PERPETUITIES LEGISLATION: HAIL, PENNSYLVANIA!

AND THREE CHEERS FOR VERMONT, WASHINGTON AND KENTUCKY; TWO CHEERS FOR MASSACHUSETTS, MAINE AND CONNECTICUT; ONE CHEER FOR IDAHO; AND RESPECTFUL APPLAUSE FOR THE NEW HAMPSHIRE COURT

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This Article started out as an answer to Philip Mechem's "Further Thoughts on the Pennsylvania Perpetuities Legislation" attacking the Pennsylvania Estates Act of 1947 and all the rest of the "new-fangled legislation" on perpetuities, 1954-59.[1] But since others have expressed themselves in a somewhat similar vein it seems worthwhile to answer them all, especially as the roster of the opposition is so impressive:

Professor Percy Bordwell, sometime of Iowa, Harvard and Rutgers.

Professor Philip Mechem, sometime of Iowa, now of Pennsylvania.

Professor Lewis M. Simes, sometime of Michigan, now of the Sixty-five Club at Hastings.

Professor Bertel M. Sparks, New York University.[2]

I include Simes in this list with some hesitation. Bordwell, Mechem and Sparks seem irreconcilable; they were brought up on the Gospel according to Gray[3] and seem determined to die in the true faith,

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1 107 U. PA. L. REV. 965 (1959). The adjective "new-fangled" is Mechem's and I am indebted to him for recalling it to me. I hadn't heard it since my grandmother died at the age of 86 shortly before World War II; and grandmother used it only with reference to extreme and distasteful changes in women's fashions, such as the elimination of the bustle or the introduction of colored nail varnish. Pre-Mechem I don't recall it being used to enrich scholarly discussion.

2 I here provide references to the anti-reformist publications: SIMES, PUBLIC POLICY AND THE DEAD HAND 72 (1955); SIMES & SMITH, FUTURE INTERESTS § 1230 (2d ed. 1956); Bordwell, *Perpetuities From the Point of View of the Draughtsman*, 11 RUTGERS L. REV. 429 (1956); Simes, *Is the Rule Against Perpetuities Doomed? The "Wait and See" Doctrine*, 52 MICH. L. REV. 179 (1953); Sparks, *A Decade of Transition in Future Interests*, 45 VA. L. REV. 493 (1959); Sparks, *Future Interests*, in N.Y. UNIV. LAW SCHOOL, 1955 ANN. SURVEY AM. L. 517, 525-28 (1956) [hereinafter cited as ANN. SURVEY AM. L.]; Sparks, *Future Interests*, 1954 ANN. SURVEY AM. L. 655, 664-68 (1955). Having provided data as to the academic titles of my learned friends I will omit titles from here on, and trust that no offense will be taken where none intended. I also will not clutter up the footnotes by detailed page references except where it seems to me important.

3 I yield to no one in admiration for the contribution of Gray in his own era, just as I make obeisance to Coke's learning on Littleton's "Tenures" and to Fearne's "Contingent Remainders" with its passionate defense of the purity of the Rule in

fundamentalist to the end.[4] But since Simes and I agree that the Rule badly needs repair, it is my guess that I could amend some of the statutes I have sponsored to meet his objections (though I do not think them serious, as will appear) and that if he got down to drafting and actively sponsoring a statute to meet his own objectives, I would conclude that it did about ninety per cent of the job.

There is a sad and humiliating aspect of this distinguished group of professors: they are all my friends of many years standing, and the degree of virulence of their attacks on my ideas [5] is in direct proportion

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Shelley's Case in their eras. My co-author and I, he being Gray's grandson, have paid our tribute in the dedication of LEACH & TUDOR, THE RULE AGAINST PERPETUITIES (1957):

TO JOHN CHIPMAN GRAY
GRANDFATHER OF ONE OF US
PROFESSIONAL FOREBEAR OF BOTH
WHO IN HIS JURIDICAL VALHALLA
MAY WELL REALIZE
THAT HIS "REMORSELESS" RULE
WAS MORE APPROPRIATE
TO HIS TIME THAN TO OURS

However, it must be remembered that Gray's treatise is an 1886 book which, in its current 1942 edition by Roland Gray, has preserved the original text and all of Gray's 1886 ideas. The problems of that middle year of Grover Cleveland's first term have little resemblance to our problems today. This does not mean that Gray's 1886 ideas are necessarily wrong at this date, but it does mean that they are not necessarily right in our present climate and that we are entitled to think for ourselves in the light of conditions as they now exist.

[4] There is a passage in the preface to Mechem's recently published *Cases on Future Interests* which is open to the alternative interpretations that: (a) he wishes he were not a fundamentalist but can't help it, or (b) he fears that his colleagues in the profession will not recognize his fundamentalism. To assure objectivity in this matter I quote from a review by Professor Lowell Turrentine: "The editor [Mechem] says in his preface that the volume will strike many readers as unorthodox, if not heretical. I had no such reaction." 12 J. LEGAL ED. 459, 460 (1960). I concur with Turrentine. Dismantle the stake in the market square and carry away the faggots. Let's not burn Mechem—for heresy, that is.

[5] . . . and jibes at me personally. Most learned readers will not be interested in this bandying about of personalities, but as justification for any gentle taunts I may be tempted to fling, mostly in footnotes, I wish here to record how I have been gouged, kicked, and clawed. Restrained comments appear in bracketed italics.

Sparks is quite gentle. To him I am a "wait-and-see enthusiast" [*The footnote to this quote embraces in the epithet that rabid mob of extremists, the seven Justices of the Supreme Judicial Court of Massachusetts*] who "became enamored" of the "curious aberration" of the Pennsylvania statute and who makes "unreasoned attacks upon the Rule."

Mechem, after referring to Gray as that "distinguished writer" and to Simes and Schuyler as his "learned brothers" [*Who denies any of these? What wounds is that other names were mentioned in the article without accolade*], calls me "the great protagonist of wait-and-see" [*Is "great" an obeisance? I doubt it*] who uses "intemperate language" [*The language in question appeared in that archtype of yellow journalism, the Law Quarterly Review*] "to popularize a few freak cases by giving them cute names" [*Wrong—I sought to depopularize widely destructive decisions by giving them* accurately descriptive *names*]. He also lets the reader in on my instability of personality by saying I become "infuriated" to the point of becoming an "enthusiast" for reform. [*He has me there, for I have said, right in print, "there is one tempermental requirement for useful consideration of this subject: a capacity for constructive indignation. If we have lost it, we must recapture it."* LEACH & TUDOR, *op. cit. supra* note 3, at 175; Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721, 727 (1952).]

to how well they know me and how closely we have been professionally associated. On the other hand, most of the supporters of my published views are men whom I know only casually if at all. I hesitate to draw any general conclusion as to the charm and persuasiveness of my physical presence or to adopt the recommendation of a colleague that hereafter in appellate cases I eschew oral argument and submit on briefs.

To avoid the impression that this is a lone battle by an aging Harvard law professor against the above-mentioned imposing list, I should note that my views are shared by my American co-author, Owen Tudor, my British co-author, Dr. J. H. C. Morris, the twelve members of the British Law Reform Committee (of which more later), the forty-four lawyers and judges who sponsored the Pennsylvania statute, the law-trained members of the legislatures named in the subtitle of this Article, and a fair spread of legal periodical literature.[6]

THE STATUTES AND THEIR BACKGROUNDS

Briefly summarized, my opinion is that the law of perpetuities is presently defective in (a) imposing a requirement of prospective certainty of vesting, viewed from the date of creation of the interest, and

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From the normally benign, kindly, even cherubic Bordwell comes the following: "My good friend, Bart Leach [*Et tu, Perci!*] . . . is a power to be reckoned with. . . . Moreover, he is a man of action [*So this is indictable in New Jersey?*], somewhat of a legal Billy Graham, who is not content until he has converted others to his views and seen the law changed in accordance with his ideas." [*Note the none too subtle overtones of evangelistic fervor and precipitate revolutionary change—elements likely to repel the New Jersey bar and legislature at which Bordwell's article is plainly aimed.*] "It is plain that he was the force behind the Massachusetts statute effective January 1, 1955, which went as far in carrying out his ideas as he thought practicable." [*This suggestion of a Svengali-Trilby relationship between me and the legislatures which have passed these statutes would be a little hard to explain with reference to the twelve lawyers, judges, and professors of the Lord Chancellor's Law Reform Committee which, after two years' study, adopted nearly all my recommendations—but probably Bordwell's failure to refer to the Committee Report and undertake the explanation is a matter of dates. The Report doubtless was not available to him before his article went to press, but he might try the explanation now.*]

One can learn to enjoy anything, including being a pincushion for the barbs of one's friends; so I here record that in my own university I have been dubbed The Don Quixote of the Inconsequential Cause—but in another connection. See 46 A.B.A.J. 245 (1960).

[6] See LEACH & TUDOR, *op. cit. supra* note 3, apps. 1-5 & *passim*; MORRIS & LEACH, THE RULE AGAINST PERPETUITIES 33 *passim* (1956); Law Reform Committee, *Fourth Report*, CMD. No. 18 (1956); PA. COMM. ON DECEDENTS' ESTATES LAWS, PROPOSED ESTATES ACT OF 1947 (1946); Brégy, *A Defense of Pennsylvania's Statute on Perpetuities*, 23 TEMP. L.Q. 313 (1949); Cohan, *The Pennsylvania Wait-and-See Perpetuity Doctrine—New Kernels from Old Nutshells*, 28 TEMP. L.Q. 321 (1955); Thornely, *Property Law—The Rule against Perpetuities—Reform*, 1957 CAMBRIDGE L.J. 30; Waterbury, *Some Further Thoughts on Perpetuities Reform*, 42 MINN. L. REV. 41 (1957). And the real pioneer in whose steps I am proud to follow is Quarles, *The Cy Pres Doctrine: Its Application to Cases Involving the Rule against Perpetuities and Trusts for Accumulation*, 21 N.Y.U.L. REV. 384 (1946). I do not mean to suggest that all of these accept all of my views, nor indeed that all whom I count as opponents are 100% against me. Quite a wide spectrum is available for shadings of opinion.

(b) totally destroying a gift that offends the Rule instead of cutting it down to size. Thus, I recommend legislation that (a) requires a court to wait and see how events turn out and thus decide perpetuities cases on facts that actually happen instead of facts that might have happened, and (b) when a violation of the Rule is found, reform the interest on the cy pres principle.

All of the statutes here considered carry out one or both of these recommendations to a greater or lesser extent.[7]

Vermont: Full Scale Wait-and-See and Cy Pres

> "Any interest in real or personal property which would violate the rule against perpetuities shall be reformed, within the limits of that rule, to approximate most closely the intention of the creator of the interest. In determining whether an interest would violate said rule and in reforming an interest the period of perpetuities shall be measured by actual rather than possible events."

It is my belief that this simple statute does the whole necessary job and will practically eliminate perpetuities litigation without opening the door to perpetual family trusts.[8]

Washington and Kentucky

Washington copied the Vermont statute in 1959, making it applicable to trusts only; but this covers nearly all of the family-disposition cases. Kentucky also copied it in 1960, without limitation to trusts, but adding a clause that the measuring lives must have "a causal relationship to the vesting or failure of the interest."

Pennsylvania: Full Scale Wait-and-See

> "Sec. 4. (a) *General.* No interest shall be void as a perpetuity except as herein provided.
>
> (b) *Void Interest.* Upon the expiration of the maximum period allowed by the common-law rule against per-

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[7] CONN. GEN. STAT. REV. §§ 45-95 to -100 (1958); IDAHO CODE ANN. § 55-111 (1957); KY. REV. STAT. §§ 381.215-.223 (1960); ME. REV. STAT. ANN. ch. 160, §§ 27-33 (Supp. 1959); MASS. ANN. LAWS ch. 184a, §§ 1-6 (1958); PA. STAT. ANN. tit. 20, §§ 301.4, 301.5 (1950); VT. STAT. ANN. tit. 27, §§ 501-03 (1959); Wash. Laws 1959, ch. 46, §§ 1-6. After this Article was in proof, Maryland joined the parade with a Massachusetts-type statute. MD. ANN. CODE art. 16, § 197A (1957).

[8] The Vermont legislature asked for my recommendations and a draft statute. It is the only instance in which I have had a free hand. A summary of my testimony in support of this act, developed in collaboration with the Harvard Law School Student Legislative Research Bureau, appears in LEACH & TUDOR, *op. cit. supra* note 3, at 224. The five appendices to this volume all deal with various aspects of the perpetuities legislation covered by the present article.

petuities as measured by actual rather than possible events, any interest not then vested and any interest in members of a class the membership of which is then subject to increase shall be void. . . .

Sec. 5. *Disposition When Invalidity Occurs.* . . .

(3) *Other Void Interests.* All other void interests shall vest in the person or persons entitled to the income at the expiration of the period described in subsection (b)."

This was the first of the current crop of curative statutes. I had nothing to do with it, but applaud it. It is the particular subject of Mechem's attack;[9] Bordwell and Sparks have tended to train their fire on the later statutes which I sponsored. The Pennsylvania statute emerged from the Committee on Decedents' Estate Laws of the Joint State Government Commission in a report dated November 15, 1946. The Committee consisted of nine judges and twenty-two lawyers distributed geographically throughout the Commonwealth of Pennsylvania and chosen for their experience in Orphans' Court matters and the list included part-time teachers from Pittsburgh and Dickinson Law Schools. The report was printed as a pamphlet and circulated to local bar associations and to judges. It was also reprinted by the publisher of one of the advance reports and circulated to its subscribers. Suggestions were received and changes made. Then, several months after circulation to the profession, it was presented to the legislature.[10] I do

[9] One of the real puzzles in this situation is why Mechem chooses me to clobber about the Pennsylvania statute. I didn't draft it. Mechem's colleague Philip A. Brégy did. You might think that the reason Mechem goes after me and leaves Brégy alone is that Brégy has been less firm in advocacy or more respectful toward the traditional lore of the Rule. Not so. Consider the following colorful passage which, unaccountably, does not excite Mechem to literary mayhem: "As a result of this hocus-pocus [the doctrine that a court must shut its eyes to events which have actually occurred], the rule against perpetuities had degenerated into a sort of Sunday Supplement puzzle, providing laughs for law students but scarcely a logical and effective limitation on the fettering of property. Furthermore, the result at common law of a decision that a future interest was void because it might have done something which it didn't, was no laughing matter for anyone. The void interest would be awarded back to heirs or residuary beneficiaries long since dead and carried by the wills of unwitting testators until it dropped, depleted by taxes paid along the way, into the laps of surprised persons who often had nothing to do with the original family or the original gift. Thus were the sins of the father visited on the sons even to the third generation—presumably on the theory that the soul of the testator or settlor who caused all this trouble would be taught a lesson. There were those who considered this whole procedure a little unworthy of the adult mind." Brégy, *supra* note 6, at 314. And Mechem accuses *me* of intemperate language!

[10] Letter of August 19, 1959, Philip A. Brégy to author. Mr. Brégy had a major part in drafting the act, was granted a fellowship at the University of Pennsylvania to work on the various 1947 statutes, and has published a book on this legislation. His discussion of perpetuities appears in BRÉGY, INTESTATE, WILLS AND ESTATES ACTS OF 1947, at 5251-5550 (1949).

not suggest that the soundness of the statute is res judicata as far as Mechem is concerned, especially since he is a relatively new boy in the Commonwealth; but there appears to be nothing to the notion that this was hasty, ill-considered legislation of which the nature was not understood. The Comments in the Committee Report are perfectly clear as to what the statute was doing and why.[11]

Connecticut, Maine, Massachusetts: Life-Estate Wait-and-See, Age-Contingency Cy Pres

These statutes, of which Massachusetts produced the first, cause the wait-and-see doctrine to be applied only following life estates (or contingencies based on lives) of persons in being when the period of perpetuities starts to run. Thus the court waits until the end of the life estate and looks at the facts as of that time. This will cover most cases, but it clearly leaves some gaps which the Vermont and Pennsylvania statutes would fill. Another section provides that age contingencies in excess of twenty-one which would render a gift void will be reduced to twenty-one—a limited cy pres application adapted from the 1925 English Law of Property Act. This statute was originally drafted by Professor A. James Casner, Mr. Guy Newhall (the dean of the probate bar in Massachusetts), and myself. It was submitted for comment to the Massachusetts bar through the *Bar Journal*, to the Abstract Club (an active conveyancing group), to the estates partners of leading offices throughout the state, and informally to the Justices of the Supreme Judicial Court. After two stages of amendment and re-submission it was presented to the legislature and enacted. For the purpose of providing a "legislative history" to aid in interpretation a summary of the testimony before the Legal Affairs Committee was published in the *Bar Journal* and the *Harvard Law Review*.[12] The Connecticut and Maine legislatures copied the statute verbatim.

Idaho

Idaho probably has full scale cy pres, applicable to trusts only. One must say "probably" because the 1957 Idaho statute will certainly require interpretation. The Idaho legislature would be well advised to substitute promptly either the Vermont or the Kentucky statute.

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11 PA. COMM. ON DECEDENTS' ESTATE LAWS, PROPOSED ESTATES ACT OF 1947 (1946). The act is defended in Brégy, *supra* note 6, at 313, and in Cohan, *supra* note 6, at 321.

12 See LEACH & TUDOR, *op. cit. supra* note 3, at 197; Leach, *Perpetuities Legislation, Massachusetts Style*, 67 HARV. L. REV. 1349 (1954).

New Hampshire

The New Hampshire court has two decisions on the books which lead to the logical conclusion that the state has judicially adopted both cy pres and wait-and-see principles.[13] The first of these, reducing a remote age contingency (reaching forty) to twenty-one, was castigated by Gray in terms which now make strange reading in view of the almost unanimous current agreement that a statute to the same effect is desirable.[14]

Is There Any Need for Corrective Legislation?

I should have thought it unnecessary at this late date to discuss this question.[15] But no, Sparks declares that the common-law Rule "has usually worked rather well" and that cases in which the conclusive presumption of fertility has been applied where future issue was unlikely "are extremely rare." Mechem feels that I used "some rather intemperate language" in my five-count indictment of the Rule in a pair of 1952 articles, suggests that if I could prove that "any very great number of wills have currently been the innocent victims of the Rule" I

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[13] Merchants Nat'l Bank v. Curtis, 98 N.H. 225, 97 A.2d 207 (1953); Edgerly v. Barker, 66 N.H. 434, 31 Atl. 900 (1891).

[14] See Gray, Rule Against Perpetuities §§ 857-93 (4th ed. 1942). The grounds of Gray's attack on *Edgerly v. Barker* are strangely reminiscent of the thought processes of my learned friends who disagree with me. First, he said, the testator intended this gift for such children as should reach 40, not 21, and the two groups might well be quite different; thus, the court was really making a new will for the testator. He does not point out that the alternative which he espouses would take the gift away entirely. And what, said Gray, justifies cutting the contingency down to 21? Why not be logical and make the period "twenty-one years after the death of all the students now at Dartmouth College?" And what will the court do with a gift "to the person who shall be Chief Justice of New Hampshire 50 years from today?" Gray described the court as "taking the first step in that chase after the will-o'-the-wisp of general and particular intent which the Court of King's Bench [in some dubiously relevant decisions on the Rule in Shelley's Case] began more than a hundred years ago, and which, after long wanderings and stumblings and groanings of spirit, it has now finally abandoned." Finally, "in New Hampshire, the more learned and acute the lawyer, the greater the perplexity in which such cases would plunge him."

Well, for better or worse, *Edgerly v. Barker* has now been on the books for 69 years, the groanings of spirit of the New Hampshire courts have not been audible, and the perplexity of the bar does not seem to be significantly greater than elsewhere. In a footnote to § 884 Gray argues vehemently against an 1832 proposal of the English Commissioners on the Law of Real Property to effect this same result by statute and points with satisfaction to the failure of Parliament to act on this recommendation. But, alas, this was in Gray's second edition; so the editor of his later editions rather pathetically ends up this long footnote by adding: "But now see the Law of Prop. Act (1925), Sec. 163 . . . ." (This, of course, is the section which reduces to 21 age contingencies which would otherwise invalidate a gift.)

[15] "I agree with most of Professor Leach's criticisms of the workings of the Rule." Simes, *op. cit. supra* note 2, at 64. "As to some criticisms and proposed reforms of the common law rule against perpetuities there can be little disagreement." Schuyler, *Should The Rule Against Perpetuities Discard Its Vest?*, 56 Mich. L. Rev. 683, 725 (1958). And see Law Reform Committee, *Fourth Report*, Cmd. No. 18 *passim* (1956). The classic judicial statement of the basic defects in the Rule is that of Lord Blanesburgh in Ward v. Van der Loeff, [1924] A.C. 653, 678.

would have done so, and concludes from the list of citations collected by Professor Thomas L. Waterbury [16] that "in these United States there are not more than three or four casualties a year." He alludes to the "hundreds of wills defeated because the *T* didn't know that two witnesses were required" and the fact that "many good barks founder on such rocks as class gifts, divide and pay over, vesting, gifts to issue, gifts to survivors, and so on and so on," and considers that by comparison the perpetuities failures are "a trifle." [17]

To these learned gentlemen the only cases that count as demonstrations of the inadequacy of the Rule are those in which the gift is invalidated by a reported appellate opinion. They would exclude the following:

> (a) Cases in which the gift is upheld on appeal after being held invalid (or valid) in the trial court—for instance, *Sears v. Coolidge*,[18] the case that finally convinced the Massachusetts bar that something should be done about the nonsense aspects of the Rule. In this case the remainder in an inter vivos trust was attacked on the ground that a widower of eighty-one whose only two children were women of fifty-nine and fifty-five could have more grandchildren before he died. The probate court held the gift void. The Supreme Judicial Court reversed by taking a "second look" on the basis of a power to amend the trust—and of course no more grandchildren were born, as anyone with common sense would know without being told. So the anti-reformists say: see, Leach doesn't have an Innocent here to prove his Reign of Terror. But the list of parties occupies four full pages of the printed record (229 pages); and after all possible consolidations eight briefs were submitted (417 pages) and six counsel argued orally. The total fees allowed to dozens of counsel and guardians *ad litem* in the main estate and a half-dozen subsidiary estates is a matter of public record, but the additional fees charged to individual clients who stood to lose millions upon an affirmance will never be known; let each have his guess as to the probable total.

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[16] Waterbury, *supra* note 6, at 41. This is a whacking great 63-page article—by a wide margin the most comprehensive and thorough treatment of the subject I have seen. But, after catching me out on a couple of relatively minor points where I am glad to confess error, it ends with espousal of wait-and-see. Doesn't it shake Mechem just a bit that this scholarly analyst (". . . whose work in this area I so much admire . . . ."—Mechem, *supra* note 1, at 969) comes to conclusions diametrically opposed to Mechem's?

[17] It is just as well that Mechem didn't get into the medical profession; had he done so he would probably now be castigating Dr. Jonas Salk as a "polio enthusiast" and trying to block his work because deaths from heart disease and cancer are so much more numerous.

Mr. Justice Frankfurter recalls that in the days when the Nine Old Men were laying the axe to minimum-wage legislation in the name of "freedom of contract," the apologists for the Court were saying, "well, numerically only relatively few cases knocked out legislation." But he also points out the ancillary effect of these decisions in inhibiting state legislatures. PHILLIPS, FELIX FRANKFURTER REMINISCES 103 (1960). The analogy is obvious.

[18] 329 Mass. 340, 108 N.E.2d 563 (1952).

I for one don't think much of a state of the law that "saves" a gift by such attrition.

(b) Cases which are settled, either before or after a trial court ruling. A Boston lawyer who wishes to remain anonymous (see *Canon of Ethics XXVII*) says: "My office has annually an average of three to five estates with perpetuities problems—perhaps a total of fifty since World War II. Of these only one has gone through to an appellate opinion. The rest have been settled, sometimes by conceding a little, sometimes a lot to the claimant under the Rule." Any practicing lawyer knows that the number of cases appearing in appellate decisions is a far smaller percentage of the total than the part of the iceberg that shows above the water. There is no Vermont decision on the Rule; yet when I was testifying on behalf of the Vermont statute practically every lawyer I talked to told about cases where the Rule was involved and concessions had to be made. One great trouble with the Rule is its all-or-nothing aspect; if you lose, you lose all. It is the rarely courageous lawyer who will recommend to an otherwise penniless remainderman that he (usually she) fight it out to the end instead of taking a fifty-fifty offer.

(c) Cases where the issue exists but is never raised. This, by the way, was the situation in *Sears v. Coolidge* until the trust had been in existence nearly four decades. The trust was executed in 1913 and the settlor died in 1920. The possible perpetuities defect was known to several adults who would have benefited by making claims under the Rule (and the defect was freely discussed at Harvard Law School); but the trust dispositions were fair to everyone and nobody wanted to raise a row in two closely knit families. So the trust ran on unchallenged until 1951 when the time for termination arrived, at which point a fiduciary raised the issue which the families had determined to bury, and thus forced the litigation. Perpetuities cases are for the most part family cases; if litigation results, children are suing their parents, or nephews their aunts, or cousins each other—and in most families this just isn't done. So, my learned friends will say, what harm is done in these cases? Only this: if the defect is voluntarily revealed or an astute internal revenue agent spots it, then the person who has not asserted his rights will find himself subjected to a gift tax liability. Is this the way we want the Rule to work?

Any decision can have repercussions far beyond the immediate parties. Take, for example, *Haggerty v. City of Oakland*,[19] a little gem

[19] 161 Cal. App. 2d 407, 326 P.2d 957 (1958), 73 HARV. L. REV. 1318 (1960). None of the anti-reformists has protested this case in the two years since it has been out. Perhaps Mechem and Bordwell haven't heard of it—as I hadn't until a fairly recent trip to Los Angeles. Sparks describes both majority and dissenting opinions as "well-reasoned," finds no fault with the result, and approves the proposition that a commercial lease to commence at a date which might be beyond the period of perpetuities is void. Sparks, *Future Interests*, in *1959 Ann. Survey Am. L.*, 35 N.Y.U.L. REV. 401, 408 (1960).

that ought to gladden the hearts of my fundamentalist friends. This case holds void a ten-year lease of a civic auditorium to commence "when the auditorium shall be completed," there being a covenant by the city to proceed with construction promptly in good faith. The decision has thrown into question settled arrangements for store leases in dozens of shopping centers and other new commercial construction. The existence of the case can give utterly unjustified renegotiating leverage to any lessor or lessee who feels his financial position strong enough to threaten litigation.

But why should we have to give quantitative proof of the devastation worked by the Rule in its present form? It is precious little solace to a group of children whose gifts fail through one of the nonsense doctrines to be told that they shouldn't worry because they represent a rather small statistic.

LET'S TALK POLICY—AND ECONOMICS

Alienability of Land

The anti-reformists say that my various proposals—I call them "mine" as a short-hand expression though regretfully I originated none of them but merely espoused them—would extend the period of unmarketability of land titles because of contingent future interests. I share their revulsion at the removal of land from its most productive use through legal future interests; but if my friends are really serious about this they should themselves become reformers on a much broader front. *All* instruments which create present and future interests in land, other than commercial leases, should be turned into trusts for sale after the pattern of the Price Act in Pennsylvania or the Law of Property Act, 1925, in England.[20] That is, the holder of a legal life tenancy should be able to sell a fee simple in the land and transfer the future interests to the proceeds of sale.

The worst offenders in this area are rights of entry on a fee and possibilities of reverter, which in this country are exempt from the Rule. The Massachusetts statute and its Connecticut and Maine counterparts all put time limits on these interests as to future instruments;[21] and as

[20] PA. STAT. ANN. tit. 20, § 1561 (1958). For an exposition of the Law of Property Act, 1925, 15 Geo. 5, c. 20, see MEGARRY, A MANUAL OF THE LAW OF REAL PROPERTY 87 (1946).

[21] Sparks finds that I must suffer from a split personality since, in the same statute, I recommended both easing the Rule generally by wait-and-see and putting clamps on rights of entry and possibilities of reverter. Says he, "this statute can best be described by comparing it with the mythical man who mounted his horse and rode off in all directions." 1954 ANN. SURVEY AM. L. 655, 664 (1955). A year later he announced the discovery that I had left a sleeper in the statute by making it possible to have executory interests that will not vest for 51 years. 1955 ANN. SURVEY AM.

to past instruments another Massachusetts statute [22] imposes a re-recording requirement which in time should knock out most of the offenders. (I personally think that if a statute imposed time limitations on these interests retroactively it would have an excellent chance of being held constitutional, especially if it were accompanied by a legislative declaration that these ancient interests, usually buttressing an obsolete restrictive covenant, were destructive of the one basic community resource and a threat to the tax base. But no legislature, as far as I know, has been willing to try this out.) The Vermont legislature rejected my proposal on this subject on the ground that it was not *in pari materia;* but I hope they will now legislate on this problem in some comprehensive manner.

A Policy Against Long Trusts?

First, I must point out that the long trust question is not at issue in discussion of these statutes. The reason is this (and I have said it time and again and it has never been answered): *in all cases that have arisen in this century where the gift has failed under the Rule, the instrument could have been so drafted as to be unchallengable under the strictest perpetuities doctrine unaided by legislation.* Furthermore, I and my reform colleagues, and all the anti-reformists too, would have so drafted the instrument if they had been advising the donor. Thus, the type of legislation I advocate will not extend the period of the Rule; it will simply give to the donor who happens to choose a nonspecialist as his counsel the same advantage as if he had gone to an experienced specialist.

If we are to restrict the duration of private trusts to a period less than that which an expert estate planner can now achieve, let us (a) find out what socio-economic objectives, if any, would be served by this step, (b) apply it to everybody, not just capriciously destroy ultimate gifts because of the ineptness of the draftsman, and (c) frame a type of restriction which demonstrably accomplishes the socio-economic objectives decided upon.

Let us start our consideration of these issues by quoting Percy Bordwell's contribution to economic and sociological analysis:

> ". . . One who has sojourned in metropolitan Boston for a time is struck with the atmosphere of settled wealth. The adventurous

L. 517, 526 (1956). I can state categorically that this is not so, as can be observed not only from the text of the statute but also from the memorandum presented to the legislature, which is part of the statutory history. LEACH & TUDOR, *op. cit. supra* note 3, at 211-13; Leach, *supra* note 12, at 1362-64. Simes and Taylor state the effect of the section under discussion with complete accuracy and do not even refer to Sparks' competing interpretation. SIMES & TAYLOR, THE IMPROVEMENT OF CONVEYANCING BY LEGISLATION 209-10 (1960).

[22] MASS. ANN. LAWS ch. 260, § 31A (1959) (enacted in 1956).

> spirit that once marked the Salem clippers seems nothing but a nostalgic memory. Trusts, and these are likely to be spendthrift trusts, are the order of the day. The estate planner is king. But this is not the atmosphere of most of the rest of the United States. Adventure still lurks. The intention of the settlor is not a jealous god to be obeyed at all hazards. The estate planner is not king. Massachusetts and Pennsylvania may well be a law unto themselves. Their perpetuity acts, it is believed, are not for import." [23]

It seems a shame to tarnish with facts a paragraph of such lyrical virtuosity; but in fairness to the reader I must perform this distasteful duty. At the time Bordwell wrote, Connecticut and Maine had already adopted the Massachusetts statute, New Hampshire decisions had reached the same result, Delaware had for decades imposed fewer restrictions on the estate planner than Massachusetts, and Wisconsin imposed none at all. Furthermore, Vermont, Kentucky, Idaho, and Washington have since jumped on the reform bandwagon; and the British Law Reform Committee has unanimously recommended a Massachusetts-type act to Parliament. If, as Bordwell says, the Massachusetts estate planner is king, he is a very successfully aggressive monarch.

The *Restatement* concedes that "the basis or justification of this assumption [that social welfare requires the imposition of restrictions upon the fettering of property] has never been adequately explored and has been seldom discussed." [24] And then, of course, the Reporter and his advisers (all lawyers, no economists or sociologists) go right forward with a "rationale" of the whole law of perpetuities upon social and economic bases. Adequate exploration is still for the future.[25]

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[23] Bordwell, *supra* note 2, at 435. I wish I could deny that Bordwell's strictures upon "metropolitan Boston" (the adjective sideswipes Cambridge without actually naming it) are based upon personal observation. But, alas, this is impossible. Shortly after World War II we at Harvard invited the Bordwells to live among us, share our labors and rejoice in what we then considered to be mutual affection and admiration. So his opinions are based upon adequate personal observation even though one might be permitted to question his conclusions. On our part I am sure that the warmth of our feelings toward Bordwell is not so ephemeral that it can be affected by a peroration in the *Rutgers Law Review*. By the way, Sparks thinks that Bordwell's quoted paragraph provides "a possible explanation" of "an unusual phenomenon." Sparks, *A Decade of Transition in Future Interests*, 45 VA. L. REV. 493, 497 n.230 (1959).

[24] 4 RESTATEMENT, PROPERTY 2129 (1944) (introductory note).

[25] I readily concede that it is more tedious to examine the national economy factually than to hypothesize about it. But those of my friends who are going to base arguments about perpetuities policy upon considerations of economics have just got to do the studying. As a starter I would suggest they dip into the three volumes of the HOUSE COMM. ON WAYS AND MEANS, 86TH CONG., 1ST SESS., TAX REVISION COMPENDIUM—COMPENDIUM OF PAPERS ON BROADENING THE TAX BASE (Comm. Print 1959). I do not pretend to have read this; but it is not I who am making economic arguments for a policy position on perpetuities. The reference comes from my friends in the Department of Economics at Harvard; they have read it—and participated in it—and they assure me, for example, that any argument based upon a supposed deficiency in the funds available for risk investments cannot possibly be supported.

Arguments for Restricting the Duration of Trusts

What are the *public* reasons for restricting the duration of trusts? They might be that:

Trusts tend to foster family economic empires of such power as to threaten the public good.

Estate and income taxes, however, to say nothing of the antitrust laws, have taken care of the economic power problem. Where are the great family empires now—those built on the Rockefeller, Carnegie, Ford, Harriman, Morgan, Vanderbilt fortunes? If a Harriman or a Rockefeller gets elected as Governor of New York, does anyone suggest that he bought his way in after the manner of the Boss Tweed period and that he continues in office to feather the family nest? [26]

Trusts tend to restrict the risk capital available to the economy; and risk capital is in short supply.

Are either of these statements true? I doubt it, and at least would have to hear proof. Nearly all modern trusts give the trustee unlimited power of investment; and the modern trustee, faced with creeping inflation and the great income tax advantage of capital gains over dividends and interest, leans strongly to what have come to be known as "growth" investments. Furthermore, anyone who is worried about the availability of risk capital for "manufacture of jet airplanes, machinery operated by atomic energy, and scores of other things which, in the long run, may lead to a higher and better civilization" [27] should

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[26] In reflecting upon Gray's "remorseless" (his word) attitude toward the Rule it must not be forgotten that he was writing in 1886, the bad old days of the predatory rich with no income tax or estate tax to hold in check the power accorded to them by a laissez-faire system all too articulately expressed:

Vanderbilt (Cornelius): "What do I care for the law? I got the power ain't I?"

Vanderbilt (W. H.): "The public be damned."

Morgan: "Men owning property should do what they like with it. I owe the public nothing."

Bishop Lawrence (Mass.): "In the long run it is only to the man of morality that wealth comes . . . Godliness is in league with riches."

(Quotes are from DULLES, THE UNITED STATES SINCE 1865 ch. 4 (1959).) It was the period of the Marble Palace at Newport, Morgan's *Corsair* ("If you have to think about the expense of a yacht you shouldn't own one") and the Fifth Avenue mansions, of the Four Hundred flocking to the original production of *The Mikado.* It was *not* the period of a Rockefeller succeeding a Harriman in dedicated public service, of the Ford Foundation divesting itself of control of the Ford Company and devoting the proceeds to worthy causes including Harvard, of Carnegie steel millions vying with Nobel munitions millions in promoting world peace, or of a 91% top income tax bracket and a 77% top estate tax bracket which tend to produce many of the last-named phenomena and to cause a book of recent vintage to be entitled *The Last Billionaire.*

[27] SIMES, *op. cit. supra* note 2, at 60.

keep his eye on the "space industries" shares on the Big Board. Can anyone view the rise of the stock market and fall of the bond market in the last five years and conclude that investment in America is trending toward conservatism? And what will the beneficiary do with his capital if he gets it earlier? Probably put it right back into one of the investment trusts.

Trusts restrict expenditures for consumer goods to income from the trust securities, whereas it is often in the public interest that capital be so spent.

While this is perhaps true, I should have thought that since the beginning of World War II we had been trying to *restrict* or "syphon off" buying power to avoid inflation. Besides, if a trust is properly drafted, invasion of the principal to meet needs of the beneficiary will always be included; and these needs are likely to crop up when a sound economy dictates that buying power should be increased.

It is socially desirable that the wealth of the world be controlled by its living members and not by the dead.

This argument gets us into semantics. Obviously when *A* dies leaving property to *B* in trust for *C* for life, remainder to *C*'s children, the wealth is controlled by the living: as to management by the trustee, as to expenditure of income (and perhaps some principal) by the beneficiaries. Now, it is true that *C* can't take the remainder away from his children. Perhaps it is socially desirable that he should be able to; but this would have to be argued out—and then, if an affirmative answer were given, more drastic restrictions than any yet suggested would have to be imposed.

It is socially undesirable that some individuals should have assured incomes and be protected from the economic struggle for existence.

As to the assured incomes this is an argument against all inheritable wealth; Tommy Manville's inglorious career is dependent, not necessarily upon a long trust, but upon the inheritability of the millions his old man made in asbestos. As to protection from the economic struggle, this is a relic of the period when old age insurance was considered socialistic paternalism; as Simes has put it, the welfare state "is not organized on a theory of survival of the fittest, but of survival of the weak." [28]

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[28] SIMES, *op. cit. supra* note 2, at 57.

Is there a justification for prospective hypothetical determination of validity as of testator's death instead of contemporaneous factual determination at a later time?

From 1787 when *Jee v. Audley* [29] first set forth the rule that a court must blind its eyes to facts that have actually occurred when prior estates end, nobody, not even Gray, not even the *Restatement* with its passion for "rationales," ever tried to rationalize this rule. I pointed this out in 1952, so some of those who don't like these statutes have now gone to work to fill the gap *nunc pro tunc*.

Bordwell hasn't entered this contest. Indeed he apologizes for *Jee v. Audley*: "Lord Kenyon [of *Jee v. Audley*] was an entirely different type from Lord Nottingham [of the *Duke of Norfolk's Case*].[30] He liked to say 'No.' Furthermore he had a gift of hasty generalization that was likely to make his generalizations stick because of their very oracular character. The result he reached in *Jee v. Audley*, it is believed, would not have appealed to Lord Nottingham." With all of this I agree. But in Bordwell's mind, "the question is whether his [Leach's] cure isn't worse than the disease." And the reader can guess the answer: he thinks the changes I propose, though not revolutionary, "are in the wrong direction." Here Bordwell and I part company.

Mechem goes in for assertion: "there is a strong policy in favor of making possible the determination of the validity of interests at the earliest possible moment, which in the case of wills is the death of the testator." [31] Why? And whose policy? Certainly not that of the Pennsylvania courts—or the Massachusetts courts either—both of which refuse to pass upon the validity of a gift under the Rule Against Perpetuities until prior estates have ended.[32] Mechem brushes off these inconvenient holdings by saying, "courts are often lazy and willing to put off anything that can be put off" and "a bad practice should not be perpetuated by bad legislation." [33] It's still just assertion.

Simes makes an extraordinary argument, and since he has published it three times in identical terms I must conclude that he is deadly

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[29] 1 Cox 324, 29 Eng. Rep. 1186 (Ch. 1787).

[30] 3 Ch. Cas. 1, 26, 36 Eng. Rep. 690 (1682).

[31] Mechem, *supra* note 1, at 979. Following this quote the reader will find a page and a half of discussion before the author turns to a new point. The reader must examine this for himself; to me it adds up to no more than unsupported assertion.

[32] B.M.C. Durfee Trust Co. v. Taylor, 325 Mass. 201, 89 N.E.2d 777 (1950); Quigley's Estate, 329 Pa. 281, 198 Atl. 85 (1938).

[33] Mechem, *supra* note 1, at 979, 980. Does he really mean this? And does he attribute similar motivation to the rule of the Supreme Court of the United States that a constitutional determination will be postponed if any other basis for disposing of the case exists? See Ashwander v. TVA, 297 U.S. 288, 346-48 (1936) (concurring opinion of Mr. Justice Brandeis). I should think this little quip might reduce the good professor's popularity among the black-robed gentry in Harrisburg and Washington.

serious about it. He says that under a wait-and-see statute there will be no one who can prevent the trustee from embezzling the trust estate in collusion with the life tenant, since neither the remaindermen nor the reversioner are certain to have an interest in view of the fact that the validity of the remainder depends upon future events.[34] There is no citation of authority; and I do not believe that Simes' view of probate or equity procedure applies in any state of the Union. *Both* the remaindermen *and* the reversioner would have to be parties to a court accounting (How else could an honest trustee protect himself?); and *all* of them would be appropriate petitioners in a bill in equity to protect the corpus of the trust against embezzlement[35]—to say nothing of the local district or county attorney who normally shows official interest in thievery. If Simes were sitting as judge in that probate or equity court would he really say, as he visualizes the ruling of his hypothetical judge, "we cannot do anything for you, for your interest may be void *ab initio*

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[34] This argument is made in COMMITTEE ON RULES AGAINST PERPETUITIES, ABA SECTION OF REAL PROPERTY, PROBATE & TRUST LAW, LEGISLATORS' HANDBOOK ON PERPETUITIES 38 (1958) [hereinafter cited as LEGISLATORS' HANDBOOK]; 3 SIMES & SMITH, *op. cit. supra* note 2, § 1230, at 131; Simes, *supra* note 2, at 185-86. In each of these publications there appears a footnote as follows: "It may be argued that it is better to deny an action to [the remaindermen] than to hold their interests void, as would be done under the common law rule." On this Simes is quite right; it not only may be argued but hereby is argued. "In answer it may be said that it is better to give a resulting interest to [the reversioner] than to allow the trustee to embezzle the fund." On this he is quite wrong; both the remaindermen and the reversioner would be parties to a trustee's petition for allowance of his account and would have standing to petition for an accounting or for removal of the trustee.

[35] I should not have thought it necessary to cite authority for the proposition that any court would consider both the remaindermen and the reversioner necessary parties to a petition to allow the trustee's account and proper parties to bring a petition to surcharge or remove the trustee. Since Simes is discussing Massachusetts and Pennsylvania I will limit the references to those states.

In Massachusetts, notice of a trustee's petition for allowance of his account must be given to a long list of categories of persons "and to other persons who are *or may become* interested and who shall have filed with the accountant and the register of probate a request in writing for notice of proceedings on accounts." (Emphasis added.) MASS. ANN. LAWS ch. 206, § 24(5) (1955); 2 NEWHALL, SETTLEMENT OF ESTATES AND FIDUCIARY LAW IN MASSACHUSETTS § 285 (1958). "Persons having contingent interests are persons interested in the trust and in the accounts (citations omitted) unless indeed such interests are so utterly unsubstantial as to amount to nothing more than 'a film of mist.'" Young v. Tudor, 323 Mass. 508, 511, 83 N.E.2d 1, 3 (1948). See also Porotto v. Fiduciary Trust Co., 321 Mass. 638, 75 N.E.2d 17 (1947), which indicates the solicitude of the Massachusetts courts for admitting to the proceedings all persons having any vestige of an interest. It will be recalled that Guy Newhall was a co-draftsman and co-sponsor of the Massachusetts statute; if it had presented difficulties with probate procedure he would have been the first to spot and correct them.

As to Pennsylvania I have sought the aid of Philip A. Brégy. He agrees with my position, citing PA. STAT. ANN. tit. 20, §§ 320.703-.704 (1950); Gill's Estate, 293 Pa. 199, 142 Atl. 207 (1928); *cf.* BRÉGY, INTESTATE, WILLS AND ESTATES ACTS OF 1947, at 5156 (1949). He adds that the proposition is so obvious that it would be difficult to find a case where it had been contested. He reminds me that the problem is not new in Pennsylvania because the Pennsylvania courts, like those of Massachusetts, will not pass on the perpetuities point until termination of prior estates.

under the Rule against Perpetuities; we must 'wait and see' "?[36] I don't believe it for a minute.

If the reader still thinks there is some justification for the might-have-been rule, let him now consider the situations where without aid of statute the courts already wait and see:

(a) Where there are alternative contingencies, one remote and one not, we wait to see which occurs.[37]

(b) Where there is a power to amend or a power to appoint, we wait to see whether the power will be exercised and in passing upon the amendment or appointed interest examine all facts at the time of amendment or appointment;[38] and, where the power is not exercised, in passing upon the interest in default we examine all facts at the date the power expires.[39]

(c) It is more intriguing to the pedagogue than important to the profession that two familiar and respected cases call for a wait-and-see solution: *Evers v. Challis*[40] (obsolete except where the rule of destructibility of contingent remainders is in force) and *In the Matter of Horner* (obsolete since New York has abandoned the two-life rule).[41]

Of course the really important item in this list is (b), for the vast majority of modern well-drawn trusts, testamentary or inter vivos, contain some type of power which compels the court to wait and see. So really the chief function of the wait-and-see statutes is to extend to the relatively few trusts not containing powers the rules which already apply to the relatively numerous trusts that do contain them. This is a completely exact statement of the effect of the Massachusetts-type statutes. The Pennsylvania-type statutes will probably turn out to have a slightly greater effect, but not much.

Is there any tendency among the wealthy to produce trusts which exceed the period of perpetuities?

In thirty-five years of practice, largely connected with estate work, I have never found a testator or settlor who had any wish to exceed the limits of the Rule in its most severe application. Is this atypical? We

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[36] See note 34 *supra.*

[37] Gray v. Whittemore, 192 Mass. 367, 78 N.E. 422 (1906); *In re* Curryer's Will Trusts, [1938] 1 Ch. 952; 6 AMERICAN LAW OF PROPERTY § 24.54 (Casner ed. 1952).

[38] *In re* Warren's Estate, 320 Pa. 112, 182 Atl. 396 (1936), *overruling* Smith's Appeal, 88 Pa. 492 (1879); 6 AMERICAN LAW OF PROPERTY § 24.35 (Casner ed. 1952).

[39] Sears v. Coolidge, 329 Mass. 340, 108 N.E.2d 563 (1952); 6 AMERICAN LAW OF PROPERTY § 24.36 (Casner ed. 1952).

[40] 7 H.L.C. 531, 11 Eng. Rep. 212 (H.L. 1859).

[41] 237 N.Y. 489, 143 N.E. 655 (1924). The significance of this case and of Evers v. Challis, *supra* note 40, is pointed out in Note, *Cardozo, Horner and "Wait and See,"* 8 SYRACUSE L. REV. 211 (1957).

can test the answer by looking to Delaware and Wisconsin where a testator or settlor can have a trust as long as he pleases—in Delaware because of a 1938 statute causing the period of perpetuities to run from the exercise, not creation, of all powers; in Wisconsin because its New York-type statute ("suspension of the power of alienation") is construed to put no limit on trusts where the trustee has a power of sale.[42] As to Delaware I know of no complaints in the twenty-two years since the statute was passed. One Milwaukee lawyer has expressed a fear that Wisconsin trusts will get out of hand in length, mostly for tax reasons;[43] but, upon inquiry, he states that he finds no sentiment for legislation and that "even the Supreme Court has indicated no particular need for change." So I guess the Milwaukee Braves, the Green Bay Packers, and all those breweries and herds of dairy cattle will continue to be exposed to the ghoulies and ghasties that people the nightmares of my anti-reformist friends. (I wonder whether this will cause Percy Bordwell to hurl at the state of the La Follettes the anathema with which he has afflicted the commonwealth of the Cabots and Lowells.[44]) But the important thing is that inquiries at the Wisconsin bar indicate that their clients just don't want to create over-long trusts and that they are advising their clients that this decision is wise because of the unpredictability of tax and other features in the remote future. It seems there just isn't any problem.[45]

Still and all, I think Wisconsin should have a restriction on future interests (I would recommend the common-law Rule as modified by the Vermont statute) for a very practical reason: our present estate and inheritance tax system depends upon the wealth of the community going through the wringer every so often, and in the main it depends upon the Rule Against Perpetuities and its relatives to prevent the intervals from being too long. If Wisconsin stays out of line in this matter, and if some taxpayers, or even just a couple of big ones, abuse the privilege for a supposed tax advantage, the Internal Revenue Code will be amended to eliminate the abuse, and the amendment may well do harm outside, as well as inside, Wisconsin. Special provisions of the Code

[42] DEL. CODE ANN. tit. 25, § 501 (1953); WIS. STAT. ANN. §§ 230.14-.15 (1957), *In re* Walker's Will, 258 Wis. 65, 45 N.W.2d 94 (1950); Becker v. Chester, 115 Wis. 90, 91 N.W. 87 (1902).

[43] Dede, *Perpetuities in Private Trusts in Wisconsin*, 42 MARQ. L. REV. 514 (1959).

[44] See note 23 *supra* and accompanying text.

[45] I have received from Dede and from two other Milwaukee lawyers samples of the longest trusts of which they are aware. All of them could be accommodated within the common-law Rule, *mutatis mutandis*, by standard drafting devices—except that in the future there might be trouble with the exercise of special and testamentary powers of appointment. As to this matter, these trusts may well run into tax difficulties under INT. REV. CODE OF 1954, § 2041(a)(3).

were enacted to eliminate tax advantages in the Delaware statute, and these have been a nuisance to everyone.[46]

Is there need for a Rule Against Perpetuities at all?

As a rule of property, I doubt it—and so, oddly enough, does Mechem.[47] But I share his visceral impression that there is something wrong in permitting a testator to exercise the power of the dead hand a century after his death—and the fact that he can do it right now under the Rule doesn't make it any righter. (As Mechem felicitously puts it, "the rule doesn't conspicuously stand in the way of unsocial people with good lawyers.")

However, as indicated with reference to Wisconsin, I feel that a rule against perpetuities of approximately the standard length is an adjunct to our system of estate, inheritance and gift taxation, and that if we didn't have one the revenue laws would have to be revised with a lot of unnecessary stress and strain. So I am for having a rule against perpetuities that blocks the perpetual family trust but doesn't do so through destructive methods that have no relation to the policy objective.

I am sure that most of us, if charged with framing a rule against perpetuities *de novo,* would not use the twenty-one-year period. Twenty-one as the age of majority is a relic of feudal times, pragmatically determined by the physical ability to wear heavy armor, wield the weapons of the day, and sustain trial by combat.[48] We too are entitled to be pragmatic under the conditions of our own time. The test should be: at what age is it reasonable to expect that a man or woman will be mature enough to handle capital funds? Surely twenty-one, the age of a junior in college, is too young. Thirty is a good deal more realistic; perhaps thirty-five. But I have no urge to summon a crusade to change twenty-one to some higher figure; the present scope of the Rule is quite adequate for the expert draftsman, and wait-and-see and cy pres statutes can protect the public from the inexpert.

THE "LIVES IN BEING" PROBLEM

The Pennsylvania Statute

All of the anti-reformists say that under the Pennsylvania statute (measuring the period by "actual rather than possible events") it is

[46] INT. REV. CODE OF 1954, §§ 2041(a)(3), 2514(d); CASNER, ESTATE PLANNING 565 (2d ed. 1956).

[47] Mechem, *supra* note 1, at 968-69.

[48] See James, *The Age of Majority,* 4 AM. J. LEGAL HIST. 22 (1960). But there is no universality in the age of majority, either at a particular moment of time or in a particular country. The British sovereign still attains majority at 18. Magna Carta seems to mark the first appearance of 21, the age having been 15 in the ninth and tenth centuries. French nobles attained majority at 17. The Roman law put the age at 25.

impracticable to determine who are the lives in being. Mechem, for example, visualizes himself in the classroom with his students asking "What life?" In that case, says he, "I would be floored because no one yet knows the answer to that question." Imagine! Mechem never discusses anything in the classroom to which the answer is not known?

If any among the readers of this Article have the patience to go through the anti-reformist literature I suggest reading it with the following question in mind: are the writers really trying to solve the problem or are they trying to make the statute look bad? As a corollary question: are the hypothetical cases with which any writer deals the ones that actually occur or are they museum pieces he has dreamed up with a view to announcing in mock dismay that he is "floored"? It has been wisely remarked—I wish I could locate the quote—that any sound project can be made to look absurd if it is absurdly carried out.[49]

The anti-reformists, and in this instance Simes too, all adopt the view that under the Pennsylvania statute you wait until the questionable interest vests and then go back to see whether you can find a life, out of a twenty-one-year old New York telephone directory for example, which was in being at the critical period and which has expired less than twenty-one years ago.[50]

Because this Article is basically an answer to Mechem, I deal with his treatment of this thesis. He postulates a bequest to testator's widow for life and then to his brother's children who reach twenty-five. Then he asks whether the gift will be good if, by waiting and seeing, it turns out that all children reach twenty-five within twenty-one years after the death of (a) the widow, (b) the brother, (c) the lawyer whom the testator expresses the wish to have employed, (d) the testator's gardener whom the testator cautions as to the care of the hedge on his estate, (e) "and so on." [51]

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[49] Even Simes (who, as I have said, recognizes that legislative correctives are necessary and with whom I believe I could work out mutually satisfactory legislation) is drawn into the pattern of discussing the Pennsylvania statute with reference to such grotesqueries as a gift "to such of the testator's lineal descendants as are alive 120 years after testator's death." LEGISLATORS' HANDBOOK 39.

[50] "If the lives are selected at the end rather than at the beginning, longer lives will likely be chosen. The draftsman who selects twelve healthy babies at the inception of the future interest for measuring lives may find that they all die within six months. [*I hope my learned friend never applies for employment as an actuary.*] But if he could select the lives when the contingency happens, he could never fail to find long ones. On this matter, hindsight is inevitably better than foresight." Simes, in LEGISLATORS' HANDBOOK 39. The New York Telephone Directory crops up *id.* at 39; SIMES & SMITH, *op. cit. supra* note 2, § 1230, at 132; Simes, *supra* note 2, at 187.

[51] Mechem, *Further Thoughts on the Pennsylvania Perpetuities Legislation*, 107 U. PA. L. REV. 965, 981 (1959). Since it is my chosen profession to nurture and protect the young I must express indignant disbelief when Mechem says that his Pennsylvania "average student" would say that the widow was measuring life because

Let's answer Mechem's question with regard to this case which he apparently considers so difficult as to demonstrate the folly of the statute. My guess is that the court's opinion would read somewhat as follows:

> "In this case the measuring lives are the widow and testator's brother—the widow because there can be no distribution of principal until her death and also because under our settled practice, Quigley's Estate, 329 Pa. 281, we will not pass upon the validity of the remainder until the end of the life estate; and the brother because no further children can be born after his death. If, at the death of the survivor of the widow and the brother, it appears either that (a) no further children were born to the brother after T's death or (b) that all are over the age of four at the death of such survivor, then the gift is good. If the will contains no express disposition of the income after the widow's death, we shall imply a gift of intermediate income to the children from time to time living and to the estates of those who have reached twenty-five and died. If the contingencies are not favorable at the death of the survivor of the widow and the brother, immediate distribution of the principal will be made to those receiving the income, under section 4(e)(3) of the statute. If a child should reach twenty-five after the death of the widow but before the death of the brother, the Orphan's Court should make a distribution of principal to such child and should exercise its discretion as to exacting a forthcoming bond in the light of its judgment as to the probability of birth of further children which might reduce the size of the distributee's ultimate share. We consider the suggestion of counsel that the testator's lawyer or his gardener 'and so on' should be used as measuring lives to be so patently frivolous as to violate the standards of dignity which this court is entitled to expect from members of the bar."

Mechem and the other anti-reformists have unaccountably neglected two sources which indicate that no such nonsense as they propose was intended by the official committee (appointed under statutory authority) which prepared this statute—and therefore, on recognized principles of statutory construction, that no such intention can be attributed to the legislature:

> (a) The Report of the Joint State Government Commission which recommended the wait-and-see statute here under discussion makes the following comment on the relevant section: "this subsection . . . *is intended to disturb the common law rule as little as possible,* but to make actualities at the end of the period, rather than possibilities as of the creation of the interest, govern and to

"she is mentioned in the will and so one of the parties involved" and implies that his students would apply the same reasoning to the lawyer, the gardener, and so on. If he doesn't get burned in effigy on the campus for that, his students are not worthy inheritors of the spirit of the Whiskey Rebellion.

provide a more equitable disposition of void gifts." [52] This comment also appears in *Purdon's Statutes* immediately after the section in question.

(b) In 1949 Philip A. Brégy who was Associate Research Consultant to the Committee—operating under a fellowship from the University of Pennsylvania Law School—wrote a compendious book on the *Intestate, Wills and Estates Acts of 1947,* including the perpetuities section. In this he devotes several pages to the selection of lives-in-being under the statute and says: "under the statute, it is submitted that lives in being reasonably related to the gift should be used in measuring the period for actual vesting." He then deals with four difficult Pennsylvania cases—actual cases from real people, not concoctions contrived to prove a point—and disposes of them in a practical manner which makes sense to me and, I predict, will make sense to the Pennsylvania courts.[53]

And what do you do where there are no relevant lives? Easy, use twenty-one years. This disposes of a case suggested by Simes: "to the B Church in fee simple; but if the land should ever cease to be used for church purposes, then to C in fee simple." [54] After twenty-one years the B Church has an indefeasible fee. The only Pennsylvania case on the statute so far is a nisi prius decision on an option, unlimited in time, which was in fact exercised within (a) twenty-one years—actually six, and (b) the lives of both parties.[55] The opinion suggests that the

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[52] Quoted in BRÉGY, *op. cit. supra* note 10, at 5251. This sentence from the report is quoted by Simes, *supra* note 2, at 183, not as a guide to construction of the statute, but as proof that the Committee did not realize "how revolutionary this piece of legislation is."

[53] BRÉGY, *op. cit. supra* note 10, at 5268-72. Asserting a negative is notoriously risky, so as to the neglect of Brégy I will only state that: (a) I do not recall any reference to his book by the anti-reformists, (b) the book is not cited by Mechem, writing in the School where part of the book was written, and (c) the book is not cited in the *Legislators' Handbook.* As to the probable acceptance of the Brégy book as a source of statutory interpretation, it should be noted that the Introduction by the Chairman of the Advisory Committee states as to Brégy and his colleague M. Paul Smith: "Probably no two persons know as well as they the detailed provisions of the acts and the reasons which have caused the adoption of particular sections and clauses." BRÉGY, *op. cit. supra* note 10, at v. It has been held that the Commissioners' comments may be considered in construing the statutes. Martin's Estate, 365 Pa. 280, 283, 74 A.2d 120, 122 (1950).

[54] LEGISLATORS' HANDBOOK 39-40. Using the telephone-directory assumption Simes has this title being tied up for 125 years by the statute. What he does not remind the reader is that *right now* this title can be tied up *forever* in exactly this way under established perpetuities doctrine: the grantor conveys to the B Church so long as the premises are used for church purposes, and then conveys the possibility of reverter to C. Indeed, two recent decisions indicate that this can be done all at once in a will by treating the testamentary clauses as if they operated successively instead of simultaneously. Brown v. Independent Baptist Church, 325 Mass. 645, 91 N.E.2d 922 (1950); Knowles v. South County Hosp., 140 A.2d 499 (R.I. 1958). See 6 AMERICAN LAW OF PROPERTY § 24.62 (Casner ed. 1952).

[55] Mumma v. Hinkle, 138 LEGAL INTELLIGENCER (Philadelphia) 321 (Pa. C.P. 1958). Sparks joins the telephone-directory group by asking: "What would have been the result if the option had not been exercised until after the death of both parties to

option would be good for the lives of both parties plus twenty-one years, but plainly this was of no consequence in the particular litigation because if the statute was applied at all the exercise of the option within six years brought it within the period of the life of either party *or* twenty-one years. I do not consider that in such a situation the lives of the parties to this option are "reasonably related" to it under Brégy's test; or, to put it differently, I do not consider that a commercial option between individuals should be treated differently from one between corporations. So, had I been writing that opinion, I would have rested the case on the twenty-one-year period.

Massachusetts-type Statutes

Simes declares that no lives-in-being problem exists with the Massachusetts statute and its counterparts in Maine and Connecticut, inasmuch as the wait-and-see principle is applied only up to the termination of the life estates; [56] and none of the anti-reformers disagree.

Vermont-type Statutes

These statutes have the same language which the critics of Pennsylvania find so ambiguous; that is, they declare that "the period of perpetuities shall be measured by actual rather than possible events." The 1960 Kentucky statute adds: "provided, however, the period shall not be measured by any lives whose continuance does not have a causal relationship to the vesting or failure of the interest." [57] This addition seems to me a good idea, especially if it makes my learned friends happier. But I expect that the Vermont and Washington courts will reach the same result without the additional clause; indeed, I recommend that they do, if the problem comes before them. But I anticipate very little litigation under these statutes; the ability to reform the limitation "to approximate most closely the intention of the creator of

it, but if at the time of exercise a stranger could have been found who was actually in being when the option contract was entered into? If the option is never exercised, at what point may the optioner convey a marketable title free of the option?" My answer: after 21 years the option cannot be exercised and the optioner has a marketable title. But I also answer that *this is not a real problem.* Commercial options do not in practice constitute a threat to alienability. And Sparks should know this better than any of us. In the Empire State where he teaches there are *no* time restrictions on options. *In re* Waterfront, 246 N.Y. 1, 157 N.E. 911 (1927); 6 AMERICAN LAW OF PROPERTY § 24.56 (Casner ed. 1952).

[56] LEGISLATORS' HANDBOOK 38 n.4.

[57] Professor Jesse Dukeminier, Jr., of the University of Kentucky College of Law took a leading part in sponsoring this statute in collaboration with prominent members of the bar and the judiciary. They all went through the character-building experience *of actually getting the statute enacted.* Bravo! Governor Bert T. Combs, a former judge of the Court of Appeals, not only gave his official approval to the statute after it had passed the legislature but also actively sponsored the bill.

the interest" so narrows the area of controversy that the parties are quite likely to conclude that litigation is not worth its cost.

This leads to a worthwhile observation: Mechem finds the Pennsylvania statute faulty and predicts that it will be "repealed or modified." [58] Well, there he is on the Pennsylvania Turnpike with the legislature at Harrisburg about a hundred miles down the road; and there is the Kentucky statute as a guide to modifying the Pennsylvania law so that the troubles are removed. What are we waiting for? Is it the function of the profession to take pot-shots at laws alleged to be defective, or to go out and get the defects removed?

The Infectious Invalidity Problem

First, let's define the problem. When part of the gifts in a will or trust violate the Rule, the courts inquire whether what is left can stand by itself (the void gift passing into the residue or as a reversion) without serious distortion of the dispositive scheme of the testator or settlor. If the answer is negative then other gifts—prior, concurrent, or subsequent—are also stricken out.[59] Now this does not happen very often; but when it does, mark well the method by which the court proceeds as given in the *Restatement,* for the reader may find therein the solution to all difficulties. The court, says the *Restatement,* will ask itself the following question:

> "If the [testator or settlor] . . . should now examine his proposed plan of disposition with the parts excised therefrom which have been found to offend the rule against perpetuities, would he decide that his original scheme of disposition *would be more closely approximated* by invalidating all, . . . or part, . . . of the balance, or by allowing the balance to take effect in accordance with its terms . . .? Whichever of these three modes of procedure is judicially ascertained to be most likely to accord with the desires of the [testator or settlor] . . . is followed out. The dispositive planning of [testators and settlors] . . . is thus given the fullest possible effectiveness consistent with the social regulation implicit in the rule against perpetuities." [60]

Simes and Sparks say that if you wait and see whether the facts make the future interest valid, then if it proves invalid there is no way

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[58] Mechem, *supra* note 51, at 980.

[59] 6 American Law of Property §§ 24.48-.52 (Casner ed. 1952); 4 Restatement, Property § 402 (1944); 3 Simes & Smith, Future Interests §§ 1262-64, 1943 (2d ed. 1956).

[60] 4 Restatement, Property § 402, comment a (1944). (Emphasis added.) Simes was one of the advisers. *Id.* at iii. The quoted passage is specifically adopted in Taylor v. Dooley, 297 S.W.2d 905, 909 (Ky. 1956).

to correct distortion by invalidating *prior* interests which have already taken effect and expired.[61] The reply is that, first, this is not a real problem that actually arises. Simes has made this point three times from 1953 to 1958, including his very carefully prepared *Cooley Lectures* at Michigan,[62] and all three times he has used the same *hypothetical* case as an illustration. I just don't believe he can find a real case where (a) a gift would be void under the wait-and-see rule and (b) unacceptable distortion would be caused by the interests which have previously expired.[63] This is a challenge. If Simes and Sparks turn up one case I shall be surprised; but one case will not make me think the problem is important. Second, in Pennsylvania and Massachusetts the problem raised by Simes and Sparks already existed prior to the statutes, because of the decisions refusing to pass on validity until the expiration of life estates—and no trouble has resulted.[64] And

[61] LEGISLATORS' HANDBOOK 40; 3 SIMES & SMITH, *op. cit. supra* note 59, § 1230, at 134; Simes, *Is the Rule Against Perpetuities Doomed? The "Wait and See" Doctrine*, 52 MICH. L. REV. 179, 189 (1953); Sparks, *A Decade of Transition in Future Interests*, 45 VA. L. REV. 493, 496 (1959).

[62] See note 61 *supra*.

[63] I say this with some confidence because when I came to write the relevant sections of *American Law of Property* I discovered that I couldn't find a really good case and finally plagiarized a version of Simes' own hypothetical from his earlier edition. See 6 AMERICAN LAW OF PROPERTY § 24.52 (Casner ed. 1952). The cases cited by Simes (preceded by the telltale "See") consist of one which both he and I have publicly criticized (3 SIMES & SMITH, *op. cit. supra* note 59, § 1262 n.25; 6 AMERICAN LAW OF PROPERTY § 24.50 n.2 (Casner ed. 1952)), and another where the precepts of the *Restatement*, Simes and myself seem clearly to be violated, as Simes himself notes at 3 SIMES & SMITH, *op. cit. supra* note 59, § 1262 n.26. The cases are Millikin Nat'l Bank v. Wilson, 343 Ill. 55, 174 N.E. 857 (1931); *In re* Richards' Estate, 283 Mich. 484, 278 N.W. 657 (1938). Sparks cites Taylor v. Dooley, 297 S.W.2d 905 (Ky. 1956), which is a neat example to prove my point. There was a gift of one-half of testator's realty to his daughter Marian for life, remainder to her children for their lives, remainder to her grandchildren in fee; the other half was given to his son in fee. Now this is practically Simes' (and my) hypothetical case. Bound by the *Jee v. Audley* rule, the court invalidated the ultimate remainder and (questionably, as it seems to me) also knocked out the two prior life estates; then, to prevent distortion also knocked out the son's gift and caused the whole to pass by intestacy. But the point is this: testator died in 1941 at which time Marian was 43 years old and had a single child, aged 18; up to the time the action was filed (date not given but inferrable within reasonable limits from the 1957 date of appellate opinion) no further children had been born to her—as anyone would expect. So, under wait-and-see in any possible version, there was no violation at all.

[64] Sparks seems to forget this when he notes that "the infectious invalidity doctrine is definitely operative in Massachusetts" and that we have a wait-and-see statute, and he wonders how those two will mix. Sparks, *supra* note 61, at 496 n.229. The case he cites is New England Trust Co. v. Sanger, 337 Mass. 342, 149 N.E.2d 598 (1958). If the "infectious invalidity" enthusiasts (may I use the word too?) expect any comfort out of this case they had better read it carefully. It made my co-author Owen Tudor very unhappy, because the result was unfavorable to his client, and the opinion compounded the injury by citing copiously his works and mine. Briefly, two trust instruments were executed by the settlor, one in 1913 (which had a void remainder) and one in 1930 (which, despite a rather amusing near-error, was all valid). Both instruments had the same dispositive scheme. By knocking out all of the 1913 instrument, a reversion in the settlor resulted; and this was happily disposed of by the 1930 trust. The court points out that infectious invalidity has been applied in Massachusetts only in a single case and approves Gray's statement that "if anything

third, if we really have to make a choice of evils between the occasional case (and they have still to find just *one*) where distortion results through ignoring infectious invalidity, and the many cases where gifts are defeated (or compromises forced) through the *Jee v. Audley* rule, I choose the former.

But no such choice is necessary. All that is needed is to adopt the cy pres principle as in Vermont. The reader will have noted that, according to the rationale in the *Restatement,* the infectious invalidity rule is simply a *cy pres doctrine based upon an assumption of invalidity of the gift*—the court considers which arrangement would "more closely approximate" the testator's wishes—very nearly the words of the Vermont statute. Just turn this idea around and perform the same process on the assumption of *validity* of the gift within the limits of the Rule—and the job is done; since there is no invalidity at all, but only reformation, there is no infectious invalidity problem.

THE CY PRES STATUTES—VERMONT, WASHINGTON, KENTUCKY, ETC.[65]

Perpetuities reform was first subjected to group discussion at the ABA meeting of 1953. At that meeting everyone agreed that the current state of the law was a mess and that something should be done about it. Simes was for a cy pres statute. I concurred on principle but doubted that legislatures could be convinced; so I was prepared to settle for wait-and-see.[66] But there was no harm in giving it a try, for in my view cy pres offers a total and simple solution. And lo, the Vermont legislature bought the idea, and the Washington and Kentucky legislatures followed with statutes that were surprises to me until I read about them.

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is now well settled in the law it is that a life estate, good in itself, is not destroyed by the remainder over being bad for remoteness or any other reason." However, the court adds that where, as in *Sanger,* the judicial knife can perform painless and healing surgery, the operation will be undertaken.

[65] The "etc." covers Idaho and the New Hampshire judicial cy pres doctrine. It is particularly appropriate that Kentucky should have enacted a cy pres statute, because it was former Judge James Quarles of the Chancery Court at Louisville who first suggested the cy pres idea and who developed it with scholarly analogies that have never been challenged—and right in Sparks' front yard too. Quarles, *The Cy Pres Doctrine: Its Application to Cases Involving the Rule against Perpetuities and Trusts for Accumulation,* 21 N.Y.U.L. REV. 384 (1946). Probably, also in Sparks' front yard, we should count his Dean in the cy pres camp. Niles, *Two Lives Down—and Goal to Go, Change in New York Perpetuities Rule Appraised—Further Reform Suggested,* 98 TRUSTS & ESTATES 104, 108 (1959). Niles doesn't like wait-and-see, but his reasons suggest that he has taken the anti-reformists somewhat too seriously. Still, if he can get a cy pres statute enacted in New York our troubles are over. Every other state would fall in line within a five-year period.

[66] PROBATE & TRUST LAW DIV., ABA SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW 83-93 (1953); LEACH & TUDOR, THE RULE AGAINST PERPETUITIES 201-02 (1957).

Meanwhile, Simes had backed away from cy pres, but not very far. His position is now as follows,[67] with my comments in bracketed italics:

> "Should there be a blanket cy pres provision such as [the Vermont statute] . . . which would allow the court to rewrite the limitations in all cases of invalidity? Against this it can be urged that a blanket rule would necessitate litigation in all such cases before interested parties could determine the effect of limitations. [*I doubt this. The big incentive to perpetuities litigation, and to the threat of litigation that forces serious concession by way of compromise, is its all-or-nothing character. If the contestant wins, the proponent gets nothing. But when the issue is limited to the question of what reformation within the limits of the Rule will most closely approximate the testator's intent, the spectrum of possible choices is very narrow, hardly worth litigating. Try it out on half a dozen cases and see.*] Moreover, it might mean that the judge could rewrite the will in a manner which would be entirely unpredictable. [*Same comment. The court is limited by the statutory requirement to provide the closest approximation to the testator's intent. The spectrum is narrow.*] Doubtless, even this would be preferable to holding the future interest totally void. [*Agree.*] The alternative to a blanket provision would be a number of specific statutes which would take care of particular situations commonly arising. Then, as new situations arise which would appear to be sufficiently common to call for a rule, other specific statutes dealing with them could be enacted. [*The problem is one of legislative practicality. It is very, very hard work to get one of these statutes passed—and to come back for amendments 'as new situations arise' is just asking too much of overworked committees.*] Of course, it would also be possible to have the specific provisions, and, in addition, a blanket statute to take care of cases not within any of the particular provisions." [*I agree one hundred per cent—provided that this kind of statute can be drafted in such a way that legislatures will enact it, which means that they must understand it. There's only one way to find out about this: try. Simes is in California, not far from Sacramento. Let's go.*] [68]

Sparks considers the Vermont statute a "dangerous provision." And what is the danger? That there might result "dispositions never intended by the testator or grantor." [69] It is hard for me to take this

[67] LEGISLATORS' HANDBOOK 37.

[68] *Id.* at 37. Three years before the *Legislators' Handbook*, Simes had discussed the same problem in his PUBLIC POLICY AND THE DEAD HAND 74-79 (1955). At that time he elaborated the statement in the *Legislators' Handbook* but added, "it is my conclusion that no blanket cy pres provision should be included in perpetuities legislation." I can only infer, and certainly hope, that the omission of that sentence in the *Legislators' Handbook* was intentional and significant.

[69] Sparks, *supra* note 61, at 498.

"danger" seriously when (a) the court is restricted to dispositions most closely approximating the testator's intention, and (b) the alternative is to strike down the gift entirely and give the property to somebody completely outside the testator's scope of donative intent.

I cannot find that anyone else has indicated doubts about the cy pres statutes, so it would seem that all we have to do now is get cracking with the legislatures.

How Can the Nonspecialist Lawyer or Legislator Reach a Conclusion?

There is a danger in this welter of law review articles, published lectures, ABA proceedings, and handbooks by perpetuities specialists. It is that the nonspecialist will say, "How can I judge the merits of this controversy? My field is corporations—or trial practice, or tax. Each of these pros sound plausible—until you read what the other fellow says—and they do get pretty excited, don't they? So, a plague on both their houses; I'll think of something else."

There is an answer to this. In any case where you find a controversy between specialists, try to find a group of other specialists who are clearly qualified, disassociated personally and professionally from the controversy, and who have made a study of the issues and come up with answers.[70]

The Law Reform Committee, appointed by the Lord Chancellor, includes four justices of the High Court of Justice, three practicing barristers (including the author of a standard text on real property), two practicing solicitors, and three law professors from leading English universities. In 1954 they were charged by the Lord Chancellor with considering the Rule Against Perpetuities. After two years of study they presented a thirty-five-page *Report* containing twenty-two recommendations for legislation which can be found in the *Legislators' Handbook*.[71] The recommended legislation includes adoption of wait-and-see provisions and, despite rejection of broad-scale cy pres, accomplishes the same result by statutory provisions which in my judg-

[70] This applies in other fields, *e.g.*, the currently raging controversy as to the adequacy of American military strength. The controversy involves the White House, the Pentagon, Capitol Hill, and all candidates for the Presidency. No one directly involved can be clearly absolved of bias of one kind or another. But when you get groups like the Rockefeller Brothers Committee (privately organized and financed) and the Gaither Committee (appointed by the President) coming up with answers which all go in one direction, some confidence in their conclusion is justified.

[71] Pp. 8-9. But the *Handbook* does not include the 30 pages of extremely informative analysis of the defects of current law with which I am completely in accord For my comment on the *Report* see *Perpetuities Reform by Legislation: England*, 70 Harv. L. Rev. 1411 (1957), reprinted as Appendix III to Leach & Tudor, *op. cit. supra* note 66, at 217.

ment are somewhat too complex for enactment in many American states.[72]

It may be inferred that the anti-reformists don't like this *Report* but don't quite know what to do about it. Sparks doesn't mention it in the attacks on wait-and-see legislation contained in his annual chapters for the *Survey of American Law* or in his 1959 article on "A Decade of Transition in Future Interests." Mechem doesn't mention it in his 1959 article in this *Review*. Bordwell's 1956 article surely went to press before the *Report* (November, 1956) was available, but he has been quiet as a mouse on the subject in the intervening three years. Simes includes the Summary of Recommendations in the *Legislators' Handbook* but does not attempt to answer the *Report* in his Appendix IV opposing wait-and-see statutes. For those interested the item can be had from Her Majesty's Stationery Office, London, for 1s 6d.

Appearances Notwithstanding, This Is Serious Business

There has been a good deal of fun and games about the last few years of running debate. I started this by hamming up a couple of 1952 articles—consciously, to get people to read them and thus attract attention to the problem. (As Senator James Hamilton Lewis of Illinois used to say about his pink beard, anything that attracts attention is good; you would rather have it dignified, but you don't always have a choice.) Then Bordwell and Mechem joyfully entered the act, turning the hose on me personally; I am flattered by this and enjoy it, especially as it gives me a free hand in returning buffet for buffet among a small fraternity of old friends.[73]

But enough is enough. These issues have been debated *ad nauseam*. There hasn't been a new idea in at least two years—including the present Article which is mostly a rehash of already available material.

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[72] The reader may ask why there has been no Act of Parliament in view of this unanimous Committee Report? A good question, to which the answer requires more than usual understanding of Parliamentary procedures. First, a bill must be drafted; and this is the prerogative of parliamentary officials and is not permitted to the committee. Second, either the bill must become a government measure (in competition with the overwhelmingly important public issues of the day) or a private member's bill (and private members get time only by ballot and must then choose priority for this time). See Thornely, *Property Law—The Rule Against Perpetuities—Reform*, 1957 Cambridge L.J. 30, 34. Lest we become too sanguine it is worth remembering that § 163 of the Law of Property Act (reducing to 21 excessive age contingencies) was proposed by a Royal Commission in 1832 but not enacted until 1925. They don't rush things in the Old Country.

[73] On submitting this Article I sent copies to Professors Bordwell, Mechem, Simes and Sparks, offering to delete any passages they found personally offensive and suggesting that they make any desired reply in the same issue of this *Review*. Two deletions were made; and Professor Mechem has accepted the invitation to make a reply.

Simes warned against precipitate action and counselled careful study; but that was six years ago, and the possibilities of fruitful study have long since reached the point of diminishing returns. The English Law Reform Committee, Simes' book, Waterbury's compendious article, the *Legislators' Handbook,* and miscellaneous familiar items have exhausted this mine. The last thing we need is a committee study—that perfect prescription for inaction [74]—except a very small committee in a particular state with the definite objective of immediate statutory reform, as recommended by Dean Niles for New York.

So let's stop playing blocks and cutting paper dolls and join together in the practical business of making law. The law reviews have done all they can in this type of situation: creating (or destroying) the climate for reform, and identifying goals. But reform will be carried out by individual state legislatures acting upon committee reports concerning bills which have been thoughtfully and professionally drafted and which some legislator has been induced to put in the hopper and sponsor. This takes leg work and lobbying in the best sense—that is, using the instrumentalities of democracy selflessly in the public interest. It is a state by state matter and must be handled locally.

I have already suggested that Mechem and Simes can and should go to work at Harrisburg and Sacramento, respectively. (The California bar is still buzzing with indignation about the *Haggerty* case, so the climate for reform there is presently propitious.) Sparks can do the same in Albany, and Dean Niles is obviously eager to assist. Waterbury was legislation-minded when he was at Montana,[75] and his current home state of Minnesota could use his help. Bordwell's deep learning and great prestige could bring order to New Jersey or Iowa law. Schuyler has dipped his toe in the water by actually drafting a statute (though my experience leads me to think it is too complex for

[74] Sometimes a look at history is helpful. In quest of funds for his expedition, Columbus arrived in the royal city of Cordova on January 20, 1486. He first was granted audience by Ferdinand and Isabella in May of the same year, whiling away the interval by acquiring a mistress and begetting a son. Ferdinand was unimpressed but Isabella gave credence to Columbus' "new-fangled" ideas. In the early summer of 1486 she appointed a committee to examine into the matter headed by Fray Hernando de Talavera. The committee reported favorably late in 1490. The report was attacked on the ground that St. Augustine had said there was no land on the other side of the globe from Europe. (I do not wish to alienate the Catholic vote by analogizing St. Augustine to John Chipman Gray—both great men but both dead a long time.) So what happened? The Queen appointed another committee headed by Bartolome de Las Casas. Las Casas, who seems to have been a "man of action" (any significance in that first name?), reported in a few months. Very shortly, after some tight negotiations, the enterprise was approved, and financed—but not, sad to relate, by the pledging of Isabella's jewels which is a fable concocted in the seventeenth century. 1 MORISON, ADMIRAL OF THE OCEAN SEA 116-37 (1942). Actually a delay of only about five years is par on the course for two committees.

[75] Waterbury, *Montana Perpetuities Legislation—A Plea for Reform,* 16 MONT. L. REV. 17 (1955).

most state legislatures) and could profitably plunge all the way in at Springfield to the benefit of Illinois law.

I do not greatly care what type of statute is enacted. The Vermont statute is in my view the best of the lot, but the Massachusetts-Connecticut-Maine version is quite satisfactory. I sympathize with Schuyler's wish to get rid of the vesting concept, but I doubt that it is worth the effort. I consider it very important to put time limitations, one way or another, on possibilities of reverter and rights of entry. And, with a view to eliminating real clogs on alienability, I believe all states could profitably enact a version of the Pennsylvania Price Act. Any statute prepared by any of the experts mentioned in the previous paragraph will be good, and this goes for several dozen more specialists in the field throughout the country.

The talky-talk phase in this business should be considered at an end. Now let's all do something about it. And let's needle the British in Washington this summer into getting action in Parliament.