hammond, 134 Mich. 419, 96 N. W. 510; Danforth v. Oshkosh, 119 Wis. 262, 97 N. W. 258; Rong v. Haller 109 Minn. 191, 123 N. W. 471; Penfield v. Tower, 1 N. D. 216.)

"Let us see what this means. The legislature has established the rule that trusts for the receipt of the rents and profits of land shall be inalienable. Because of the inalienability which has thus been imposed upon the trust, it is declared to be void. Because of a quality annexed to his gift which he probably did not contemplate, perhaps did not even desire, the wishes of the creator of the trust are frustrated, his cestuis disappointed, and his property distributed among those whom he has indicated no desire to benefit. The law has been rather over-sensitive to thwarting the intention of the creators of trusts in the interests of the public, but if the legislature ever consciously contemplated such a result as that here indicated, it must be adjudged guilty of a wanton disregard of the intention of the creators of trusts and of the rights of their intended cestuis.

"The writer does not believe that the revisers or the legislature ever contemplated any such result. He believes that the revisers when
the receipt of the rents and profits of lands were authorized in the original statutes by subdivisions 3 and 4. They were trusts to apply rents and profits to the use (originally education and support) of any person for his life, or for a shorter period, and trusts to accumulate for minors. The beneficial interests in these two classes were held generally unassignable in New York. They are unassignable whether the trust is to apply the rents and profits to the use of the beneficiary or to pay them over to him.

In Minnesota trusts to receive rents and profits and to apply them to the use of beneficiaries, or to pay them over to them, can undoubtedly be created under both subdivisions 3 and 6; and as the latter does not restrict the application or payment to the life of the beneficiary, they may be validly limited to the beneficiary and his heirs, provided the trust is otherwise sufficiently guarded against an undue suspension. What beneficial interests are unassignable is uncertain. The only Minnesota case construing section 6718 is \textit{Simmons v. Northwestern Trust Co.}\footnote{Chaplin, \textit{Express Trusts}, (N.Y.) ch. IX. The present New York statute reads, “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, but the right and interest of the beneficiary of any other trust in real property may be transferred.” Real Property Law, sec. 103. See Chaplin, \textit{Suspension of The Absolute Power of Alienation, 2nd ed.}, sec. 187 et seq.} A testatrix devised real and personal property to the trust company “to be held by the trustee and the income therefrom paid over” to a sister of testatrix during her life with the remainder over at her death to two other sisters. The trustee took possession of the personal property, but allowed the beneficiary for life to occupy the realty. She was married at the time of the devise, but later procured a divorce. She acquired the interest of her sisters in the land and then brought an action to compel the trustee to transfer the property to her. Oral evidence was offered to show that the purpose of the trust was to keep the property from her husband’s control and so had been accomplished. The court held that it was unnecessary to decide whether this evidence could be considered be-

\footnote{Cochrane v. Schell, (1894) 140 N. Y. 516, 36 N. E. 971; Cf. Radley v. Kuhn, (1884) 97 N. Y. 26.}

\footnote{(1917) 136 Minn. 357, 162 N. W. 450.}
cause she was entitled to have the trust terminated in any case, saying:

"There can be no serious doubt of her right of alienation, not only of the corpus of her estate, but also the income, since the will contains nothing inconsistent with the exercise of such right. Section 6718, G. S. 1913, has no application to a trust of the character of the one at bar. It applies only to trusts to receive and apply to specific purposes the rents and profits of land."129

This construction limits the prohibition of section 6718 very narrowly. When the beneficiaries are to receive the rents and profits directly from the trustees, their interests are alienable. They are inalienable only when the trustee is to apply the income to specific purposes for the beneficiaries. This is probably what the New York revisors had in mind, but the New York courts interpreted the section more broadly.130

These unassignable trusts suspend the power of alienation. The beneficiaries may be ascertained, and their interests vested, but so long as the beneficiaries cannot dispose of their interests, the trust must continue, and the trustee cannot dispose of the legal title by section 6720, unless he has power to do so by the terms of the trust.131 If such power is not given, trusts of which the beneficial interests are inalienable by section 6718, must be so restricted by their terms that they cannot continue for more than two lives in being at their creation. A trust to collect rents and profits and apply them to the use of three persons for their lives, is void.132 Similar trusts for five years, are void.133 The trust may be for any number of persons or for persons not in being or for a term of years, provided that it is made to terminate not later than the expiration of some two lives, in being at its creation.134

The discussion so far has been limited to trusts of real property, in which the beneficial interests are inalienable under 6718.

129 With respect to the real property, the decision depends on this reasoning if the oral evidence is ignored. An inalienable beneficial interest requires the continuance of the trust for its accomplishment. So it has been held in New York that the life beneficiary whose interest is not assignable cannot put an end to the trust on getting in the legal remainder. Chaplin, Suspension of The Power of Alienation, 2nd ed., sec. 63; Asche v. Asche, (1889) 113 N. Y. 232, 21 N. E. 70.
131 Chaplin, Suspension of The Power of Alienation, 2nd ed., secs. 185, 186.
133 Simpson v. Cook, (1877) 24 Minn. 180; Chaplin, Suspension of The Power of Alienation, 2nd ed., sec. 76.
Trusts of real property in which the beneficial interests are alienable will now be considered. Section 6718 provides that the rights and interest of every person, for whose benefit a trust for the payment of a sum in gross is created, are assignable. Interests in trusts authorized by subdivisions 1 and 2, are assignable. There may be beneficial interests not included in either the “non-assignable” part of this section, or in the “assignable” part. The two parts do not include beneficial interests of all kinds. Other beneficial interests are probably assignable, as at common law. Any attempt to restrain their alienation should be subject to the common law rules against restraints on alienation. These rules are in force in the state.

Trusts which do not create non-assignable interests can suspend the power of alienation in only one way. If the beneficiaries are not in being, the power is suspended. And if they might not be in being at the termination of two lives in being when the trust is created, the trust will be void. But if the beneficiaries must all be in being and ascertained within the period allowed, the trust is valid. They can convey their interests and terminate the trust. If the beneficiaries might not be in being and ascertained within the period allowed, the trust may be saved by giving a power of sale to the trustee. It is enough that the power be given to be exercised only on the death of two persons in being when the trust is created. Whether the power must be mandatory or may be discretionary, and whether there must be a limit to the duration of the trust of the proceeds, are problems already discussed. Trusts under subdivisions 1 and 2 never suspend the power of alienation. They are subject to no statutory restriction, because they need none. The purpose of trusts authorized by them is to convey.

Trusts for accumulation of the rents and profits of land are authorized by subdivision 4. They are subject to the rules prescribed in chapter 59. These rules require that the accumula-
tion must begin within two lives in being at the creation of the trust; be for minors in existence when it begins, and terminate on the expiration of their respective minorities.143 Direction for accumulation for a longer period is void only as to the excess. These rules do not apply to trusts for the accumulation of income of personal property. Such may be accumulated for any number of lives in being at the creation of the trust and for twenty-one years after their termination.144 Under this rule, it is possible to tie up property, no one receiving any of the income for about one hundred years.

**Summary**

Passive trusts of real property for definite beneficiaries are executed. They operate as conveyances of the legal title to the beneficiaries.

Active trusts of either real or personal property may be created for any purpose (except charitable) possible by the common law.

Trusts as such cannot be created for charitable purposes.

Trusts of personal property are valid if they do not violate the common law rule against perpetuities. Whether they are valid if they violate the rule, is uncertain. They are probably void.

Trusts of real property are valid if a mandatory power of sale of the real property is given to the trustee, to be exercised on the death of two persons in being when the trust is created, and if the trusts of the proceeds do not violate the common law rule against perpetuities. Whether they are valid if they violate this rule, is uncertain. They are probably void. Pretty certainly if authorized only by subdivision 6. These statements are probably true when the power is discretionary.

Trusts of real property, which give the trustee no power of sale, and of which the beneficial interests are not assignable, are valid if by their terms they cannot last more than two lives in being. If they might last longer, they are void.

Trusts of real property, which give the trustee no power of sale, but of which the beneficial interests are assignable, are valid, if by their terms the beneficiaries must all be in being and ascen-

143See Chaplin, Suspension of The Power of Alienation, 2nd ed., secs. 211-219; Minnesota Loan & Trust Co. v. Douglas, (1917) 135 Minn. 413, 161 N. W. 158; could the period be extended to that allowed for personal property by giving the trustee a discretionary power of sale as in Tower's Estate, supra pages 341-43.

144Congdon v. Congdon, (Minn. 1924) 200 N. W. 76.
tained within two lives in being at their creation. If the be-
ficiaries might not be ascertained within this period, they are void.

Trusts for accumulation of the rents and profits of land may
continue only during minorities; trusts for accumulation of in-
come of personal property may continue for lives in being and
twenty-one years after their termination.

Suggestions for Legislation

Those proposed by the author in 8 Minnesota Law Review
315-316, and, in addition, the following:

Authorize the creation of charitable trusts unrestricted in
duration; eliminate subdivisions 1 to 5, inclusive, of section 6710;
clarify the meaning of the first proviso of subdivision 6; strike
out the second proviso; carry sections 6687-6689 of chapter 59 over
to chapter 60, and restate them so that they will be a restriction
on trusts for accumulation authorized by subdivision 6, applicable
alike to real and personal property; make sections 6712 and 6718
include the income of personal property, make clear what bene-
ficial interests are, and are not, assignable, limit the time they may
be unassignable and provide that they shall be assignable when that
time has expired.

These changes would simplify and clarify the law. They
would permit such dispositions of property as testators usually
desire, which are not inconsistent with a sound public policy. Leg-
islation is needed to prevent litigation expensive to individuals and
to the state, too often resulting in the frustration of testators' at-
ttempts to make reasonable dispositions of their property for char-
itable or private purposes, but sometimes allowing dispositions con-
trary to public policy.