Purefoy v. *Rogers* and The Rule Against Perpetuities

INTRODUCTION

The common law rule against remoteness of vesting is alive and living in New Brunswick. Despite the statutory reforms to which the rule has been subjected elsewhere,[1] and despite the strong representations for reform which have been presented in this jurisdiction,[2] the rule survives in its common law form.

That this is, or should be, a matter of serious concern, must be obvious to anyone who is familiar with the rule and its implications and consequences. Any rule of law which can be described accurately as "a technicality-ridden legal nightmare" and "a dangerous instrumentality in the hands of most members of the bar"[3] must be one that is ripe for reform.

One of the harshest aspects of the rule is the fact that it applies *ab initio.* If there is any possibility, however slight, that an interest can violate the rule then that interest is declared void *ab initio.* One is not permitted to wait and see if the rule will be violated in fact. This is one of the principal aspects of the rule which has undergone statutory reform in other jurisdictions where a "wait and see" approach has been adopted.[4] And it is certainly an area of reform which is to be encouraged.

Pending the adoption of such legislation, it may be useful to note that there is limited scope for the application of a "wait and see" approach in New Brunswick under the present regime of law. That is

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[1]See, for example, the English *Law of Property Act* 1925 and *Perpetuities and Accumulations Act* 1964, the Ontario *Perpetuities Act,* R.S.O. 1970, c. 343, as well as legislation adopted in several of the United States of America beginning in Pennsylvania in 1947.

[2]The most detailed proposals for reform are contained in "Survey of the Law of Real Property — A Working Report" prepared by Alan M. Sinclair, Q.C. and Douglas G. Rouse, Q.C. for the Law Reform Division, Department of Justice, New Brunswick, and presented in 1976.

[3]W. Barton Leach, "Perpetuities Legislation, Massachusetts Style", (1953-54) 67 *Harv. L. Rev.* 1349.
It is worth noting the full paragraph in which that description of the rule is contained.

The Rule against Perpetuities is a technicality-ridden legal nightmare, designed to meet problems of past centuries that are almost nonexistent today. Most of the time it defeats reasonable dispositions of reasonable property owners, and often it defeats itself. It is a dangerous instrumentality in the hands of most members of the bar. It ought to be substantially changed by statute, and the lawyers ought to see that this is done.

[4]*Supra,* footnote 1.

possible through the combined application of two rules of law respecting future interests, namely, the "timely vesting" rule and the rule in *Purefoy* v. *Rogers.*[5]

The principal purpose of this note is to examine how the application of those rules can prevent an interest from being subject to the rule against perpetuities and prevent it from being void *ab initio.* This can have very real practical significance particularly as regards attempted testamentary dispositions within a family.

RULE AGAINST PERPETUITIES

By way of introduction to the main topic of this note it would be useful to review the main elements of the rule against perpetuities. The rule is stated by Gray as follows:

> No interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest.[6]

The public purpose of the rule is to prevent property from being subjected to contingencies for too long a period of time. Contingencies tend to make property less attractive to prospective purchasers and thus tend to render the property inalienable in practice. Inalienability has been viewed traditionally as being contrary to the public interest because it reduces the utility of property. The rule accomplishes the purpose of retaining free alienability by striking down future contingencies which are too remote and which would, therefore, tie the property up for too long.

At this point it would be useful to recall what can cause a future interest to be contingent. The causes are three (a) the fact that the grantee is unborn; (b) the fact that the grantee is unascertained; and (c) the fact that there is a condition precedent which must be satisfied before the grantee is entitled to take the interest.

If a testator were to devise Blackacre to his son A for life with remainder to A's first child, then the remainder interest in the first child would be contingent if A did not have any children at the time of the testator's death. The unborn first child would have a contingent remainder which would vest in interest immediately upon his birth.

If a testator were to devise Blackacre to his son A for life with remainder to A's widow, then the remainder interest in the widow would be contingent if A were still living at the time of the testator's death

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[5](1670), 2 Wm. Saunders 380; 85 E.R. 1181 (K.B.D.).

[6]*Ibid.*, at 1192.

because a living person cannot have a widow. Since A's widow cannot be ascertained until his death the remainder will continue to be contingent while A lives. If he dies leaving a widow then the remainder will vest both in interest and in possession.

If a testator devises Blackacre to his son A for life with remainder to the first of A's children who becomes a medical doctor, then the remainder will be contingent if none of A's children is a medical doctor at the time of the testator's death. The condition precedent would have to be satisfied before any of A's children could claim a vested interest in the property.

In each of these cases the future interest is contingent. Consequently, it is necessary to enquire whether it violates the rule against perpetuities (which may alternatively, and usefully, be referred to as the "rule against remoteness of vesting"). The answer in each case is that the interest does not violate the rule. The rules of law with respect to contingent remainders are such that any of those three interests will not be permitted to vest except during A's lifetime or on his death. And since A is a life in being at the time of creation of the interests it is not possible, therefore, for any of them to vest beyond lives in being plus 21 years. The rules in relation to contingent remainders will be explored in greater detail below.

To ascertain whether a future interest violates the rule against perpetuities it is necessary to determine what is causing the interest to be contingent and whether it is possible for that contingency to be satisfied beyond the perpetuities period. If it is then the interest is void *ab initio.*

Let us suppose, for example, that a testator, being an avid hockey fan, makes the following testamentary disposition:

> I devise Blackacre to Bernard ("Boom Boom") Geoffreon and his heirs, but if the Toronto Maple Leafs should win the Stanley Cup then to Punch Imlach and his heirs.

The interest in Imlach is contingent upon the Maple Leafs winning the Stanley Cup. Is it possible that that could happen beyond the perpetuities period? Since the answer is clearly in the affirmative the interest is void.

What might the testator have done in order to prevent the interest from violating the rule? There were several avenues open to him by which to limit the possible vesting of the interest to the perpetuities period. For example, any of the following prescriptions would have accomplished that end.

> (a) . . . but if the Toronto Maple Leafs should win the Stanley Cup during Punch Imlach's lifetime then . . .

(b) . . . but if the Toronto Maple Leafs should win the Stanley Cup during the lifetime of any person who is a member of that team at the time of my death then . . .

(c) The vesting period prescribed in (a) or (b) could be extended by adding after "lifetime" the words "or within 21 years thereafter".

The purpose could be accomplished as well by limiting the vesting to a period of 21 years next following the testator's death. Thus, ". . . but if the Toronto Maple Leafs should win the Stanley Cup within 21 years after my death then . . ." would protect the interest from being void *ab initio.* Of course, if in any of those cases the interest did not vest by the time the prescribed period ran out then it would be destroyed. However, it would have had at least a chance to take effect.

Another method by which the testator might have prevented the interest from being void *ab initio* would have been by giving Imlach a life estate rather than a fee. A life estate can obviously take effect only during the lifetime of the intended life tenant. If, therefore, a contingent life interest is given to a life in being, there is no way that that interest can vest beyond the perpetuities period. It can only vest during the lifetime of the life tenant who is a life in being.

TIMELY VESTING RULE

A contingent freehold remainder must be supported by a preceeding vested freehold estate. Since the law does not permit remainders after fee simple estates, and since the fee tail has been abolished by statute, the only kind of freehold estate which can support contingent freehold remainders is the life estate. Accordingly, a contingent remainder for life or in fee simple must be preceded by one or more vested life estates.

The timely vesting rule provides, in effect, that a contingent freehold remainder will be destroyed if it fails to vest by the time that all preceding vested estates come to an end. Thus, if when the vested life estate comes to an end the remainder is still contingent, it will come to an end as well because there will no longer be a vested estate to support it.

The timely vesting rule is, in effect, a "wait and see" rule. It waits to see if the contingent remainder will vest in time. If it does not then it is destroyed.

While the original purpose of the timely vesting rule was to prevent an abeyance of seisin and thereby reinforce the feudal system, its principal purpose and consequence today is similar to that of the rule against perpetuities; that is, to prevent land from being subject to contingencies for too long.

While all contingent future interests are subject to the rule against perpetuities it is clear that some such interests can never violate the rule. A first contingent remainder can never violate the rule against perpetuities because it must be preceded immediately by a vested life estate; and, being subject to the timely vesting rule, it must vest by the time and preceding "life in being" dies or it will be destroyed. Thus, it is not possible for a first contingent remainder to vest beyond lives in being plus twenty-one years.

If, however, a conveyance or devise creates successive contingent remainders then the second and subsequent contingent remainders may violate the rule against perpetuities notwithstanding the timely vesting rule. Let us suppose, for example, that a testator were to create the following devises.

> I devise Blackacre to my son A for life and on his death for his widow for life and on her death for the first of A's children who shall become a medical doctor.

Assuming that A is living at the time of the testator's death he would take a present vested life estate in Blackacre. The remainder in the widow for life would be contingent because the widow would be unascertained at the time. Assuming that none of the A's children had become a medical doctor by the time of the testator's death then that remainder in fee simple would also be contingent. The remainder in the widow is the first contingent remainder and that in A's child is a subsequent contingent remainder.

Because of the timely vesting rule the remainder in the widow must vest upon A's death or it will be destroyed. Since A is a life in being his widow's remainder cannot vest beyond the perpetuities period. However, under the timely vesting rule the interest in A's child does not have to vest until the interest in A's widow comes to an end. If, therefore, it is possible for the widow to die beyond the perpetuities period then the timely vesting rule would permit the interest in A's child to vest beyond the perpetuities period. In that case, the interest would be rendered void by the rule against perpetuities.

In this case the contingent remainder in A's child would not be saved by the timely vesting rule. Neither the widow nor the child is necessarily a life in being at the time of the testator's death. It is possible for both the widow and the child to be born after the testator's death and for the widow to die and the child to become a medical doctor more than twenty-one years after the death of A, the only known relevant life in being.

In short, while the application of the timely vesting rule can enable an interest to escape the rule against perpetuities it does not necessarily produce that result. In other words, it does not permit us to "wait and see" in all cases.

RULE IN *PUREFOY* V. *ROGERS*

As a consequence of the enactment of the *Statute of Uses* in 1535 it became possible to create new types of legal future interests. Those so-called executory interests include the shifting interest which takes effect by divesting a preceding estate in a grantee, and the springing interest which takes effect in the future by divesting the grantor's title.

Executory interests were spawned and nurtured in equity as springing and shifting uses and became legal interests only by virtue of the *Statute of Uses.* Having grown up outside the common law they were not subjected to the destructibility rules which were developed in relation to legal remainders. Consequently, an executory interest is not necessarily destroyed simply because it fails to vest by the time a preceding estate in another grantee comes to an end.

Let us suppose, for example, that a testator were to provide as follows:

> I devise Blackacre to my widow for life and after her death for the first of my children who shall become a medical doctor.

As a springing executory interest the devise for the child can vest whenever a child of the testator becomes a medical doctor at anytime in the future, whether before or after the widow's death. In other words, it is not subject to the timely vesting rule and can subsist as a contingent interest even after the preceding interest in the widow has come to an end. As a result Blackacre remains subject to the contingency as long as any child of the testator is still living and no such child has become a medical doctor.

While executory interests are subject to the rule against perpetuities it is apparent that they can cause property to be tied-up subject to contingencies for longer periods than remainders can. It was for the purpose of preventing this that the rule in *Purefoy* v. *Rogers* was developed. The rule was stated by Hale C. J. as follows:

> Where a contingency is limited to depend on an estate of freehold which is capable of supporting a remainder, it shall never be construed to be an executory devise, but a contingent remainder only, and not otherwise.[7]

Under the rule a future interest which could take effect as either a contingent remainder or an executory interest must take effect as a contingent remainder. The interest is thus subjected to the timely vested rule and will be destroyed if it does not vest by the time the preceding estate ends.

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[7]John Chipman Gray, *The Rule Against Perpetuities* (4th ed.), (Boston: Little, Brown and Co., 1942) at 191.

To determine whether the rule in *Purefoy* v. *Rogers* applies to the last example cited above one must ascertain whether the interest in the widow is capable of supporting a contingent remainder in freehold and whether it is possible for the contingency to be satisfied before the estate in the widow comes to an end. The answer to each question is, "Yes". The widow's life estate can support a contingent remainder in freehold; and it is possible for a child of the testator to become a medical doctor before the widow's death. Consequently, the devise to the child is a contingent remainder and not a springing executory interest. The "contingency period" is thus limited to the lifetime of the widow and will not continue for the lifetimes of the children.

Because the rule in *Purefoy* v. *Rogers* was designed to restrict the ability of grantors to subject property to contingencies it was natural for conveyancers to take a negative attitude towards the rule and to seek means of avoiding it. The rule can be avoided easily by giving to the "preceding grantee" a determinable term of years or a fee simple subject to condition subsequent, neither of which can support a contingent remainder in freehold. Alternatively, the future interest can be limited in such a way as to render it incapable of vesting during the preceding life estate, thus preventing it from being construed as a contingent remainder.

The purpose of this note, however, is to highlight a positive feature of the rule which appears to have attracted little attention.[8] Application of the rule can enable a future interest to escape being declared void *ab initio* by rendering the rule against perpetuities inapplicable. In such cases, the *ab initio* rule against perpetuities is replaced by the wait and see timely vesting rule, thus making it possible for the grantor's intention to be fulfilled, at least in part.

Let us suppose, for example, that a testator were to provide as follows:

> I devise Blackacre to my son A for life and after his death for such of his children as shall attain the age of twenty-five years.

The testator's intention is probably that any child of A who attains the age of twenty-five years, whether before or after A's death, is to take a share of the estate in Blackacre. In other words, he probably intends that the vesting of a child's interest can take place after A's life estate has come to an end. On that basis, however, the children's interest would be void as violating the rule against perpetuities. A is the only relevant life in being at the time the testator's death. Since it is possible for a child of A to reach the age of twenty-five more than twenty-one years after A's

[8] Indeed, *Purefoy* v. *Rogers* seems to have attracted little attention generally in Canada. It is not mentioned in the "Cases Judicially Considered" volumes of the *Canadian Abridgment,* second edition.

death it is possible for the interest to vest beyond the perpetuities period. Consequently, as an executory interest the devise for the children would be void *ab initio.*

However, the devise for the children satisfies the requirements for application of the rule in *Purefoy* v. *Rogers.* The estate devised to A is capable of supporting a contingent remainder in freehold and it is possible for the contingency, the attaining of the age of twenty-five years, to be satisfied during A's lifetime. As a result the interest in the children must be construed as a contingent remainder rather than an executory interest.

As a first contingent remainder the children's interest cannot violate the rule against perpetuities because its vesting period is limited to the lifetime of a life in being, A. In effect, therefore, the application of the rule in *Purefoy* v. *Rogers* to a case of this sort causes the *ab initio* rule of destruction, the rule against perpetuities, to be replaced by a wait and see rule of destruction, the timely vesting rule. This is the positive side of *Purefoy* v. *Rogers,* the side which provides the opportunity for at least part of the grantor's intention to be realized.

THE NEED FOR REFORM

While the principal purpose of this note is to reacquaint practitioners in New Brunswick with the Rule in *Purefoy* v. *Rogers* and to demonstrate how it might be utilized to the client's advantage, it underlines as well the need for reform of our law of property in general and of the rule against perpetuities in particular. It is greatly to our disadvantage and discredit that we continue to be governed by exceedingly technical rules which were developed in another era to meet the needs of social, economic and political systems which are very different from our own. Our inertia appears to be without justification when one notes the extensive reforms which have been undertaken in other jurisdictions, including the jurisdiction from which our rules were derived and in which they have long since been abandoned or radically revised.[9]

While identification of specific areas of reform is beyond the scope of this note it is appropriate to suggest that the "mischief" which the timely vesting rule, the rule in *Purefoy* v. *Rogers* and the rule against perpetuities were designed and intended to combat could be dealt with quite adequately by the adoption of a "wait and see" rule against perpetuities. Precedents are available.[10]

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[9]Reference should be made in particular to the English *Law of Property Act* 1929 and *Perpetuities and Accumulations Act* 1964.

[10]*Supra,* footnotes 1 and 2.

A CASE IN POINT

It appears likely that the most recently reported New Brunswick case involving failure under the rule against perpetuities would have been decided differently if appropriate reforms had been effected. In *Re Fownes Estate*[11] the Court was asked to determine whether the following provisions of the will of Albert A. Fownes were "invalid by reason of being contrary to the Rule against Perpetuities or for any other reason".

> 3(*i*) To provide in their absolute discretion for my children and grandchildren (including those born after my death) preferably the latter in case of illness or if in the opinion of my trustees they or any of them are in necessitous circumstances and in the case of my grandchildren (including those born after my death) for their education.
> 3(*j*) At the end of a period of twenty-five years from the date of my death or upon the death of my sister, the said Cora G. Fownes, whichever is the longer period, to terminate this trust and divide my property as follows: Seventy (70) per cent to my children and grandchildren (including those born after my death) in equal shares and thirty (30) per cent to my nephews and nieces then living in equal shares. If none of my children or grandchildren (including those born after my death) are then living all my property shall be divided among my said nephews and nieces in equal shares.

The answer given by the learned Chief Justice was as follows:

> The vesting is unspecified in paragraph 3(*i*) of the Will under consideration and paragraph 3(*j*) provides for a term of twenty-five years from the death of the testator before the trust is terminated and vesting can occur. It is clear that as far as paragraphs 3*(i)* and 3*(j)* of the Will there is no vesting within the required period and therefore the said paragraphs are void by reason of being contrary to the rule against perpetuities.[12]

Under paragraph 3(*i*) the trustees were given an absolute discretion as to whether to confer any benefits on the children and grandchildren. Consequently, the beneficiaries could not be construed as having vested interests in the trust property. Taken alone that provision would have permitted the property to be tied up in the trust as long as any child or grandchild of the testator still lived without the necessity that any benefit be actually conferred on any of them. That would not have been offensive, *per se,* had the class of beneficiaries been confined to the testator's children and those of his grandchildren who were living at the time of his death. Property may be tied up in a private trust for the perpetuities period of lives in being plus twenty-one years. Here, however, the class was not confined to lives in being. Grandchildren born after the testator's death were also included. As a consequence, under the terms of paragraph 3(*i*) taken alone it would have been possible for the property to have been tied up, and the ultimate vesting on the termination of the trust to have been postponed, beyond the perpetuities period.

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[11](1975), 10 N.B.R. (2d) 226 (N.B.Q.B.).

[12]*Ibid.*, at 228.

Paragraph 3(*i*) cannot be read in isolation, however. It must be read and construed in conjunction with paragraph 3(*j*) which placed a time limit on the duration of the trust and, therefore, on the postponement of the vesting. Under that provision the trust was to come to an end and the property was to vest in the children, grandchildren and nephews and nieces "At the end of a period of twenty-five years from the date of my death or upon the death of my sister, Cora G. Fownes, whichever is the longer period. . .".

Had the testator limited the duration of the trust and, therefore, the vesting period to twenty-one years from the date of his death or to the lifetime of his sister, or any other life or lives in being, or to a period of a life or lives in being plus twenty-one years, then in all probability the interests could have been protected because all of those alternatives would be within the perpetuities period. Indeed, it would have been possible by using some of those alternatives to have postponed the vesting for more than twenty-five years after his death.

However, the use of the twenty-five year period is not permitted under our common law perpetuities rule. A period of twenty-five years can come to an end more than twenty-one years after the death of a life or lives in being. Therefore, any period of vesting defined in terms of an absolute number of years must be confined to twenty-one or less.

As things turned out in this case the twenty-five year alternative would have been the relevant vesting period because the testator's sister, Cora G. Fownes, predeceased him. Nevertheless, the case does clearly point up the artificiality and harshness of the common law perpetuities rule. It operated in this case to destroy provisions based on a twenty-five year vesting period while the testator, properly advised, could have provided for a considerably longer vesting period without violating the rule.

Had New Brunswick adopted reforms similar to those contained in the English *Perpetuities and Accumulations Act* of 1964 the provisions in question in the Fownes case should have been held valid. That Act permits the use of an alternative to the perpetuity period based on lives in being. It allows the grantor or testator to specify a fixed period of years not exceeding eighty as the perpetuity period. Although that Act would probably require that the period so chosen be more clearly expressed by the testator as being a perpetuities period than the Fowne's will does, nevertheless, the period of twenty-five years so chosen would clearly have fallen within the permitted limits, and the testator would not have died partially intestate.

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