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Professor Newman compares and discusses the statutory suspension rule and the rule against perpetuities in this article, concluding that there should be only one standard for determining when a restraint on alienation lasts too long. The author proposes a new rule which will eliminate a number of uncertainties and ambiguities in the law of property and future interests.

The basic principle involved in the title of this discussion is the common law policy that the owner of the current beneficial interest in property should have the power of disposition, in order to enable the property to be used most effectively for the well being of the community. The rule against perpetuities and the statutory rules against suspension of the power of alienation are primarily measurements of the permissible duration of restraints. The rule against perpetuities establishes in addition an intermediate test of suspension, the criterion of vesting. The vesting criterion is unnecessary since the presence of any contingent interest generally interferes with the salability of the property. The vesting criterion is inadequate because it does not cover two very common situations, vested equitable interests and contingent equitable interests which comply with the rule, but which nevertheless often produce overlong suspension. The vesting criterion is confusing to an appalling degree. The statutory suspension rule covers all the situations in which legal control over restrictions which interfere with alienation of property is needed; but its exclusive emphasis on measurement of the permissible duration of restraints makes it of no help in establishing a test of suspension; and therefore it fails to afford a solution to the confusion as to the circumstances under which suspension exists. The simultaneous existence of both rules in many jurisdictions in the United States leads to almost hopeless confusion as to both the test and the permissible period of suspension. There is need for an inclusive rule which limits the duration of any interest which clogs alienability, and which defines suspension. An appropriate method of dealing with the basic problem of establishing a rule for limiting the duration of any sort of restraint which interferes with the ability of the current owner of the beneficial interest in property to sell or mortgage

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it if the need should arise would be a return to the common law policy, supplemented by the establishment, either by judicial decision or preferably by statute, of a permissible period during which restraints on alienability may last.

Owners of property often wish, in giving it to members of their families, to establish controls over the successive enjoyment of the property or the subsequent devolution of its ownership. This desire is opposed to the social interest that property be freely disposable by a current absolute owner. The law of property thus has to deal with two antithetical factors: on the one hand, a deeply felt individual desire to establish controls over the future benefits or devolution of property after ownership has been transferred; and on the other hand, a strong social policy that ownership be unrestricted so that in case of necessity the property can be sold or mortgaged in accordance with the wishes of the current owner of the beneficial interest. In the civil law systems, the social interest that property be free from restrictions which might interfere with its alienation and that ownership be indivisible overrides the individual desire to attach restrictions which will be effective after ownership is transferred.[1] In those legal systems, in the rare instances in which successive limitations of property are permitted, legal controls over the period during which restrictions on enjoyment or alienation will be enforced are unnecessary because, as was the case in the common law system until shortly before the Statute of Uses, future interests can be created only in favor of persons who are living when the property is originally transferred. In the common law system, future contingent estates are recognized as performing a useful function in giving the opportunity for making reasonable provision for the enjoyment or devolution of property in accordance with conditions which may arise in the future. In the case of restrictions on alienation caused by the creation of future interests, the common law has reached a compromise between the desire of the owner of property to control the enjoyment of the property and to provide for its subsequent devolution of ownership, and the social policy against such restrictions. The compromise which has been reached is to permit the imposition of such restrictions for limited periods of time.

There are two sorts of legal controls in the common law system over attempts to limit the right of enjoyment or the right of the disposition of property by the transferee of some present beneficial

1. FRENCH CIVIL CODE art. 807, 1048, 1082. The French Civil Code art. 544 defines the right of property as the right to enjoy and dispose of things in the most absolute manner. See also FRENCH CIVIL CODE art. 537; LLOYD, PUBLIC POLICY; A COMPARATIVE STUDY IN ENGLISH AND FRENCH LAW 18-20 (1953). The codifiers of the New York Revised Statutes of 1830 set before themselves as their ideal of simplicity the French law of real estate.

interest. One sort of control is to declare invalid such limitations on the power to dispose of the property. The other type of legal control is to limit, in the case of contingent legal interests and of all interests in trust, the period of time during which the power of alienation may be suspended as the result of restrictions imposed by the former owner. The application of the first type of control depends on the nature of the restriction and on the nature of the estate to which the restriction is attached. Some restrictions make the attempted alienation ineffective and do not result in the forfeiture of the ownership of the estate; others result in the forfeiture of ownership of the estate if the restriction is sought to be violated. In the case of estates of inheritance, either legal or equitable, both types of restrictions are invalid.[2] It is for this reason that in states where trusts are deemed to clog alienability there may not be any trust of a fee. In the case of legal life estates, restrictions of the first type, called disabling restraints, are usually invalid;[3] but restrictions which result in the forfeiture of the ownership of the estate and the passing of ownership to another person are sometimes allowed.[4] Restrictions of either type attached to legal interests are comparatively rare. The second type of control applies to either legal or equitable interests. In the case of absolute legal interests, the rule against perpetuities accomplishes the public policy in favor of alienability by curtailing the period during which the vesting of future interests may be postponed. However, since successive limitations of legal interests are comparatively rare, most of the problems dealing with the effect of provisions which interfere with the alienability of property arise in connection with trusts.

Restrictions attached to equitable interests arising out of the creation of a trust must be such that they will cease to be operative within periods of time prescribed by law. It is this type of restriction which is the particular subject of the following discussion. The end which the law seeks to accomplish is approached, in the case of equitable interests, in two ways: by requiring the vesting of future interests within the period established by law, or by requiring that any conditions to absolute ownership which would interfere in any way with the sale of the property must be such that they will cease to be effective within the prescribed period. The former method, which requires the timely vesting of future interests, is called the rule against perpetuities. The latter method is called the policy against

2. GRAY, RESTRAINTS ON ALIENATION § 279 (2d ed. 1895); LITTLETON, TENURES § 360 (Wambaugh ed. 1903); Statute of Westminster III (Quia Emptores), 1290, 18 Edw. 1, c. 1, establishing the right of fee owners to alienate.

3. GRAY, RESTRAINTS ON ALIENATION § 134 (2d ed. 1895); Schnebly, *Restraints on Alienation*, 44 YALE L.J. 961, 989-95 (1935).

4. GRAY, *op. cit. supra* note 3, § 46; Schnebly, *supra* note 3, at 991-94.

suspension of the power of alienation. Later, in modern times, this latter policy has been expressed in a statutory rule against suspension of the power of alienation.

Of the two methods of curtailing the period during which provisions interfering with the alienation of property will be legally effective, the method of limiting the permissible period to a period on the termination of which all contingent interests must become vested, if they are ever to do so, is, although itself ancient, the more recent. Long before the rule against perpetuities, as it has been called ever since it was originated in a dictum of Lord Nottingham in 1681,[5] a basic policy against protracted suspension of the power of alienation, which might have the effect of removing property from participation in commerce, had become well established. To this policy was probably due the doctrine, even though future estates had been a part of the English law of property since the Norman Conquest, that only vested remainders were permitted. When this policy was relaxed shortly before the enactment of the Statute of Uses in 1535, the only relaxation at common law was to permit remainders, necessarily contingent, to the heirs of persons who were living when the estates in remainder were created. In equity, for about a century before the Statute, other contingent interests had been recognized; and after the Statute almost numberless possibilities of contingent interests were adopted, as the effect of the Statute, into the common law in the form of contingent estates or executory interests. Today in England the only method of restricting the permissible duration of such interests is the rule against perpetuities through requiring the timely vesting of contingent interests.

In the United States, commencing with the enacting of the New York Revised Statutes of 1830,[6] another criterion was found for determining the legality of restraints on alienation. The object of the new statutory method, which is called the rule against suspension of the power of alienation, is exactly the same as the ultimate object of the older rule against perpetuities: to assure that after a period of time which the law determines property encumbered with such restraints may be restored to participation in commerce. It seems fairly certain that this new statutory suspension rule was not intended to be exclusive, but only to supplement the older rule against perpetuities, incorporated into the New York statutory system of real property law along with the newly formulated rule against suspension.[7] The use of both rules in New York, almost of necessity, has

5. Duke of Norfolk's Case, 3 Chan. Cas. 1, 22 Eng. Rep. 931 (Ch. 1681).

6. N.Y. REV. STAT. part 2, c. 1, tit. 2, §§ 14-23, 63 (1830); *id.* part 2, c. 4, tit. 4, §§ 1, 2.

7. SIMES, FUTURE INTERESTS § 565 (1936); N.Y. REAL PROP. LAW §§ 46, 50, refer to vesting in interest.

complicated the understanding of the nature of each rule and of the extent to which the rules have independent effect. Although a wealth of important legal literature has been written in explanation of these types of legal controls over the permissible duration of restrictions on the alienability of property,[8] the distinction between the two rules is not easy to grasp. Sometimes the difficulty in understanding the distinction is due to an incomplete comprehension of the nature of the tests of suspension which are being compared. For these reasons it is felt that a survey of the relationship between the vesting requirement of the rule against perpetuities and the rule against suspension of the power of alienation may be useful, at least to the extent of emphasizing some of the problems which are involved. It is the opinion of the writer that the custom in legal writing of resting each step of reasoning on specific authority tends at times to obscure what might otherwise have been a clearer approach to the basic problems. At the risk of being thought, possibly with justification, guilty of a departure from the accepted paths of scholarship, the following observations are offered as a base for more detailed study by students of the law who may be desirous of verifying the observations by independent research.

The core of the rule against perpetuities, which requires that contingent interests in property, to be valid, must be capable of vesting within the period of the rule, is that the interest must be susceptible of becoming unconditional, or absolute, as to ownership within the prescribed period.[9] The period usually adopted in the United States is lives in being, including where appropriate any actual gestation period, and an additional period of twenty-one years in which the vesting may take place. Unconditional, or absolute,

8. Among the most helpful discussions, in the opinion of the writer, are the following: CHAPLIN, SUSPENSION OF THE POWER OF ALIENATION § 358 (3d ed. 1929); KALES, ESTATES, FUTURE INTERESTS AND ILLEGAL CONDITIONS AND RESTRAINTS IN ILLINOIS § 658 (2d ed. 1920); Bordwell, *Alienability and Perpetuities*, 22 IOWA L. REV. 437 (1937); 23 *id.* at 1 (1937); 24 *id.* at 635 (1939); 25 *id.* at 1 (1939); 25 *id.* at 707 (1940); Cleary, *Indestructible Testamentary Trusts*, 43 YALE L.J. 393 (1934); Fraser, *The Rationale of the Rule Against Perpetuities*, 6 MINN. L. REV. 560 (1922); Fraser, *The Rule Against Perpetuities; Suspension of the Power of Alienation*, 8 MINN. L. REV. 295 (1924); Fraser, *The Rules Against Restraints on Alienation*, 9 MINN. L. REV. 314, 341 (1925); Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638 (1938); Morray, *The Rule Against Prolonged Indestructibility of Private Trusts*, 44 ILL. L. REV. 467 (1949); Schnebly, *Restraints on Alienation*, 44 YALE L.J. 1380, 1404 (1935); Simes, *Is the Rule Against Perpetuities Doomed?*, 52 MICH. L. REV. 179 (1953); Sweet, *Contingent Remainders and Other Possibilities*, 27 YALE L.J. 979 (1918); Sweet, *The Monstrous Regiment of the Rule Against Perpetuities*, 18 JURID. REV. 132 (1906); Turrentine, *The Suspension Rule and Other Statutory Restrictions on Trusts and Future Interests in California*, 9 HASTINGS L.J. 262, 284 (1958); Whiteside, *Suspension of the Power of Alienation in New York*, 13 CORNELL L.Q. 167 (1928).

9. GRAY, THE RULE AGAINST PERPETUITIES § 201 (2d ed. 1906); SIMES, FUTURE INTERESTS § 567 (1936).

ownership requires that the ownership must arise in ascertained or immediately ascertainable persons and that this ownership must be certain in the sense that there must be no further condition to complete ownership. In all jurisdictions, if these two conditions are met, the estate does not violate the rule against perpetuities,[10] the reason being that if the future interests in the property are such that they must vest, if they are ever to do so, within the period of the rule, the property will not remain out of effective participation in commerce longer than the prescribed period.

The rule against suspension of the power of alienation, like the rule against perpetuities, is designed to restore property to commerce within the prescribed period, but this result is accomplished, in the rule's original form, by the imposition of a different test of alienability than the test established in the rule against perpetuities. The test of the rule against perpetuities is that of practical possibility of sale, not legal possibility. When the owners of a future estate become identified, they can sell their interests, and from the viewpoint of legal possibility the property is potentially restored to commerce. If, however, their ownership is not absolute, that is, unconditional, the salability of the property will be impaired because by the time they agree on the valuation of the contingent interest, the possibility of sale may well have disappeared; or the parties may fail ever to agree.[11] Thus the property, although legally salable if the parties agree on how the proceeds of the potential sale are to be divided, is as a practical matter taken out of the market. Expressed in another way, the property, although legally salable, is as a practical matter unsalable. As Professor Powell has stated the distinction, the rule against perpetuities is concerned with the fact of alienability as well as the possibility.[12] The suspension rule is concerned only with the legal possibility.

There has been a wide divergence of views on the part of legislators, judges, and text writers as to the desirability or necessity for the adoption or retention of either rule. Most commentators have refrained from expressing an opinion on this question. Among those who have ventured to do so, Rundell[13] and Turrentine[14] favor the

10. SIMES, FUTURE INTERESTS § 567 (1936).

11. GRAY, THE RULE AGAINST PERPETUITIES § 268 (2d ed. 1906); Fraser, *The Rationale of the Rule Against Perpetuities,* 6 MINN. L. REV. 560, 573 (1922).

12. Powell, *Suspension of the Power of Alienation,* 30 COLUM. L. REV. 140 (1930).

13. Rundell, *The Suspension of the Absolute Power of Alienation,* 19 MICH. L. REV. 235 (1921).

14. Turrentine, *The Suspension Rule and Other Statutory Restrictions on Trusts and Future Interests in California,* 9 HASTINGS L.J. 262, 284 (1958).

retention of the suspension rule; Fraser,[15] Bogert[16] and Powell[17] favor the rule against perpetuities. Simes seems to suggest that the suspension rule is preferable.[18] Rundell and Fraser point out the undesirability of two rules, each of which is considerably complex and undoubtedly, to some extent at least, overlaps the area covered by the other rule. Fraser has suggested that if at all possible both of these rules should be replaced by a single rule that any limitation which might remain contingent beyond the period allowed is void. Even such a rule would not cover all situations, however, in which control is needed—for example, restraints on alienation caused by indestructible trusts of vested interests, in which some limitation on the period of permissible duration may be desirable. The single rule, if any such is to be found, must be of wider application than to cover merely contingent interests.

It is important to compare in some detail the tests by which alienability is to be determined in the two rules designed to curtail the permissible period of suspension of the power of alienation. Essentially the difference, as has already been stated, is that according to the statutory suspension rule, all that is required is the legal possibility of sale by all the owners of interests in the property, acting in concert, of an interest which, in the hands of the new owner, will be a fee simple absolute in the case of real property, or in the case of personal property, an absolute ownership. According to the rule against perpetuities, which operates through requiring timely vesting of contingent interests, such a sale must be not only legally possible, but practicable as well. For this reason, the existence of a future interest which, although certain as to the identity of the owners, is uncertain as to their absolute ownership because of uncertainty of the occurrence of an event the happening of which is a condition to such absolute ownership, suspends the alienability of the property. In the area of the widest application of both rules, trusts, the tests of the two rules have become almost identical. Historically, in New York, where the rule against suspension in its statutory form originated, all that the suspension rule required was the legal possibility of sale. The New York Court of Appeals was faced with the necessity of interpreting a statute which might have been phrased in more traditional terms and which introduced a concept of absolute ownership that was new as to personal property, at least in its verbal formulation.

15. Fraser, *The Rationale of the Rule Against Perpetuities*, 6 MINN. L. REV. 560 (1922).

16. 1A BOGERT, TRUSTS AND TRUSTEES § 219 (1935).

17. Powell, *Perpetuities in Arizona*, 1 ARIZ. L. REV. 225 (1960).

18. Simes, *Is the Rule Against Perpetuities Doomed?*, 52 MICH. L. REV. 179, 193 (1953).

The court in early cases[19] drew a distinction between the test of suspension of the power of alienation, which it said required in the case of personal property only the legal possibility of a transfer by the combined action of identified persons who owned interests in the property, and the vesting test applicable to real property, which imposed the dual requirement of identification of the owners and also unconditional ownership of the property. In the course of time, beginning within six years after the enactment of the Revised Statutes of 1830, the suspension rule was broadened by judicial decision in New York so as to require, in the case of equitable interests in trust, not only certainty of the identity of the owners of the various interests, but elimination of impediments to sale caused by the presence of an indestructible trust as well.[20] This extension of the concept of suspension of the power of alienation plainly introduced into the test of suspension matters arising from impediments to sale created by circumstances other than uncertainty as to the identity of the owners of the interests. Thereafter, there was no sensible reason for excluding from the category of impediments to alienability under the suspension test any other circumstance, such as, for example, the necessity for the happening of some future event before ownership would be absolute—*cessante ratione legis, cessat et ipsa lex.* Thus the tests of suspension in the case of equitable interests according to the rule against suspension and the tests according to the rule against perpetuities coalesced, and there remained no further need for both rules. This evolution of the suspension rule has apparently gone unnoticed so far as its effect on the vesting rule is concerned, although the enlarged conception of the suspension rule renders the vesting rule superfluous. The function of the rule against perpetuities has thus contracted in an important area of its operation, contingent equitable interests, to that of an adjunct to the statutory rule against protracted suspension of the power of alienation, which was precisely the function of the rule against perpetuities in relation to the ancient

19. *In re* Wilcox, 194 N.Y. 288, 87 N.E. 497 (1909); Sawyer v. Cubby, 146 N.Y. 192, 40 N.E. 869 (1895); Nellis v. Nellis, 99 N.Y. 505, 3 N.E. 59 (1885).

20. *In re* Hitchcock's Will, 222 N.Y. 57, 118 N.E. 220 (1917); Farmers' Loan & Trust Co. v. Kip, 192 N.Y. 266, 85 N.E. 59 (1908); Kalish v. Kalish, 166 N.Y. 368, 59 N.E. 917 (1901); Allen v. Allen, 149 N.Y. 280, 43 N.E. 626 (1896); Brewer v. Brewer, 11 Hun 147 (N.Y. Sup. Ct. 1877), *aff'd sub nom.* Bremer v. Penniman, 72 N.Y. 603 (1878); Moore v. Littel, 41 N.Y. 66 (1869); Belmont v. O'Brien, 12 N.Y. 394, 405 (1855); Hawley v. James, 16 Wend. 61 (N.Y. Ct. of Err. 1836); Coster v. Lorillard, 14 Wend. 265 (N.Y. Ct. of Err. 1835); Equitable Trust Co. v. Pratt, 117 Misc. 108, 193 N.Y. Supp. 152 (Sup. Ct. 1922); Hobson v. Hale, 95 N.Y. 588 (1884) (dictum); Robert v. Corning, 89 N.Y. 225 (1882) (dictum); Leonard v. Burr, 18 N.Y. 96 (1858) (dictum); *In re* Maltman's Estate, 229 Mich. 321, 190 N.W. 250 (1922). The rule has been codified in California. CAL. CIV. CODE § 771 (Deering 1949). Professor Simes has noted the evolving construction of the suspension rule, although without particularizing as to the precise nature of the evolution. SIMES, *op. cit. supra* note 10, § 566.

common law policy against protracted suspension. The gradual evolution of the statutory suspension rule is by no means surprising. What would be surprising, as Professor Gray has remarked with reference to the evolution of the rule against perpetuities,[21] would be that the full significance of the newly evolved statutory suspension rule would have been understood in all its ramifications as soon as it was promulgated. Courts have continued, however, to re-state both rules in the terms of their original formulation with respect to the criteria of suspension with each rule having, in consequence, a field of operation, that of contingent equitable interests, in which both rules operate concurrently with almost identical effect.

Thirteen other jurisdictions,[22] commencing soon after the establishment of the suspension rule in New York in 1830, adopted it, seemingly without full understanding of its complete meaning and function or of its relation to the rule against perpetuities. In all those jurisdictions the rule against perpetuities was already in force, in their common law. Three of those states abandoned the rule against perpetuities and established the suspension rule as the exclusive test of alienability.[23] In two of the states which adopted the suspension rule, it was subsequently abandoned by statute.[24] In Kentucky and Oklahoma the statutes have sometimes been interpreted as merely declaratory of the common law rule against perpetuities,[25] but it seems probable that this impression was the result of the frequent overlapping of the two different tests of suspension. In most of the states which adopted the suspension rule there were thereafter in existence two different designs for handling the problem of establishing limits to the period during which property may be taken out of effective participation in commerce. In some of the states which have

21. Gray, *Remoteness of Charitable Gifts*, 7 HARV. L. REV. 406 (1894).

22. ARIZ. REV. STAT. § 33-261 (1956); CAL. CIV. CODE § 715 (Deering 1949); D.C. CODE ANN. § 45-102 (1961); IDAHO CODE ANN. § 55-111 (1949); IND. STAT. §§ 51-101, -103 (Burns 1933); KY. REV. STAT. ANN. § 381.220 (1955); MICH. COMP. LAWS 1929, § 12934 (1929); MINN. STAT. ANN. § 500.13 (1947); MONT. REV. CODES § 67-406 (1962); N.D. CENTURY CODE § 47-02-27 (1960); OKLA. STAT. ANN. tit. 60, § 31 (1949); S.D. CODE § 51.0231 (1939); WIS. STAT. ANN. § 230.14 (1957).

23. Idaho [see Locklear v. Tucker, 69 Idaho 84, 203 P.2d 380 (1949)]; Minnesota [Mineral Land Inv. Co. v. Bishop Iron Co., 134 Minn. 412, 159 N.W. 966 (1916)]; Wisconsin [Miller v. Douglass, 192 Wis. 468, 213 N.W. 320 (1927)]. In Arizona and Iowa the decisions raise doubt as to whether or not the suspension rule supersedes the rule against perpetuities. Lowell v. Lowell, 29 Ariz. 138, 240 Pac. 280 (1925); Jordan v. Woddin, 93 Iowa 453, 61 N.W. 948 (1895); *cf.* Todhunter v. Des Moines, I. & Mo. R.R., 58 Iowa 205, 12 N.W. 267 (1882).

24. IND. STAT. ANN. §§ 51-105, -109 (Burns 1951); MICH. STAT. ANN. § 26.14 (1957).

25. *In re* Walker's Estate, 179 Okla. 442, 66 P.2d 88 (1937). In Kentucky the statute is deemed to be merely declaratory of the rule against perpetuities, Fidelity & Columbia Trust Co. v. Tiffany, 202 Ky. 618, 260 S.W. 357 (1924); Brown v. Columbia Fin. & Trust Co., 123 Ky. 775, 97 S.W. 421 (1906); see Roberts, *Kentucky's Statute Against Perpetuities*, 16 KY. L.J. 97 (1927).

adopted the suspension rule, superimposed on the common law rule against perpetuities, the coalescence of the two tests of suspension has been recognized, but only in the case of equitable interests and not in the case of contingent legal interests.[26] Such a distinction is without any sound basis, and should not be perpetuated. The enlarged construction of the test of alienability in the suspension rule should be applied also in the case of contingent legal interests, which would make the vesting rule superfluous as an independent test of suspension. The New York courts have very properly abandoned any distinction, with regard to the test of alienability, between vested and contingent equitable interests; and any such distinction between contingent legal and equitable interests is equally pointless. If this distinction were to be abandoned, the same test of suspension would be applied to absolute legal interests and to all interests in trust. Since in the ten states, including New York, where both rules are in force,[27] the rule against remote vesting answers the requirements of identified ownership and unconditional ownership of legal interests, the suspension rule, for the purpose of requiring unconditional ownership within the prescribed period is unnecessary in the case of absolute legal estates. This is perhaps the reason for its abandonment in some states in which it was previously in force. In those states, and also, of course, in the large majority of jurisdictions in the United States where the suspension rule has never been in force, the only clearly formulated rule against the protracted removal of privately owned property from commerce by

26. *In re* Maltman's Estate, 195 Cal. 643, 234 Pac. 898 (1925); Grand Rapids Trust Co. v. Herbst, 220 Mich. 321, 190 N.W. 250 (1922).

27. In addition to Wisconsin, where the suspension rule is the only rule in force, it is in force along with the vesting rule in ten other jurisdictions: Arizona, California, District of Columbia, Minnesota, Idaho, New York, Montana, North Dakota, Oklahoma, and South Dakota. In Arizona and Minnesota it applies only to real property. In California a statute, CAL. CIV. CODE §§ 715.2, 716 (Deering 1949) expressly provides for both rules. In Michigan and Indiana, former superseding statutes have been repealed, and the common law rule against perpetuities substituted. See note 24 *supra*. The statutes in Montana, South Dakota, North Dakota, and the District of Columbia have not been definitively construed. Hazen v. American Security & Trust Co., 265 Fed. 447 (D.C. Cir. 1920); *In re* Murphy's Estate, 99 Mont. 114, 43 P.2d 233 (1935); Hagen v. Sacrison, 19 N.D. 160, 123 N.W. 518 (1909); *In re* Havsgaard's Estate, 59 S.D. 26, 238 N.W. 130 (1931). In thirty-three states the rule against perpetuities alone, or in conjunction with the suspension rule, is in force: Alabama, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming. In six states by statute, CONN. GEN. STAT. §§ 45-95 (1958); ME. REV. STAT. ANN. c. 160, § 27 (1959); MASS. GEN. LAWS c. 184A, § 1 (1955); PA. STAT. ANN. tit. 20, §§ 301.4, 301.5 (1950); VT. STAT. ANN. tit. 27, § 501 (1959); WASH. REV. CODE § 11.98.050 (1959). And in New Hampshire by judicial decision actual events, rather than possibilities, control, Merchants Nat'l Bank v. Curtis, 98 N.H. 225, 97 A.2d 207 (1953), noted in 67 HARV. L. REV. 355 (1953).

reason of restrictions on its alienation is the vesting requirement, sometimes incorporating the common law rule by statute and sometimes merely continuing the common law rule without the aid of statute. In England the rule against perpetuities is the only rule against remoteness of vesting.[28] It is exclusively in effect in thirty-seven American jurisdictions. Three more have rules resembling it.[29]

Has the suspension rule an area of operation different from the area of operation of the rule against perpetuities? The question may be divided into consideration of vested legal estates, contingent legal estates, and equitable estates of both kinds.

I. Vested Legal Estates

Since the vesting requirement of the rule against perpetuities is satisfied if all the future interests are susceptible of becoming vested within the prescribed period, whereas the suspension rule applies even to vested interests, it might seem that the suspension rule would operate in a situation in which the rule against perpetuities does not. Although this is true as an abstract proposition, it will readily be seen that the suspension rule even in the case of vested absolute interests has no independent effect. Vested interests, apart from trusts, do not suspend the power of alienation; and therefore the rule against suspension does not apply, any more than does the rule against perpetuities. Any restraint on alienation is dealt with either as terminating the ownership of the estate to which it is attached if the restraint is sought to be violated or as rendering ineffective any attempted alienation, leaving the ownership otherwise undisturbed; or it is limited in its effect, in some jurisdictions, to life estates. There is no other control provided by law, or necessary, over such types of restraint on alienation, because the restraint can be made legally ineffective without destroying the estate to which the restriction has been attached. This is not so in the case of contingent future interests, where it is the very nature of the interest itself which creates the suspension; and to invalidate the suspension completely, in contrast to limiting its permissible duration, would be to destroy the contingent estate and preclude the benefits which in our legal system are deemed to follow from this method of ownership of estates in property.

II. Contingent Legal Interests

Likewise in the case of contingent legal estates, both rules have identical effect. The rule against perpetuities precludes the remote

28. Law of Property Act, 1925, 15 Geo. 5, c. 20, § 163.

29. Comment, *Recent Changes in Statutory Rules Against Prepetuities,* 38 Cornell L.Q. 543 n.4 (1953).

vesting which would unduly prolong the suspension; but it is also indisputable that as long as the contingency lasts, the future interest, by reason of its contingent nature, suspends the power of alienation of the entire property. Both rules in the case of contingent legal estates lead to the same result.

III. EQUITABLE INTERESTS

A. EXISTENCE OF SUSPENSION

In determining whether a trust in itself creates a clog on alienation, several problems must be taken into account: whether a power of sale in the trustee cures the difficulty;[30] whether a separate power to assign the equitable interests is necessary in order to remove the difficulty, in which case spendthrift trusts would in themselves create a clog; and, the most important consideration, whether a trust, even apart from any spendthrift restrictions, is in itself indestructible. Obviously only indestructible trusts clog alienation; if all the beneficiaries are of full age and capacity and own among them vested and indefeasible interests, or if the owners of all contingent interests are living and identified and are of full age and capacity, statutes in many states permit the termination of inter vivos trusts by the settlor with their consent.[31] In the case of testamentary trusts or inter vivos trusts in the absence of statute, the overwhelming weight of authority, since the decision of *Claflin v. Claflin* in 1889, is that they are indestructible.[32] Under this view, in jurisdictions where indestructible trusts are deemed to impair the alienability of the property, if the suspension rule is in force, a trust cannot last longer than the lifetimes of persons who were living when the trust began and in some states

30. Powell, *Perpetuities in Arizona,* 1 ARIZ. L. REV. 225, 238 (1960), feels that a power of sale makes the property in a trust alienable. There is a public policy against permitting an indestructible trust of long duration. Internal attack will be allowed. RESTATEMENT (SECOND), TRUSTS § 62 (1959). An attempt to create perpetually indestructible interests was held invalid in First Nat'l Bank v. Rice, 101 N.J. Eq. 520, 139 Atl. 396 (ch. 1927). See also KALES, ESTATES, FUTURE INTERESTS AND ILLEGAL CONDITIONS AND RESTRAINTS IN ILLINOIS § 658 (2d ed. 1920). *Contra,* Simes, *Is the Rule Against Perpetuities Doomed?,* 52 MICH. L. REV. 179, 192 (1953) (referring to the stagnation of risk investment caused by trusts); Cleary, *Indestructible Testamentary Trusts,* 43 YALE L.J. 393 (1934); Morray, *The Rule Against Prolonged Indestructibility of Private Trusts,* 44 ILL. L. REV. 467 (1949).

31. N.Y. PERS. PROP. LAW § 23; N.Y. REAL PROP. LAW § 118; CAL. CIV. CODE § 2280 (Deering 1949); OKLA. STAT. ANN. tit. 60, § 175.41 (1949); TEX. CIV. STAT. tit. 125A, art. 7425 b-41 (Vernon 1960); N.C. GEN. STAT. § 39-6 (1950). See also *In re* Mowinkel's Estate, 130 Neb. 10, 263 N.W. 488 (1935).

32. Claflin v. Claflin, 149 Mass. 19, 20 N.E. 454 (1889); *accord,* RESTATEMENT, TRUSTS § 337 (1935); see KALES, *op. cit. supra* note 30, § 288; Annot., 45 A.L.R. 743 (1926). Gray and Kales differ as to the time when the suspension starts; see Gray, Note, 19 HARV. L. REV. 604, 605 (1906); Kales, *Several Problems of Gray's Rule Against Perpetuities, Second Edition,* 20 HARV. L. REV. 192, 202-04 (1907); Cleary, *Indestructible Testamentary Trusts,* 43 YALE L.J. 393, 400 (1934).

an additional period measured in years. In England perhaps it is because trusts are not ordinarily indestructible[33] that their existence is not considered to suspend the power of alienation, and thus they are not considered to violate the common law policy against unduly prolonged suspension. The purpose of the trust, of course, must also be considered, since after its purpose has been carried out, it is terminable at the desire of the beneficiaries. This question is itself an extremely complicated one, and different presumptions as to the probable purpose of the settlor will affect the decision on the problem of terminability.[34] If an indestructible trust is deemed to clog alienability, there is authority to the effect, even in the absence of a statutory suspension rule, that the duration of the trust should be limited. Gray, Kales, and Scott argue for such a principle.[35] There are a few dicta and decisions both ways.[36] Bogert feels that the majority of the dicta announce an American policy that indestructible trusts must be limited in duration, even in the absence of a statutory suspension rule.[37]

B. Duration of Suspension

The principal difference in the effect of the two rules is in regard to the duration of trusts. It seems to be assumed in states which have adopted the statutory suspension rule while retaining the rule

33. *In re Chardon*, [1928] 1 Ch. 464; *In re* Couturier, [1907] 1 Ch. 470; Saunders v. Vautier, Cr. & Ph. 240, 41 Eng. Rep. 482 (Ch. 1841); Josselyn v. Josselyn, 9 Sim. 63, 59 Eng. Rep. 281 (Ch. 1837). The English courts have never decided the problem in the situation where there are contingent equitable interests which preclude alienation.

34. See Newman, Trusts 481-88 (2d ed. 1955); 3 Scott, Trusts § 337 (2d ed. 1956); Cleary, *Indestructible Testamentary Trusts*, 43 Yale L.J. 393, 406-11 (1934).

35. See Gray, The Rule Against Perpetuities § 121 *ii* (3d ed. 1915); Kales, *op. cit. supra* note 30, §§ 739-41; Scott, *Control of Property by the Dead*, 65 U. Pa. L. Rev. 632, 649 (1916). If an absolute fee in possession cannot be conveyed, either because of a contingent interest or because of an indestructible trust, there is a suspension of ownership.

36. In the case of indestructible trusts, whether there is or is not a statutory rule against suspension, the period during which the trust may last is limited. Van Epps v. Arbuckle, 332 Ill. 551, 558, 164 N.E. 1, 4 (1928), analyzed in 43 Yale L.J. 393, 402 (1934); Loomis v. Laramie, 286 Mich. 707, 282 N.W. 876 (1938); *In re* Shallcross' Estate, 200 Pa. 122, 49 Atl. 936 (1901); *In re* Howard's Estate, 54 Pa. D. & C. 312 (Orph. Ct. Lycoming County 1945). Other examples are cited in 1A Bogert, *op. cit. supra* note 16, § 218 n.55 and in Kales, *op. cit. supra* note 30, § 569 n.54. In these states there was a statutory suspension rule in force. Where no statutory rule was in force, the same resnlt was reached in dicta in the following cases: Barnum v. Barnum, 26 Md. 119, 90 Am. Dec. 88 (1866); Sonthard v. Southard, 210 Mass. 347, 96 N.E. 941 (1911); Mercer v. Mercer, 230 N.C. 101, 52 S.E.2d 229 (1949), noted in 48 Mich. L. Rev. 235 (1949); and see Alexander v. House, 133 Conn. 725, 54 A.2d 510 (1947). *Contra*, that a trust is not limited in duration: Turner v. Safe Deposit & Trust Co., 148 Md. 371, 129 Atl. 294 (1925); Deacon v. St. Louis Union Trust Co., 271 Mo. 669, 197 S.W. 261 (1917); Forbringer v. Romano, 10 N.J. Snper. 175, 76 A.2d 825 (Super. Ct. 1950).

37. 1A Bogert, *op. cit. supra* note 16, § 218.

against perpetuities that the measuring period of both rules is that which is enacted as the permissible period of suspension. The sole exception was California for a long period prior to 1951; there the allowable periods for vesting and for suspension were different, the suspension rule leaving out the additional twenty-one year term for vesting permitted by the local rule against perpetuities. Thus, during this period of its legislative history a bequest to *A*'s unborn heir, to take effect within twenty-one years after *A*'s death, would be good under the rule against perpetuities but bad under the suspension rule. This discrepancy was corrected by the enactment of a statute in 1951 establishing identical periods, lives plus twenty-one years. As Professor Turrentine has pointed out,[38] where the periods differ, the rules have different effects in regard to the permissible duration of the restraint. What seems to have been completely overlooked in all the jurisdictions which have adopted the statutory suspension rule, is that the rules have different effects on the permissible duration of trusts even though the measurement period is the same. In the case of equitable interests in indestructible trusts in jurisdictions in which such trusts are deemed to suspend the alienability of the property, the rule against perpetuities, which requires only the timely vesting of contingent interests, permits a trust to last during the entire lifetime of the owner of the last contingent interest to vest. The suspension rule cuts down the period during which a trust may last to the period established by the suspension rule, for example lives in being plus twenty-one years. The two rules, although they use the same measure, apply the measure to different situations. The rule against perpetuities measures the period between the time when the trust begins and the time when the last contingent equitable interest vests, or must vest; and the trust, so far as the rule against perpetuities is concerned, may continue thereafter indefinitely—actually since there can be no trust of a fee or for an indefinite succession of lives, for the lifetime of the owner of that interest. The suspension rule, on the contrary, measures the period during which the trust may last, from the time when the trust begins to the time when it ends. According to the rule against suspension, the trust, since there can be no trust of a fee, must end at the death of persons whose lives measure its duration or within a term of years thereafter; and contingent life interests, in the view of the matured test of suspension of the rule against suspension, in themselves suspend the power of alienation. According to the rule against perpetuities, if the ultimate remainder in trust will become vested within twenty-one years after

38. See Turrentine, *The Suspension Rule*, 9 HASTINGS L.J. 262, 267 (1958). The statute correcting the discrepancy is CAL. CIV. CODE § 715.2 (the perpetuities rule), and § 715.1 (the suspension rule) (Deering 1949).

the death of persons who were living when it commenced, there is no legal impediment to its further continuation. The suspension rule thus has the effect of shortening the permissible duration of trusts by eliminating the lifetime, or part of it, of the owner of the last contingent interest to vest, even though it vests in time.[39] It should be noted that even in the absence of a statutory suspension rule, the duration of a trust is nevertheless limited by the rule that there can be no trust of an estate of inheritance, that is to say, of a fee,[40] or for an indefinite succession of lives; and it is also limited by the common law policy against prolonged suspension of the power of alienation, which in itself establishes a limitation on the permissible duration of trusts to a period probably the same as the period during which a valid vesting may occur under the rule against perpetuities.[41] A private trust may not last indefinitely anywhere.[42] This is merely the necessary application of the policy illustrated in *Taltarum's Case*[43] and other devices of escape from De Donis to equitable estates. The

39. Examples of trusts to endure for a life not in being, making them invalid in the suspension states, are Otto v. Union Nat'l Bank, 38 Cal. 2d 233, 238 P.2d 961 (1951), noted in 4 STAN. L. REV. 598 (1952); *In re* Maltman's Estate, 195 Cal. 643, 234 Pac. 898 (1925) (trust bad under suspension rule although good under the rule against perpetuities); *In re* Van Wyck's Estate, 185 Cal. 49, 196 Pac. 50 (1921); *In re* Durand's Will, 250 N.Y. 45, 164 N.E. 737 (1928); *In re* Horner's Will, 237 N.Y. 489, 143 N.E. 655 (1924).

An example of a trust good during the minority of unborn beneficiaries, under the rule against perpetuities, is Sheridan v. Blume, 290 Ill. 508, 125 N.E. 353 (1919). This involved a trust for the children of the testator's daughter until the youngest child reached the age of 21 years. *Held*, trust was not distributable until after the death of the daughter, to allow for the birth of other children. In Camden Safe Deposit & Trust Co. v. Scott, 121 N.J. Eq. 366, 189 Atl. 653 (Ct. Err. & App. 1937) a trust to continue until unborn grandchildren reached the age of thirty was sustained against external attack. A trust may continue for the lives of after-born beneficiaries, if they are born within lives in being. RESTATEMENT, PROPERTY § 378 (1944).

It is not accurate to say, as was said in Fitchie v. Brown, 211 U.S. 321, 329 (1908) that "the utmost extent of a trust at common law" is lives in being plus 21 years. *Contra*, and expressing the weight of authority, Hazen v. American Sec. Co., 265 Fed. 447 (D.C. Cir. 1920); SIMES, FUTURE INTERESTS § 557 (1936). There are occasional statutes limiting the duration of trusts, however. An example is MINN. STAT. ANN. § 501.11 (Supp. 1961), providing that a trust shall not continue for a period longer than lives in being and 21 years after the death of the survivor of the lives. In states where there is no suspension rule, trusts may endure for a life not in being; see Sheridan v. Blume, *supra* note 38.

40. RESTATEMENT, TRUSTS § 62 (1935).

41. Both GRAY, *op. cit. supra* note 35, § 121c-i, and KALES, *op. cit. supra* note 30, §§ 732-38 feel that trusts which are to continue beyond the period of the rule against perpetuities are terminable by the beneficiaries, not by virtue of the rule, but under another rule adopting the same period; *accord*, Cleary, *Indestructible Testamentary Trusts*, 43 YALE L.J. 393, 400 (1934).

42. SIMES, FUTURE INTERESTS § 403 (1936); RESTATEMENT, PROPERTY § 381 (1944). In a few states there are different periods for the suspension of legal and of equitable interests. An example is OKLA. STAT. ANN. tit. 60, § 172 (1949) (duration of trusts is 21 years or lives in being); *cf. id.* § 175.47 (suspension period for legal interests is lives in being and 21 years thereafter).

43. Y.B. 12 Edw. IV, 19 (1472).

vesting requirement of the rule against perpetuities, although it applies to the beginning of interests, not to their termination, nevertheless establishes a terminal period at which a trust must, to be valid, end. It is impossible for a trust to be valid unless the equitable interests of the beneficiaries are so limited that they are susceptible of timely vesting under the rule against perpetuities. Even in the absence of a rule against perpetuities, the period of permissible duration of an indestructible trust is the lives of human beings who are alive when the trust is established, or the lives of persons as yet unborn but whose birth will take place, if ever, by the end of the lifetimes of living persons or by the end of a gestation period following such lives, or within some relatively brief additional period.[44]

The difference in the effect of the two rules, arising from their different terminal points of measurement, can be observed in a situation such as that which was present in a Wisconsin case, *In re Butter's Will*.[45] There a trust had been established for the testator's sister and her children until the youngest child should reach the age of thirty years. Since all the remainders must of necessity vest, if at all, by the end of the lifetime of the testator's sister, who was living when the trust began, the vesting rule, in a state where that rule was in effect, would not have impaired the validity of the remainder. In Wisconsin trusts are not deemed to clog alienability; but had the case arisen in one of the many states in which the existence of a trust suspends the power of alienation, the application of the suspension rule, which was in effect in Wisconsin, would have cut short the last remainder to vest. However, the remainder was not invalidated by the rule against perpetuities, and the trust, as far as that rule was concerned, might have lasted for the entire lifetime of the remaindermen. In jurisdictions where a trust is deemed to suspend the power of alienation, the vesting rule requires that the trust must come to an end at the termination of the last life to vest. The suspension rule, on the other hand, measures the permissible duration from the commencement of the trust, as does the rule against perpetuities, but does not permit the trust to last longer than the prescribed period, usually slightly different from the permissible duration of suspension in the case of contingent legal interests at common law.[46] Stated another way, in a trust, after all the beneficial interests have become vested, the rule against perpetuities is not concerned with its duration, although the trust must necessarily end at the death of the owner of the last interest which vests in time. Thus, the two rules lead to different permissible periods of duration.

44. SIMES & SMITH, FUTURE INTERESTS § 1391 (2d ed. 1956).
45. *In re* Butter's Will, 239 Wis. 249, 1 N.W.2d 87 (1942).
46. N.Y. REAL PROP. LAW § 42.

For example, in a trust for *A* for life, then for *A*'s eldest child, as yet unborn, for life, the remainder to *A*'s eldest child will vest, if at all, immediately at the expiration of a life in being, the lifetime of *A*. Thus, the trust will be valid for the whole lifetime of *A*'s eldest child, as far as the rule against perpetuities is concerned, because his estate must vest, if it vests at all, by the end of the lifetime of *A*, who was living when the trust began. The effect of the suspension rule, however, is that the estate for *A*'s eldest child, and perhaps in consequence the whole trust, is invalid because the suspension of the power of alienation, in jurisdictions where a trust is deemed to suspend such power, might according to the terms of the trust last for a longer period than lifetimes of persons who were living when the trust began, or twenty-one years thereafter, since *A*'s son might live longer than twenty-one years. The difference in the effect of the two rules may be illustrated by a further example. Let us suppose a trust for *A* for life, then for *B* for life, remainder to *B*'s eldest child for life, remainder to *B*'s second child for life. The ultimate remainder to the second child may not vest within twenty-one years after lives in being, since the eldest child of *B* may live longer than twenty-one years. The entire trust, unless it is found to be severable,[47] will fail. If the trust is found to be severable, the remainder to *B*'s eldest child for life would be valid so far as the rule against perpetuities is concerned, because it must vest, if it is ever to vest, by the end of the lifetime of *B*, who was living when the trust began. Under the suspension rule the ultimate estate, and perhaps in consequence the whole trust, is invalid, because the power of alienation may, according to the terms of the trust, be suspended for longer than lifetimes of persons who were living when the trust began; the remainder to *B*'s eldest child will also be invalid because it might last longer than twenty-one years after *B*'s death, if his eldest child should live more than twenty-one years. It is doubtful whether the benefit, if any, of this extended period outweighs the complexities which are introduced by the parallel existence of both rules—the vesting rule and the rule against suspension. It is equally doubtful whether the shortening of the permissible duration is desirable, since a beneficiary who is only twenty-one is not ordinarily well fitted to deal prudently with property. It is certain that no such distinction was intended by the introduction of the statutory rule against suspension. This undesirable resnlt of the shorter period of the suspension rule conld be easily avoided by extending the permissible period of suspension to lives in being plus an additional consecutive term measured by the lifetime

47. On separability see 77 U. PA. L. REV. 523 (1929); 37 YALE L.J. 675 (1927). *Compare* Ford v. Yost, 299 Ky. 682, 186 S.W.2d 896 (1944) (entire trust invalidated), *with In re* Wanamaker's Estate, 335 Pa. 241, 6 A.2d 852 (1939) (only remainder invalid).

of the ultimate beneficiary. Another simple way of eliminating such a discrepancy would be to provide for a period of suspension which would end at the expiration of the time allowed for the vesting of contingent future estates,[48] as was done in a recent amendment to the New York statute relating to accumulations.

C. LIMITATIONS ON THE DURATION OF TRUSTS APART FROM THE RULE AGAINST PERPETUITIES AND THE STATUTORY RULE AGAINST SUSPENSION

Apart from the rule against perpetuities and the statutory suspension rule, any restriction on the permissible duration of indestructible trusts must come from the common law policy against unduly protracted suspension of the power of alienation. Clearly such a policy existed since very ancient times in English law. Both the rule against perpetuities and the statutory suspension rule are devices to reduce to more or less specific formulation this common law policy of encouraging alienability of property, which dates back to near the end of the first century after the Norman Conquest. Early manifestations of the policy were the enlargement of life estates held under tenants in capite into estates of inheritance by the introduction of the conditional fee in the time of Henry II; the mortmain provisions of Magna Charta and the Statute of Mortmain of 1279;[49] *D'Arundel's Case*,[50] decided in 1225, establishing the right of an owner in fee simple to alienate his property without the consent of his expectant heirs; chapter 1 of Quia Emptores, 1290,[51] which forbade the owner of a fee simple, in alienating his property, to impose new obligations of feudal tenure in his own favor; and the methods devised in the late middle ages for escape from the effect of De Donis in validating estates tail, culminating in *Taltarum's Case*[52] and perpetuated in modern statutes, in both England and in all of the states of the United States, eliminating the fee tail. The policy still exists with even more imperative need than in ancient times. Whether the policy is reduced to specific formulation by rule or by statute is not especially important.

Whether or not there is a policy against protracted suspension applicable to indestructible trusts is not clearly decided by any preponderance of authority.[53] The scarcity of authority may be due to the fact that the terminal point of duration would be established at

48. Chapters 453, 454, N.Y. Laws of 1959 as discussed by Pasley, *The 1960 Amendment to the New York Statutes on Perpetuities and Powers of Appointment*, 45 CORNELL L.Q. 679, 686 (1960).

49. 7 Edw. I.

50. Brac. N.B. 1054 (1225).

51. Statute of Westminster III, 1290, 18 Edw. 1, c. 1.

52. Y.B. 12 Edw. IV, 19 (1472).

53. See cases cited note 36 *supra*.

all events by a measurement similar to that of the rule against perpetuities and the fact that in the absence of a rule against perpetuities the statutory suspension rule, which adopts a substantially similar measurement of the period of permissible duration of restraints on the power of alienation, would merely shorten this duration in a manner which is not particularly important, and which is perhaps not particularly desirable, by cutting down the terminal period of a trust to a period measured by a designated term of years instead of the entire lifetime of the owner of the last contingent interest to vest. Successive limitations of an indefinite series of life estates, either legal or equitable, would obviously violate statutes abolishing the fee tail.

IV. Conclusion

The difference which originally existed in the tests of suspension established by the rule against perpetuities and the statutory suspension rule, which may have had a good deal to do with the retention of both rules in the New York statutory system and in the systems of the several other states which adopted the plan of the pilot statute in New York, has long since been eliminated in the very common situation of suspensions created by indestructible trusts. The former distinction, originally devised because the test applied only to personal property, to which the vesting test was considered inapplicable, cannot be accepted as a valid reason for the perpetuation of two rules designed to accomplish exactly the same object—the timely restoration of property to commerce. In no interpretation of the effect of the two rules can both be necessary. In the case of limitations of successive legal interests in property, the suspension rule is unnecessary if there is a vesting rule. Whether or not there is a suspension rule, the existence of a vesting rule will curtail the period of suspension in the case of vested remainders or present estates. In the case of contingent remainders, either rule will serve to limit the period of suspension due to the presence of the contingent interest. In the case of contingent interests in trust, the suspension rule requires that the trust end by the time when a vesting must occur, since the existence of a contingency to vesting, whether due to uncertainty of ownership or of owners, itself impairs the power of alienation; thus making a vesting requirement unnecessary. Moreover, apart from either rule, the common law policy against protracted suspension would require that the trust come to an end within a period to be prescribed either by the courts or by the legislature, the length of which would depend on the policy of the governing jurisdiction as to the desirability of permitting a trust to continue for the lifetime, or a part of it, of the owner of the last beneficial interest to vest. The local policy toward the desirability of trusts, which might lead to confining the

class of potential beneficiaries either to living persons or to include their immediate issue or other consecutive lives, would determine the permissible duration.

There is thus no situation in which both rules, or indeed either rule, would be necessary. If a choice is to be made, it would seem that the suspension rule offers certain advantages. It covers all the situations comprehended within the vesting requirement of the rule against perpetuities and also the important additional area of vested and contingent equitable interests in trust. I suggested several years ago[54] that the vesting requirement if retained in addition to the statutory suspension rule might possibly serve a useful purpose of furnishing an obvious test of suspension, obviating the need for further investigation of that problem in any given case. Further reflection has led me to feel that the vesting test, itself, involves the resolution of so many imponderables that it is not easier, but often more difficult to apply than the test of suspension. The suspension rule covers vested and contingent interests, either legal or equitable, and thus covers indestructible trusts of either vested or contingent interests. In eliminating the vesting test of suspension, it also avoids the difficulty present in the application of the rule against perpetuities of choosing between the alternatives of striking down a gift of a future interest for a reason which may never come to pass or even in some situations which events have shown did not come to pass,[55] or of leaving the title in an indeterminate condition under the wait and see rule. The only difference in the practical effect of the two rules is that the suspension rule shortens the possible term of trusts by eliminating all or part, depending on the local statute, of the terminal period consisting of the lifetime of the owner of the last interest to vest within the period of the rule against perpetuities. This period is allowed if the vesting rule is the sole controlling factor with regard to the permissible duration of trusts. The ideal solution must center about a suspension rule establishing a permissible period of suspension measured by the lifetime of persons who were living when the trust began, or the lifetime of other persons born by the end of those lifetimes, or by a period of years to allow the second succession of beneficiaries to attain an age when they may be expected to be able to handle the property prudently; the trust to end by that time, if not previously invalidated, if the provisions for termination have already taken effect.

There is no doubt that we must have some fairly well-defined standard for determining when a restraint on alienation lasts too long. There is need for only one rule directed to the ultimate objec-

54. NEWMAN, TRUSTS § 336 (2d ed. 1955).
55. Merchants Nat'l Bank v. Curtis, 98 N.H. 225, 97 A.2d 207 (1953).

tive sought—the establishment of a limitation upon the period during which alienability may be postponed. This limitation of the period of permissible duration of the state of inalienability must apply to all interests of any kind, present or future, vested or contingent, legal or equitable, absolute or in trust. The test of suspension should be the practical possibility, as well as the legal possibility, of alienation. Such a rule would have the merit of attacking directly the object to be attained, the establishment of a limitation on the period during which absolute ownership may be postponed, rather than indirectly by requiring the timely vesting of contingent interests, a phenomenon which in itself is of no significance. The period to be adopted would probably be either lives in being and an additional period of lives which would follow without any interval of time the termination of the lives in being, or if this period is deemed too long, merely an additional period of years. The long period of experimentation with different rules of evolving significance has probably been unavoidable, but has had the result of giving rise, in determining the permissible extent of control of property after ownership has been transferred, to a heterogenous congeries of rules instead of a clearly envisaged unitary principle. Today we are in a position to re-draw these rules in the form of a single, simple rule which will accomplish all the ends which we have so long sought. All that is necessary is a rule to the effect that restraints on the continuance of any interest in which the power of alienation is restricted will not be valid unless they must end within a designated period. A rule based on the test of suspension rather than of vesting, and thereby offering larger coverage, directness of approach to the ultimate objective, and the elimination of the uncertainty as to the duration of trusts created by the simultaneous operation of the vesting and the suspension rules, might be formulated along the following lines:

"No limitation of an estate or interest in property, vested or contingent, legal or equitable, present or future, or of any right affecting property which might, by any possibility, legal or practical, postpone the absolute ownership of property for a period longer than the expiration of the lifetimes of persons living when the property is transferred by the former owner, and an additional period of thirty years, shall be valid, unless, by the time the question is presented to a court for decision, subsequent events have eliminated all uncertainty that absolute ownership of the property will occur within the prescribed period, or unless, by such time, the uncertainty has been eliminated. This statute shall not be applied in such a manner as to disturb any rights which may have accrued prior to the elimination of any uncertainty with regard to the ownership of any interest in or affecting the property."