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SHOULD THE RULE AGAINST PERPETUITIES DISCARD ITS VEST?*

Daniel M. Schuyler†

I. INTRODUCTORY

THE venerable rule of property known as the rule against perpetuities has recently been subjected to numerous searching and critical analyses, some of which will presently be discussed. Thus far nothing has been published dealing with, and only Professor Simes has touched upon,¹ what seems to the present writer to be the most serious problem engendered by the common law rule in its commonly accepted form, i.e., the notion that the rule is concerned only with remoteness of vesting. It is the purpose of the present discussion to examine the concept of vesting as related to the rule and to attempt to answer the question posed by the title of this article. To accomplish this objective it will be necessary first to advert to the history and purpose of the rule, to consider the application and consequences of violation of the rule in its present form and whether or not it performs a function in modern jurisprudence, and also to review the major criticisms which have thus far been launched against the rule. No attempt will be made to treat statutory substitutes which take the form of prohibitions against the "restraint of the absolute power of alienation"; what follows will be concerned with the common law rule and certain recent modifications of it.

A. Statement, History and Purpose of the Rule

Professor Gray's final pronouncement of the rule, that "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest,"²

*This article is being published in two instalments.—Ed.

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¹ SIMES, PUBLIC POLICY AND THE DEAD HAND 67-68, 80-82 (1955). The author wishes to acknowledge his indebtedness to Professor Lewis M. Simes for his careful examination and analysis of the manuscript and for his helpful suggestions in connection therewith.

² GRAY, THE RULE AGAINST PERPETUITIES, 4th ed., §201 (1942) (hereinafter cited as GRAY).

has of course become the rubric within which all future interests must fall in order to be valid. To the layman it would surely seem singular that a rule of high public policy, the very purpose of which is to devastate intention, should be couched in unintelligible abstractions. Indeed, the lawyer who remembers his law school struggles with "lives in being" and "vesting" may not view the rule very differently. Perhaps, however, the lawyer may find comfort in Holmes' epigram (uttered in another connection) that "a page of history is worth a volume of logic."³ For Gray's statement of the rule, with all of its infirmities, is probably as good a shorthand restatement as could be made of the patchwork of decisions extending over a period of more than two centuries, which, taken as a whole, constituted the common law's assessment of where the line should be drawn as to the length of time that title-clogging future interests might remain extant. Thus, except in historical perspective, one may doubt that very much sense could be made of the rule against perpetuities—or for that matter of many rules of property. It is too much to expect that the ultimate composite of the judgments of a large number of judges of different eras and backgrounds, none of whom could be certain of his final objective, should be a model of logic. In fact, it ought to be a source of wonderment, and it is a very great tribute to the common law, that the rule against perpetuities is as logical as it is.

Since the history of the rule—which is inseparably interwoven with its purpose—has been admirably outlined in Gray's treatise,⁴ it need not long detain us here. It should, however, be observed that no rule against perpetuities would be necessary in a system of law which recognized no future interests. This is so because the rule is not a rule against restraints on the alienation of property. The rules against restraints on alienation are concerned mostly with direct restraints; the rule against perpetuities deals with the indirect restraints created by future interests. It is not strange, therefore, that the rule against perpetuities did not take firm root until shortly after the decision in 1620 in *Pells v. Brown*⁵ where the indestructibility of the executory inter-

³ *New York Trust Co. v. Eisner*, 256 U.S. 345 at 349 (1921) (federal estate tax of 1916 held constitutional).

⁴ GRAY, 126-176.

⁵ Cro. Jac. 590, 79 Eng. Rep. 504 (1620). Except for *Smith v. Warren*, Cro. Eliz. 688, 78 Eng. Rep. 924 (1599), earlier cases appear to have held conditional limitations to be destructible. GRAY, §§142-147.

est seems first to have been unequivocally recognized. Destructible future interests had not offered the alluring and mischievous possibility of endless dead-hand control which the judges were quick enough to see lurking in the shadow of a future interest which could never be destroyed and which might, unless contained, impair a title for a thousand years or even more. Nor is it strange that the judges who participated in the construction of the confining mechanism were unwilling to fix its limits at the beginning.⁶ Rather it is to their credit that they recognized the limits on their oracular capacities and took the matter step by step.⁷

B. *Application and Effect of the Rule*

Although the rule seems clearly to have been designed to further the marketability and development of real property and hence the economic welfare of an agrarian society,⁸ there is no doubt that it applies with equal force to legal interests in personalty.⁹ It applies also to equitable interests in real and personal

⁶ *The Duke of Norfolk's Case*, 3 Ch. Cas. 1 at 36, 22 Eng. Rep. 931 (1681): "They will perhaps say, where will you stop, if not at *Child and Bayly's Case*? *Answ.* Where? why everywhere, where there is not any Inconvenience, any Danger of a Perpetuity; and whenever you stop at the Limitation of a Fee upon a Fee, there we will stop in the Limitation of a Term of Years. . . . Now the *Ultimum quod sit*, or the utmost Limitation of a Fee upon a Fee, is not yet plainly determined; but it will be soon found out, if Men shall set their Wits on Work to contrive by Contingencies to do that, which the Law has so long laboured against; the Thing will make it self evident, where it is inconvenient, and, God forbid, but that Mischief should be obviated and prevented." Per Lord Chancellor Nottingham.

⁷ In *The Duke of Norfolk's Case*, 3 Ch. Cas. 1 at 36, 22 Eng. Rep. 931 (1681), Lord Chancellor Nottingham interpreted *Wood v. Sanders*, 1 Ch. 131, 22 Eng. Rep. 728 (1669), as holding that a contingency "wearing out in the Compass of two Lives in Being, the Remainder over . . . might well be limited upon it." See also *Lloyd v. Carew*, Show. Parl. Cas. 137, 1 Eng. Rep. 93 (1697). More lives were allowed in *Scatterwood v. Edge*, 1 Salk. 229, 91 Eng. Rep. 203 (1699), and in *Thellusson v. Woodford*, 11 Ves. 112, 32 Eng. Rep. 1030 (1805), it was established that any number of lives reasonably capable of ascertainment could be selected. The 21-year period in gross was an outgrowth of the holding in *Stephens v. Stephens*, Cas. T. Talb. 228, 25 Eng. Rep. 751 (1736), where an interest which might not vest until the expiration of a life in being and the minority of the taker was held good. In *Cadell v. Palmer*, 1 Cl. & Fin. 372, 6 Eng. Rep. 956 (1833), it was held that a 21-year period in gross could be added to lives in being.

⁸ 6 AMERICAN LAW OF PROPERTY 13-14 (1952) (hereinafter cited as AMERICAN LAW OF PROPERTY); CAREY AND SCHUYLER, ILLINOIS LAW OF FUTURE INTERESTS §475 (1941) (hereinafter cited as CAREY AND SCHUYLER); GRAY, §§119, 268; MORRIS AND LEACH, THE RULE AGAINST PERPETUITIES 13-18 (1956) (hereinafter cited as MORRIS AND LEACH); SIMES, PUBLIC POLICY AND THE DEAD HAND 33-40 (1955); SIMES AND SMITH, THE LAW OF FUTURE INTERESTS, 2d ed., §1212 (1956) (hereinafter cited as SIMES AND SMITH).

⁹ GRAY, §§202, 323; MORRIS AND LEACH, 12; SIMES AND SMITH, §1235.

property even in instances where a trustee has an unrestricted power of sale,¹⁰ and the argument has been forcefully put forward that it should apply to the duration of trusts even though all outstanding interests are irrevocably vested.¹¹ The acceptance of Gray's notions as to the scope of the rule, however, would preclude its application to the duration of trusts per se and would require the conclusion that a trust could last forever if all of the future interests created by it were certain to vest within the limits of time.¹² But even Gray and his disciple, Professor Kales, were dissatisfied with this view and suggested that some rule akin to the rule against perpetuities should apply to the postponement of the enjoyment of vested equitable future interests.¹³ As to this point, no clear-cut rule of decision exists¹⁴ and scholars are not in agreement,¹⁵ so it remains a hazy area in a field of law with respect to which long years of trial and error have developed a good deal of certainty concerning many of its other phases.

Without attempting to be exhaustive, but speaking with greater particularity, the rule applies, where future interests are remote, to contingent executory interests and to contingent remainders, at least where these are rendered indestructible by protective legislation.¹⁶ As a result, the rule is of course applicable to contingent class gifts and in this connection it is important to note that, in its orthodox sense, the rule demands not only that a class gift vest within the prescribed period but also that the precise shares of each member of the class be determined within that time.¹⁷ It applies also to options in gross to purchase property,¹⁸ to the creation and exercise of powers of appointment¹⁹

¹⁰ GRAY, §269; SIMES AND SMITH, §1249.

¹¹ SIMES AND SMITH, c. 40. And see MORRIS AND LEACH, 311-316.

¹² GRAY, §412. And see *id.*, §§232-246.

¹³ *Id.*, §§121.1 to 121.8; KALES, FUTURE INTERESTS, 2d ed., §§658-661, 677, 681, 732-741 (1920).

¹⁴ SIMES AND SMITH, §1393 at 245-247. And see CAREY AND SCHUYLER, §§478, 480; *id.*, 1954 Supp., §§478, 480.

¹⁵ SIMES AND SMITH, §1391, n. 2.

¹⁶ *Executory interests*: GRAY, §§160-164; SIMES AND SMITH, §1238. *Contingent Remainders*: CAREY AND SCHUYLER, §496; GRAY, §§284-286; MORRIS AND LEACH, 197-203; SIMES AND SMITH, §1237.

¹⁷ 6 AMERICAN LAW OF PROPERTY, §24.26; CAREY AND SCHUYLER, §497; GRAY, §§369-375; MORRIS AND LEACH, 95-96, 118-125; SIMES AND SMITH, §1265.

¹⁸ 6 AMERICAN LAW OF PROPERTY, §24.56; CAREY AND SCHUYLER, §492; GRAY, §§275-275.1; MORRIS AND LEACH, 213-215; SIMES AND SMITH, §1244.

¹⁹ 6 AMERICAN LAW OF PROPERTY, §§24.32-24.33; CAREY AND SCHUYLER, §483; GRAY, §§510-540; MORRIS AND LEACH, 131-150; SIMES AND SMITH, §§1271-1276.

and in England and perhaps in some American states to fiduciary powers.²⁰ It even applies to charitable gifts which may not take effect until too remote a time except in cases where the remote gift follows a valid prior gift to charity.²¹

Since the rule is supposed to be concerned only with remoteness of vesting, it has no application to reversions or vested remainders,²² nor indeed to those executory interests which, at least for convenience, may for the moment be referred to as "vested."²³ Rights of entry,²⁴ possibilities of reverter,²⁵ resulting trust interests²⁶ and options appendant to long term leases,²⁷ however remote, have not generally been regarded in this country²⁸ as subject to the rule.

The non-application of the rule to the contingent future interests to which reference is made in the last sentence of the preceding paragraph seriously undermines the logic of the concept of the rule as one which is applicable to remote contingent interests and inapplicable to vested interests. That this is not the only illogical aspect of the rule will be more particularly shown when the requirement of absolute certainty of vesting is discussed. For the moment it is sufficient to recall that the rule insists that in testing the validity of a future interest we must determine whether, at the time the interest was created, there was any possibility, however remote, that the interest might not vest within the limits of time.²⁹ If, according to this test, a future interest is found to violate the rule, absolute invalidity is the consequence, no matter how devastating this may be to the inten-

²⁰ 6 AMERICAN LAW OF PROPERTY, §24.63; CAREY AND SCHUYLER, §484; GRAY, §§487-509.19; MORRIS AND LEACH, 225-235; SIMES AND SMITH, §1277.

²¹ 6 AMERICAN LAW OF PROPERTY, §§24.38-24.40; CAREY AND SCHUYLER, §491; GRAY, §§589-607; MORRIS AND LEACH, 179-188; SIMES AND SMITH, §§1278-1287.

²² 6 AMERICAN LAW OF PROPERTY, §24.19; GRAY, §205; SIMES AND SMITH, §1235.

²³ 6 AMERICAN LAW OF PROPERTY, §24.20; CAREY AND SCHUYLER, §480; SIMES AND SMITH, §1236.

²⁴ 6 AMERICAN LAW OF PROPERTY, §24.62; CAREY AND SCHUYLER, §493; GRAY, §§304-310; MORRIS AND LEACH, 205-206; SIMES AND SMITH, §1238.

²⁵ 6 AMERICAN LAW OF PROPERTY, §24.62; CAREY AND SCHUYLER, §493; GRAY, §313; MORRIS AND LEACH, 205-206; SIMES AND SMITH, §1239.

²⁶ CAREY AND SCHUYLER, §495; GRAY, §327.1; SIMES AND SMITH, §1240.

²⁷ 6 AMERICAN LAW OF PROPERTY, §24.57; CAREY AND SCHUYLER, §492; GRAY, §230.3; SIMES AND SMITH, §1244.

²⁸ In England rights of entry are subject to the rule. MORRIS AND LEACH, 205. So are possibilities of reverter but according to only one case. *Hopper v. Corporation of Liverpool*, 88 S.J. 213 (1944). The English cases also hold that an option given a tenant for years to purchase the fee is bad if exercisable at too remote a time. GRAY, §230.3, n. 1.

²⁹ 6 AMERICAN LAW OF PROPERTY, §24.21; GRAY, §214; MORRIS AND LEACH, 68-89; SIMES AND SMITH, §1228.

tion of the maker of the instrument of gift.³⁰ Moreover, in some jurisdictions at least, if the invalid attempt to create a future interest is regarded as inseparably interwoven with prior and otherwise valid gifts, these too will be void.³¹ Thus the rule is not only illogical in some of its applications and non-applications, but it is also characterized by extreme harshness when it is transgressed.

C. *Does the Rule Perform a Modern Function?*

Even the briefest consideration of the original purpose and development of the rule and of its present day form and application is enough to induce the conclusion that a program to modernize the common law rule against perpetuities may well be apropos. Certainly there is virtually automatic justification for reappraisal of any rule of law which had its origin almost three and a half centuries ago in a totally different social order. And, if that were not enough, the peculiarities of old age that have come to characterize the rule, its stringent and relentless effects, its unnecessarily punitive qualities, and, above all in the opinion of the writer, the notion that the mortal results of its application or non-application should be made to depend upon the occult concept of vesting—all of these factors—combine to signalize the worth of probing deeply in search of possible improvements. But one should first be satisfied that some rule against perpetuities has modern utility. For, if there is no present need to limit the time when future interests vest in possession or otherwise, then the rule should simply be abolished.

Of course, no responsible person would advocate that an ancient common law rule of property should be summarily jettisoned, but it by no means follows from the mere age of a rule that its non-retroactive abandonment will be attended with undue disturbance. Illustrative of this is the abrogation in England and in many American jurisdictions, after careful consideration, of the rule in *Shelley's Case*³² and the rule of destructibility of contingent remainders.³³ In neither instance have any untoward

³⁰ 6 AMERICAN LAW OF PROPERTY, §24.44; GRAY, §§629-631; MORRIS AND LEACH, 239-242; SIMES AND SMITH, §§1288-1290.

³¹ 6 AMERICAN LAW OF PROPERTY, §§24.48-24.52; CAREY AND SCHUYLER, §§180-181; GRAY, §§247-249.9; MORRIS AND LEACH, 162-165; SIMES AND SMITH, §§1262-1264.

³² SIMES AND SMITH, §§1563-1568.

³³ *Id.*, §§207-208.

consequences been apparent. Experience would thus justify the abolition of the rule against perpetuities if one could honestly conclude that there is no present need to limit the time when future interests should vest in possession or otherwise. This problem has received distinguished attention,³⁴ but no one has yet suggested that no rule against perpetuities should be retained. Indeed, although Professor Simes declines to accept the conventional rationalizations of the rule, his thoughtful and thoroughgoing treatment of this subject³⁵ closes with a defense of some rule against perpetuities which is unlikely to be pierced in the foreseeable future. It would of course be superfluous to review his arguments in detail here, but it will serve a purpose to summarize them briefly and to offer a few comments concerning them.

Professor Simes first analyzes the rule against perpetuities in terms of its original purpose, i.e., as Gray put it, "forwarding the circulation of property which it is its policy to promote."³⁶ Professor Simes concludes that the essence of the rationale of the rule, as advanced in the English cases and by such eminent authorities as Jarman, Lewis and Gray, is this: "The Rule against Perpetuities furthers alienability; if it were not for this Rule, property would be unproductive and society would have less income."³⁷ But this is no longer true, Professor Simes argues, for modern dispositions of substantial wealth are for the most part dispositions of securities in trust. And even if the trustee does not have an unrestricted power of sale according to the trust instrument or by statute, equity can permit the sale of trustee property which has become unproductive. Moreover, quite apart from this doctrine, where corporate shares or bonds are held in trust, property owned by the corporation is freely alienable. Professor Simes also shows that English legislation (which could be adopted in American jurisdictions in lieu of a rule against perpetuities) has in effect abolished legal future interests and made all future interests equitable, at the same time allowing only two legal estates in land, the fee simple absolute and the term for years. If a "trust for sale," pursuant to which trustees are required to sell realty

³⁴ Fraser, "The Rationale of the Rule Against Perpetuities," 6 MINN. L. REV. 560 (1922); MORRIS AND LEACH, 13-18; SIMES, PUBLIC POLICY AND THE DEAD HAND 32-71 (1955).

³⁵ *Id.* at 40-63.

³⁶ GRAY, §2.1.

³⁷ SIMES, PUBLIC POLICY AND THE DEAD HAND 36 (1955).

is not created, a "settlement" is, and where there is a settlement, "there is always some person, usually the life tenant, who has power to sell in fee simple."³⁸ The proceeds will be held in trust for the benefit of those who were originally given an interest in the property in question. Professor Simes concludes that, "In England, when property is affected by a future interest, there is, in nearly all cases, some person who can sell absolutely or in fee simple."³⁹ Accordingly, if the policy of the rule against perpetuities is merely to further alienability, that policy is satisfied by the English legislation just described and can be as well satisfied by like legislation in any jurisdiction which recognizes future interests. In addition, Professor Simes points to the expanding concepts of the power of eminent domain, especially as illustrated by the English Town and Country Planning Act of 1947,⁴⁰ which seems to permit anyone interested in acquiring property for more productive use to do so where the intended use is practicable and approved as a part of a development plan. In such a case land can be acquired by a governmental board and turned over to the individual who proposes to improve it. Kindred legislation exists also in this country⁴¹ and, since it relies for its implementation on the power of eminent domain, it has an overbearing effect on outstanding future interests and hence tends to minimize the need for a rule against perpetuities as a means of confining the clogging effect of future interests.

A second rationalization which has been advanced in favor of a modern rule against perpetuities is the notion that such a rule tends to prevent undue private concentrations of wealth. Professor Simes rejects this as a justification for the rule since he feels that, "undue concentration of wealth is an evil which can best be combatted by tax legislation, rather than by perpetuity rules."⁴²

Finally, it has been suggested that, "limitations unalterably effective over a long period of time would hamper the normal

³⁸ *Id.* at 45.

³⁹ *Id.* at 46.

⁴⁰ 10 & 11 Geo. 6, c. 51 (1947), discussed by SIMES, *PUBLIC POLICY AND THE DEAD HAND* 48-52 (1955). See especially *Hanily v. Minister of Local Government & Planning*, [1952] 2 Q. B. 444.

⁴¹ See, e.g., Ill. Rev. Stat. (1955) c. 671½, §§63-91 (Blighted Areas Redevelopment Act); 65 N.Y. Laws (McKinney Unconsol. 1949) tit. 11, §3301 et seq. (Urban Redevelopment Corporations Law).

⁴² SIMES, *PUBLIC POLICY AND THE DEAD HAND* 57 (1955).

operation of the competitive struggle."⁴³ In other words, in the absence of any rule against perpetuities, natural selection resulting from survival of the fittest, would be jeopardized. This Professor Simes also dismisses as a valid vindication of the rule. If it is unsound to permit the unfit to be protected for many generations, then why shelter even one generation? Moreover, the idea that the weak should be weeded out in the economic struggle is inconsonant with the "elaborate welfare machinery" afforded by modern society which is "not organized on a theory of survival of the fittest, but of survival of the weak."⁴⁴

Despite the foregoing, Professor Simes concludes that there is a true basis for a rule against perpetuities in that, "It is socially desirable that the wealth of the world be controlled by its living members and not by the dead."⁴⁵ In furtherance of this position he points to the tendency toward stagnation which would result from perpetual dead-hand control, if only in the limitations which this would place upon the venturing of risk capital and indeed upon the expenditure of capital for consumer goods, which, under certain circumstances, may be very desirable from a social point of view. Finally, the dead hand could, through the mechanism of shifting interests, impose standards of conduct on beneficiaries for generations to come if there were no limit upon the time when future interests could take effect.

As to dispositions in trust one may agree with Professor Simes that the rule against perpetuities cannot be rationalized today in terms of furthering alienability when the trustee has an express power of sale. Likewise, in non-trust gifts, it is true that legislation, similar to the English legislation described above and insuring the existence in some person of a power to convey land free of future interests, would eliminate the need for a rule against perpetuities concerned solely with the marketability of real estate. But not all trusts contain powers of sale and many American states do not have statutes creating fiduciary powers of sale as a matter of law. Nor do courts of equity freely direct the sale of trust property where no such power exists⁴⁶ and even if they did the encumbrance created by the necessity of resort to the judicial process is not lightly to be ignored. Furthermore, it is not

⁴³ 4 PROPERTY RESTATEMENT 2132 (1944).

⁴⁴ SIMES, PUBLIC POLICY AND THE DEAD HAND 58 (1955).

⁴⁵ *Id.* at 59.

⁴⁶ 2 SCOTT, TRUSTS, 2d ed., §§167, 190.4 (1956).

likely that many American legislatures could readily be induced to go as far as the British Parliament did in limiting the freedom of settlors and testators to impose, upon property dispositions, restrictions in the form of future interests which have long been recognized.⁴⁷ And certainly, in the area of public control of property, most American states are not yet prepared to go as far as the British did in the English Town and Country Planning Act of 1947. One may therefore differ with Professor Simes' statement that, "if . . . alienability to secure productivity is the sole purpose of the Rule against Perpetuities, then we have reached a point where the Rule should be completely abolished."⁴⁸ Of course, on the assumption that substitutionary legislation of the type described would be adopted, one would be less inclined to quarrel with this position. But before this can come to pass a great deal of legislative inertia must be overcome; meanwhile the rule still seems to serve some of its original purpose.

Whether a rule against perpetuities is warranted for the more metaphysical reason that, somewhat like the Sherman Act, it furthers a healthy competition is obviously open to debate. As opposed to Professor Simes' expressed reasons for disbelief in this as a ground for retention of the rule, it can be argued that although the desire to protect one's immediate family should be sanctioned as an incentive to productivity, this must be balanced against the undesirability of cloaking generation after generation of weaklings with the security of a great fortune. This is not, as Professor Simes argues, inconsistent with present day "welfare" thinking, for the proponents of security want security for all—not just for a select few. So it is not entirely illogical to urge that even in a welfare state the rule against perpetuities performs the societal function of striking a fair balance between what Professor Leach has called the "dynastic impulses" of the very wealthy and a reasonable and commonly shared aspiration that children and grandchildren be spared some of the struggle undergone by their ancestors. However, whatever one's conclusion in this regard may be, there is much to be said for Professor Simes' view that this balance should be maintained through the taxing process and not by a rule of property.

⁴⁷ In addition to the Town and Country Planning Act, note 40 *supra*, see the Law of Property Act, 15 Geo. 5, c. 20 (1925), the Settled Land Act, 15 Geo. 5, c. 18 (1925) and the Trustee Act, 15 Geo. 5, c. 19 (1925), all discussed in SIMES, PUBLIC POLICY AND THE DEAD HAND 44-51 (1955).

⁴⁸ *Id.* at 53.

With Professor Simes' judgment that too much control of the living by the dead is undesirable and that the rule against perpetuities is desirable because it tends to prevent the dead hand from reaching too far into the future, no sensible person could disagree. The analogy that he draws between testamentary restrictions and "special legislation, written by the dead hand, applicable only to particular persons and property, and as unchanging as the ancient laws of the Medes and Persians,"⁴⁹ is persuasive. So is his argument that, by restricting the dead hand, the rule tends to free risk capital, which is a necessity unless our basic economic concepts are to be abandoned. Acceptance of this point of view leads at once to agreement with Professor Simes' broader conclusion that some rule against perpetuities is needed. More especially is this true if one believes, as has been suggested above, that the rule still performs a function in furthering the alienability of property and that it perhaps serves at least some role in promoting competition. If these things are so, our attention may appropriately be directed toward seeking to adapt the rule to its modern setting.

II. CRITICISMS OF THE RULE AND SUGGESTED REFORMS

Most of the major criticisms which have been directed at the rule against perpetuities are interrelated. It is therefore virtually impossible, as will be apparent from the discussion which follows, completely to separate one indictment from another. However, in the interest of clarity, an effort will be made to categorize, so far as possible, and to illustrate in concrete terms the reason for, the scholarly assaults which have been made upon the rule during the past several years. Reforms which have been suggested will then be considered in conjunction with examples of the evils they are designed to cure. Finally, an attempt to weigh the efficacy and practicability of these suggestions will be made before specific treatment of the problems created by the rule's concern with remoteness of vesting is undertaken.

A. *The Rule Is Illogical and Harsh*

1. *In the Period Which It Specifies.* As it finally crystallized, the rule against perpetuities requires that future interests must vest within lives in being and 21 years from the date of their creation. Any number of measuring lives having no relationship

⁴⁹Id. at 38.

to the dispositions in the instrument of gift⁵⁰ may be selected, provided that they and the time when they come to an end are reasonably capable of ascertainment.⁵¹ The 21-year period may be a period in gross unrelated to any measuring lives or to the minorities of any potential takers.⁵² A child who is conceived is a life in being for purposes of the rule and therefore the period or periods⁵³ of gestation of a child or children *en ventre* is often in a sense added to the period of the rule, but a period of nine months in gross may not be added.⁵⁴

Considering the length of time that the judicial process took to settle upon the period of the rule,⁵⁵ it is questionable whether any clear-cut statement of the reasons for the period ultimately decided upon can be regarded as much more than an *ex post facto* rationalization. It is said, however, that lives in being and 21 years was selected as the prescribed period because the rule was designed to control unreasonable family settlements and it is reasonable that one disposing of property should be able to provide for all of the members of his family whom he knew, and for their children during their minorities.⁵⁶ Whether or not this is a retrospective appraisal it makes good sense, and it has afforded the springboard for suggestions that the period of the rule should in some respects be modified.

Although no severe attacks have been made upon the period of the rule as it affects family dispositions, some proposals for change have been made. In the light of the rationale that a testator should be able to make provision for those whom he knew, it has been suggested that the difficulty of ascertaining and tracing large numbers of unrelated lives may call for some further restriction on the number of measuring lives that may be selected.⁵⁷ It has also been suggested that draftsmen could be more

⁵⁰ *Thellusson v. Woodford*, 11 Ves. 112, 32 Eng. Rep. 1030 (1805).

⁵¹ *Re Villar*, [1929] 1 Ch. 243 (all the lineal descendants of Queen Victoria living at testator's death). Compare *Re Leverhulme*, [1943] 2 All E. R. 274 at 280-281: "As a result of my decision the clause in question can still be validly employed in the case of a testator dying in 1925; but I do not at all encourage anyone to use the formula in the case of a testator who dies in the year 1943 or at any later date." Per Morton, J.

⁵² *Cadell v. Palmer*, 1 Cl. & Fin. 372, 6 Eng. Rep. 956 (1833).

⁵³ GRAY, §§220-222.

⁵⁴ *Cadell v. Palmer*, 1 Cl. & Fin. 372 at 421, 422, 6 Eng. Rep. 956 (1833). GRAY, §222.

⁵⁵ The rule's development extended over upwards of 200 years from the decision in *Child v. Baylie*, Cro. Jac. 459, 79 Eng. Rep. 393 (1618), and perhaps prior thereto (GRAY, §§153-154) to *Cadell v. Palmer*, 1 Cl. & Fin. 372, 6 Eng. Rep. 956 (1833).

⁵⁶ MORRIS AND LEACH, 65.

⁵⁷ *Id.* at 66-67.

certain of achieving their clients' objectives if, as an alternative to lives in being and 21 years, they were permitted to choose a period in gross of as long as 80 years.⁵⁸ Finally, the view has been advanced that the 21-year period in gross (which Gray thought should never have been extended beyond minorities⁵⁹) is too short, the theory being that if one should be permitted to provide for his grandchildren he should be able to keep capital out of their hands for a longer time than lives in being and the 21-year period in gross may permit.⁶⁰

As to non-family dispositions, uniformity in recommendations for reform has been lacking insofar as time limitations are concerned. As appears later in more detail, the exemption from the rule of possibilities of reverter and rights of entry (which are seldom employed in family settlements) is quite generally thought to be unjustified.⁶¹ Opinion varies, however, as to the extent to which these interests should be subjected to temporal restrictions. Apparently some proponents of reform feel that lives in being and 21 years, at least as an alternative period, would afford an apt time limitation,⁶² despite the fact that a possibility of reverter or a right of entry is almost never established for the purpose of providing for children and more remote issue of the creator of the interest. With respect to options in gross (as distinguished from options appendant to leases which most commentators seem to feel should not be restricted⁶³), proponents of reform would apparently agree that lives in being are inappropriate as a measure of validity, for lives in being would almost always be irrelevant and would constitute an artificial intrusion upon a purely commercial transaction.⁶⁴ But there is disagreement as to whether options in gross should be limited in time at all and if so to what degree.⁶⁵

⁵⁸ Law Reform Committee, Fourth Report, Cmd. 18, at 7, 30 (1956) (hereinafter cited as Law Reform Committee Report).

⁵⁹ GRAY, §§186-188.

⁶⁰ MORRIS AND LEACH, 67-68; SIMES, PUBLIC POLICY AND THE DEAD HAND 68-69 (1955).

⁶¹ Law Reform Committee Report 20-21, 32; MORRIS AND LEACH, 207-211; SIMES, PUBLIC POLICY AND THE DEAD HAND 70-71, 79-80 (1955).

⁶² Law Reform Committee Report 20; MORRIS AND LEACH, 207; Leach, "Perpetuities Legislation, Massachusetts Style," 67 HARV. L. REV. 1349 at 1354-1355, 1362-1365 (1954).

⁶³ 6 AMERICAN LAW OF PROPERTY, §24.57; CAREY AND SCHUYLER, §492; Law Reform Committee Report 19, 32; MORRIS AND LEACH, 218; SIMES AND SMITH, §1244, p. 162. But see GRAY, §230.3.

⁶⁴ 6 AMERICAN LAW OF PROPERTY, §24.56, p. 142; GRAY, §330.3, pp. 367-368, n. 2; Law Reform Committee Report 19-20, 32; MORRIS AND LEACH, 217.

⁶⁵ *Pro*: CAREY AND SCHUYLER, §492; GRAY, §§330 to 330.3; Law Reform Committee

2. *In Its Requirement of Absolute Certainty of Vesting.* As is well known, the rule against perpetuities is a pessimist or an optimist depending upon one's point of view. That is but another way of expressing the rule's requirement that future interests to which it applies must be absolutely certain, at the time of their creation, to vest within the prescribed limits of time. It is not enough that a future interest might or even almost surely would do so; if it was not sure to do so, the interest is bad and indeed was void from its inception. This extraordinarily despairing approach not only invalidates many interests which, if permitted to stand, would have vested within the period of the rule, but it also complicates the mathematical aspects of the rule since one must exhaust all possible assumptions as to births, deaths, and often the happening of other events, to be sure one has done one's sums correctly.⁶⁶ This aspect of the rule, which necessitates (often in retrospect) assumptions of the most improbable possibilities, has generated some fantastic decisions. These in turn have been responsible for Professor Leach's very articulate invectives,⁶⁷ presently to be discussed, against the present rule.

The rigors of the requirement of absolute certainty of vesting cannot, in theory at least, be mitigated through the interpretative process; the formula is that you construe the instrument of gift as though there were no rule against perpetuities. Having thus construed the instrument, you then apply the rule and it is simply unfortunate if its inexorable mathematics destroy the dispositions intended.⁶⁸ In other words, the rule is a rule of

Report 19-20, 32 (21-year period recommended). *Con:* 6 AMERICAN LAW OF PROPERTY, §24.56, pp. 142, 143-145 ("neither lives in being nor a period of twenty-one years, nor both together, have any significance . . ."); Leach, "Perpetuities in Perspective: Ending the Rule's Reign of Terror," 65 HARV. L. REV. 721 at 736-739, 748 (1952); MORRIS AND LEACH, 220.

⁶⁶ 6 AMERICAN LAW OF PROPERTY, §24.21; GRAY, §214; Leach, "Perpetuities in Perspective: Ending the Rule's Reign of Terror," 65 HARV. L. REV. 721 at 728-734 (1952); MORRIS AND LEACH, 68-69; SIMES AND SMITH, §1228.

⁶⁷ Leach: "The Rule Against Perpetuities and Gifts to Classes," 51 HARV. L. REV. 1329 (1938); "Perpetuities: Staying the Slaughter of the Innocents," 68 L. Q. REV. 35 (1952); "Perpetuities in Perspective: Ending the Rule's Reign of Terror," 65 HARV. L. REV. 721 (1952); "Perpetuities Legislation, Massachusetts Style," 67 HARV. L. REV. 1349 (1954); "An Act Modifying and Clarifying the Rule Against Perpetuities," 39 MASS. L. Q. (No. 3) 15 (1954).

⁶⁸ See, e.g., *Pearks v. Mosely*, 5 App. Cas. 714 at 719 (1880): "You do not import the law of remoteness into the construction of the instrument, by which you investigate the expressed intention of the testator. You take his words, and endeavour to arrive at their meaning, exactly in the same manner as if there had been no such law. . . ." Per Lord Selborne.

property and applies irrespective of intention. That only a whimsical grantor or testator would knowingly make a void gift is supposedly of no consequence. Fortunately for many testators (or, more accurately, the intended objects of their bounty), courts frequently, if tacitly, ignore this harsh precept.⁶⁹

The foregoing may be best understood when illustrated in concrete terms. Thus, suppose that *T* by his will gives property in trust to pay the income to *A* for life, and at his death to distribute the corpus of the trust to the eldest son of *A*, living at *A*'s death, who becomes a college graduate.⁷⁰ *A* will have an equitable life estate if he is alive at *T*'s death and an attempt will have been made to create an equitable future interest in his eldest son who survives him and has graduated or does graduate from college. This, however, is invalid even though when *T* dies *A* has ten sons who are all college graduates and even though all of them survive *A*. The requirement of absolute certainty of vesting demands that we assume (no matter if the validity of the interest is not litigated until after *A*'s death) that all of *A*'s sons *might* have predeceased him; that he *might* have had another or more sons; that one or more of these hypothetical afterborns *might* have survived *A*; and that the eldest of these *might* not have graduated from college until more than 21 years after the death of *A* who was a life in being at *T*'s death. Thus the rule is violated, on the basis of hypothetical suppositions, by a future interest which, if allowed to stand, would have vested at *A*'s death—21 years short of the period permitted by the rule. The gift could have been saved, of course, had the draftsman referred to "the eldest son of *A* *who is living at T's death* and who survives *A*," for then whoever took the gift would have been a life in being at *T*'s death. But that was not done, and, under orthodox views of the rule, the italicized words cannot be added or implied by construction.

Another illustration of the requirement of absolute certainty of vesting is to be found in the so-called "unborn widow" cases. Suppose a testamentary gift by *T* to *A* for life, remainder to his widow for life, remainder to such of *A*'s children as are living at the death of the widow. *T* has always been fond of *A*'s wife,

⁶⁹ 6 AMERICAN LAW OF PROPERTY, §24.45; CAREY AND SCHUYLER, §508; GRAY, §633; MORRIS AND LEACH, 242-245; SIMES AND SMITH, §§1288-1290.

⁷⁰ Cf. *Abbiss v. Burney*, 17 Ch. Div. 211 (1881), where the gift over was "unto such son of *William MacDonald*, Archdeacon of *Wilts*, as should first attain the age of twenty-five years. . . ."

W, who is alive when *T* makes his will and who also survives *T*. *A* is 65 when *T* dies; *W* is 63. *A* and *W* have four children ranging in age from 32 to 40. *A* predeceases *W* who later dies leaving the four children surviving her. Thus, if allowed to take the property willed to them, the children would take 21 years before the expiration of the period of the rule because *A* and *W* were both lives in being at *T*'s death. The ulterior gift to the children is nevertheless void.⁷¹ The rule requires the assumption that *W* might predecease *A*, that *A* might marry a woman unborn at *T*'s death, that she might have children by *A* and that she might live for more than 21 years after the death of the last to die of *A* and all of his children by *W*. *A*'s children by his second marriage would then be the ultimate takers and, since the gift to *A*'s children was to such of them "as are living at the death" of his widow, their "interests" would not have vested within the period of the rule. These assumptions present the rule in one of its most illogical aspects, for under the facts supposed it is clear indeed that when *T* referred to *A*'s "widow" he meant *W* who was a life in being. If the draftsman had said that, or if a court so interpreted the will, the gift over to the children would be good.

Proponents of reform argue that since proper draftsmanship would have prevented both of the gifts above supposed from being destroyed, the rule is illogical in striking down a future limitation which, had it not been invalid, would in fact have vested well within the limits of time.⁷² This being so, the argument runs, the spirit of the rule is not violated. The rule is thus too harsh since it visits "venial faults with oppressive retribution."⁷³

3. *In Accepting Fantastic Hypotheses.* Closely related to the

⁷¹ 6 AMERICAN LAW OF PROPERTY, §24.21; GRAY, §214; MORRIS AND LEACH, 70-71; SIMES AND SMITH, §1228 at 119-120.

⁷² 6 AMERICAN LAW OF PROPERTY, §§24.21 to 24.23; Law Reform Committee Report 8-9, 10-12, 15-16; MORRIS AND LEACH, 73-74, 79-81, 83-89. See also, in addition to Professor Leach's articles, cited note 67 supra, the following: notes, 60 HARV. L. REV. 1174 (1947); 97 UNIV. PA. L. REV. 263 (1948); Bregy, "A Defense of Pennsylvania's Statute on Perpetuities," 23 TEMP. L. Q. 313 (1950); Newhall, "Doctrine of the 'Second Look,'" 92 TRUSTS AND ESTATES 13 (1953); Tudor, "Absolute Certainty of Vesting under the Rule Against Perpetuities—A Self-Discredited Relic," 34 BOST. UNIV. L. REV. 129 (1954); Cohan, "The Pennsylvania Wait-and-See Perpetuity Doctrine—New Kernels from Old Nutshells," 28 TEMP. L. Q. 321 (1955); Bogert, "Public Policy and the Dead Hand: A Special Book Review," 6 DEPAUL L. REV. 51 (1956).

⁷³ Per Cardozo, J., in *Jacob & Youngs, Inc. v. Kent*, 230 N.Y. 239 at 242, 129 N.E. 889 (1921), a contract case holding that the contractor would not be denied recovery because of an insignificant deviation from specifications.

rule's requirement of absolute certainty of vesting is its acceptance of fantastic hypotheses, both prospectively and retroactively. Some of the most notorious of these owe their notoriety to Professor Leach's picturesque and playful sobriquets. Those which appear to have piqued him the most⁷⁴ and which are particularly spectacular are the rule's assumptions that: (1) a man or woman, regardless of age or physical condition, is capable of fathering or bearing children (the "Fertile Octogenarian"); (2) that a child, however young, is capable of procreation (the "Precocious Toddler"); and (3) that a will may be probated or some other event may occur more than 21 years after a testator's death (the "Magic Gravel Pit").

The doctrine of the fertile octogenarian may be illustrated by assuming the same facts which were supposed in the preceding subdivision, i.e., that *T* creates a testamentary trust to pay the income to *A* for life and at his death to pay over the corpus to the eldest son of *A*, living at *A*'s death, who becomes a college graduate. We have seen that the ultimate gift is void even though at *T*'s death *A* has ten sons who have already graduated from college. We have also seen that if no son of *A* born after *T*'s death could take, the ultimate gift would be good. Let us now suppose that *A* is *T*'s daughter and that she is 65 years old when *T* dies. Obviously she can have no more children so anyone who lives to answer the description of a taker of the ultimate gift is bound to be one of *A*'s ten sons who were living at *T*'s death. Hence the ultimate gift is bound to vest within the period of the rule. But it is invalid nonetheless, for the rule against perpetuities presumes that *A* is capable of having more children⁷⁵ and once this assumption is made all of the other assumptions made in the preceding subdivision come into play and with nuclear vigor operate to destroy the future interest.

The precocious toddler requires a little more imagination but he may be conjured up. In *Re Gaite's Will Trusts*,⁷⁶ *T* had made a testamentary gift of income to *A* for life and following that a gift of principal to "such of her grandchildren living at my death or born within five years therefrom who shall attain the age of 21 years. . . ." At *T*'s death, *A* was 65 and had two living

⁷⁴ Leach, "Perpetuities in Perspective: Ending the Rule's Reign of Terror," 65 HARV. L. REV. 721 at 731-734 (1952).

⁷⁵ *Jee v. Audley*, 1 Cox. 324, 29 Eng. Rep. 1186 (1787).

⁷⁶ [1949] 1 All E. R. 459.

children and one grandchild. Only by supposing that *A might* remarry, that she *might* have another child and that that child *might* have a child within five years from *T's* death, could the gift to *T's* grandchildren be invalid. That would mean that a child under five would have to be presumed capable of producing an offspring. Although the court held the gift to the grandchildren good, it reached that result on the footing that a marriage of the hypothetical precocious toddler under the age of 16 would have been void under English Law.⁷⁷ It would certainly have been more sensible to say that the suppositious infant could not have had a child within five years from *T's* death and that therefore any grandchildren who answered the description of takers must do so, if at all, within the period of the rule.

The exhaustion of the magic gravel pits was the event upon which, in *Re Wood*,⁷⁸ the testator's issue, living upon the happening of that event, were to take. The gravel pits were in fact exhausted within six years after the testator's death, but the gift to his issue was held void because the gravel pits *might* have lasted more than 21 years. Gifts to take effect upon the happening of so-called "administrative" or other more common contingencies, e.g., the probate of a will,⁷⁹ the payment of debts⁸⁰ or the ending of the war⁸¹ are equally offensive to the rule despite the extreme unlikelihood of any such event occurring beyond the prescribed limits of time. Again they could be saved by proper draftsmanship, or by temperate judicial construction. But draftsmen continue to be fallible and the attitude of courts toward their foibles continues to be something less than benevolent.

From the foregoing examples it must be apparent that the extreme hypotheses prerequisite to the results reached are but an extension of the requirement of absolute certainty of vesting.

⁷⁷ This aspect of the case is criticized in Leach, "Perpetuities in Perspective: Ending the Rule's Reign of Terror," 65 HARV. L. REV. 721 at 733-734 (1952). But compare Morris, "Rule Against Perpetuities and Age of Marriage," 13 CONV. 289 (1949); MORRIS AND LEACH, 82-83.

⁷⁸ [1894] 3 Ch. 381.

⁷⁹ *Johnson v. Preston*, 226 Ill. 447, 80 N.E. 1001 (1907); *Ryan v. Beshk*, 339 Ill. 45, 170 N.E. 699 (1930). But see *Belfield v. Booth*, 63 Conn. 299, 27 A. 585 (1893). And compare Ill. Rev. Stat. (1955) c. 30, §153a, altering this rule in Illinois.

⁸⁰ GRAY, §§415-416. And see *Hodam v. Jordan*, (E.D. Ill. 1949) 82 F. Supp. 183.

⁸¹ But in *Monarski v. Greb*, 407 Ill. 281, 95 N.E. (2d) 433 (1950), a charitable gift contingent upon the inability to locate certain enemy aliens or to pay legacies to them within "three years after the Armistice of War II . . ." was held valid on the surprising ground that the contingency was "certain to all sane persons to occur well within . . . the period limited by the rule against perpetuities."

Consequently, the arguments of proponents of reform directed against the fantastic suppositions in which the rule at times requires one to indulge are much the same as those put forward in opposition to the requirement of certainty. However, as to cases such as those discussed in this subdivision, it is in addition argued with a good deal of reason that a conclusive presumption of fertility or a presumption that an administrative contingency will not occur within the period of the rule is an affront to common sense and hence a serious reflection on a system of law which is supposed to be logical.

4. *In Its Application to Class Gifts.* As before stated the rule against perpetuities is even more stringent as applied to class gifts than it is in its application to gifts to individuals. When a gift is to a class the entire interest given must of course be certain to vest within the period of the rule. But, more than that, if the gift is void as to any member of the class the entire gift will be held to be bad.⁸² A typical case is a testamentary gift to *A* for life followed by a gift over to such of his children as attain 25.⁸³ Even if one of *A*'s children has reached 25 at the testator's death and has thus attained a vested interest, the gift to the children of *A* fails. According to the usual rules as to the closing of classes the class remains open until *A* dies. Meanwhile he may have more children and one or more of them may not reach 25 and thus attain a vested interest until more than 21 years after the death of the last to die of *A* and all of his children who were living at *T*'s death. Since the class gift is regarded as inseparable it is said to fail entirely; it is not even good as to those children of *A* who were living when the testator died and who had to reach the specified age, if at all, within their own lifetimes.

Proponents of reform urge that this application of the rule is based on historical error, that no sensible explanation has ever been offered in support of it, and that it is especially illogical since most testators would prefer that their bounty should be bestowed upon some members of a class than to have their attempted gift fail altogether.⁸⁴ Thus, it is said, it would be better

⁸² 6 AMERICAN LAW OF PROPERTY, §24.26; CAREY AND SCHUYLER, §497; GRAY, §373; MORRIS AND LEACH, 95-96; SIMES AND SMITH, §1265.

⁸³ This is in substance *Leake v. Robinson*, 2 Mer. 363, 35 Eng. Rep. 979 (1817).

⁸⁴ 6 AMERICAN LAW OF PROPERTY, §24.26; Law Reform Committee Report 14, 31; Leach, "The Rule Against Perpetuities and Gifts to Classes," 51 HARV. L. REV. 1329 at 1336-1338, 1352-1353 (1938); MORRIS AND LEACH, 118-125.

in the example given to split the class and to allow the children of *A* who were living at the testator's death to take to the exclusion of any born thereafter. When the rule of destructibility⁸⁵ of contingent remainders prevailed, remaindermen who answered the description of takers at the ending of the supporting estate took to the exclusion of other previously potential takers.⁸⁵ Likewise courts have not invalidated class gifts in their entirety merely because the rules concerning the closing of classes often arbitrarily exclude potential takers as objects of a class gift.⁸⁶ Why should the rule against perpetuities cause such devastation when other equally important rules have not produced like results in like situations?

5. *In Its Non-Application to Possibilities of Reverter, Rights of Entry and Resulting Trusts.* It is elementary learning that where, by the use of language of limitation, a determinable fee is created, a possibility of reverter remains in the maker of the gift. So, if property is given to a church "so long as it shall be used for church purposes," the church has a determinable fee and the donor has a possibility of reverter.⁸⁷ If the property ceases to be used for church purposes, the fee automatically reverts to the donor or his successors. When language of condition, as distinguished from language of limitation, is employed, the fee is not a determinable one, but is called a fee subject to a condition subsequent and the maker of the gift has a right of entry. Thus, if the gift supposed were altered to read to the church in fee simple, "but if the property shall cease to be used for church purposes the grantor may re-enter the property," the church has a fee subject to a condition subsequent and the donor has a right of entry.⁸⁸ If the property ceases to be used for church purposes the fee does not automatically revert to the donor or his successors, but, upon re-entry or the performance of some equivalent act, he or they get the fee back. A resulting trust, which might often

⁸⁵ *Abbyss v. Burney*, 17 Ch. Div. 211 at 229-230 (1881): "According to my experience it has always been assumed, without argument, that where the fee is vested in trustees upon trust for a man for life, and after his death upon trust for such of his children as . . . shall attain twenty-one, . . . and at the death of the tenant for life there are some children adult and some minors, the minors, if they live to attain twenty-one, will take along with the others; but if equity had followed the law, then, inasmuch as there were persons capable of taking at the death of the tenant for life, namely, the adult children, they would have taken to the exclusion of the children who were minors, as was the case where the limitations were legal." Per Jessel, M.R.

⁸⁶ 5 AMERICAN LAW OF PROPERTY, §§22.39-22.45; CAREY AND SCHUYLER, §§236-244; MORRIS AND LEACH, 103-118; SIMES AND SMITH, §§634-648.

⁸⁷ *North v. Graham*, 235 Ill. 178, 85 N.E. 267 (1908); *First Universalist Society v. Boland*, 155 Mass. 171, 29 N.E. 524 (1892).

⁸⁸ SIMES AND SMITH, §242.

be more accurately denominated a "possibility of a resulting trust," is the residual interest in the maker of a gift or his successors which remains if property is trusteeed and the trust is or becomes invalid or incapable of accomplishment. For instance, if property is given to trustees for a particular charitable purpose and if that purpose fails, the judicial *cy pres* power cannot be invoked to apply the property to another and like charitable objective and the trustees will hold the property on a resulting trust for the benefit of the donor or his successors.⁸⁹ This type of interest may well be analogized to a possibility of reverter and indeed might be called an "equitable possibility of reverter" but for the fact that it does not seem to be dependent for its existence on the express use of language of limitation.

That the future interests described in the preceding paragraph are contingent cannot be doubted despite the fact that it has been thought at least arguable that the possibility of reverter and the possibility of a resulting trust can be regarded as vested.⁹⁰ However, in America, to the extent that the matter has been judicially determined, all three interests are said to fall outside of the ambit of the rule against perpetuities.⁹¹ In England the rule seems to apply to rights of entry⁹² and perhaps to possibilities of reverter,⁹³ but not to resulting trusts.⁹⁴ Proponents of reform have urged that the American view exempting possibilities of reverter and rights of entry (except as incident to leases and mortgages) cannot be justified,⁹⁵ for interests of this kind may and do operate to clog real estate titles for long periods of time and with unwonted frequency. Some have thought that these interests should be made subject to time limitations even stricter than those prescribed

⁸⁹ 4 SCOTT, TRUSTS, 2d ed., §413 (1956).

⁹⁰ Possibilities of Reverter: ". . . [I]t could be argued that . . . possibilities of reverter are vested interests, and vested interests as such should not be subject to the rule. . . ." SIMES AND SMITH, §1239, p. 147. Resulting Trusts: "[The] . . . resulting trust is a vested interest, and therefore is not obnoxious to the Rule against Perpetuities." GRAY, §603.9.

⁹¹ 6 AMERICAN LAW OF PROPERTY, §24.62; CAREY AND SCHUYLER, §§493-494; GRAY, §§304-310, 313, 327.1; MORRIS AND LEACH, 205-206; SIMES AND SMITH, §§1238-1240.

⁹² MORRIS AND LEACH, 205.

⁹³ *Hopper v. Corporation of Liverpool*, 88 S.J. 213 (1944). "However, this . . . has been criticised, and cannot be said to have settled the point beyond question . . . until some litigant carries the matter to the Court of Appeal." Law Reform Committee Report 20.

⁹⁴ GRAY, §603.9; Law Reform Committee Report 21.

⁹⁵ Law Reform Committee Report 20-21; Leach, "Perpetuities in Perspective: Ending the Rule's Reign of Terror," 65 HARV. L. REV. 721 at 739-745 (1952); MORRIS AND LEACH, 207-211; SIMES, PUBLIC POLICY AND THE DEAD HAND 70-71, 79-80 (1955).

by the rule against perpetuities⁹⁶ and it has also been urged that possibilities of resulting trusts should certainly be subject to the rule itself.⁹⁷

6. *In Its Application to Options and Administrative Powers.* In England the rule against perpetuities is said to be applicable to options in gross⁹⁸ and even to options appendant to long term leases.⁹⁹ Specific performance will not be decreed against one other than the optionee who has purchased from the optionor, but if the optionor has not parted with the property subject to the option the optionee may have specific performance.¹⁰⁰ And even where specific performance will not be granted the optionee may have an action in damages against the optionor.¹⁰¹ In America the weight of authority seems to be that options in gross are subject to the rule¹⁰² and that the optionee may not recover damages against the optionor.¹⁰³ Options appendant to long term leases are not thought to be subject to the rule in this country.¹⁰⁴

Gray thought that all options should be subject to the rule,¹⁰⁵ as indeed they ought logically to be if the rule is concerned solely with remoteness of vesting.¹⁰⁶ Professor Leach would exempt all options from the sphere of the rule's operation¹⁰⁷ whereas others would restrict options in gross at least to some degree and would approve the American view that options appendant to long term leases ought not to be fettered by arbitrary time limits.¹⁰⁸

⁹⁶ See, e.g., the Illinois so-called "Reverter Act" [Ill. Rev. Stat. (1955) c. 30, §§37b-37h] limiting the duration of these interests to 50 years. This statute is discussed in CAREY AND SCHUYLER (Supp. 1954), §§50-55. It was held constitutional in *Trustees of Schools v. Batdorf*, 6 Ill. (2d) 486, 130 N.E. (2d) 111 (1955). For statutes of like import, see 6 AMERICAN LAW OF PROPERTY, §24.62, p. 158, n. 18. A 30-year period is there recommended. *Id.* at 157.

⁹⁷ Law Reform Committee Report 21, 32.

⁹⁸ *London & South Western Ry. v. Gomm*, 20 Ch. Div. 562 (1882).

⁹⁹ *Woodall v. Clifton*, [1905] 2 Ch. 257.

¹⁰⁰ *Hutton v. Watling*, [1948] Ch. 26, *affd.* on other grounds, [1948] Ch. 398, and criticized in Walford, "Options of Purchase and Perpetuities," 12 CONV. 258 (1948).

¹⁰¹ *Worthing Corporation v. Heather*, [1906] 2 Ch. 532.

¹⁰² 6 AMERICAN LAW OF PROPERTY, §24.56; GRAY, §§330.1; SIMES AND SMITH, §1244.

¹⁰³ *Eastman Marble Co. v. Vermont Marble Co.*, 236 Mass. 138, 128 N.E. 177 (1920). Other cases are cited in SIMES AND SMITH, §1244, p. 161, n. 38.

¹⁰⁴ 6 AMERICAN LAW OF PROPERTY, §24.57; CAREY AND SCHUYLER, §492; SIMES AND SMITH, §1244, p. 162.

¹⁰⁵ GRAY, §§330-330.3.

¹⁰⁶ Leach, "Perpetuities in Perspective: Ending the Rule's Reign of Terror," 65 HARV. L. REV. 721 at 736-737 (1952).

¹⁰⁷ Leach, "Perpetuities in Perspective: Ending the Rule's Reign of Terror," 65 HARV. L. REV. 721 at 737, 748 (1952); "Perpetuities Legislation, Massachusetts Style," 67 HARV. L. REV. 1349 at 1355 (1954); "Perpetuities Reform by Legislation," 70 L. Q. REV. 478 at 490 (1954).

¹⁰⁸ Law Reform Committee Report 18-20, 32.

Since options to purchase are commercial devices it seems obvious that they should not be subjected to a rule designed in the beginning to control family settlements. And certainly there is little logic to the English view that specific performance may be awarded in favor of the original optionor and that he may be subject to damages if he has breached the option by putting the property subject to it beyond his control. On the premise that the option is bad, indirect enforcement should be just as objectionable as the direct sanction of specific performance.

Another aspect of the rule which is of greater concern to the English bar than it is to American conveyancers is the application of the rule to administrative powers commonly conferred upon trustees, e.g., powers to sell, lease, mortgage, to appoint successor trustees or to invest and reinvest. Such powers, though exercisable beyond the period of the rule, have not generally been held invalid in this country,¹⁰⁹ but they are probably all subject to the rule in England.¹¹⁰ Since the matter is undecided in many American states and since Gray espoused the English view¹¹¹ the matter may not be free from doubt in those American jurisdictions where no authoritative decision has been rendered. Proponents of reform argue that administrative powers conferred upon trustees should not be subject to the rule since for the most part they further the very purpose which the rule itself was designed to promote, i.e., the fluidity of property.¹¹² Hence the insertion of such powers in trust conveyances should be encouraged and it should be made clear that they are exempt from the rule. It should be observed that administrative powers are in this regard to be distinguished from powers of appointment, of which a power given a trustee to allocate beneficial interests in income or corpus is a species, and which, if not personal to the trustee, may be exercised beyond the period of the rule if the trust may last longer than that period. It may also be observed that if a trust cannot last longer than lives in being and 21 years, no administrative or other power granted the trustee could be exercisable beyond the period of the rule.¹¹³

¹⁰⁹ 6 AMERICAN LAW OF PROPERTY, §24.63; CAREY AND SCHUYLER, §484; SIMES AND SMITH, §1277.

¹¹⁰ MORRIS AND LEACH, 228-229.

¹¹¹ GRAY, §§488-489.

¹¹² Leach, "Powers of Sale in Trustees and the Rule Against Perpetuities," 47 HARV. L. REV. 948 (1934). And see the authorities, in agreement, note 109 *supra*.

¹¹³ SIMES AND SMITH, §1391, p. 240, suggest that the rule should be that, "A private

7. *In Wholly Invalidating Interests Which Transgress It.* When property is given by will in trust to pay the income to *A* for life and after his death to deliver the corpus of the trust to the first son of *A* who shall reach 25, the gift over is too remote. If there is a testamentary gift in trust to pay the income to the testator's children during their lives and upon their respective deaths to pay over the corpus to such of their respective children as reach 25, the posterior gifts are equally bad. In each instance the disposition of the corpus of the trust is altogether void and the principal of the fund becomes intestate property even if the equitable life estates are allowed to stand. If, in the second supposed case, it is further assumed that the intestacy of the ulterior gifts results in the entire beneficial interest in the trust property passing to the equitable life tenants as heirs of the testator, some courts would say that the whole trust scheme should fail and that the testator's children should be allowed to take outright by intestacy.¹¹⁴ So, too, where one-third of an estate was left to a daughter in fee and the other two-thirds were left in invalid trusts for the testator's two sons, all of the dispositions were held to fail entirely.¹¹⁵ In the first instance, in the absence of spendthrift or other protective provisions, it seems senseless that the equitable life estates should be sustained when the equitable fee is at the command of the equitable life tenants; in the second instance, the validation of the equitable life estate and the invalidation of the remote limitations following it would result in one of the testator's children ultimately acquiring five-ninths of the testator's property despite a reasonably clear intention that there should be equality of distribution between the family of the first child and those of the other two. The conclusion that the entire disposition should in each case fail is a manifestation of what has been called the doctrine of "infectious invalidity,"¹¹⁶ i.e., the view that where invalid posterior gifts are inseparably interwoven with those which are anterior to them the entire disposition will fail. Whether or not this result will ensue is said to depend upon the intangible of

trust cannot be made indestructible, by its terms, for a longer period than a life or lives in being and twenty-one years beyond." See also MORRIS AND LEACH, 311-316.

¹¹⁴ 6 AMERICAN LAW OF PROPERTY, §§24.48-24.52; CAREY AND SCHUYLER, §§180-181; GRAY, §§247-249.9; MORRIS AND LEACH, 162-165; SIMES AND SMITH, §§1262-1264.

¹¹⁵ *In re Richards' Estate*, 283 Mich. 485, 278 N.W. 657 (1938), involving the former Michigan statutory rule, but applicable nevertheless on the point of inseparability.

¹¹⁶ So denominated in 6 AMERICAN LAW OF PROPERTY, §24.48.

what the testator would have wanted had he known that he could not do part of what he was trying to do.¹¹⁷

It will be noted that in the illustrations set forth in the preceding paragraph the invalidity of the bad gifts was the result of the contingency that the taker or takers should attain the age of 25. Gifts contingent upon another person's dying under an age in excess of 21 may be equally offensive to the rule. So if property is given to *A* for life, remainder to his first born daughter, and if such daughter shall die under 25 leaving children surviving her, then to such of the daughter's children as survive her, the gift to *A*'s grandchildren is bad unless at the time it becomes effective *A* has a daughter in being. If not, the first born daughter of *A* will probably take an indefeasibly vested interest as soon as she is born¹¹⁸ and even if she has a child and dies, let us say at 20, leaving that child surviving her, the child will not take under the instrument of gift though of course he may take through his mother.

Proponents of reform believe that the automatic invalidation of future interests, regardless of when they would in fact have vested, as illustrated in this subdivision, is too harsh.¹¹⁹ Various proposed remedies and combinations of remedies, subsequently discussed, are suggested.¹²⁰ In the case of options in gross which might be exercised beyond the period of the rule and which are accordingly invalid, total invalidity is too drastic a penalty. If these are to be subject to time a limitation such as 21, 30 or 50 years, no attempt to exceed such limitation should wholly invalidate them;¹²¹ they should, as in the case of invalid accumulations, be "void only as to the excess."¹²²

8. *In Its Purported Concern With Remoteness of Vesting Alone.* In the third edition of his treatise Gray recognized that vested future interests are often as capable of impairing the fluidity of property as contingent interests and that the alienability of vested interests "is not a sufficient ground for excluding them from the

117 CAREY AND SCHUYLER, §181.

118 Where a gift over is invalid the prior gift usually remains absolute according to the weight of American authority. CAREY AND SCHUYLER, §176; *id.*, Supp. 1954, §176; SIMES AND SMITH, §§828, 830.

119 See the texts and articles cited note 72 *supra*. And see SIMES, PUBLIC POLICY AND THE DEAD HAND 66-67, 74-79 (1955).

120 See "Reforms Which Have Been Suggested," p. 709 *infra*.

121 GRAY, §330.3, pp. 367-368, n. 2; Law Reform Committee Report 19-20.

122 1 JARMAN, WILLS, 8th ed., 395-396 (1951); SIMES AND SMITH, §468.

the operation of the Rule."¹²³ "It seems," he said, "that in the ideal system of law . . . no interests which did not vest in possession within the allotted period of time be allowed. *They are within the practical reason of a Rule against Remoteness.*"¹²⁴ Professor Carey and the writer, some sixteen years ago, expressed the view that, "No concept of vesting or contingency or other abstraction has any place in the solution of perpetuity questions."¹²⁵ More recently, Professor Simes, though not without reservation, suggested that those who would reform the rule should give careful thought to eliminating from it the concept of vesting and to requiring that most future interests should become possessory within the limits of time.¹²⁶

The reasons (which will of course be amplified later) for these misgivings concerning the abstraction of vesting as the sacred emblem of the validity of a future interest may be summarized as follows: (1) Many vested future interests impair the fluidity of property to just as great a degree as do their contingent brethren. (2) The concept of vesting is a feudal concept which arose in connection with the law of remainders and it is consequently difficult if not impossible to apply it sensibly in testing the validity of modern future interests which are for the most part executory interests or the equivalent thereof. (3) Highly technical, and for the most part illogical, rules of construction were developed in furtherance of the rule of early vesting, which in turn was originally developed to mitigate the harshness of the rule of destructibility of contingent remainders.¹²⁷ Without regard for their original objective, these rules are invoked to determine whether or not, for purposes of the rule against perpetuities, future interests are vested. Confusion has been the result. (4) This confusion has created a great area of unjustifiable uncertainty in the solution of perpetuity problems. And although the concept of vesting has the one advantage of injecting flexibility into an area of the law where unjustly harsh results might flow from a completely rigid rule against perpetuities, there ought to be a less abstruse and more logical way of maintaining an adequate degree of flexibility.

¹²³ GRAY, §972.

¹²⁴ *Ibid.* Italics supplied.

¹²⁵ CAREY AND SCHUYLER, §474, p. 586.

¹²⁶ SIMES, PUBLIC POLICY AND THE DEAD HAND 67-68, 80-82 (1955).

¹²⁷ Schuyler, "Drafting, Tax and Other Consequences of the Rule of Early Vesting,"

B. Reforms Which Have Been Suggested

1. *Altering the Period of the Rule.* It has been seen that five proposals have been made with respect to the period of the rule: (1) that there should be some restriction on the number of measuring lives which may be used; (2) that a period in gross should be added as an alternative to lives in being and 21 years; (3) that the 21-year period in gross be extended; (4) that possibilities of reverter and rights of entry should be subject to temporal restrictions; and (5) that the same approach should be applied to options in gross.

Dr. Morris and Professor Leach criticize the use of extraneous lives as a measure of validity. They say that so many may be used as to make "difficult and expensive . . . out of all proportion to the advantages to anyone of thus extending the period of perpetuities" the tracing of the lives and determining the deaths of the persons whose lives are chosen.¹²⁸ They admit that, "Any attempt to restrict the number of permitted lives by statute would involve formidable difficulties of definition," but they say that "the magnitude of the task which would confront the parliamentary draftsman is no reason for not attempting it."¹²⁹ The report of the English Law Reform Committee comments that, "However desirable such proposals may be in theory, in the end they founder on the difficulty of evolving a definition which, without being too complex to be practicable, succeeds in drawing the line in approximately the right place."¹³⁰ There might, of course, be some sense in insisting that lives relevant to the dispositions in the instrument of gift should be used. But that would invite the making of illusory gifts, and the exclusion of beneficiaries of these as lives in being would involve all of the problems which used to be involved in determining when an appointment under a power was illusory.¹³¹ In short, the position of the British Law Reform Commission is persuasive. However, if no one who was not a beneficiary of the instrument of gift could be a "life in being," much of the rule's mathematical complexity would be eliminated.

As a means of diminishing the attractiveness to draftsmen of selecting numerous lives as measuring lives, the British Law Re-

¹²⁸ MORRIS AND LEACH, 66.

¹²⁹ *Id.* at 67.

¹³⁰ Law Reform Committee Report 7.

¹³¹ Cases concerning the doctrine of illusory appointments (which is not generally followed in this country) are collected in 100 A.L.R. 343 (1936). The doctrine was abolished in England by statute. 11 Geo. 4 and 1 Wm. 4, c. 46 (1830).

form Committee has proposed that an 80-year period in gross might be desirable.¹³² This period would be available as an alternative to lives in being and 21 years, but, once selected, it would apparently be exclusive. It would also be tied in with the notion, discussed in the next subdivision, that the validity of future interests should depend upon whether they in fact vest within the limits of time, not upon whether they might not have—the principle denominated “wait and see.” Such a reform would have more appeal to the British bar than in this country because of the fashion in England of employing so-called “royal lives clauses” as a means of comprehending a maximum number of measuring lives.¹³³ In this country the equivalent of such clauses is seldom used as a technique of draftsmanship and lives in being hence do not as often become so hard to determine and measure. It must be admitted, however, that a fixed period in gross, which might be available as a concurrent instead of an exclusive alternative, has about it a fascination founded in simplicity.

The third suggestion concerning the period of the rule, i.e., lengthening the 21-year period in gross, is also not without appeal if one accepts the supposition that the shortness of the period is likely to preclude the withholding of capital from the grandchildren of the maker of a gift beyond their minorities.¹³⁴ There are, however, two basic fallacies in this supposition. First, a testator who provides for distribution of his estate among his grandchildren when they reach 35 or 40 or upon the expiration of a period of 21 years from the death of the last to die of all of the beneficiaries of his will living at his death, whichever event occurs first, will almost always succeed in keeping funds out of the hands of his grandchildren before they reach the age specified. Only if the testator specifies an advanced age of distribution, say 50 or 60, or if he is young and has no grandchildren living at his death, is it likely that relevant lives in being at his death plus 21 years will expire while the grandchildren are younger than the age which is specified as that at which distribution is to be made to them. Second, if the rule is truly concerned with remoteness of vesting alone, distribution from grandchildren can be theoretically withheld from them until they reach any age, provided of course that the draftsman makes certain (if that is possible to do) that they

¹³² Law Reform Committee Report 7, 30.

¹³³ *Id.* at 6.

¹³⁴ MORRIS AND LEACH, 67-68; SIMES, PUBLIC POLICY AND THE DEAD HAND 68-69 (1955).

attain interests which are vested both in quality and quantity within the period of the rule. Despite these observations it may well be that the 21-year period in gross should be extended, for even if the rule continues to be directed at remoteness of vesting the extension of this period would at least facilitate the making of valid gifts over to the issue of grandchildren who died under an age of distribution in excess of 21 and this seems a reasonable objective. Also, should a rule directed against remoteness of possession be deemed desirable, or should such a rule in fact exist in a rule which limits the duration of trusts to the perpetuity period, there would be instances (e.g., if the maker of a dispositive instrument had no grandchildren *in esse* when the instrument took effect) where distribution could not be withheld after grandchildren attained 21 without resort to the doubtful expedient of selecting irrelevant lives as measuring lives.¹³⁵ Should the 21-year period in gross be extended, a period of 30 years ought to be adequate¹³⁶ and a period of 40 years would probably be the maximum that ought to be adopted.

The view that possibilities of reverter and rights of entry should be subject to temporal restrictions in the form of a period in gross appears to be sound unless one is prepared to espouse the more flexible view that courts should simply be given the power to decree such interests to be no longer valid when they either served no useful purpose or had ceased to do so.¹³⁷ As already observed, all proponents of reform seem to agree that these interests should not be allowed to continue unfettered, and there seems also to be considerable agreement that alternative periods of validity should be allowed, i.e., some period in gross and also the period of the rule against perpetuities.¹³⁸ Since lives in being almost never have anything to do with determinable fees or fees subject to rights of entry, it is very difficult indeed to see why the common law perpetuity period should be adopted, even as an alternative, to control the duration of possibilities of reverter and rights of entry. If they are to be subject to restrictions

¹³⁵ Cf. Law Reform Committee Report 6-7.

¹³⁶ Cf. Wis Stat. (1955) §230.15.

¹³⁷ "A more sensitive treatment of the problem, perhaps by way of conferring equitable jurisdiction to extinguish such interests when they have ceased to serve any useful purpose, might be thought preferable." *Trustees of Schools v. Batdorf*, 6 Ill. (2d) 486 at 492-493, 130 N.E. (2d) 111 at 115 (1955) (per Schaefer, J.). See also CAREY AND SCHUYLER, (Supp. 1954) §55.

¹³⁸ Law Reform Committee Report 20, 32; MORRIS AND LEACH, 211; SIMES, PUBLIC POLICY AND THE DEAD HAND 76-77 (1955).

in time, then they should become void after the expiration of a fixed period of time. The same should be true of attempted executory gifts over following determinable fees and fees subject to conditions subsequent, except in the case of an executory gift over which is incident to a family settlement. For example, in the case of a gift to *A* for life, remainder to his first born son, but if the latter dies without issue then over, the period of the common law rule (or any modification of it) should apply. The foregoing discussion is of course not pertinent to possibilities of reverter and rights of entry incident to commercial transactions (e.g., a lease or a mortgage) which should not be fettered in any way by time restrictions.

The last suggestion for reforming the period of the rule—that a period in gross should apply to options in gross—is similar to the view urged in the preceding paragraph. Since options are commercial devices they cannot sensibly be subjected to time restrictions measured by lives in being any more than possibilities of reverter and rights of entry. Here again it seems clear that if a time restriction is adopted, some period of validity should be selected and that options in gross should be valid for that period and thereafter become ineffective. In other words, as in the case of possibilities of reverter and rights of entry, if too long a time were specified in the instrument creating the option, the option should not be invalid from its inception but void only as to the excess.

2. *The Principle Should Be "Wait and See."* From what has been said it is apparent that the requirement of absolute certainty of vesting and the total invalidation of offensive interests have been major objects of criticism of the rule. Several cures have been advanced. The most popular is the so-called "wait and see" principle.¹³⁹ Under this principle, the validity of future interests would not be determined at the date of their creation; one would wait to see whether any future interests which *might* have violated the rule did or would in fact violate it. As will appear, advocates of "wait and see" do not all agree how long the waiting period should be. The proposal, however, will be better under-

¹³⁹The principle of "wait and see" is approved in the articles, notes and texts cited note 72 supra. It is criticized in: Phipps, "The Pennsylvania Experiment in Perpetuities," 23 TEMP. L. Q. 20 (1949); comment, 48 MICH. L. REV. 1153 (1950); note, 26 TEMP. L. Q. 148 (1952); Simes, "Is the Rule Against Perpetuities Doomed," 52 MICH. L. REV. 179 (1953); Simes, "The Policy Against Perpetuities," 103 UNIV. PA. L. REV. 707 at 726-728, 732-733 (1955); SIMES, PUBLIC POLICY AND THE DEAD HAND 72-73 (1955).

stood by referring back to some of the examples of invalid interests which have already been given. Testamentary gifts are assumed in each instance.

1. Gift in trust to pay income to *A* for life, and upon his death to distribute the corpus to the eldest son of *A*, living at his death, who becomes a college graduate.¹⁴⁰ If you waited until *A* died and you saw that he had a son who was a college graduate, the gift over would be valid.

2. Gift to *A* for life, remainder to his widow for life, remainder to such of *A*'s children as are living at the widow's death.¹⁴¹ If you waited until *A* died and you saw that his widow was a woman who had been born at the testator's death, the gift over would be valid.

3. Gift to *A* for life, remainder to such of his children as attain 25.¹⁴² If you waited until *A* died and you saw that he had at that time no child, born after the testator's death, who at *A*'s death was under four years old, the gift over would be valid.

A serious question arising in connection with the principle of "wait and see" is how long do you wait to see? Suppose in example 1 that *A* had no son living at his death who had graduated from college, but he did have a son alive who was two years old. Would you say that since the rule was not satisfied at *A*'s death the ultimate gift was bad? Or would you wait another 21 years, i.e., until the period of the rule expired, to see whether *A*'s son did in fact graduate from college within the limits of time? Suppose in example 2 that the widow of *A* turns out to be a woman who was not living at the testator's death. Do you hold the gift over bad at *A*'s death? Or do you wait for 21 years to see if the widow lives that long? Suppose in example 3 that *A* has children alive at his death but some of them are not four years old. Do you say that none can take? Or do you wait and see whether the children of *A* who were under four when *A* died themselves die before another 21 years passes? Or do you split the class at *A*'s death and say that his children who were four years old or more at *A*'s death may take to the exclusion of the others?

Advocates of the "wait and see" principle have given different answers to the questions posed in the preceding paragraph. In

¹⁴⁰ P. 697 *supra*.

¹⁴¹ Pp. 697-698 *supra*.

¹⁴² P. 701 *supra*.

Pennsylvania the 1947 modification of the rule against perpetuities provides that, "Upon the expiration of the period allowed by the common law rule against perpetuities 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."¹⁴³ Apparently you wait as long as the law allows and you see what the situation is then. In Massachusetts, the 1954 modification of the rule provides that the validity of a future interest limited to take effect at or after the termination of one or more life estates or lives in being "shall be determined on the basis of facts existing at the termination of such one or more life estates or lives." A life estate is defined to include "an interest which must terminate not later than the death of one or more persons" even though it may terminate at an earlier time.¹⁴⁴ This statute, applying as it does only where antecedent estates precede the future interests affected, is obviously narrower in scope than the Pennsylvania statute. Also, the period during which you "wait" is not the whole period of the rule but only until the ending of the preceding estate. Thus the Massachusetts statute would, in each of the three foregoing examples, allow you to "wait" until *A*'s death and then "see"; in Pennsylvania you would presumably "wait" the longer periods suggested in the preceding paragraph. The English Law Reform Commission suggests what may be a middle ground, i.e., that you "wait" until you are able to "see" either that a questionable limitation could never vest within the period of the rule or until events showed that it could never vest outside the period.¹⁴⁵ The Pennsylvania statute may mean the same thing but it does not expressly say so.

The Pennsylvania "wait and see" doctrine gives rise to great and admitted difficulties in connection with the determination of who are to be counted as measuring lives.¹⁴⁶ These can, as has been suggested,¹⁴⁷ be solved if the courts construe the statute as

¹⁴³ Pa. Stat. Ann. (Purdon, 1950) tit. 20, §301.4.

¹⁴⁴ Mass. Laws Ann. (1955) c. 184A, §1.

¹⁴⁵ Law Reform Committee Report 10-11.

¹⁴⁶ Comments, 97 UNIV. PA L. REV. 263 at 267-268 (1948); 48 MICH. L. REV. 1158 at 1166-1169 (1950); Simes, "Is the Rule Against Perpetuities Doomed?" 52 MICH. L. REV. 179 at 186-188 (1953); Cohan, "The Pennsylvania Wait-and-See Perpetuity Doctrine—New Kernels from Old Nutshells," 28 TEMP. L. Q. 321 at 330-336 (1955); MORRIS AND LEACH, 86-88.

¹⁴⁷ Cohan, "The Pennsylvania Wait-and-See Perpetuity Doctrine—New Kernels from Old Nutshells," 28 TEMP. L. Q. 321 at 336 (1955).

contemplating the same measuring lives as would be used in the application of the common law rule, excepting only that actual rather than possible events would be considered. But even such an interpretation will require considerable litigation¹⁴⁸—a fact which hardly recommends adoption of such a statute as a means of simplifying a complicated rule of property. Moreover, waiting out the entire period of the rule, or even until the interests in question must or cannot vest within that period would, in the case of non-trust dispositions, render many titles unmarketable for a far longer time than would be the case today. For instance, in examples 1 and 2 above, one would know at once under existing law that the future interests were invalid, whereas under the Pennsylvania statute and the English proposal it would be necessary in example 1 to wait and see if *A*'s son graduated from college or died within 21 years from the date of *A*'s death, and in example 2 to wait and see whether *A*'s widow (if she were unborn at the testator's death) died within 21 years after *A*'s death. A similar waiting period could of course be required by the instrument of gift, thus producing like results in terms of marketability, but this fact is not an answer to Professor Simes' telling comment that, "to tie up property for the period of the rule, and then eventually to prohibit a testator from doing what he wishes with his own property after all, would seem to be backed by no public policy whatsoever."¹⁴⁹ An instrument of gift which by its terms ties up property for the maximum period allowed by the law and no longer is not open to this objection because in such a case one will know from the beginning that the future interests are valid.

The Massachusetts statute to some extent meets the problems created by the Pennsylvania statute, because in Massachusetts validity will be passed upon only when antecedent life estates or their equivalent terminate.¹⁵⁰ These life estates will undoubtedly be valid because under Massachusetts law the vice of remoteness

148 MORRIS AND LEACH, 88: "In most of the cases that will actually arise; the Pennsylvania statute will no doubt be easily workable. *But it will unquestionably require a substantial amount of litigation to clarify its application.* Such litigation will take time and meanwhile the exact state of the law will be in doubt. . . ." Italics supplied.

149 Simes, "Is the Rule Against Perpetuities Doomed?" 52 MICH. L. REV. 179 at 190 (1953).

150 The writer accepts Professor Leach's statement as authority for the statement in the text. Leach, "An Act Modifying and Clarifying the Rule Against Perpetuities," 39 MASS. L. Q. (No. 3) 15 at 21 (1954). ". . . [I]t is standard practice for courts to refuse to pass upon the validity of the remainder until . . . [the anterior estates have ended]."

inherent in future interests apparently does not affect the validity of prior interests.¹⁵¹ Therefore the property is neither tied up nor is a determination of validity deferred for longer than was the case under the common law rule. But in a jurisdiction where the doctrine of "infectious invalidity" prevails, a statute would be an anomaly which would prevent a determination of the invalidity of future interests until the ending of prior estates which might themselves be invalid if the future interests turned out, upon a "wait and see" basis, to be too remote. And even in a jurisdiction where the doctrine of infectious invalidity is not recognized there may still be a good deal of inconvenience attendant upon waiting until all prior estates are ended for an adjudication of the status of future interests. The English Law Reform Committee recognizes this and would apparently allow applications for the determination of the validity of future interests to be made at any time; but the court could only make a final declaration with respect to interests which events, at the time of application, had shown to be certain to vest or incapable of vesting within the period of the rule. Under the English proposal an absolutely final adjudication could not be made until "events showed that the limitation could never vest within the period" or that "it could never vest outside the period."¹⁵² This proposal has the disadvantage of involving the possibility of several judicial interpretations as to the perpetuity aspects of the same instrument, as contrasted with the once-and-for-all-time system afforded by the present rule and, it must be admitted, by the Massachusetts statute.

It is apparent that each "wait and see" approach has its disadvantages. Each indubitably widens the scope of dead-hand control—perhaps, however, not to the extent of "dooming" the rule against perpetuities as Professor Simes has forcefully argued.¹⁵³ But an advocate of reform who is not convinced by Professor Simes should nevertheless heed the other imbroglios, indicated above, into which the principle of "wait and see" may lead—particularly the tangible and intangible costs of interim uncertainty.

3. *Reforming Invalid Limitations.* Almost seventy years ago the Supreme Court of New Hampshire in *Edgerly v. Barker*,¹⁵⁴

¹⁵¹ 6 AMERICAN LAW OF PROPERTY, §24.47.

¹⁵² Law Reform Committee Report II.

¹⁵³ Simes, "Is the Rule Against Perpetuities Doomed?" 52 MICH. L. REV 179 (1953).

¹⁵⁴ 66 N.H. 434, 31 A. 900 (1891).

without the aid of any statute, held that a gift to the testator's grandchildren when the youngest reached 40 should be transmuted into a gift to them when the youngest reached 21, thus saving the gift from destruction. The court said that the intent that the grandchildren should take was paramount to the intent that they should take at a particular time and that this dominant intent should be carried into effect *cy pres*. Professors Leach¹⁵⁵ and Simes,¹⁵⁶ following an earlier suggestion of Judge Quarles,¹⁵⁷ advocate widespread adoption of the New Hampshire court's position, through legislation where necessary,¹⁵⁸ in order to mitigate the harshness of the rule against perpetuities. Presumably this judicial *cy pres* power would be extended not only to the reduction of age contingencies as in *Edgerly v. Barker*, but also to other alterations in gifts such as closing or splitting a class of beneficiaries in a manner designed to avoid offense to the rule, or shortening a period at the end of which a future interest should vest. Thus if a gift were made to all and every the great-grandchildren of a testator when the youngest reached 21, a court might say that the gift should be made to read to "all and every my great-grandchildren, *being children of such of my grandchildren as are living at my death*, when the youngest of them attains 21." Or, in the case of a testamentary gift to "such of the children of *A* as attain 25," a court might either alter the age 25 to 21 or it might close or split the class of takers, as in the preceding example, by adding the words "within 21 years from the death of the last to die of *A* and all of his children who are living at my death" after the words and figure "attain 25." Or, if property

¹⁵⁵ Leach: "The Rule Against Perpetuities and Gifts to Classes," 51 HARV. L. REV. 1329 at 1336-1338 (1938); "Perpetuities: Staying the Slaughter of the Innocents," 68 L. Q. REV. 35 at 51 (1952); "Perpetuities in Perspective: Ending the Rule's Reign of Terror," 65 HARV. L. REV. 721 at 735-736 (1952); "Perpetuities Legislation, Massachusetts Style," 67 HARV. L. REV. 1349 at 1353-1354 (1954); "Perpetuities Reform by Legislation," 70 L. Q. REV. 478 at 490, 491 (1954); "An Act Modifying and Clarifying the Rule Against Perpetuities," 39 MASS. L. Q. (No. 3) 15 at 24 (1954).

¹⁵⁶ Simes: "Is the Rule Against Perpetuities Doomed?" 52 MICH. L. REV. 179 at 193-194 (1953); "The Policy Against Perpetuities," 103 UNIV. PA. L. REV. 707 at 728, 733-736 (1955); PUBLIC POLICY AND THE DEAD HAND 69, 76-79 (1955).

¹⁵⁷ Quarles, "The *Cy Pres* Doctrine: Its Application to Cases Involving the Rule Against Perpetuities and Trust for Accumulation," 21 N.Y. UNIV. L. Q. REV. 384 (1946). See also Looker, "Rules Against Perpetuities," 94 TRUSTS & ESTATES 832 (1955); Bogert, "Public Policy and the Dead Hand: A Special Book Review," 6 DEPAUL L. REV. 51 at 57 (1956).

¹⁵⁸ Cf. the statute recently adopted in Vermont which directs the court to reform any interest which would violate the rule to effectuate the intention of the creator of the interest. Vermont Laws (1957) No. 157.

were given by will to *A* for life, remainder for life to any widow of his (thus making difficult an interpretation that a widow who was a life in being at the time of the gift was meant), remainder to such of *A*'s children as may be living at the death of the widow, a court might say that the gift to the widow should be made to read, "remainder to any widow of *A*'s until her death or until the expiration of 21 years from the death of the last to die of all of the beneficiaries of this will who are living at my death." In each instance, validity would supplant invalidity.

The difficulty with the *cy pres* approach is the high degree of uncertainty that it introduces into the effect of dispositive instruments. This uncertainty would probably not constitute, as uncertainty sometimes does, an impetus to perpetuity litigation, since the beneficiaries of an instrument of doubtful validity would almost surely resist a declaration of invalidity whether the *cy pres* power existed or not. However, the existence of a power to rewrite an otherwise invalid gift would involve nebulous speculations into what the maker of the gift would have wanted if he had known that his attempted gift was bad. For instance, in the case of a contingent class gift payable to the children of *A* when the youngest reaches 25, would the testator prefer that the age contingency should be reduced to 21 or that the class should comprehend only children of *A* who were living at the testator's death? The answer to this question will never be definitive and is bound to vary from case to case. It involves, moreover, the most delicate and intangible aspects of the interpretative process. Nor is it an answer that the *cy pres* power works well in cases where gifts for general charitable purposes fail or that courts are faced in other cases with determining what a testator would have wanted under some unanticipated circumstance. In the charitable trust cases we accept the *cy pres* doctrine because we feel that a general charitable intent is meritorious and should be given effect as a matter of public policy. No public policy demands that solicitude for private dispositions should be carried to the point of injecting into perpetuity cases, which are complicated enough at best, the most difficult of all construction problems, i.e., that of deciding what a dead man would have thought had he thought about something that he didn't think about.¹⁵⁹ The average chancellor is too busy to balance carefully the many factors which

¹⁵⁹ Schuyler, "Future Interests in Illinois: Current Maturities and Some Futures," 50 N.W. UNIV. L. REV. 457 at 538-539 (1955).

ought to be weighed before an answer to this troublesome interpretative enigma is attempted. As a result, the solution of perpetuity problems is likely to become more involved if a *cy pres* solution is attempted, and fewer cases are likely to be resolved at a *nisi prius* level. The protraction and increased cost of litigation, familiar to every chancery practitioner, which would attend this result may well have induced proponents of reform to shun *cy pres* in connection with recent Massachusetts legislation.¹⁶⁰ No doubt these considerations also prompted rejection of *cy pres* by the English Law Reform Committee with the statement, "We are far from convinced that the complexities inherent in such a vague and uncertain jurisdiction would be outweighed by any practical advantage."¹⁶¹

That *cy pres* offers an impracticable solution to perpetuity problems is not to say that invalid limitations cannot be remolded satisfactorily and with more certainty. Since 1925, section 163 of the English Law of Property Act¹⁶² has provided in substance that if an interest would violate the rule because it is contingent upon attainment or failure to attain an age in excess of 21, the age of 21 shall be substituted for the age specified. This section would validate many of the invalid types of gifts of which examples are given earlier in this discussion. So, if property were given to *A* for life, remainder to such of his children as reach 25, the age 21 would supplant the age 25. Or if the gift were to *A* for life, remainder to his first born daughter, but if such daughter shall die under 25 leaving children surviving her, then to such children, a like substitution would be made. The same would be true of a gift to *A* for life, remainder to his first born son who reaches 25. In each instance, the automatic alteration of the age contingency saves an otherwise void gift. It has been said that this section cures "the most common single cause of violations of the Rule" and that the absence of litigation concerning it shows that it has worked well.¹⁶³ Gray, on the other hand, thought that the

¹⁶⁰ Leach, "Perpetuities Reform by Legislation," 70 L. Q. REV. 478 at 490 (1954): "The objection in Massachusetts [to *cy pres*] is a practical one: it was, in our judgment, just too big a step for our judges and lawyers to take. . . ." Leach, "An Act Modifying and Clarifying the Rule Against Perpetuities," 39 MASS. L. Q. (No. 3) 15 at 24 (1954): ". . . [I]t is considered preferable at this time to dispose of the great majority of cases by a simple statute [automatically reducing age contingencies] unlikely to cause litigation than to try to remedy all cases by a less specific statute [providing for *cy pres*]."

¹⁶¹ Law Reform Committee Report 16.

¹⁶² 15 Geo. 5, c. 20, §163 (1925).

¹⁶³ MORRIS AND LEACH, 54.

section would take property from persons whom the testator meant to have it and transfer it to others.¹⁶⁴ But surely that is less true of section 163 than it is of the rule itself, and section 163 has the distinct merit of ameliorating the harshness of the rule without injecting the vagueness and uncertainty of the *cy pres* doctrine. A more cogent criticism may be that the effect of the section is to put capital into the hands of beneficiaries before their training has readied them to receive it.¹⁶⁵ Again, however, it seems probable that the makers of most gifts would rather have their beneficiaries take at too early an age than not take at all. However, five members of the English Law Reform Committee would not apply section 163 or its equivalent until it was determined whether the questionable limitations did in fact vest within the period of the rule.¹⁶⁶ In other words, they would first apply the principle of "wait and see." A majority of the English Law Reform Committee did not subscribe to this view; they would apply section 163 first and then, if necessary, "wait and see."¹⁶⁷

The English Law Reform Committee suggests still a further means of reforming class gifts to comply with the rule. If, after applying section 163, and after having "waited and seen," some of the members of a class did not attain vested interests within the limits of time, the committee suggests that those members of the class who did attain such interests in timely fashion should be allowed to take.¹⁶⁸ This of course involves a rejection of the rule of *Leake v. Robinson*¹⁶⁹ and an acceptance of Professor Leach's theory that class gifts should not be regarded as indivisible for purposes of the rule. A case could arise if a testator made a gift to such of *A*'s grandchildren as attain 25. The gift is invalid unless at the testator's death *A* and his children are dead, or unless a grandchild has attained 25 thus closing the class. Testing the effect of section 163, the gift is still too remote because *A* may have children after the testator dies and they may have children who may reach 21 (substituted for 25) and they may not do so until more than 21 years after the death of *A* and all of

¹⁶⁴ GRAY, §872.

¹⁶⁵ Law Reform Committee Report (dissenting note by Mr. Burrows and Dr. Morris in which three other members of the committee of 12 concurred) 34.

¹⁶⁶ *Id.* at 34-35.

¹⁶⁷ Law Reform Committee Report 15.

¹⁶⁸ *Id.* at 14, 15.

¹⁶⁹ 2 Mer. 363, 35 Eng. Rep. 979 (1817).

his children and grandchildren who were alive when the testator died. Presumably, therefore, section 163 will not apply at all since its application is limited to cases where it would save the gift from destruction. We would therefore "wait and see" whether all of *A*'s grandchildren will take or whether the class must be split. Presumably we shall wait until the death of *A* and all of his children and grandchildren who were living at the testator's death or until *A*'s oldest grandchild reaches 25, whichever event occurs first, since the class would be closed at all events upon the happening of the latter event. If the death of all relevant lives in being is the event which marks the end of the "wait and see" period, all of *A*'s grandchildren who are four years old or more at that time, even children of children of *A* who were not living at the testator's death, will be able to share in the gift because all of such grandchildren must reach 25 or die thereunder within 21 years from the expiration of the relevant lives. On the other hand, splitting the class without "waiting and seeing" would make the gift good only as to grandchildren of *A* who were alive at the testator's death. Obviously, the effect of the "wait and see" principle in terms of the number of grandchildren who would share in the gift would depend entirely on how many grandchildren were born during the "wait and see" period. Since this would vary so much in individual situations, it is by no means easy to appraise the benefit of "waiting and seeing" in terms of its effect upon what testators might generally prefer. The difficulties of applying the principle of "wait and see" in other situations have already been discussed; there are no like problems involved in confining a class, as of a testator's death, to persons whose interests will necessarily be irrevocably fixed within the period of the rule. The only real objection to splitting class gifts arises from the fact that it may frustrate intention to an even greater degree than would the intestacy which would flow from complete invalidity.¹⁷⁰ Perhaps the splitting of classes in apt situations could be best accomplished by legislative indications

¹⁷⁰ Professor Leach, who argued with great force that there was no basis for the English view that class gifts are indivisible, also suggested that, "It is a problem of construction, similar to that which is faced by a court when it declares one section of a statute unconstitutional: Is the amputated portion so vital to the body that it cannot survive the amputation?" Leach, "The Rule Against Perpetuities and Gifts to Classes," 51 HARV. L. REV. 1329 at 1338 (1938). More recently he may have partially recanted. MORRIS AND LEACH, 125: "These suggestions [concerning class gifts] are analogous to . . . the doctrine of 'Infectious Invalidity.' . . . [This] doctrine . . . has not been adopted by English courts, nor (in the opinion of . . . [Dr. Morris]) is it desirable that it should be."

that instruments should be construed, where possible, so as not to violate the rule,¹⁷¹ rather than by legislative mandates as to the splitting of class gifts. Unless the latter were tempered with a direction that courts investigate what the testator would have preferred under the circumstances a good many injustices might result. That would be very close to a mandatory *cy pres* approach with all of its inherent problems already described.

4. *Adopting Realistic Presumptions.* As has been seen, the fantastic hypotheses of which the common law rule requires acceptance often cause gifts to be held to be too remote. These hypotheses fall into two broad categories: (1) the assumption that the procreation of offspring may occur at any age; and (2) the assumption that administrative contingencies, though highly unlikely to occur beyond the period of the rule, may in fact do so.

As to the presumption of fertility, the English Law Reform Committee would eliminate it and substitute in its place a rebuttable presumption that no woman who has attained 55 is capable of bearing a child and that no person under 14 is capable of procreating or bearing a child. In addition, the committee would permit the introduction of medical evidence to establish such incapacity. If subsequent events should rebut the presumption or confute the evidence, any decision based upon either would be allowed to stand. But an afterborn child who, according to the decision, could not have been born, would be able to pursue any property rights (even to the point of following or tracing) which it might have and which did not violate the rule.¹⁷²

To illustrate how the English Law Reform Committee proposal would work, let there be supposed a gift to the grandchildren of the testator's daughter *A* to be divided among them when all and every the said grandchildren of *A* attain 25. At the testator's death *A* is 56 years old and has a daughter *B* who is 24 years old. *B* has two children, *C* and *D*, six and four years old. Under the common law rule the gift to *A*'s grandchildren is invalid. Nor will it be validated by the application of section 163 of the Law of Property Act which, if it applied, would reduce

¹⁷¹SIMES, PUBLIC POLICY AND THE DEAD HAND 74 (1955): ". . . [T]here should be a rule of construction to this effect: If there is a possibility of invalidity under the Rule, the court should construe the language of the will to effectuate as nearly as possible what the testator would have intended at the time of his death had he then known that the application of the Rule might make all or a part of the will invalid."

¹⁷²Law Reform Committee Report 9, 31.

to 21 the age contingency upon which the grandchildren of *A* were to take. Section 163 is therefore inapplicable because it "operates on a limitation either at once or not at all. . . ." ¹⁷³ If, however, *A* can have no more grandchildren the gift to her grandchildren is good. Applying the presumption of inability to bear children at an age in excess of 55, we find that *A* can have no more children. Allowing and relying upon medical evidence, we find that *B* has been sterilized and can have no more children. The gift is saved without even "waiting and seeing." Twenty-one years pass and *C*, *A*'s youngest grandchild, reaches 25. Distribution is made to *B* and *C*; the class may be closed because no more grandchildren may be born. Then, *B*, at the age of 45 confounding her gynecologist, has another child, *E*. The decision that the gift to *A*'s grandchildren was valid stands even though "the subsequent birth of a child . . . shows the evidence to be erroneous. . . ." ¹⁷⁴ But if *E* (the grandchild who couldn't be born) attains 25 within 21 years from the death of the last to die of *A*, *B*, *C* and *D*, *E*'s interest will, on a "wait and see" basis, prove to be valid. Evidently *E* would be able, under the English proposal, to force *C* and *D* to disgorge part of what they had received, for *E* has a right to property "that in the event is not itself void for perpetuity," and "that right (including any right to follow or trace the property) is not prejudiced by the decision of the court." ¹⁷⁵

The advantage of presumptions suggested by the English Law Reform Committee and of receiving and relying upon medical evidence as to capacity to have offspring are apparent. In many cases, these proposals would validate otherwise void but harmless future interests. Furthermore, even though the Law Reform Committee favors the "wait and see" approach, the proposals under discussion would often eliminate the necessity of resort to the "wait and see" principle so that the validity or invalidity of future interests could be determined at a much earlier date than would be possible on a strictly "wait and see" basis. However, one cannot wax enthusiastic over the suggestion that if events rebut the presumption of infertility or prove medical evidence to have been erroneous, an afterborn child should in some cases be permitted to upset distributions already made

¹⁷³ *Id.* at 15.

¹⁷⁴ *Id.* at 9.

¹⁷⁵ *Ibid.*

with the sanction of a judicial decree. This reinjects uncertainty and quite plainly could place distributees under such a decree in an equivocal position.

In respect of other improbable possibilities, the so-called administrative contingency cases such as a gift contingent upon the probate of a will, the payment of debts or when an estate is settled, Professor Simes has suggested that there should be statutory directions that such conditions shall be deemed to be contemplated to occur within 21 years.¹⁷⁶ The Law Reform Committee rejects this solution on the footing that "a satisfactorily exhaustive enumeration of . . . [traps to be excluded] would be difficult to devise and, however well formulated, would leave untouched the more general criticism that even where real as distinct from theoretical possibilities are concerned, it is wrong that the rule should invalidate gifts which in fact vest within the permitted period. . . ."¹⁷⁷ Admitting the difficulty of composing an all-inclusive list of contingencies to be embraced by a statute, it seems likely that Professor Simes' objective could be achieved in part by specific legislation and in part by the creation of a statutory direction that, for perpetuity purposes, there shall be a presumption that the maker of an instrument of gift intended validly to dispose of his property. Such a presumption would be of assistance in the administrative contingency cases and it ought also to aid in eliminating many of the other undesirable results which flow from the requirement of absolute certainty of vesting.¹⁷⁸

5. *Discarding the Rule's Vest.* Since the major objective of this article is to weigh the validity of exempting vested interests from the rule, the suggestion that the concept of vesting as a test of validity should be discarded is mentioned here only for the sake of completeness and will be touched upon only briefly at this point. Professor Simes has indicated that reversions and other future interests incident to long term leases and other commercial transactions would have to be exempt from a rule against perpetuities directed at remoteness of possession.¹⁷⁹ He seems also to feel that equitable interests in income should be regarded as possessory interests.¹⁸⁰ Finally, he suggests that litigation over the

¹⁷⁶ SIMES, PUBLIC POLICY AND THE DEAD HAND 77 (1955).

¹⁷⁷ Law Reform Committee Report 10.

¹⁷⁸ Cf. SIMES, PUBLIC POLICY AND THE DEAD HAND 74 (1955).

¹⁷⁹ *Id.* at 81.

¹⁸⁰ *Ibid.*

vested or contingent character of future interests could perhaps more safely be eliminated by treating as contingent all future interests limited to take effect in possession or enjoyment at the ending of a life estate.¹⁸¹ The merit of these and other possibilities can be adequately measured only after the concept of vesting as a whole has been considered. First it will be well to summarize the other suggestions for reform of the rule which have been discussed since some of these may well be interwoven with the possibility of removing the rule's vest.

C. *Comments Concerning the Foregoing*

As to some criticisms and proposed reforms of the common law rule against perpetuities there can be little disagreement. The period of the rule, perhaps not altogether logical, has caused but mild comment. Extending the 21-year period in gross to 30 or 40 years and introducing an alternative period of 75 or 80 years might be desirable, especially if the rule should be made applicable to remoteness of possession. Rights of entry and possibilities of reverter, unless incident to long term commercial devices such as leases and mortgages, ought to be made subject to temporal restrictions. Except in family settlements, however, a fixed period of time, perhaps 30 to 50 years, should apply. Resulting trust interests (or possibilities thereof) should probably also be subject to the rule. In the case of trusts for particular charitable purposes, however, this would require the introduction of a modified executive *cy pres* power, for if a resulting trust could not take effect if a particular charity ceased to exist after the period of the rule expired, what would be done with the property? Subjecting resulting trusts, arising when the purposes of a private trust were no longer capable of accomplishment, to the rule would almost necessitate a concomitant rule that all private trusts must end within the period of the rule. Again, if this were not so, what disposition would be made of the trust property if the resulting trust were void? Options appendant to long-term leases and mortgages, being commercial devices, should be clearly exempted from the rule. So should administrative powers of trustees, if private trusts are to be allowed to last longer than the period of the rule. These powers further rather than defeat the rule's objectives. If options in gross are to be subject to temporal restric-

¹⁸¹ *Id.* at 82.

tion, the restriction should be a fixed period and they should be valid during that period.

A large area of agreement also exists with respect to the rule's harshness in its requirement of absolute certainty, in its acceptance of fantastic hypotheses, in its application to class gifts and in its total invalidation of interests which transgress it. Disagreement exists as to the remedy. The automatic reduction of age contingencies in excess of 21 years to 21, the creation of a presumption of infertility with respect to infants, aged women and perhaps aged men, and the opening of the door to the admission of medical evidence of incapacity to produce offspring would supplant fantasy with logic. So would a presumption that those disposing of property want to do so validly. Among other things, such a presumption might encourage the splitting of classes where this would save class gifts from the rule without injecting the perhaps undesirable inflexibility which the mandatory splitting of classes for that purpose would create. On the other hand, a broad grant to courts of a *cy pres* power to reform otherwise void limitations would make for considerable uncertainty, might protract and add to the cost of perpetuity litigation, and for these reasons seems to the writer to be unwise. The principle of "wait and see" is highly controversial and although it solves some problems it certainly adds new ones. If it is to be adopted at all it must be in modified form. In a jurisdiction which recognizes the doctrine of "infectious invalidity," the "wait and see" principle is wholly impracticable. However, as will later be suggested in more detailed fashion, if some sort of a statutory "saving clause" could be devised so that antecedent interests would automatically end when the period of the rule expired, all of the advantages of "wait and see" could be achieved without running afoul of the greatest objection to it, i.e., interim uncertainty. The difficulty lies in drafting a satisfactory statutory direction as to the destination of property when the period of the rule expires before the event upon which future interests are specified to take effect has occurred. This problem is especially acute in cases where the instrument of gift has created future interests limited to take effect upon alternative contingencies which, but for the proposed statutory "saving clause," would be too remote.

[To be concluded.]