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EFFECT OF REDUCTION OF THE AGE OF MAJORITY ON THE PERMISSIBLE PERIOD OF THE RULE AGAINST PERPETUITIES

ALICE A. SOLED*

The modern form of the common law rule against perpetuities¹ has been stated in different ways,² its traditional formulation being that "[n]o 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."³ Regardless of how the Rule is stated, however, it uniformly has been agreed⁴ that the permissible period of the Rule is twenty-one years after a life or lives in being at the creation of the interest in question. Until recently, the 21 year period of the Rule generally has corresponded to the period of time required to elapse between a person's birth and his attainment of the age of majority.⁵ Since 1968, however, at least thirty-six states

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1. Hereinafter sometimes referred to in the text of this article as "the Rule."

2. See, e.g., J. GRAY, *THE RULE AGAINST PERPETUITIES* § 201 (4th ed. 1942); 7 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 196, 215-216 (2d ed. 1937, reprinted 1966); E. MILLER, JR., *THE CONSTRUCTION OF WILLS IN MARYLAND* § 314 (1927); 3 L. SIMES & A. SMITH, *THE LAW OF FUTURE INTERESTS* § 1222 (2d ed. 1956); 2 H. TIFFANY, *THE LAW OF REAL PROPERTY* § 391 (3d ed. 1939).

3. J. GRAY, *supra* note 2, § 201.

4. See, e.g., 6 *AMERICAN LAW OF PROPERTY* §§ 24.12, 24.14 (A. J. Casner ed. 1952); 2 W. BLACKSTONE, *COMMENTARIES* 174 (1st ed. 1766); E. COKE, *COMMENTARY UPON LITTLETON* 271.b.n.1.V. (F. Hargrave and C. Butler ed. 1787); 2 C. FEARNE, *CONTINGENT REMAINDERS AND EXECUTORY DEVICES* *77 (318), *82-*83 (321) (5th ed. 1796); J. GRAY, *supra* note 2, §§ 201, 206, 223, 224; 7 W. HOLDSWORTH, *supra* note 2, at 196, 215-216, 225-227; 4 J. KENT, *COMMENTARIES ON AMERICAN LAW* *17-*18, *266-*267, *271 (3d ed. 1836); W. LEWIS, *A PRACTICAL TREATISE ON THE LAW OF PERPETUITY* *154-*155, *159-*162, *167-*168 (Am. ed. 1846); E. MILLER, JR., *supra* note 2, §§ 314, 323; 3 L. SIMES & A. SMITH, *supra* note 2, §§ 1222-1225; 2 H. TIFFANY, *supra* note 2, §§ 391, 399; Jones, *Reforming the Law—The Rule Against Perpetuities*, 22 MD. L. REV. 269, 271-274 (1962).

5. Note, however, that the age of majority has been 19 in Alaska since 1959 (ALASKA STAT. § 25.20.010 (1973)) and has been 18 in Wisconsin for limited purposes since 1955 (WISC. STAT. ANN. § 42.02(3) (1957)). And, the age of majority for females has been 18 in Arkansas since 1873 (ARK. STAT. ANN. § 57-103 (1947)), in Idaho since 1864 (IDAHO CODE § 32-101 (1963)), in Illinois since 1872 (ILL. ANN. STAT. ch. 3, § 131 (Smith-Hurd 1961)), in Montana since 1895 (MONT. CONST. art. II, § 14 and MONT. REV. CODE ANN. § 64-101 (1947)), in South Dakota since 1877 (S.D. COMPILED LAWS ANN. § 26-1-1 (1967)), and in Utah since 1898 (UTAH CODE ANN. § 15-2-1 (1972)); although the age of majority for males still is 21 in Arkansas (ARK. STAT. ANN. § 57-103 (1947)) and in Utah (UTAH CODE ANN. § 15-2-1 (1972)), and was reduced to 18 only as recently as 1971 in Illinois (ILL. ANN. STAT. ch. 3, § 131 (Smith-Hurd 1961), as amended in 1971 (Supp. 1974)) and 1972 in Idaho (IDAHO CODE § 32-101 (1963), as amended in 1972 (Supp. 1973)), in Montana (MONT. CONST. art. II, § 14 and MONT. REV. CODE ANN. § 64-101 (1947), as amended in 1972 (Supp. 1973)), and in South Dakota (S.D. COMPILED LAWS ANN. § 26-1-1 (1967), as amended in 1972 (Supp. 1973)).

have reduced the age of majority below 21.⁶ This trend has prompted the suggestion that a reduction in the age of majority may require a corresponding reduction in the permissible period of the Rule,⁷ since, “[f]rom an historical point of view, it would seem to be clear that age 21 [the twenty-one year period of the Rule] was originally selected to correspond with the age of majority.”⁸ According to this hypothesis, for example, a reduction in the age of majority to 18 may impliedly require a corresponding

6. ARIZ. REV. STAT. ANN. §§ 1-215.14, 1-215.17 (1956), as amended in 1972 (Supp. 1973); CAL. CIV. CODE § 25 (West 1954), as amended in 1972 (West Supp. 1974), and § 25.1, added in 1972 (West Supp. 1974); CONN. GEN. STAT. ANN. (1970) § 1-1d, added in 1972 (Supp. 1973); FLA. STAT. ANN. (1963) § 743.07, added in 1973 (Supp. 1974-1975); GA. CODE ANN. § 74-104 (1933), as amended in 1972 (No. 862 [1972] Ga. L. 193); IDAHO CODE § 32-101 (1963), as amended in 1972 (Supp. 1973); ILL. ANN. STAT. ch. 3, § 131 (Smith-Hurd 1961), as amended in 1971 (Supp. 1974); IND. CODE §§ 34-1-67-1 (6), (15) (1973), as amended in 1973 (Supp. 1973); IOWA CODE ANN. § 599.1 (1949), as amended in 1972 (Supp. 1974-1975); KY. REV. STAT. § 2.015 (1969), as amended in 1968; LA. CIV. CODE ANN. art. 37 (West 1952), as amended in 1972 (Supp. 1974); ME. REV. STAT. ANN. tit. 1, § 72 (1964), as amended in 1969 (Ch. 433 [1969] Me. P.L. 1150-1151) and in 1972 (Supp. 1973), and tit. 1, § 73, added in 1969 (Ch. 433 [1969] Me. P.L. 1151-1152), as amended in 1972 (Supp. 1973); MD. ANN. CODE art. 1, § 24, added in 1973 by ch. 651, § 1 [1973] Md. Laws 1300 (originally intended to be codified at MD. ANN. CODE art. 1, § 21 (Supp. 1973)); MASS. GEN. LAWS ANN. ch. 4, § 7 (48)-(51) (1973), added in 1973 eff. 1/1/74 (Supp. 1973); MICH. COMP. LAWS §§ 722.51-.55, added in 1971 (No. 79 [1971] Mich. P.A.); MINN. STAT. ANN. § 645.45 (3) (1964), as amended in 1973 (Supp. 1974); MONT. CONST. art. II, § 14 and MONT. REV. CODE ANN. § 64-101 (1947), as amended in 1972 (Supp. 1973); NEB. REV. STAT. § 38-101 (1968), as amended in 1969 (L.B. 167 [1969] Neb. Sess. L. 1072) and in 1972 (L.B. 1086 [1972] Neb. Sess. L. 579); NEV. REV. STAT. ch. 129.010 (1971), as amended in 1973 (ch. 753 [1973] Nev. Stat. 1577, 1578)—for limited purposes only; N.H. REV. STAT. ANN. §§ 21:44, 21-B:1, added in 1972 (Supp. 1973); N.J. STAT. ANN. §§ 9:17B-1 to -3, added in 1972, eff. 1/1/73 (Supp. 1974-1975); N.M. STAT. ANN. §§ 1-2-2K and 13-13-1, added in 1971 (Supp. 1973); Chs. 889-940 [1974] N.Y. Laws 1375-1444 (amending scattered sections of McKinney's New York laws); N.C. GEN. STAT. §§ 48A-1, -2, added in 1971 (Supp. 1973); N.D. CENT. CODE § 14-10-01 (1971), as amended in 1973 (Supp. 1973); OHIO REV. CODE ANN. § 2131.02 (Page 1968), as amended in 1973, eff. 1/1/74 (Supp. 1973); OKLA. STAT. ANN. tit. 15, § 13, added in 1972 (1972); R.I. GEN. LAWS ANN. § 15-12-1, added in 1972 (Supp. 1973); S.D. COMPILED LAWS ANN. § 26-1-1 (1967), as amended in 1972 (Supp. 1973); TENN. CODE ANN. § 1-305 (30), added in 1972 (Supp. 1973); TEX. REV. CIV. STAT. art. 5923b, added in 1973 (Supp. 1974); VT. STAT. ANN. tit. 1, § 173 (1972), as amended in 1971 (Supp. 1973); VA. CODE ANN. § 1-13.42 (1973), added in 1972; WASH. REV. CODE ANN. § 26.28.010 (1961), as amended in 1971 (Supp. 1973); W. VA. CODE ANN. § 2-2-10 (m) (1971), as amended in 1972 (Supp. 1974), and § 2-2-10 (aa), added in 1972 (Supp. 1974); WYO. STAT. ANN. § 8-18.1, added in 1973 (Supp. 1973). In all but three of these states, the age of majority was reduced to 18. In Iowa, Nebraska and Wyoming, the age of majority was reduced to 19.

7. Section of Estates and Trusts, *Report*, 5 MD. B.J. No. 4 at 32, 33 (July, 1973); Stiller, *Estate planning changes necessitated by statutory reduction of the age of majority*, 1 ESTATE PLANNING No. 1, at 2, 5-6 (Autumn, 1973). Cf. Knag, *The Connecticut Eighteen-Year-Old Emancipation Act: Problems of Construction and Application Encountered By the Estates and Trusts Practitioner*, 47 CONN. B.J. 147, 165-166 (1973).

8. Section of Estates and Trusts, *supra* note 7, at 33; Stiller, *supra* note 7, at 5.

reduction in the permissible period of the Rule to eighteen years after a life or lives in being at the creation of the interest in question.

Consequently, by its terms, this hypothesis poses a problem only for those jurisdictions in which the permissible period of the Rule is a creature of the common law, rather than of statute,⁹ and the age of majority has been reduced for all purposes, including those of the common law, rather than for limited purposes or for purposes of statutory construction only. At least seventeen states presently are in this category.¹⁰ The problem is particularly acute in those jurisdictions where the statute reducing the age of majority expressly states that it does so for all common law purposes, as in Maine,¹¹ New Hampshire,¹² North Carolina¹³ and Virginia.¹⁴ It is almost as acute in Maryland, where the *preamble* to the legislation reducing the age of majority states that such legislation is "generally related to a comprehensive lowering of the age of majority from 21 to 18 years of age in common law and in the enumerated sections and articles of the Annotated Code of Maryland",¹⁵ although the legislation itself nowhere expressly states that the age of majority is reduced for common law purposes.¹⁶

The theory that a statutory reduction in the age of majority may require a corresponding reduction in the permissible period of the Rule apparently is based upon the historical origin of the Rule's 21 year element.¹⁷ However, resolution of the problem

9. In this context, the permissible period of the Rule is a creature of statute *only* if its duration is expressly set forth in a statute. (See, e.g., CAL. CIV. CODE § 715.2 (West 1954); GA. CODE ANN. § 85-707 (1933); IND. CODE § 32-1-4-1 (1973); KY. REV. STAT. § 381.215 (1969); OHIO REV. CODE ANN. § 2131.08 (Page 1968)). Conversely, the permissible period of the Rule here is considered to be a creature of the common law, even if the Rule itself is adopted expressly by statute, if the *duration* of the permissible period of the Rule is *not* set forth in the statute. (See, e.g., ARIZ. REV. STAT. ANN. § 33-261.01, added in 1963 (Supp. 1973): "The common law rule known as the rule against perpetuities shall hereafter be applicable . . ."; MD. ANN. CODE, Est. & Tr. Art., § 11-102 (1974), formerly Md. Ann. Code art. 93 § 11-102 (1969): "[T]he common law rule against perpetuities as now recognized in the state is preserved . . .").

10. Alaska; Connecticut; Florida; Illinois; Louisiana; Maine; Maryland; Nebraska; New Hampshire; New Jersey; New Mexico; North Carolina; Rhode Island; South Dakota; Texas; Vermont; Virginia. For the citations to the statutes in these jurisdictions reducing the age of majority, see notes 5 (Alaska) and 6 *supra*.

11. ME. REV. STAT. ANN. tit. 1, § 73, added in 1969 (Ch. 433 [1969] Me. P.L. 1151-1152), as amended in 1972 (Supp. 1973).

12. N.H. REV. STAT. ANN. § 21-B:1, added in 1972 (Supp. 1973).

13. N.C. GEN. STAT. §§ 48A-1, -2, added in 1971 (Supp. 1973).

14. VA. CODE ANN. § 1-13.42 (1973), added in 1972.

15. Ch. 651 [1973] Md. Laws 1300, 1303.

16. See ch. 651 [1973] Md. Laws 1300.

17. See Section of Estates and Trusts, *supra* note 7, at 33; Stiller, *supra* note 7, at 5-6.

posed by this theory in fact depends upon the *significance* of the 21 year element of the permissible period of the Rule, as distinguished from its rationale or historical basis.¹⁸ For, as a general proposition, a statute will not be construed to alter the common law unless its language so mandates, either expressly (which is not the case here) or by *necessary* implication.¹⁹ And, despite the wide acceptance of the maxim that where the reason of a common law rule ceases the rule also ceases,²⁰ elimination of the historical basis of a rule of property law does *not* necessarily require elimination of the rule itself. For example, the doctrine that a contingent remainder is destructible by a premature determination of the preceding particular freehold estate originated as a corollary of the feudal requirement that transfer of a freehold interest in land be by feoffment with livery of seisin.²¹ Yet, in spite of the fact that, with few exceptions, transfer by livery of seisin either never existed or was early abolished in this country,²² the destructibility rule has persisted in most jurisdictions here unless and until abrogated by statute.²³ Similarly, it has been argued that, since the possibility of reverter resulted from application of the feudal doctrine of tenure, its existence depends upon the existence of ten-

18. See Knag, *supra* note 7, at 165-166. Section of Estates and Trusts, *supra* note 7, at 33, and Stiller, *supra* note 7, at 5, state, with respect to this problem, that "[t]he issue is whether or not the designation of 21 years in the rule against perpetuities is intended to be related to a person's status as an adult." However, while the quoted language, standing alone, could be construed to refer to the significance of the 21 year element of the permissible period of the Rule, it becomes unclear, when the quoted language is taken in context, whether such language refers to the significance of the 21 year element or to its rationale or historical basis. See Section of Estates and Trusts, *supra* note 7, at 33; Stiller, *supra* note 7, at 5-6.

19. 1 J. KENT, *supra* note 4, at *464; J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION §§ 50.05, 61.01 (4th ed. C. Sands 1973, 1974). *E.g.*, Lutz v. State, 167 Md. 12, 172 A. 354 (1934); Price v. Hitaffer, 164 Md. 505, 514-15, 165 A. 470, 473-474 (1933); Congdon v. Congdon, 160 Minn. 343, 361, 200 N.W. 76, 82 (1924). See Sprecher v. Sprecher, 206 Md. 108, 113, 110 A.2d 509, 511-512 (1955). *But see* Linkins v. Protestant Episcopal Cathedral Foundation of the District of Columbia, 187 F.2d 357 (D.C. Cir. 1950).

20. *E.g.*, Funk v. United States, 290 U.S. 371 (1933). The classical expression of the maxim is "*cessante ratione legis, cessat ipsa lex.*" BLACK'S LAW DICTIONARY 288 (4th ed. 1951).

21. 1 L. SIMES & A. SMITH, *supra* note 2, § 193, at 216 and § 209, at 246.

22. 1 L. SIMES & A. SMITH, *supra* note 2, § 193, at 216.

23. 1 L. SIMES & A. SMITH, *supra* note 2, §§ 207, 209. For example, notwithstanding the effective abolition in Maryland of the requirement of livery of seisin as of 1766 (MD. ANN. CODE, Real Prop. Art., § 4-104 (1974), formerly Md. Ann. Code art. 21, § 4-104 (1973); Matthews v. Ward, 10 G. & J. 443 (Md. 1839), followed in Key's Lessee v. Davis, 1 Md. 32 (1851)), the destructibility rule apparently persisted in Maryland until abrogated in 1929 by statute now codified as MD. ANN. CODE, Est. & Tr. Art., § 11-101 (1974), formerly Md. Ann. Code art. 93, § 11-101 (1969). (See Crisfield v. Storr, 36 Md. 129, 11 Am. R. 480 (1872) (dictum)).

urial ownership unmodified by the Statute Quia Emptores.²⁴ Yet, the possibility of reverter generally is recognized in this country today,²⁵ even though, in most jurisdictions, ownership is allodial or the Statute Quia Emptores is in effect.²⁶

Thus, if the 21 year element of the permissible period of the Rule in fact represents an actual minority, or a period equal to an actual minority, then, by definition, a reduction in the age of majority would cause a corresponding reduction in the permissible period of the Rule.²⁷ Conversely, if the 21 year element of the permissible period of the Rule is a period in gross unconnected with an (actual) minority, *i.e.*, is not, and need not be, related to any person's status as a minor or adult, a reduction in the age of majority necessarily should have *no* effect on the permissible period of the Rule irrespective of its historical origin.²⁸

In this connection, it must be noted that, since the problem is one of first impression, so to speak, the determination to be made is what the 21 year element of the permissible period of the Rule actually and/or *potentially* represented at the time as of which the English common law was received here.²⁹ And, this is so regardless of what it may in fact have represented at some prior

24. J. GRAY, *supra* note 2, §§ 31, 39; 1 L. SIMES & A. SMITH, *supra* note 2, §§ 17, 283, stating the argument, but concluding that it is immaterial in view of the present general recognition of the existence of the possibility of reverter. *But see* J. GRAY, *supra* note 2, § 39 n.1, at 37-38; 1 L. SIMES & A. SMITH, *supra* note 2, §§ 17, 283.

25. *E.g.*, J. GRAY, *supra* note 2, § 39; 1 L. SIMES & A. SMITH, *supra* note 2, § 283.

26. J. GRAY, *supra* note 2, §§ 23-28, 38, 39. In Maryland, for example, the possibility of reverter flourishes like the green bay tree (*see, e.g.*, Ringgold v. Carvel, 196 Md. 262, 76 A.2d 327 (1950); McMahon v. Consistory of St. Paul's Church, 196 Md. 125, 75 A.2d 122 (1950); Evans v. Safe Deposit & Trust Co. of Baltimore, 190 Md. 332, 58 A.2d 649 (1948); Perkins v. Inglehart, 183 Md. 520, 39 A.2d 672 (1944); Conner v. Waring, 52 Md. 724 (1880); MD. ANN. CODE, Real Prop. Art. §§ 6-101 to -105 (1974), formerly Md. Ann. Code art. 21, §§ 6-101 to -105 (1973)), although land ownership has been allodial since the American Revolution. (Matthews v. Ward, 10 G. & J. 443 (Md. 1839)).

27. *See* Section of Estates and Trusts, *supra* note 7, at 33; Stiller, *supra* note 7, at 5-6.

28. Knag, *supra* note 7, at 165-166.

29. *See* McGraw v. State, 234 Md. 273, 199 A.2d 229, *cert. denied*, 379 U.S. 862 (1964); Damasiewicz v. Gorsuch, 197 Md. 417, 79 A.2d 550 (1951); Gilbert v. Findlay College, 195 Md. 508, 74 A.2d 36 (1950); Lickle v. Boone, 187 Md. 579, 51 A.2d 162 (1947); Price v. Hitaffer, 164 Md. 505, 165 A. 470 (1933); State v. Buchanan, 5 H. & J. 317, 9 Am. Dec. 534 (Md. 1821); Coomes v. Clements, 4 H. & J. 480 (Md. 1819); State v. Brown, 21 Md. App. 91, 318 A.2d 257 (1974); State v. Magliano, 7 Md. App. 286, 255 A.2d 470 (1969); Congdon v. Congdon, 160 Minn. 343, 200 N.W. 76 (1924); Becker v. Chester, 115 Wis. 90, 91 N.W. 87 (1902) (*dictum*); W. FRATCHER, PERPETUITIES AND OTHER RESTRAINTS 270, 271 (1954). *Cf.* Linkins v. Protestant Episcopal Cathedral Foundation of the District of Columbia, 187 F.2d 357 (D.C. Cir. 1950); Latz v. Latz a/k/a Schafer, 10 Md. App. 720, 272 A.2d 435, *pet. denied*, 261 Md. 726 (1971).

point in time.³⁰ In fact, if there is a conflict between the actual and the potential nature of a common law rule as of the time we received the common law, it would appear that the potential prevails over the actual.³¹ For, the common law rule against perpetuities entered our jurisprudence by virtue of our reception of the English common law.³² And, it generally is held that the common law received by us is "the common law in mass, as it existed here, either potentially, or practically, and as it prevailed in England at the time [as of which the common law was received here]. . . ." ³³ Moreover, in determining what the common law potentially was at the time of its reception here, subsequent decisions

must be received as expositions of the law as it before existed, and not as creating a new law, or altering the old one, which could only be done by legislative enactment. . . . And it is a mistake to suppose, that they are expansions of the common law, which is a system of principles not capable of expansion, but always existing. . . .³⁴

30. See *Chilcott v. Hart*, 23 Colo. 40, 45 P. 391 (1896); *State v. Buchanan*, 5 H. & J. 317, 358, 9 Am. Dec. 534, 568 (Md. 1821). Cf. *Linkins v. Protestant Episcopal Cathedral Foundation of the District of Columbia*, 187 F.2d 357 (D.C. Cir. 1950).

31. See *Linkins v. Protestant Episcopal Cathedral Foundation of the District of Columbia*, 187 F.2d 357 (D.C. Cir. 1950). Cf. *Chilcott v. Hart*, 23 Colo. 40, 45 P. 391 (1896).

32. J. GRAY, *supra* note 2, § 200. *E.g.*, *Chilcott v. Hart*, 23 Colo. 40, 45 P. 391 (1896); *Congdon v. Congdon*, 160 Minn. 343, 200 N.W. 76 (1924); *Barton v. Thaw*, 246 Pa. 348, 92 A. 312 (1914); *Becker v. Chester*, 115 Wis. 90, 91 N.W. 87 (1902) (dictum). See 1 AMERICAN LAW OF PROPERTY, *supra* note 4, § 1.40; 1 J. KENT, *supra* note 4, at *470-*473. The English common law was received in this country as of various times, depending upon the jurisdiction. Among the most common reception dates appear to be 1607 (usually described as the fourth year of James I) [*e.g.*, COLO. REV. STAT. ANN. § 135-1-1 (1963); LL. ANN. STAT. ch. 28, § 1 (Smith-Hurd 1961)] and July 4, 1776 [*e.g.*, FLA. STAT. ANN. § 2.01 (1963); MD. CONST. DECLARATION OF RIGHTS, art. 5 (1972)]. 1 AMERICAN LAW OF PROPERTY, *supra* note 4, § 1.40, and 1 J. KENT, *supra* note 4, at *470-*473, contain a general discussion of the dates as of which the common law was received here.

33. *State v. Buchanan*, 5 H. & J. 317, 358, 9 Am. Dec. 534, 568 (Md. 1821). *Accord*, *McGraw v. State*, 234 Md. 273, 199 A.2d 229, *cert. denied*, 379 U.S. 862 (1964); *Gilbert v. Findlay College*, 195 Md. 508, 74 A.2d 36 (1950); *Lickle v. Boone*, 187 Md. 579, 51 A.2d 162 (1947); *Price v. Hitaffer*, 164 Md. 505, 165 A. 470 (1933); *State v. Brown*, 21 Md. App. 91, 318 A.2d 257 (1974); *Latz v. Latz a/k/a/ Schafer*, 10 Md. App. 720, 272 A.2d 435 (1971), *pet. denied*, 261 Md. 726 (1971); *State v. Magliano*, 7 Md. App. 286, 255 A.2d 470 (1969). See *Becker v. Chester*, 115 Wis. 90, 91 N.W. 87 (1902); W. FRATCHER, *supra* note 29, at 270, 271.

34. *State v. Buchanan*, 5 H. & J. 317, 357, 9 Am. Dec. 534, 566, 567 (Md. 1821). *Accord*, *Chilcott v. Hart*, 23 Colo. 40, 45 P. 391 (1896); *McGraw v. State*, 234 Md. 273, 199 A.2d 229, *cert. denied*, 379 U.S. 862 (1964). See *Congdon v. Congdon*, 160 Minn. 343, 200 N.W. 76 (1924); *Becker v. Chester*, 115 Wis. 90, 91 N.W. 87 (1902); W. FRATCHER, *supra* note 29, at 270, 271. Cf. *Linkins v. Protestant Episcopal Cathedral Foundation of the District of Columbia*, 187 F.2d 357 (D.C. Cir. 1950); *Latz v. Latz a/k/a Schafer*, 10 Md. App. 720, 272 A.2d 435 (1971), *pet. denied*, 261 Md. 726 (1971).

In Colorado, for example, where the common law reception date is 1607,³⁵ it has been held³⁶ that the modern common law rule against perpetuities is part of that state's received common law, even though the development of the modern form of the Rule commenced only in 1685, with the final decision in *The Duke of Norfolk's Case*.³⁷ In so holding, the Colorado Supreme Court stated:

The common law thus being a constant growth, gradually expanding and adapting itself to the changing conditions of life and business from time to time, what the law is at any particular time must be determined from the latest decisions of the courts; and the recognized theory is that, aside from the influence of statutory enactments, the latest judicial announcement of the courts is merely declaratory of what the law is and always has been.³⁸

Similarly, in Maryland, where the common law reception date is July 4, 1776,³⁹ the Maryland Court of Appeals⁴⁰ has used post-1776 cases as authority for the proposition that, as of July 4, 1776, it was established law that burglary can be committed in a church at common law.⁴¹

Upon application of the above principles, it becomes clear that a reduction in the age of majority should have *no* effect on the permissible period of the Rule. For, as will be shown hereafter, it is almost indisputable that, as of the time of our reception of the English common law, the 21 year element of the permissible period of the Rule was potentially a period in gross unconnected with an actual minority.

35. COLO. REV. STAT. ANN. § 135-1-1 (1963).

36. *Chilcott v. Hart*, 23 Colo. 40, 45 P. 391 (1896).

37. 3 Ch. Cas. 1, 53, 22 Eng. Rep. 931, 963 (H. L. 1685), *aff'g* 3 Ch. Cas. 1, 22 Eng. Rep. 931 (Ch. 1682).

38. 23 Colo. 40, 56, 45 P. 391, 397 (1896).

39. MD. CONST. DECLARATION OF RIGHTS, art. 5 (1972).

40. *McGraw v. State*, 234 Md. 273, 199 A.2d 229, *cert. denied*, 379 U.S. 862 (1964).

41. It should be noted that, while there are Maryland decisions stating that post-1776 English decisions are not authoritative in Maryland with respect to the state of the common law in 1776 (*e.g.*, *Gilbert v. Findlay College*, 195 Md. 508, 74 A.2d 36 (1950); *Dudrow v. King*, 117 Md. 182, 83 A. 34 (1912); *Greenwood v. Greenwood*, 28 Md. 369 (1868); *Koontz v. Nabb*, 16 Md. 549 (1861), these decisions appear to confuse the reception of English decisions construing received English statutes, which is frozen as of July 4, 1776 [MD. CONST. DECLARATION OF RIGHTS, art. 5 (1972), as construed in *The Mayor and City Council of Baltimore v. Williams*, 6 Md. 235 (1854), *Dashiell v. The Attorney General*, 5 H. & J. 392, 9 Am. Dec. 572 (Md. 1822), and *State v. Magliano*, 7 Md. App. 286, 255 A.2d 470 (1969)], with the reception of the English common law, which is *not* so frozen [MD. CONST. DECLARATION OF RIGHTS, art. 5 (1972), as construed in *Dashiell v. The Attorney General*, *supra*, and *State v. Magliano*, *supra*]. *E.g.*, *Koontz v. Nabb*, *supra*.

EVOLUTION OF THE RULE IN ENGLAND

It is generally agreed⁴² that the evolution in England of the modern form of the common law rule against perpetuities commenced in 1685 with the decision of the House of Lords in *The Duke of Norfolk's Case*,⁴³ which held that an interest is not void for remoteness if it must vest, if at all, within a life in being at its creation. It likewise is agreed⁴⁴ that such evolution ended in 1833, with the decision of the House of Lords in *Cadell v. Palmer*,⁴⁵ which held that the maximum permissible period of the Rule is "a life or lives in being [at the creation of the interest in question], and 21 years afterwards [as a term in gross], without reference to the infancy of any person whatever."⁴⁶ Thus, while *Cadell v. Palmer*⁴⁷ conclusively settled that the 21 year element of the permissible period of the Rule is a period in gross which is not, and need not be, related to any person's status as a minor or adult,⁴⁸ it did so some years after the time as of which we received the English common law, which generally is prior to 1800.⁴⁹ Nonetheless, consideration of the evolution in England of the modern form of the Rule clearly indicates that, at the time as of which the common law was received here, whether it be 1607,⁵⁰ 1776⁵¹ or

42. See J. GRAY, *supra* note 2, §§ 168-170; 7 W. HOLDSWORTH, *supra* note 2, at 196, 223-226; 3 L. SIMES & A. SMITH, *supra* note 2, §§ 1211, 1213; 2 H. TIFFANY, *supra* note 2, § 399; Jones, *supra* note 4, at 269, 271; 18 N.Y. LEGISLATIVE DOCUMENTS, (N.Y.) LAW REVISION COMMISSION, SECOND ANNUAL REPORT, LEGIS. DOC. No. 65, 159TH SESS. 36, 40 (1936).

43. 3 Ch. Cas. 1, 53, 22 Eng. Rep. 931, 963 (H.L. 1685), *aff'g* 3 Ch. Cas. 1, 22 Eng. Rep. 931 (Ch. 1682).

44. See J. GRAY, *supra* note 2, §§ 185, 186; 7 W. HOLDSWORTH, *supra* note 2, at 226-227; W. LEWIS, *supra* note 4, at *154-*162; E. MILLER, JR., *supra* note 2, § 314, at 889; 3 L. SIMES & A. SMITH, *supra* note 2, §§ 1215, 1216; 2 H. TIFFANY, *supra* note 2, § 399; Jones, *supra* note 4, at 269; 18 N.Y. LEGISLATIVE DOCUMENTS, (N.Y.) LAW REVISION COMMISSION, SECOND ANNUAL REPORT, LEGIS. DOC. No. 65, 159TH SESS. 39 (1936). For a general discussion of the history of the Rule, see also 2 C. FEARNE, *supra* note 4, at *1(298) *et seq.*; 4 J. KENT, *supra* note 4, at *263-*267.

45. 1 Cl. & F. 372, 6 Eng. Rep. 956 (H. L. 1833).

46. 1 Cl. & F. 372, 421, 6 Eng. Rep. 956, 974 (H. L. 1833).

47. 1 Cl. & F. 372, 6 Eng. Rep. 956 (H. L. 1833).

48. J. GRAY, *supra* note 2, § 186; 29 HALSBURY, THE LAWS OF ENGLAND § 579, at 289 (3d ed. 1960); 7 W. HOLDSWORTH, *supra* note 2, at 227-228; W. LEWIS, *supra* note 4, at *160; 3 L. SIMES & A. SMITH, *supra* note 2, § 1215; 2 H. TIFFANY, *supra* note 2, § 399; Jones, *supra* note 4, at 269, 272; 18 N.Y. LEGISLATIVE DOCUMENTS, (N.Y.) LAW REVISION COMMISSION, SECOND ANNUAL REPORT, LEGIS. DOC. No. 65, 159TH SESS. 39 (1936).

49. See, e.g., 1 AMERICAN LAW OF PROPERTY, *supra* note 4, § 1.40; 1 J. KENT, *supra* note 4, at *470-*473.

50. E.g., COLO. REV. STAT. ANN. § 135-1-1 (1963); ILL. ANN. STAT. ch. 28, § 1 (Smith-Hurd 1961). This date usually is referred to as the fourth year of James I, rather than as 1607. *Id.*

51. E.g., FLA. STAT. ANN. § 2.01 (1963); MD. CONST. DECLARATION OF RIGHTS, art. 5 (1972).

some other date prior to 1833, the 21 year element of the permissible period of the Rule was potentially, if not actually, a period in gross unrelated to any actual minority.

*The Duke of Norfolk's Case*⁵² involved a conveyance which may be summarized as follows: To *T* in trust for *A* and the heirs male of his body, but if *X* should die without male issue during the life of *A*, or if *A* should inherit the settlor's earldom, then in trust for *C* and the heirs male of his body (which limitation was followed by the limitation of successive remainders in tail). Upon *X*'s death without issue during the life of *A*, the question of the validity of the executory limitation over in favor of *C* was raised in Chancery. In 1682, Lord Chancellor Nottingham held⁵³ the executory limitation in favor of *C* to be valid since it did not tend to a perpetuity. Although the Lord Chancellor's decree was reversed by Lord Keeper North in 1683,⁵⁴ it thereafter was affirmed, without opinion, by the House of Lords in 1685.⁵⁵ On its facts, *The Duke of Norfolk's Case*⁵⁶ must be considered to hold only that an interest (*C*'s) which must vest, if at all, within a life in being at its creation (*i.e.*, *A*'s life) is not void as tending to a perpetuity (*i.e.*, is not void for remoteness).

In connection with our problem, however, it is noteworthy that the Lord Chancellor, in so holding, relied primarily upon the cases of *Pells v. Brown*,⁵⁷ decided in 1620, and *Hinde v. Lyon*,⁵⁸ decided in 1578. The latter, it will be noted, was decided prior to the earliest time as of which we received the common law. Each of these cases involved a limitation which can be reformulated as follows: "To *A* and his heirs, and if *A* die without issue during the life of *B*, then to *B* and his heirs." Both cases held the limitation over to *B* to be a valid executory limitation. And, although the question of remoteness of vesting (of tendency to a perpetuity) was not raised in either case, the Lord Chancellor considered them to be determinative that the limitation before him did not tend to a perpetuity.⁵⁹

Even more important, however, than the Lord Chancellor's

52. 3 Ch. Cas. 1, 22 Eng. Rep. 931 (Ch. 1682), *aff'd*, 3 Ch. Cas. 1, 53, 22 Eng. Rep. 931, 963 (H. L. 1685).

53. *Id.*

54. See 3 Ch. Cas. 1, 53, 22 Eng. Rep. 931, 963 (H. L. 1685).

55. 3 Ch. Cas. 1, 53, 22 Eng. Rep. 931, 963 (H. L. 1685).

56. 3 Ch. Cas. 1, 22 Eng. Rep. 931 (Ch. 1682), *aff'd*, 3 Ch. Cas. 1, 53, 22 Eng. Rep. 931, 963 (H. L. 1685).

57. Cro. Jac. 590, 79 Eng. Rep. 504 (K. B. 1620).

58. 3 Leonard 64, 74 Eng. Rep. 543 (Com. Pl. 1578).

59. 3 Ch. Cas. 1, 31-32, 36, and 49, 22 Eng. Rep. 931, 949-950, 953, and 960-961 (Ch. 1681, 1682).

reliance on *Pells v. Brown*⁶⁰ and *Hinde v. Lyon*,⁶¹ is his holding that an interest which must vest, if at all, within a life in being at its creation *does not tend to a perpetuity because no inconvenience is caused by the contingency*.⁶² And, most important is his elaborative dictum to the effect that his decision does not in fact determine the maximum duration of the period within which the contingency upon which an estate is limited must occur in order for there to be no inconvenience (and thus no tendency to a perpetuity).⁶³ In the oft-quoted words of the Lord Chancellor,

[T]he Law. . . will allow a future Estate arising upon a Contingency only, and that to wear out in a short Time.

But what Time? And where are the Bounds of that Contingency? You may limit, it seems, upon a Contingency to happen in a Life: What if it be limited, if such a one die without Issue within twenty-one Years, or 100 Years, or while *Westminster-Hall* stands? Where will you stop, if you do not stop here? I tell you where I will stop: I will stop where-ever any visible Inconvenience doth appear; for the just Bounds of a Fee-simple upon a Fee-simple are not yet determined, but the first Inconvenience that ariseth upon it will regulate it.⁶⁴

In consequence of the above-quoted language, and of the holding and the dictum which it embodies, *The Duke of Norfolk's Case*⁶⁵ can be said⁶⁶ to be the foundation of the proposition, there-

60. Cro. Jac. 590, 79 Eng. Rep. 504 (K. B. 1620).

61. 3 Leonard 64, 74 Eng. Rep. 543 (Com. Pl. 1578).

62. 3 Ch. Cas. 1, 49 and 51-52, 22 Eng. Rep. 931, 960 and 961-962 (Ch. 1682).

63. 3 Ch. Cas. 1, 49, 22 Eng. Rep. 931, 960 (Ch. 1682). See 7 W. HOLDSWORTH, *supra* note 2, at 225-226.

64. 3 Ch. Cas. 1, 49, 22 Eng. Rep. 931, 960 (Ch. 1682). The quoted language, moreover, is repetitive of the Lord Chancellor's prior statement in response to the self-raised objection "They will perhaps say, where will you stop, if not at *Child and Bayly's Case*?" [3 Ch. Cas. 1, 36, 22 Eng. Rep. 931, 953 (Ch. 1681)]:

[W]here there is not any Inconvenience, any Danger of a Perpetuity. . . . No Man ever yet said, a Devise to a Man and his Heirs, and if he die without Issue, living B. then to B. is a naughty Remainder, that is *Pell's* and *Brown's Case*.

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 itself evident, where it is inconvenient, and, God forbid, but that Mischief should be obviated and prevented.

[3 Ch. Cas. at 36, 22 Eng. Rep. at 953 (Ch. 1681).]

65. 3 Ch. Cas. 1, 22 Eng. Rep. 931 (Ch. 1682), *aff'd*, 3 Ch. Cas. 1, 53, 22 Eng. Rep. 931, 963 (H. L. 1685).

66. Compare *Lloyd v. Carew*, Show. Parl. Cas. 137, 1 Eng. Rep. 93 (H. L. 1697) with *Marks v. Marks*, 10 Mod. 419, 88 Eng. Rep. 789 (Ch. 1718).

after established,⁶⁷ that no interest is void for remoteness (*i.e.*, as tending to a perpetuity) if it must vest, if at all, within a reasonable time after lives in being at its creation. This proposition first was established by two cases which held that an interest is not void for remoteness if it must vest, if at all, within a *reasonable period in gross* after lives in being at its creation. The first of these was *Lloyd v. Carew*,⁶⁸ decided by the House of Lords in 1697. The second was *Marks v. Marks*,⁶⁹ decided in Chancery in 1718.

*Lloyd v. Carew*⁷⁰ involved a conveyance in trust for the benefit of *H* for life, then for the benefit of *W* for life, remainder to the children of *H* and *W* successively in fee tail, then remainder to *H* in fee simple, provided, however, that if no issue of *H* and *W* was living at the death of the survivor of them, and if the heirs of *W*

should *within twelve Months after the Decease of the Survivor of the said [H] and [W] dying without Issue as aforesaid, pay to the Heirs. . . of the said [H] the Sum of 40001.* that then the Remainder in Fee-simple so limited to the said [*H*] . . . should cease; and that then, and from thenceforth, the Premises should remain to the Use of the right Heirs of the said [*W*] for ever.⁷¹

W died without issue during *H*'s life. *H* then died without issue, leaving a will by which he devised the trust property to *J*. *W*'s heirs then brought a bill in Chancery to compel the conveyance to them of the trust property upon their payment of the 40001. The bill was dismissed in Chancery. Upon appeal, however, the House of Lords reversed the "Decree of Dismission." Since the House of Lords rendered no opinion in the matter, its decision, standing alone, might be said to hold only that an interest which must vest, if at all, within a period in gross of one year after lives in being at its creation is valid. However, while the House of

67. *Cadell v. Palmer*, 1 Cl. & F. 372, 6 Eng. Rep. 956 (H. L. 1833); *Thellusson v. Woodford*, 11 Ves. Jr. 112, 32 Eng. Rep. 1030 (H. L. 1805) (dictum), *aff'g* 4 Ves. Jr. 227, 31 Eng. Rep. 117 (Ch. 1799) (dictum); *Lloyd v. Carew*, Show. Parl. Cas. 137, 1 Eng. Rep. 93 (H. L. 1697) (by implication); *Gulliver v. Wickett*, 1 Wils. K.B. 105, 95 Eng. Rep. 517 (K.B. 1745); *Gore v. Gore*, 2 Stra. 958, 93 Eng. Rep. 967 (K.B. 1734); *Goodtitle v. Wood*, Willes 211, 125 Eng. Rep. 1136 (Com. Pl. 1740); *Stanley v. Leigh*, 2 P. Wms. 686, 24 Eng. Rep. 917 (Ch. 1732); *Marks v. Marks*, 10 Mod. 419, 88 Eng. Rep. 789 (Ch. 1718); 2 W. BLACKSTONE, *supra* note 4, at 173-174; 2 C. FEARNE, *supra* note 4, at *73 (314), *76-77 (317)-(318); J. GRAY, *supra* note 2, §§ 178-180; 7 W. HOLDSWORTH, *supra* note 2, at 227. Cf. *Scatterwood v. Edge*, 1 Salk. 229, 91 Eng. Rep. 203 (K.B. 1699) (dictum).

68. Show. Parl. Cas. 137, 1 Eng. Rep. 93 (H.L. 1697) (so holding by implication).

69. 10 Mod. 419, 88 Eng. Rep. 789 (Ch. 1718).

70. Show. Parl. Cas. 137, 1 Eng. Rep. 93 (H. L. 1697).

71. Show. Parl. Cas. 137, 1 Eng. Rep. 93, 94 (H. L. 1697) (emphasis added).

Lords rendered no opinion, the arguments of counsel on both sides of the question (on which the House of Lords presumably based its decision⁷²) are given in full. These arguments were directed exclusively to the question of whether the litigated limitation tended to a perpetuity within the meaning of Lord Nottingham's opinion in *The Duke of Norfolk's Case*,⁷³ the prevailing argument being

That there could not in Reason be any Difference between a Contingency to happen during Life or Lives, or within one Year afterwards; that the true Reason of such Opinions, which allowed them if happening within the Time of the Parties lives, or upon their Deceases, was because no Inconvenience could be apprehended thereby; and the same Reason will hold to one Year afterwards; and the true Rule is to fix Limits and Boundaries to such Limitations, when so made, as that they prove Inconvenient, and not otherwise. . . .⁷⁴

Although the arguments of counsel in *Lloyd v. Carew*⁷⁵ were formulated in terms of "Inconvenience", the decision therein has been held to be the foundation of the rule that an interest is good if it must vest, if at all, within a *reasonable* period in gross after lives in being at its creation.⁷⁶

Thus, in *Marks v. Marks*,⁷⁷ the Court of Chancery, upon the authority of *Lloyd v. Carew*,⁷⁸ upheld as valid the executory interest limited to *D.* by conveyance to "*B.* for life, with remainder to *C.* in fee, provided, that if *D.* pay 500l. to *C.* his executors or administrators, *within three months after the death of B.* that then *D.* and his heirs shall have the land . . ."⁷⁹ And, in support of this holding, the court said:

And though before the case of *Lloyd v. Carew* . . . it seems to have obtained for law, that no executory devise of a fee

72. See *Cadell v. Palmer*, 1 Cl. & F. 372, 412, 422, 6 Eng. Rep. 956, 971, 975 (H. L. 1833).

73. 3 Ch. Cas. 1, 22 Eng. Rep. 931 (Ch. 1682), *aff'd*, 3 Ch. Cas. 1, 53, 22 Eng. Rep. 931, 963 (H. L. 1685).

74. Show. Parl. Cas. 137, 139, 1 Eng. Rep. 93, 95 (H. L. 1697).

75. Show. Parl. Cas. 137, 1 Eng. Rep. 93 (H. L. 1697).

76. *Cadell v. Palmer*, 1 Cl. & F. 372, 412, 422, 6 Eng. Rep. 956, 971, 975 (H. L. 1833); *Gore v. Gore*, 2 Stra. 958, 93 Eng. Rep. 967 (K.B. 1734) (dictum); *Marks v. Marks*, 10 Mod. 419, 88 Eng. Rep. 789 (Ch. 1718). See *Stanley v. Leigh*, 2 P. Wms. 686, 24 Eng. Rep. 917 (Ch. 1732).

77. 10 Mod. 419, 88 Eng. Rep. 789 (Ch. 1718).

78. Show. Parl. Cas. 137, 1 Eng. Rep. 93 (H. L. 1697).

79. 10 Mod. 419, 88 Eng. Rep. 789, 789-790 (Ch. 1718) (emphasis added).

upon a fee should be allowed of, unless upon a contingency to happen during the life of one or more persons in being at the time of the settlement; and consequently the limitation to Nathaniel would have been void, because dependent upon a contingency to happen within three months after the death of the wife; yet since that case . . . the law is now settled, that in case of a contingency that cannot in the nature of it precede the death of a person, a reasonable time may be allowed subsequent to the decease of that person for performance of the condition; and a fee limited thereupon is good. In that case, a year was held no unreasonable time; *a fortiori* not three months, which is the present case.⁸⁰

Similarly, in *Gore v. Gore*,⁸¹ decided in 1734 by the Court of King's Bench, on reference from Chancery, an executory devise was held valid on the authority of *Lloyd v. Carew*.⁸² The limitation in *Gore* was, in effect, to *T* in trust for 500 years, then to the first and every other son of *A* in fee tail male, remainder to *B* in fee tail male (with ultimate remainders over). The question raised was whether the executory devise⁸³ to the first son of *A* was valid, since *A* had no son at the time of the deviser's death although one was born to him thereafter. Although the period during which vesting of the executory interest could be postponed after lives in being at its creation was a period of gestation, not a period in gross, the court treated it as though it was in fact a period in gross. Thus, on the first argument of this case, in 1722, it was held that the limitation did not create "a good executory devise, because it might subsist forty weeks after the death of [*A*], and they were not for going a day farther than a life in being."⁸⁴ The Chancellor, however, sent the case back to King's Bench, and, on rehearing, in 1733, the court was

unanimously of opinion, that it was a good executory devise, and that a convenient time after the life was to be allowed, according to the case of *Lloyd v. Cary* [*sic*], in Show. Parl. Cases. . . . And this necessarily being to arise within nine

80. 10 Mod. 419, 422, 88 Eng. Rep. 789, 791 (Ch. 1718).

81. 2 Stra. 958, 93 Eng. Rep. 967 (K.B. 1734).

82. Show. Parl. Cas. 137, 1 Eng. Rep. 93 (H. L. 1697).

83. The interest limited to the first son of *A* was an executory interest, not a remainder, since an estate for years is a non-freehold estate, and thus there was no precedent particular estate of freehold to support it. *E.g.*, *Gore v. Gore*, 2 Stra. 958, 93 Eng. Rep. 967 (K.B. 1734).

84. 2 Stra. 958, 93 Eng. Rep. 967 (K.B. 1734).

months after the death of [A], there was no danger of a perpetuity.⁸⁵

To retrace our steps for the moment, it should be noted that, while *Lloyd v. Carew*⁸⁶ was the first case to hold that an interest is not void for remoteness if it must vest, if at all, within a reasonable period in gross after lives in being at its creation, it was not the first case to consider the point. Thus, in *Davies v. Speed*,⁸⁷ wherein the Court of King's Bench held, in 1692, that an executory devise limited to vest on someone's death without issue is void, since the law will not expect this to occur, it was stated, as dictum, that

a feoffment to the use of A. and his heirs, to commence four years from thence, was good as a springing use, and that the whole estate remained to the feoffor in the meantime; so it is if it were to commence after the death of A. without issue, if he die without issue within twenty years.⁸⁸

Settlement of this rule, that vesting of an interest can validly be postponed for a reasonable period in gross after lives in being at its creation, was followed by establishment of the principle that an interest is valid if it must vest, if at all, within the period of a minority after lives in being at its creation.⁸⁹ This was on the theory that the period during which vesting might be postponed was reasonable, since "the power of alienation will not be restrained longer than the law would restrain it, viz. during the infancy of the first taker, which cannot reasonably be said to extend to a perpetuity"⁹⁰

85. *Id.*

86. Show. Parl. Cas. 137, 1 Eng. Rep. 93 (H. L. 1697).

87. 2 Salk. 675, 91 Eng. Rep. 574 (K.B. 1692), *aff'd*, Show. Parl. Cas. 104, 1 Eng. Rep. 72 (H.L. 1698).

88. 2 Salk. 675, 675-676, 91 Eng. Rep. 574 (K.B. 1692).

89. Cases cited notes 100-121, 145 and 154 *infra* and accompanying text.

90. *Stephens v. Stephens*, Cas. Temp. Talb. 228, 232, 25 Eng. Rep. 751, 752 (Ch. 1736). *Accord*, *Cole v. Sewell*, 2 H. L. Cas. 186, 9 Eng. Rep. 1062 (H. L. 1848) (dictum); *Cadell v. Palmer*, 1 Cl. & F. 372, 6 Eng. Rep. 956 (H. L. 1833) (dictum); *Thellusson v. Woodford*, 11 Ves. Jr. 112, 32 Eng. Rep. 1030 (H. L. 1805) (dictum); *Long v. Blackall*, 7 Term. Rep. 100, 101 Eng. Rep. 875 (K.B. 1797); *Doe v. Fonnereau*, 2 Dougl. 487, 99 Eng. Rep. 311 (K.B. 1780) (dictum); *In re Ashforth*, L.R. 1 Ch. 535 (Ch. 1905) (dictum); *Thellusson v. Woodford*, 4 Ves. Jr. 227, 31 Eng. Rep. 117 (Ch. 1799) (dictum), *aff'd*, 11 Ves. Jr. 112, 32 Eng. Rep. 1030 (H. L. 1805); *Marlborough v. Godolphin*, 1 Eden 404, 28 Eng. Rep. 741 (Ch. 1759) (dictum); *Stanley v. Leigh*, 2 P. Wms. 686, 24 Eng. Rep. 917 (Ch. 1732); *Maddox v. Staines*, 2 P. Wms. 421, 24 Eng. Rep. 796 (Ch. 1727), *aff'd sub nom. Staines v. Maddox*, 3 Bro. P. C. 108, 1 Eng. Rep. 1209 (H. L. 1728); E. COKE, *supra* note 4, at 20.a.n.5 and 271.b.n.l.v; 7 W. HOLDSWORTH, *supra* note 2, at 227; W. LEWIS, *supra* note 4, at 133.

Prior to the 1833 decision in *Cadell v. Palmer*,⁹¹ this expansion of the permissible period of the Rule, from lives in being plus a reasonable period in gross to lives in being plus a period equal to a minority, was accomplished by holdings and dicta in cases construing one of three types of limitations: those in which the vesting of an interest was postponed for lives in being at its creation plus the actual minority of the person to whom the interest was limited;⁹² those in which the vesting of an interest was postponed for lives in being at its creation plus the actual minority of one *other* than the person to whom the interest was limited;⁹³ and those in which the vesting of an interest was postponed for a period involving neither an actual minority nor any period in gross.⁹⁴ It should be noted, however, that, although *Cadell v. Palmer*⁹⁵ was the first case to hold that the maximum permissible period of the Rule is "a life or lives in being [at the creation of the interest in question], and 21 years afterwards [a period equal to a minority, as a term in gross], *without reference to the infancy of any person whatever*["],"⁹⁶ it was *not* the first case to hold that the maximum permissible period of the Rule is a period

91. 1 Cl. & F. 372, 6 Eng. Rep. 956 (H. L. 1833).

92. *Blandford v. Thackerell*, 2 Ves. Jr. 238, 30 Eng. Rep. 612 (Ch. 1793); *Stephens v. Stephens*, Cas. Temp. Talb. 228, 25 Eng. Rep. 751 (Ch. 1736); *Taylor v. Biddall*, 2 Mod. 289, 86 Eng. Rep. 1078 (Com. Pl. 1679). See *Snow v. Cutler*, 1 Lev. 135, 83 Eng. Rep. 335 (K.B. 1664).

93. *Gulliver v. Wickett*, 1 Wils. K.B. 105, 95 Eng. Rep. 517 (K.B. 1745); *Goodtitle v. Wood*, Willes 211, 125 Eng. Rep. 1136 (Com. Pl. 1740); *Stanley v. Leigh*, 2 P. Wms. 686, 24 Eng. Rep. 917 (Ch. 1732); *Maddox v. Staines*, 2 P. Wms. 421, 24 Eng. Rep. 796 (Ch. 1727), *aff'd sub nom. Staines v. Maddox*, 3 Bro. P.C. 108, 1 Eng. Rep. 1209 (H. L. 1728); *Massingberd v. Ash*, 2 Ch. Rep. 275, 21 Eng. Rep. 677 (Ch. 1684). See *Beard v. Westcott*, 5 Taunt. 393, 128 Eng. Rep. 741 (Com. Pl. 1812, 1813) (on reference from Chancery), conflicting opinion given by Court of King's Bench on subsequent reference from Chancery, 5 B. & Ald. 801, 106 Eng. Rep. 1383 (K.B. 1822), decision of the Court of King's Bench confirmed by the Lord Chancellor, Turn. & R. 25, 37 Eng. Rep. 1002 (Ch. 1822); *Buckworth v. Thirkell*, 3 Bos. & Pul. 652, 127 Eng. Rep. 351 (Com. Pl. 1804) (printed as a note to *Doe v. Hutton*, 3 Bos. & Pul. 643, 127 Eng. Rep. 347 (Com. Pl. 1804)).

94. *Thellusson v. Woodford*, 11 Ves. Jr. 112, 32 Eng. Rep. 1030 (H. L. 1805), *aff'g* 4 Ves. Jr. 227, 31 Eng. Rep. 117 (Ch. 1799) (vesting postponed for lives in being at the creation of the interest); *Wilkinson v. South*, 7 Term. Rep. 555, 101 Eng. Rep. 1129 (K.B. 1798) (vesting postponed for lives in being at the creation of the interest); *Long v. Blackall*, 7 Term. Rep. 100, 101 Eng. Rep. 875 (K.B. 1797) (vesting postponed for lives in being at the creation of the interest, including an actual period of gestation); *Doe v. Fonnereau*, 2 Dougl. 487, 99 Eng. Rep. 311 (K.B. 1780) (vesting postponed for a life in being at the creation of the interest); *Goodman v. Goodright*, 2 Burr. 870, 97 Eng. Rep. 608 (K.B. 1759) (limitation over after an indefinite failure of issue); *Jee v. Audley*, 1 Cox 324, 29 Eng. Rep. 1186 (Ch. 1787) (limitation over after an indefinite failure of issue); *Marlborough v. Godolphin*, 1 Eden 404, 28 Eng. Rep. 741 (Ch. 1759) (limitation in fee tail to unborn issue of unborn grandson of testator, to whom a life estate was limited).

95. 1 Cl. & F. 372, 6 Eng. Rep. 956 (H. L. 1833).

96. 1 Cl. & F. 372, 421, 6 Eng. Rep. 956, 974 (H. L. 1833) (emphasis added).

in gross of 21 years after lives in being at the creation of the interest in question. For, those cases upholding the validity of limitations in which the vesting of an interest was postponed for lives in being at its creation plus the actual minority of one *other* than the person to whom the interest was limited, must be said to hold that an interest is valid if it must vest, if at all, within a period in gross of 21 years after lives in being at its creation.⁹⁷ Moreover, despite some noted authority to the contrary,⁹⁸ it is clear that the validity of an interest whose vesting is postponed for lives in being plus the actual minority of one *other* than the person to whom the interest is limited was established *prior* to the establishment of the validity of an interest whose vesting is postponed for lives in being plus the actual minority of the same person to whom the interest is limited.⁹⁹

The validity of an interest whose vesting is postponed for lives in being at its creation plus the actual minority of one *other* than the person to whom the interest is limited first was authoritatively established by the House of Lords' affirmance, in 1728, of the Court of Chancery's decision in *Maddox v. Staines*.¹⁰⁰ The limitation construed in this case was in the following form: To A for life, then to be paid to A's children at their respective ages of 21 (if sons) or 18 (if daughters), income to be paid to A's children from A's death until the time of distribution, and if no child of A attained the age of 21 (if a son) or 18 (if a daughter), then the entire property is to be paid to the children of B. A died without issue surviving her, and the children of B (the vesting of whose interest had been postponed for A's life plus the minorities of A's children) brought a bill in Chancery against A's executors for an accounting. The Court of Chancery upheld the validity of the executory devise to the children of B as against the argument that it might vest too remotely. It did so both on the authority of *Massingberd v. Ash*¹⁰¹ and for the reason that

whether [A] shall leave children will be known at her death; if she does have children, then those children are to have the proceed and produce of the estate for their maintenance, until they come to age, before which time if they had the

97. See cases cited notes 120-138 *infra* and accompanying text.

98. J. GRAY, *supra* note 2, §§ 171-184; 7 W. HOLDSWORTH, *supra* note 2, at 226.

99. Compare cases cited notes 100-119 *infra* and accompanying text, with cases cited notes 156-162 *infra* and accompanying text.

100. 2 P. Wms. 421, 24 Eng. Rep. 796 (Ch. 1727), *aff'd sub nom.* *Staines v. Maddox*, 3 Bro. P.C. 108, 1 Eng. Rep. 1209 (H. L. 1728).

101. 2 Ch. Rep. 275, 21 Eng. Rep. 677 (Ch. 1684), also reported *sub nom.* *Massenburgh v. Ash*, 1 Vern. 234, 257, 304, 23 Eng. Rep. 437, 453, 485 (Ch. 1684).

absolute interest therein, they could not by reason of their infancy dispose of it; but as soon as they do come to that age, then they are to have the entire property, and therefore this is a very good executory devise.¹⁰²

Between the 1728 decision of the House of Lords in *Maddox v. Staines*¹⁰³ and the 1833 decision of the House of Lords in *Cadell v. Palmer*,¹⁰⁴ the validity of executory devises similar to that in *Maddox* was upheld in three cases,¹⁰⁵ was asserted by dictum in a fourth case,¹⁰⁶ apparently was upheld in a fifth case,¹⁰⁷ and apparently was not denied in any case.

More precisely, the cases of *Stanley v. Leigh*,¹⁰⁸ *Goodtitle v. Wood*,¹⁰⁹ and *Gulliver v. Wickett*¹¹⁰ each upheld the validity of the executory interest created in *B* by a limitation in substantially the following form: To *A* for life, then to *A*'s oldest child and his heirs, but if such child should die before attaining the age of 21, then to *B* and his heirs. In the *Stanley* and *Gulliver* cases, *A* died without issue surviving him. In *Goodtitle*, *A* was survived by a son who thereafter died under the age of 21.

In 1732, in upholding the validity of the limitation to *B* in the *Stanley* case, the Court of Chancery stated:

Another objection to the plaintiff's title is, that the limitation to him is postponed. . .to the daughters [of *A*] arriving to twenty-one or marriage. . .and so the contingency, on which the limitation to the plaintiff was to take effect, might not happen within the compass of a life.

. . . [however,] a longer time, a year beyond a life, was allowed in the case of *Lloyd and Carew*. . . . As to a daughter's arriving at twenty-one or marriage, that is a contingency which must happen within a reasonable time after the

102. 2 P. Wms. 421, 422-423, 24 Eng. Rep. 796, 797 (Ch. 1727).

103. 3 Bro. P.C. 108, 1 Eng. Rep. 1209 (H. L. 1728), *aff'g* 2 P. Wms. 421, 24 Eng. Rep. 796 (Ch. 1727).

104. 1 Cl. & F. 372, 6 Eng. Rep. 956 (H. L. 1833).

105. *Gulliver v. Wickett*, 1 Wils. K.B. 105, 95 Eng. Rep. 517 (K.B. 1745); *Goodtitle v. Wood*, Willes 211, 125 Eng. Rep. 1136 (Com. Pl. 1740); *Stanley v. Leigh*, 2 P. Wms. 686, 24 Eng. Rep. 917 (Ch. 1732).

106. *Buckworth v. Thirkell*, 3 Bos. & Pul. 652, 127 Eng. Rep. 351 (Com. Pl. 1804) (printed as a note to *Doe v. Hutton*, 3 Bos. & Pul. 643, 127 Eng. Rep. 347 (Com. Pl. 1804)).

107. *Beard v. Westcott*, 5 Taunt. 393, 128 Eng. Rep. 741 (Com. Pl. 1812, 1813) (on reference from Chancery), conflicting opinion given by Court of King's Bench on subsequent reference from Chancery, 5 B. & Ald. 801, 106 Eng. Rep. 1383 (K.B. 1822), decision of the Court of King's Bench confirmed by the Lord Chancellor, Turn. & R. 25, 37 Eng. Rep. 1002 (Ch. 1822).

108. 2 P. Wms. 686, 24 Eng. Rep. 917 (Ch. 1732).

109. Willes 211, 125 Eng. Rep. 1136 (Com. Pl. 1740).

110. 1 Wils. K.B. 105, 95 Eng. Rep. 517 (K.B. 1745).

death of the father [A], and indeed prevent the power of alienation no longer than the law would do if there were no such contingency expressed, as it has been held in this Court (see the case of *Maddox* versus *Staines*. . .). This objection therefore, that the contingency on which the plaintiff's title is to depend, might not happen strictly within the compass of a life, is of no weight.¹¹¹

Similarly, in 1740, in validating the limitation to *B* in *Goodtitle*, Lord Chief Justice Willes said:

[F]irst, it was held that the contingency must happen within the compass of a life or lives in being, or a reasonable number of years. . .and the rule has in many instances been extended to twenty-one years after the death of a person in being, as in that case likewise there is no danger of a perpetuity.¹¹²

And, in 1745, in validating the limitation to *B* in *Gulliver*, Chief Justice Lee stated:

That the true construction of this will is, that here is a good devise to the wife for life, with remainder to the child in contingency in fee, with a devise over, which we hold a good executory devise, as it is to commence within 21 years after a life in being. . .and the number of contingencies are not material, if they are all to happen within a life in being, or a reasonable time afterwards.¹¹³

In addition to *Maddox*, *Stanley*, *Goodtitle* and *Gulliver*, one other case must be considered at this point. This case cannot be held to *authoritatively* establish that an interest is valid if it must vest, if at all, within lives in being at its creation plus the actual minority of one *other* than the person to whom the interest is limited, since it was decided in the Court of Chancery. Yet *Massingberd v. Ash*¹¹⁴ so held in 1684, prior to the 1728 affirmance of *Maddox* by the House of Lords.

Massingberd involved a limitation which may be formulated

111. *Stanley v. Leigh*, 2 P. Wms. 686, 691-692, 24 Eng. Rep. 917, 919 (Ch. 1732). The court previously had defined a perpetuity as "the limiting of an estate. . .in such manner as would render it unalienable longer than for a life or lives in being at the same time, and some short or reasonable time thereafter." *Id.* at 688, 24 Eng. Rep. at 917-918 (Ch. 1732).

112. *Goodtitle v. Wood*, Willes 211, 213, 125 Eng. Rep. 1136, 1137 (Com. Pl. 1740).

113. *Gulliver v. Wickett*, 1 Wils. K.B. 105, 106-107, 95 Eng. Rep. 517, 518 (K.B. 1745).

114. 2 Ch. Rep. 275, 21 Eng. Rep. 677 (Ch. 1684), also reported *sub nom.* *Massenburgh v. Ash*, 1 Vern. 234, 257, 304, 23 Eng. Rep. 437, 453, 485 (Ch. 1684).

as follows: To *H* for life, then to *W* for life, income to the eldest son of *H* and *W* until he attains his majority, at which time the entire property is to be distributed to him, but if he dies before attaining his majority, then to *A* and his heirs. *H* died survived by *W*, who then was pregnant. The child (a son) was born in due course, but died six weeks thereafter. Upon the validity of the executory devise to *A* being challenged in Chancery, the court held it to be good, stating simply, "That all the Remainders and Contingencies in the Deed of Trust, being limited and confined to fall within the Compass of twenty-one Years, are good" ¹¹⁵ It should be noted, however, despite the court's brevity, that its opinion apparently was based on the argument of *A*'s counsel,

that here was no danger of a perpetuity, being the contingency must of necessity happen within the space of twenty-one years at most after the decease of either . . . [*H* or *W*]: and this cannot be said to come nearer a perpetuity than almost every settlement of a real estate; for here, if the issue [eldest son of *H* and *W*] once attains his full age, then the whole term is to be assigned unto him, and he may dispose of it at his pleasure. . . . ¹¹⁶

This follows from the fact that *A*'s counsel based their argument upon *Wood v. Sanders*, ¹¹⁷ which previously had been used by Lord Nottingham as one of the grounds for his decision in *The Duke of Norfolk's Case*, ¹¹⁸ since the Lord Keeper stated, in approving the decision of the judges in *Massingberd*, that *Massingberd* was

115. 2 Ch. Rep. 275, 282-283, 21 Eng. Rep. 677, 679 (Ch. 1684). Substantially the same language appeared in the report of this case *sub nom.* Massenburgh v. Ash, in 1 Vern. at 304, 23 Eng. Rep. at 485 (Ch. 1684):

"[T]he Judges having unanimously given their opinion, that the contingent limitation over to the plaintiff [*A*] was good, for this reason; because the contingent limitation was circumscribed, and must happen within the space of 21 years. . . the Lord Keeper declared himself fully satisfied with the opinion of the Judges, and decreed for the plaintiff [*A*]; and said, he took this case to be the same with the case of *Wood* and *Saunders*

116. 1 Vern. 234, 236, 23 Eng. Rep. 437 (Ch. 1684).

117. 1 Ch. Cas. 131, 22 Eng. Rep. 728 (Ch. 1669).

118. 3 Ch. Cas. 1, 35-36, 40, and 51, 22 Eng. Rep. 931, 952-953, 955, and 961 (Ch. 1682). In fact, Lord Chancellor Nottingham stated, in 3 Ch. Cas. 1, 51, 22 Eng. Rep. 931, 961 (Ch. 1682):

[N]o Art or Reason can distinguish [*Wood v. Sanders*, 1 Ch. Cas. 131, 22 Eng. Rep. 728 (Ch. 1669)] from our Case. . . . *Wood* and *Saunders*'s [*sic*] Case is this: To the Husband for sixty Years, if he lived so long; to the Wife for sixty Years, if she lived so long, then if *John* be living at the Time of the Death of the Father and Mother, then to *John*; but if he die without Issue, living Father or Mother, then to *Edward*. . . . How came it then to be adjudged good? Because it was a Remainder upon a Contingency, that was to happen during two Lives, which was but a short Contingency, and the law might very well expect the Happening of it?

“the same with the case of *Wood* and *Saunders* [sic]. . . .”¹¹⁹

Examination of the decisions holding that the vesting of an interest validly can be postponed for lives in being at its creation plus the actual minority of one *other* than the person to whom it was limited demonstrates that they so held because, by limitation in marriage settlements at common law, one could validly limit property to his wife for life, remainder “to the first and other sons of the marriage in tail, and until the person *to whom the last remainder is limited* is of age the estate is unalienable.”¹²⁰ In *Stanley*, for example, the court justified holding such a postponement of vesting to be valid on the ground that it would “prevent the power of alienation no longer than the law would do if there were no such contingency expressed”¹²¹ It would appear from these decisions, however, that, in determining the maximum allowable duration of the period within which an interest must vest in order for it to be valid, the courts must have been thinking in terms of a period *equal in duration to the maximum* time for which alienation theoretically *might* be suspended by common law settlement (*i.e.*, lives in being plus 21 years), rather than in terms of a period *identical to the period* for which alienation could be suspended by common law settlement (*i.e.*, lives in being plus the actual minority of the person to whom the interest over is limited).¹²² For, on their facts, these cases involved not only postponements of vesting for a period which was *not* identical to the period for which alienation could be suspended by common law settlement, but also, as in the case of a 21 year period in gross, a potential suspension of the power of alienation for longer than the period allowable at common law, since the ultimate taker himself could have been a minor when his interest vested. And, in at least three of these cases, as heretofore indicated,¹²³ the maximum permissible period for suspension of vesting in fact is said to be a period of lives in being plus 21 years.¹²⁴

119. *Massenburgh v. Ash*, 1 Vern. 304, 23 Eng. Rep. 485 (Ch. 1684).

120. *Long v. Blackall*, 7 Term Rep. 100, 102, 101 Eng. Rep. 875, 877 (K.B. 1797). See text accompanying notes 102, 111, and 114-119 *supra*; E. COKE, *supra* note 4, at 20.a.n.5 and 271.b.n.1.V; W. LEWIS, *supra* note 4, at 133.

121. See *Stanley v. Leigh*, 2 P. Wms. 686, 692, 24 Eng. Rep. 917, 919 (Ch. 1732).

122. See *Stanley v. Leigh*, 2 P. Wms. 686, 24 Eng. Rep. 917 (Ch. 1732), which cited *Lloyd v. Carew*, Show. Parl. Cas. 137, 1 Eng. Rep. 93 (H. L. 1697) as authority for its decision. *But see Goodtitle v. Wood*, Willes 211, 214, 125 Eng. Rep. 1136, 1138 (Com. Pl. 1740), wherein the Court said: “With regard to the case of *Marks v. Marks*. . . which was cited in the arguments, though it is a very good authority, yet as it was determined on a principle not applicable to this case, there is no occasion to pray it in aid of the present case.”

123. Text accompanying notes 112, 113, and 115 *supra*.

124. *Gulliver v. Wickett*, 1 Wils. K.B. 105, 106, 95 Eng. Rep. 517, 518 (K.B. 1745)

It would appear, moreover, from *Beard v. Westcott*,¹²⁵ that postponement of the vesting of an interest for lives in being plus the actual minority of one *other* than the person to whom the interest was limited was in fact considered to be equivalent to the postponement of vesting for lives in being plus a 21 year period in gross. *Beard* involved a testamentary limitation which, as simplified, has been stated as follows:

to A. for 99 years, if he so long live, remainder to the first son of A. (then unborn,) for 99 years, if he so long live, and so on in tail male to such first son lawfully issuing for ever. And for want and in default of such issue of such first son, to the second and other sons [of A] successively for 99 years only in case he so long live . . . *and if there should be no issue male of A. at the time of his (A's) death, or in case there should be such issue male at that time, and they should all die before 21 without issue male, then to B. for 99 years if he should so long live, remainder to the first son of B. for 99 years, if he should so long live, & c.*¹²⁶

A survived the testator, having theretofore attained the age of 21, and brought a proceeding in Chancery to determine both the nature of the interest created in him by the above limitation and the validity of the other interests thereby created. The Master of the Rolls referred the case to the Court of Common Pleas for its opinion. This court, in 1812, held valid the limitations to A, his first son, and B etc., and voided the intermediate limitations to the second and other sons of A, without, however, setting forth the reasons for its decision.¹²⁷ Whereupon,

The Master of the Rolls, in consequence of what Lord Alvan-

(wherein the court said, "here is. . . a devise over, which we hold a good executory devise, as it is to commence within 21 years after a life in being. . ."); *Goodtitle v. Wood*, Willes 211, 213, 125 Eng. Rep. 1136, 1137 (Com. Pl. 1740) (wherein the court said, "the rule has in many instances been extended to twenty-one years after the death of a person in being, as in that case likewise there is no danger of a perpetuity."); *Massingberd v. Ash*, 2 Ch. Rep. 275, 21 Eng. Rep. 677 (Ch. 1684), also reported *sub nom. Massenburgh v. Ash*, 1 Vern. 234, 257, 304, 23 Eng. Rep. 437, 453, 485 (Ch. 1684) (wherein the court said "That all the Remainders and Contingencies . . . being limited and confined to fall within the Compass of twenty-one Years, are good. . .").

125. 5 Taunt. 393, 128 Eng. Rep. 741 (Com. Pl. 1812, 1813) (on reference from Chancery), conflicting opinion given by Court of King's Bench on subsequent reference from Chancery, 5 B. & Ald. 801, 106 Eng. Rep. 1383 (K.B. 1822), decision of the Court of King's Bench confirmed by the Lord Chancellor, Turn. & R. 25, 37 Eng. Rep. 1002 (Ch. 1822).

126. *Beard v. Westcott*, 5 Taunt. 393, 128 Eng. Rep. 741, at 742 (Com. Pl. 1812, 1813) (emphasis added).

127. 5 Taunt. 393, 406, 128 Eng. Rep. 741, 747 (Com. Pl. 1812).

ley M.R. had said in *Thellusson v. Woodford*, 4 Ves. jun. 377, "That the period of 21 years had never been considered as a term that might at all events be added to such executory devise or trust;" entertained doubts whether this Court had not gone too far in holding all the limitations good that could take place during a life or lives in being, or within 21 years afterwards, and therefore ordered that the Court should be again attended with the case, with the following additional question. *How far the limitations over in the event. . . they [A's male issue] should all die before they attained their respective ages of 21 years without lawful issue male, were affected by the circumstance, that they [the limitations over] were to take effect at the end of an absolute term of 21 years after a life in being at the death of the testator, without reference to the infancy of the person intended to take, or by the circumstance that there might be issue of [A] living at his death. . .who would be incapable of taking according to the above certificate, for whose death under 21, the limitation over. . .must await?*¹²⁸

Upon reargument of the case before the Court of Common Pleas, the invalidity of the limitations over to *B* etc. was urged on two grounds. First,

that the term of 21 years after the termination of a life or lives in being is not given by the law for the vesting of an estate, unless the term have reference to the coming of age of the unborn child, in whom it is to vest; it cannot be added, as a term in gross, to the duration of the life or lives in being.¹²⁹

Second, that

[if]. . .the son of [A] had had a son, that person, being the unborn son of an unborn son, could take no estate, . . . [and] the limitation to him would prevent the limitation over to [B] from taking effect, for he [B] is not to take except in the event that the grandson of [A], taking an estate, should die under twenty-one; whereas that grandson never takes any estate at all, and there is nothing to support the limitation to [B], unless the interposition is allowed of a term in gross. . . .¹³⁰

128. 5 Taunt. 393, 407-408, 128 Eng. Rep. 741, 747 (Com. Pl. 1812).

129. 5 Taunt. 393, 408, 128 Eng. Rep. 741, 748 (Com. Pl. 1812).

130. 5 Taunt. 393, 409, 128 Eng. Rep. 741, 748 (Com. Pl. 1812).

The Court of Common Pleas thereupon reaffirmed its prior decision without opinion, stating only:

we are of opinion that the limitations over in the event. . . they [A's male issue] shall all die before they attain their respective ages of 21 years without lawful male issue, are not affected by the circumstance that they are to take effect at the end of an absolute term of 21 years after a life in being at the death of the testator without reference to the infancy of the person intended to take, nor by the circumstance that there may be issue of [A] living at his death . . . who would be incapable of taking according to the former certificate . . . for whose death under 21, the limitation over . . . must await.¹³¹

The Lord Chancellor, apparently dissatisfied with the decision of the Court of Common Pleas in *Beard*, referred the case to the Court of King's Bench for its opinion. The invalidity of the limitations over to *B* etc. was urged before the Court of King's Bench on the same two grounds as it was urged on reargument before the Court of Common Pleas. Like the Court of Common Pleas, the Court of King's Bench rendered its decision without opinion, holding that *A* had an estate for 99 years, determinable with his life, and that upon *A*'s death, his oldest son him surviving would take an estate for 99 years, determinable with his life, but that "all the limitations subsequent and expectant upon the limitation to the first son of [A], are void."¹³² Whereupon, counsel for *B* contended before the Lord Chancellor

that it could not be collected from their [Court of King's Bench] certificate, whether the circumstance that the limitations were to take effect at the end of a term of 21 years, without reference to the infancy of the person intended to take, created such a suspense of the vesting as to render the limitations void.¹³³

The Lord Chancellor then confirmed the decision of the Court of King's Bench, stating that "[i]t is impossible that the Court of King's Bench should not have considered that point."¹³⁴

Beard is important for two reasons. First, as previously stated, it indicates that a postponement of vesting after lives in being for the actual minority of one *other* than the person to

131. 5 Taunt. 393, 413-414, 128 Eng. Rep. 741, 749-750 (Com. Pl. 1813).

132. 5 B. & Ald. 801, 815, 106 Eng. Rep. 1383, 1388 (K.B. 1822).

133. Turn. & R. 25, 37 Eng. Rep. 1002, 1003 (Ch. 1822).

134. Turn. & R. 25, 26, 37 Eng. Rep. 1002, 1003 (Ch. 1822).

whom an interest was limited was considered to be equivalent to a postponement of vesting after lives in being for a 21 year period in gross. Second, despite the fact that the *result* in *Beard* was the invalidation of a limitation which postponed vesting for lives in being plus the actual minority of one *other* than the person to whom the interest in question was limited, *Beard* cannot be said to hold that the limitation therein was invalid *because* of such postponement of vesting. On the contrary, despite the belief of the Lord Chancellor that "[i]t is impossible that the Court of King's Bench should not have considered that point,"¹³⁵ it would appear that

the foundation of their [Court of King's Bench] certificate was, that a previous limitation [to the second and other sons of A], clearly too remote, and which was so considered by the Court of Common Pleas, made those limitations [to B etc.] also void which the Common Pleas had held good. The subsequent limitations were considered as being void, not from any infirmity existing in themselves [*i.e.*, not because they postponed vesting for twenty-one years in gross after lives in being], but from the infirmity existing in the preceding limitation; and because that was a limitation too remote, the others were considered as being too remote also.¹³⁶

Such, at least, was the opinion of Baron Bayley, as expressed in his delivery of the opinion of the judges in *Cadell v. Palmer*.¹³⁷ And, it should be noted, Baron Bayley not only sat upon the Court of King's Bench when *Beard* was decided, but in fact signed the certificate given by the Court of King's Bench in that case.¹³⁸

It thus would seem that, at least as early as 1684,¹³⁹ and almost consistently thereafter, the courts considered the permissible period of the Rule to be at least equal in duration to the maximum time for which alienation theoretically might be suspended by common law settlement (*i.e.*, lives in being plus a period of 21 years), rather than limited to a period identical to the period for which alienation could be suspended by common law settlement (*i.e.*, lives in being plus the actual minority of the person to whom the interest over is limited). This clearly appears

135. *Id.*

136. *Cadell v. Palmer*, 1 Cl. & F. 372, 420, 6 Eng. Rep. 956, 974 (H. L. 1833).

137. *Id.*

138. *See* 5 B. & Ald. 801, 815, 106 Eng. Rep. 1383, 1388 (K.B. 1822).

139. *Massingberd v. Ash*, 2 Ch. Rep. 275, 21 Eng. Rep. 677 (Ch. 1684), also reported, *sub nom.* *Massenburgh v. Ash*, 1 Vern. 234, 257, 304, 23 Eng. Rep. 437, 453, 485 (Ch. 1684) (*dictum*).

from the cases upholding the validity of an interest whose vesting is postponed for lives in being at its creation plus the actual minority of one *other* than the person to whom the interest is limited.¹⁴⁰ This is particularly apparent when these cases are viewed in light of the fact that, not only was such postponement apparently considered to be equivalent to one for lives in being plus a period of 21 years in gross,¹⁴¹ but, all but one of these cases in fact were decided *subsequent* to the establishment of the principle that an interest is not void for remoteness if it must vest, if at all, within a reasonable period *in gross* after lives in being at its creation.¹⁴² It further appears from dicta in a number of cases decided between 1759 and 1833,¹⁴³ to the effect that

limitations. . . are void, unless they necessarily vest, if at all, within a life or lives in being and 21 years or 9 or 10 months afterwards. This has been sanctioned by the opinion of judges of all times, from the time of the Duke of Norfolk's case to the present: it is grown reverend by age, and is not now to be broken in upon¹⁴⁴

140. Text accompanying notes 120-138 *supra*. See *Gulliver v. Wickett*, 1 Wils. K.B. 105, 95 Eng. Rep. 517 (K.B. 1745) (dictum); *Goodtitle v. Wood*, Willes 211, 125 Eng. Rep. 1136 (Com. Pl. 1740) (dictum); *Stanley v. Leigh*, 2 P. Wms. 686, 24 Eng. Rep. 917 (Ch. 1732) (by inference); *Maddox v. Staines*, 2 P. Wms. 421, 24 Eng. Rep. 796 (Ch. 1727) (by inference), *aff'd sub nom. Staines v. Maddox*, 3 Bro. P.C. 108, 1 Eng. Rep. 1209 (H. L. 1728); *Massingberd v. Ash*, 2 Ch. Rep. 275, 21 Eng. Rep. 677 (Ch. 1684), also reported, *sub nom. Massenburgh v. Ash*, 1 Vern 234, 257, 304, 23 Eng. Rep. 437, 453, 485 (Ch. 1684) (dictum). Cf. *Beard v. Westcott*, 5 Taunt. 393, 128 Eng. Rep. 741 (Com. Pl. 1812, 1813) (on reference from Chancery), conflicting opinion given by Court of King's Bench on subsequent reference from Chancery, 5 B. & Ald. 801, 106 Eng. Rep. 1383 (K.B. 1822), decision of the Court of King's Bench confirmed by the Lord Chancellor, Turn. & R. 25, 37 Eng. Rep. 1002 (Ch. 1822).

141. *Beard v. Westcott*, 5 Taunt. 393, 128 Eng. Rep. 741 (Com. Pl. 1812, 1813) (on reference from Chancery), conflicting opinion given by Court of King's Bench on subsequent reference from Chancery, 5 B. & Ald. 801, 106 Eng. Rep. 1383 (K.B. 1822), decision of the Court of King's Bench confirmed by the Lord Chancellor, Turn. & R. 25, 37 Eng. Rep. 1002 (Ch. 1822); text accompanying notes 124-138 *supra*. See *Stanley v. Leigh*, 2 P. Wms. 686, 24 Eng. Rep. 917 (Ch. 1732); *J. Gray*, *supra* note 2, § 180 & n.1. *But See Goodtitle v. Wood*, Willes 211, 214, 125 Eng. Rep. 1136, 1138 (Com. Pl. 1740).

142. See cases cited notes 68-119 *supra*, and accompanying text; *W. FRATCHER*, *supra* note 29, at 270, 271; 3 L. SIMES & A. SMITH, *supra* note 2, § 1215.

143. *Wilkinson v. South*, 7 Term Rep. 555, 101 Eng. Rep. 1129 (K.B. 1798); *Long v. Blackall*, 7 Term Rep. 100, 101 Eng. Rep. 875 (K.B. 1797); *Goodman v. Goodright*, 2 Burr. 870, 97 Eng. Rep. 608 (K.B. 1759); *Buckworth v. Thirkell*, 3 Bos. & Pul. 652, 127 Eng. Rep. 351 (Com. Pl. 1804) (printed as a note to *Doe v. Hutton*, 3 Bos. & Pul. 643, 127 Eng. Rep. 347 (Com. Pl. 1804)); *Thellusson v. Woodford*, 4 Ves. Jr. 227, 31 Eng. Rep. 117 (Ch. 1799) (opinions of Lawrence, J. and Buller, J.), *aff'd*, 11 Ves. Jr. 112, 32 Eng. Rep. 1030 (H. L. 1805); *Blandford v. Thackerell*, 2 Ves. Jr. 238, 30 Eng. Rep. 612 (Ch. 1793) (which involved postponement of vesting after lives in being for the actual minority of the person to whom the interest in question was limited); *Jee v. Audley*, 1 Cox 324, 29 Eng. Rep. 1186 (Ch. 1787).

144. *Jee v. Audley*, 1 Cox 324, 325, 29 Eng. Rep. 1186, 1187 (Ch. 1793). *Accord*, *Long*

Consequently, it would seem that, at the time as of which the common law was received here, the 21 year element of the permissible period of the Rule was potentially, if not actually, a period in gross unrelated to any actual minority. Certainly, it would appear to have been, at that time, actually a period in gross in that it did not have to be related to the minority of the person to whom the interest was limited. These conclusions, moreover, are fortified by the opinions of two of the most authoritative legal commentators of that time. Thus, Blackstone, writing in 1766, states that

in . . .executory devises, the contingencies ought to be such as may happen within a reasonable time; as within one or more life or lives in being, or within a moderate term of years. . . . The utmost length that has been hitherto allowed, for the contingency of an executory devise. . .to happen in, is that of a life or lives in being, and one and twenty years afterwards.¹⁴⁵

Although the only example given by Blackstone was one in which vesting was postponed for the actual minority of the person to whom the interest was limited,¹⁴⁶ it has been said of Blackstone's statement of the permissible period of the Rule that, "by stating it generally, as he did, he must have considered 21 years generally, independently of minority, as the rule."¹⁴⁷

Fearne, moreover, commences his exhaustive study of executory devises by stating that,

the case of a limitation to one for life, and from and after the expiration of one day (or any other supposed period, not exceeding 21 years we may suppose) next ensuing his decease, then over to another, may be adduced as an instance of the call. . .to which I have opened the second branch of

v. Blackall, 7 Term Rep. 100, 102, 101 Eng. Rep. 875, 877 (K.B. 1797). *Accord*, as to the maximum permissible period of the Rule, *Wilkinson v. South*, 7 Term Rep. 555, 558, 101 Eng. Rep. 1129, 1130 (K.B. 1798); *Goodman v. Goodright*, 2 Burr. 870, 879, 97 Eng. Rep. 608, 611 (K.B. 1759); *Buckworth v. Thirkell*, 3 Bos. & Pul. 652, 655, 127 Eng. Rep. 351, 353 (Com. Pl. 1804) (printed as a note to *Doe v. Hutton*, 3 Bos. & Pul. 643, 127 Eng. Rep. 347 (Com. Pl. 1804)); *Thellusson v. Woodford*, 4 Ves. Jr. 227, 314 (opinion of Lawrence J.), 324 and 327 (opinion of Buller J.), 31 Eng. Rep. 160, 164 and 166 (Ch. 1799), *aff'd*, 11 Ves. Jr. 112, 32 Eng. Rep. 1030 (H. L. 1805); *Blandford v. Thackerell*, 2 Ves. Jr. 238, 241-242, 30 Eng. Rep. 612, 614 (Ch. 1793) (which involved postponement of vesting after lives in being for the actual minority of the person to whom the interest in question was limited).

145. 2 W. BLACKSTONE, *supra* note 4, at 173-174.

146. *See* 2 W. BLACKSTONE, *supra* note 4, at 174.

147. *Cadell v. Palmer*, 1 Cl. & F. 372, 418, 6 Eng. Rep. 956, 973 (H. L. 1833).

the general distribution of executory devises.¹⁴⁸

He then proceeds to state:

[T]he law appears to be now settled, that an executory devise, either of a real or personal estate, which must, in the nature of the limitation, vest within twenty-one years after the period of a life in being, is good; and this appears to be the longest period yet allowed for the vesting of such estates.¹⁴⁹

And, finally, it is clear that the House of Lords, in deciding *Cadell v. Palmer*,¹⁵⁰ did so in the belief that the 21 year element of the permissible period of the Rule was potentially, if not actually, a period in gross, unrelated to any actual minority, as early as 1740, or, perhaps, as early as 1697. The limitation in *Cadell* postponed the vesting of the ultimate interest limited over for 28 lives in being at the creation of such interest plus a period of 20 years thereafter, limited as a term in gross without reference to the infancy of any person. The House of Lords upheld the validity of the ultimate interest limited over, the opinion of Baron Bayley stating:

Upon the direct authority, therefore of the decision of the Court of Common Pleas, in *Beard v. Westcott*. . . and the *dicta* by L. C. Justice Willes [in 1740],¹⁵¹ Lord Mansfield¹⁵² and Lord Kenyon,¹⁵³ and the rules laid down in Blackstone and Fearn, we consider ourselves warranted in saying that the limit is a life or lives in being, and 21 years afterwards, without reference to the infancy of any person whatever. This will certainly render the estate unalienable for 21 years after lives in being, but. . . it will not tie up the alienation an unreasonable length of time.¹⁵⁴

148. 2 C. FEARNE, *supra* note 4, at *26. This passage is quoted from the 5th edition, printed in 1796. However, according to Baron Bayley, this opinion of Fearn appeared in all prior editions of his work, commencing with the first edition in 1773. *Cadell v. Palmer*, 1 Cl. & F. 372, 419, 6 Eng. Rep. 956, 974 (H.L. 1833).

149. 2 C. FEARNE, *supra* note 4, at *83-*84 (321). Similar statements are made by Fearn elsewhere in his work. *E.g.*, 2 C. FEARNE, *supra* note 4, at *77 (318), *185 (355), *415-*421. These opinions of Fearn likewise are said to have appeared in all prior editions of his work, commencing with the first edition in 1773. *Cadell v. Palmer*, 1 Cl. & F. 372, 419, 6 Eng. Rep. 956, 974 (H.L. 1833).

150. 1 Cl. & F. 372, 6 Eng. Rep. 956 (H.L. 1833).

151. In *Goodtitle v. Wood*, Willes 211, 213, 125 Eng. Rep. 1136, 1137 (Com. Pl. 1740).

152. In *Goodman v. Goodright*, 2 Burr. 870, 879, 97 Eng. Rep. 608, 611 (K.B. 1759).

153. In *Wilkinson v. South*, 7 Term Rep. 555, 558, 101 Eng. Rep. 1129, 1130 (K.B. 1798); *Long v. Blackall*, 7 Term Rep. 100, 102, 101 Eng. Rep. 875, 877 (K.B. 1797); *Jee v. Audley*, 1 Cox 324, 325, 29 Eng. Rep. 1186, 1187 (Ch. 1793).

154. *Cadell v. Palmer*, 1 Cl. & F. 372, 421, 6 Eng. Rep. 956, 974 (H.L. 1833).

The Lord Chancellor, moreover, in successfully moving the adoption by the House of Lords of Baron Bayley's above-quoted opinion, said:

That rule [that an interest must vest, if at all, within lives in being and 21 years afterwards without reference to the infancy of any person] was originally introduced in consequence of the infancy of parties; but whatever was its beginning, it is now to be taken as established by the *dicta* of the Judges from time to time. *A decision of your Lordships. . . in Lloyd v. Carew [in 1697]. . . settled the rule; for the whole question was there gone into.*¹⁵⁵

In fact, the only basis for doubting that the 21 year element of the permissible period of the Rule was potentially a period in gross unrelated to any actual minority, as of the time of our reception of the English common law, is an erroneous belief. To wit, that the *first* extension of the permissible period of the Rule beyond lives in being at the creation of the interest in question was established in 1736, in *Stephens v. Stephens*,¹⁵⁶ "to cover the case where the person to whom it [the interest in question] was limited was a posthumous child or a minor."¹⁵⁷ This belief led to numerous dicta, to the effect that vesting of an interest may be postponed for 21 years after lives in being at its creation *only* to permit the person to whom such interest is limited to attain his majority.¹⁵⁸

The limitation involved in *Stephens* was by will: To my grandson, *W*, and his heirs, but if *W* shall die under the age of 21, then to such other son of the body of my daughter, *M*, as shall attain his age of 21, and his heirs (with limitations over in default of such issue). The testator died survived by *W* and *M*. *W* thereafter died prior to attaining his age of 21. Some years after the

155. *Cadell v. Palmer*, 1 Cl. & F. 372, 422, 6 Eng. Rep. 956, 975 (H.L. 1833) (emphasis added).

156. *Cas. Temp. Talb.* 228, 25 Eng. Rep. 751 (Ch. 1736).

157. 7 *W. Holdsworth*, *supra* note 2, at 226 (emphasis added). *Accord*, *Doe v. Fonereau*, 2 Dougl. 487, 508, 99 Eng. Rep. 311, 325 (K.B. 1780).

158. *Thellusson v. Woodford*, 11 Ves. Jr. 112, 143, 32 Eng. Rep. 1030, 1042 (H.L. 1805); *Thellusson v. Woodford*, 4 Ves. Jr. 227, 331, 337, 31 Eng. Rep. 117, 168, 171 (Ch. 1799) (opinion of Alvanley, M.R.), *aff'd*, 11 Ves. Jr. 112, 32 Eng. Rep. 1030 (H.L. 1805). *See* *Long v. Blackall*, 7 Term Rep. 100, 102, 101 Eng. Rep. 875, 877 (K.B. 1797) (possibly-by implication); *Beard v. Westcott*, 5 Taunt. 393, 407-408, 128 Eng. Rep. 741, 747 (Com. Pl. 1812) (on reference from Chancery), conflicting opinion given by Court of King's Bench on subsequent reference from Chancery, 5 B. & Ald. 801, 106 Eng. Rep. 1383 (K.B. 1822), decision of the Court of King's Bench confirmed by the Lord Chancellor, *Turn. & R.* 25, 37 Eng. Rep. 1002 (Ch. 1822); *Marlborough v. Godolphin*, 1 Eden 404, 418-419, 422, 28 Eng. Rep. 741, 746-747, 748 (Ch. 1759).

death of *W*, another son (*T*) was born to *M*. The question then was raised of the validity of the limitations over after the death of *W*. The court upheld their validity, saying:

[W]e do not find any case wherein an executory devise of a freehold hath been held good, which hath suspended the vesting of the estate until a son unborn should attain his age of twenty-one years, except the case of *Taylor* and *Bydall*. . . yet upon the authority of that judgment, and its conformity to several late determinations in cases of terms for years, and considering that the power of alienation will not be restrained longer than the law would restrain it, *viz.* during the infancy of the first taker, which cannot reasonably be said to extend to a perpetuity. . . we are of opinion, that the devise before mentioned [to *T*] may be good by way of executory devise.¹⁵⁹

Four facts, however, must be noted in connection with *Stephens*. First, it apparently was the earliest case to determine the validity of a postponement of vesting for lives in being plus the actual minority of the ultimate taker.¹⁶⁰ Second, it was decided in 1736, subsequent to the decisions of the House of Lords

159. Cas. Temp. Talb. 228, 232, 25 Eng. Rep. 751, 752 (Ch. 1736). *Taylor v. Biddall*, 2 Mod. 289, 86 Eng. Rep. 1078 (Com. Pl. 1679), upon which the court in *Stephens* based its decision, involved a limitation which, in form, can be stated: to *A* until her son *B* attains the age of 21, then to *B* and his heirs, but if *B* dies before attaining the age of 21, then to the heirs of *C*'s body and their heirs when they attain their respective ages of 21. *B* died under the age of 21, and the question then was raised of the validity of the interest limited to the heirs of *C*'s body. The court held in favor of the claimant of the interest limited to the heirs of *C*'s body. It is important, however, to note that the successful party in this case was the heir at law of *B*, (and thus entitled to inherit the property from *B* if the executory interest over was void and if, as a result, *B* had a fee simple absolute) as well as the sole heir of *C*'s body. For, the ground of the court's decision is not clear. As Chief Justice North stated: "In this case a fee did vest in [*B*] presently, and therefore after his death without issue the descendant [the successful party] is his heir, and hath a good title; if not as heir at law, yet she may take by way of executory devise as heir of the body of her father. . . ." 2 Mod. 289, 292-293, 86 Eng. Rep. 1078, 1080 (Com. Pl. 1679).

160. The only earlier cases found, which apparently involved a postponement of vesting for lives in being plus the actual minority of the taker of the ultimate interest, are *Taylor v. Biddall*, 2 Mod. 289, 86 Eng. Rep. 1078 (Com. Pl. 1679), discussed in note 159 *supra*, and *Snowe v. Cutler*, 1 Lev. 135, 83 Eng. Rep. 335 (K.B. 1664). The limitation in *Snowe* was: To the heirs of *W*'s body, if they attain the age of 14 years. *W* was alive, but had no issue, at the time the interest was created. Although this limitation, on its face, involves a possible postponement of vesting for two-thirds of the actual minority of the executory devisees after a life in being at the creation of the interest, the case cannot be said to decide the validity of such a postponement. For, in the first place, the court was equally divided on the validity of the gift to the heirs of *W*'s body, in consequence of which no judgment was given. And, secondly, the court seemed to view the problem solely as one of whether a limitation to an infant *en ventre sa mere* is good—and appeared to believe that the interest would vest in each child of *W* on birth, if at all.

in *Lloyd v. Carew*¹⁶¹ and *Staines v. Maddox*¹⁶² although it did not specifically refer to either of them. In fact, neither *Lloyd* nor *Staines*, nor any pre-1736 case following either of them, is mentioned in any of the cases which, by dictum, purport to limit postponement of vesting to lives in being plus the actual minority of the taker of the postponed interest.¹⁶³ Third, the decree in *Stephens* was rendered by the Court of Chancery, not the House of Lords. And, fourth, the holding in *Stephens* cannot, on its facts, be said to preclude a greater permissible period of the Rule than it held to exist, particularly in light of the subsequent decisions in *Goodtitle*¹⁶⁴ and *Gulliver*.¹⁶⁵ Consequently, the proper chronology of the evolution of the maximum permissible period of the Rule is as follows: first, lives in being at the creation of the interest; second, lives in being plus a reasonable period in gross; third, lives in being plus the actual minority of one *other* than the person to whom the interest in question is limited (which was considered to be equivalent to a period in gross of 21 years); fourth, lives in being plus the actual minority of the person to whom the interest is limited (a period which necessarily is permissible in light of the prior validation of a period equal to lives in being plus the actual minority of one *other* than the person to whom the interest is limited); fifth, lives in being plus a period in gross of 21 years, unrelated to any actual minority. And, since the second and third developments in the evolution of the permissible period of the Rule both occurred prior to the time as of which we received the English common law, it seems clear that, at such time, the 21 year element of the permissible period of the Rule was potentially, if not actually, a period in gross unrelated to any actual minority. This conclusion, moreover, is supported by those United States cases which have considered the extent to which we have adopted the Rule as part of our received common law.

ADOPTION OF THE RULE IN THE UNITED STATES

Examination of the judicial adoption, in the United States, of the common law rule against perpetuities¹⁶⁶ demonstrates that

161. Show. Parl. Cas. 137, 1 Eng. Rep. 93 (H.L. 1697).

162. 3 Bro. P.C. 108, 1 Eng. Rep. 1209 (H.L. 1728), *aff'g* *Maddox v. Staines*, 2 P. Wms. 421, 24 Eng. Rep. 796 (Ch. 1727).

163. See cases cited note 158 *supra*.

164. *Goodtitle v. Wood*, Willes 211, 125 Eng. Rep. 1136 (Com. Pl. 1740), discussed in text accompanying notes 109 and 112 *supra*.

165. *Gulliver v. Wickett*, 1 Wils. K.B. 105, 95 Eng. Rep. 517 (K.B. 1745), discussed in text accompanying notes 110 and 113 *supra*.

166. As indicated in the text accompanying note 32 *supra*, the common law rule

the 21 year element of the permissible period of the Rule generally is, and, with few exceptions, always has been, considered as actually or potentially a period in gross, unrelated to any actual minority, at the time as of which the common law was received here. In three jurisdictions,¹⁶⁷ in fact, it has been held that the 21 year element of the permissible period of the Rule is a period in gross, unconnected with any actual minority, *because* the rule in *Cadell v. Palmer*¹⁶⁸ was *in esse*, so to speak, at the time as of which the common law was received there. And, in at least eleven other jurisdictions,¹⁶⁹ there is authoritative dicta to the same effect.

against perpetuities entered our jurisprudence by virtue of our general reception of the English common law. J. GRAY, *supra* note 2, § 200. *E.g.*, *Chilcott v. Hart*, 23 Colo. 40, 45 P. 391 (1896); *Congdon v. Congdon*, 160 Minn. 343, 200 N.W. 76 (1924); *Barton v. Thaw*, 246 Pa. 348, 92 A. 312 (1914); *Becker v. Chester*, 115 Wis. 90, 91 N.W. 87 (1902) (dictum). See 1 AMERICAN LAW OF PROPERTY, *supra* note 4, § 1.40; 1 J. KENT, *supra* note 4, at *470-473; 3 L. SIMES & A. SMITH, *supra* note 2, § 1221 (by implication).

167. *Pearce v. Pearce*, 199 Ala. 491, 74 So. 952 (1917) (by implication); *Beverlin v. First Nat. Bank in Wichita*, 151 Kan. 307, 98 P.2d 200 (1940) (by implication); *Keeler v. Lauer*, 73 Kan. 388, 85 P. 541 (1906) (by implication as dictum); *First Camden Nat. Bank & Trust Co. v. Collins*, 114 N.J.E. 59, 168 A. 275 (Ct. Errors & Appeals N.J. 1933) (by implication). *But see* *McEwen v. Enoch*, 167 Kan. 119, 204 P.2d 736 (1949). In Alabama, it should be noted, in a decision subsequent to *Pearce v. Pearce*, *supra*, but likewise holding that the 21 year element of the permissible period of the Rule is a period in gross, unconnected with any actual minority, the court stated, in support of its holding: "[t]hat the term of years (under the English rule 21 years, and 9 months when the interest of . . . [a child *en ventre sa mere*] is involved) may be taken in gross without reference to any infancy. . . was settled in *Cadell v. Palmer*. . . and has not been questioned in *America*. . . ." *Crawford v. Carlisle*, 206 Ala. 379, at 387, 89 So. 565, 573 (1921) (emphasis added).

168. 1 Cl. & F. 372, 6 Eng. Rep. 956 (H.L. 1833).

169. *Towle v. Doe*, 97 Me. 427, 54 A. 1072 (1903) (wherein the court stated that "[t]he common law rule is recognized by the courts of this state, as formulated in *Cadell v. Palmer*. . . ." *Id.* at 431, 54 A. at 1074 (1903)); *Safe Deposit & Trust Company v. Sheehan*, 169 Md. 93, 103-105, 179 A. 536, 541-542 (1935) (by implication); *Congdon v. Congdon*, 160 Minn. 343, 200 N.W. 76 (1924) (wherein the court stated:

Of course the common law applies to our state. . . . [F]or the purpose of this case, it is the same whether the common law of England which became of force in this country may be said to be the common law at the time of the Revolution or whether it was the common law of England in force at the time of the Ordinance of 1787. . . .

Under the old law alienation might be suspended for any number of lives in being and 21 years, and, of course, for 21 years as a distinct period, independent of lives. This was settled by *Cadell v. Palmer*. . . . While this decision was made after the adoption of the New York statute. . . the principle was previously regarded as generally received.

Id. at 362, 364, 200 N.W. at 82, 83 (1924)); *Proprietors of the Church in Brattle Square v. Grant*, 69 Mass. (3 Gray) 142 (1855) (by implication, the court stating:

It has therefore long been the settled rule in England, and adopted as part of the common law of this commonwealth, that all limitations, by way of executory devise, which may not take effect within the term of a life or lives in being at the death of the testator, and *twenty one years afterwards, as a term in gross*. . . are void as too remote, and tending to create perpetuities. . . . See also *Cadell v.*

This position, moreover, has been taken in full awareness of the fact that the 21 year element of the permissible period of the Rule was considered to have been introduced originally to provide for an actual minority.¹⁷⁰

Palmer. . . which contains a very full and elaborate history and discussion of the cases on this subject.

Id. at 152 (1855) (emphasis added); *Toms v. Williams*, 41 Mich. 552, 2 N.W. 814 (1879) (wherein the court stated:

Under the old law alienation might be suspended for any number of lives in being and twenty-one years, and of course for twenty-one years as a distinct period, independent of lives. *This was settled in Cadell v. Palmer*. . . . This decision was not made until several years after the adoption of the New York Revised Statutes, *although its principle was previously regarded as generally received*.

Id. at 571, 2 N.W. at 826 (1879) (emphasis added). *St. Amour v. Rivard*, 2 Mich. 294 (1852) (by implication); *Hawley v. James*, 16 Wend. 61, 114 (N.Y. Ct. for the Correction of Errors 1836) (by implication); *Penfield v. Tower*, 1 N.D. 216, 46 N.W. 413 (1890) (by implication); *Barton v. Thaw*, 246 Pa. 348, 92 A. 312 (1914) (by implication, the court stating:

twenty-one years were added [to the permissible period of the Rule] to provide for the minority of children in esse at the expiration of the life estate. Later the consideration of minority was lost sight of, and the period of twenty-one years was allowed in gross, without reference to an existing minority. The rule was developed entirely at common law. It was brought to America as part of the common law of England, and is imbedded in the common law of Pennsylvania. . . . The question was settled in the House of Lords, in England, in *Cadell v. Palmer*. . . .

Id. at 352, 355, 92 A. at 313, 314 (1914); *Brown v. Brown*, 86 Tenn. 277, 6 S.W. 869 (1888) (by implication); *Becker v. Chester*, 115 Wis. 90, 91 N.W. 87 (1902); *McArthur v. Scott*, 113 U.S. 340 (1884) (by implication, the court stating:

The rule of the common law, by which an estate devised must at all events vest within a life or lives in being and twenty-one years afterwards, has reference to time and not to persons. Even the 'life or lives in being' have no reference to the persons who are to take, for the testator is allowed to select, as the measure of time, the lives of any persons now in existence; and the 'twenty-one years afterwards' are not regulated by the birth or the coming of age of any person, for they begin, not with a birth, but with a death, and are twenty-one years in gross, without regard to the life, or to the coming of age, of any person soever. *Cadell v. Palmer*. . . .

Id. at 383 (1884)).

170. See *Pearce v. Pearce*, 199 Ala. 491, 74 So. 952 (1917); *Odell v. Odell*, 92 Mass. (10 Allen) 1 (1865) (wherein the court stated, on the authority of *Proprietors of the Church in Brattle Square v. Grant*, 69 Mass. (3 Gray) 142 (1855), cited note 169 *supra*, that [t]his limit [lives in being plus 21 years] is said to have been adopted by analogy to the ordinary limitations in strict settlement for the life of a tenant in tail and the possible minority of his heir; but the life or lives need not be those of any person interested in the estate. . . nor need the term of twenty-one years refer to the infancy of any person whatever.

Id. at 5 (1865)); *Barton v. Thaw*, 246 Pa. 348, 92 A. 312 (1914) (quoted in note 169 *supra*). Compare *Odell v. Odell*, *supra*, and *Proprietors of the Church in Brattle Square v. Grant*, *supra*, with the earlier case of *Hawley v. The Inhabitants of Northampton*, 8 Mass. (7 Tyng) *3 (1811) (wherein the court said:

"But the law will allow a devise of lands in fee simple to one, with an *executory devise* over to another on a contingency, which must happen within the compass of a life or lives in being, and twenty-one years and a few months after. The twenty-one years are introduced to provide for the minority of a child born. . . ."

Id. at *37-*38 (1811) (dictum)).

The clearest statement that *Cadell* was *in esse* at the time as of which we received the common law is to be found in *Becker v. Chester*.¹⁷¹ *Becker* involved a proceeding for construction of a will. The will, *inter alia*, divided the testator's residuary estate, which consisted of both realty and personalty, into equal parts, one for each of his children. In substance, each child was to get the income from his share for his life; his surviving issue were to receive the income from his share for the 21 years following his death; and the corpus of his share was to be distributed 21 years after his death to his *then* living issue, there being provisions for alternate gifts over on failure of his issue at any time prior to distribution. Wisconsin had a statute directed against suspension of the power of alienation of realty, but had no such statute relating to personalty. The court held, alternatively, as follows: first, that the provisions of the will did not suspend the power of alienation of realty under the Wisconsin statute, since the executors were given the power to sell it at any time; second, that, in any event, the realty of which the testator had died possessed had been equitably converted into personalty by the terms of his will, so that the statute prohibiting suspension of the power of alienation of realty would not apply; third, that enactment of a statute prohibiting only suspension of the power of alienation of realty abrogated the common law rule against perpetuities with respect to personalty; but, fourth, that if it did not, the limitations in the will in question clearly were valid under the common law rule against perpetuities. In support of its fourth alternative holding, the Wisconsin court said:

This is the proposition: If the trust were to be tested by the common-law rule as to perpetuities, would it fail? That depends upon whether the twenty-one years of the rule is a gross term and an existing period of gestation, or whether the term refers to and is limited by existing infancy. There can be no reasonable controversy at this late day, it would seem, but that the prevailing idea in the home of the common law, at the time it came to us, was that the term was a certain period of twenty-one years and the period of gestation added, though the rule was not distinctly formulated and settled in the English courts till *Cadell v. Palmer*. . . . As we understand it, that decision, since it was promulgated, has been accepted both in England and in this country, not only as to what the law of England is, but what it was when we took therefrom the principles of the common law. . . .

171. 115 Wis. 90, 91 N. W. 87 (1902).

The entire roll of the elementary writers, with one exception, might be successfully called as evidence of the recognized soundness of *Cadell v. Palmer*. . . . A study of those authorities must convince any one, it would seem, that the twenty-one years of the common law is an absolute term; that *Cadell v. Palmer* did not promulgate any new rule, but only brought into clear light the law as it had existed from as early as 1766, at least. . . .¹⁷²

It should be noted, moreover, that an express statement, that *Cadell* merely formulated explicitly a principle which in fact had been established prior to our reception of the common law, is not essential to recognition that such is the case. For, absent any reference whatsoever to *Cadell* as its basis or origin, an express holding that the 21 year element of the permissible period of the Rule is a period in gross, unrelated to any actual minority, presupposes, by logical necessity, an implied holding that *Cadell* is part of the jurisdiction's received common law. And, in at least seventeen jurisdictions, it has been held or stated as dictum, though without any reference to *Cadell*, that the 21 year element of the permissible period of the Rule is a period in gross, unconnected with any actual minority.¹⁷³ In five of these jurisdictions,

172. 115 Wis. 90, 131, 132, 91 N.W. 87, 102 (1902).

173. *Henderson v. Troy Bank & Trust Co.*, 250 Ala. 456, 34 So. 2d 835 (1948) (holding); *Wilson v. D'Atro*, 109 Conn. 563, 145 A. 161 (1929) (holding); *Hoadley v. Beardsley*, 89 Conn. 270, 93 A. 535 (1915) (holding) (no authority cited); *Emerson v. Campbell*, 32 Del. Ch. 178, 84 A.2d 148 (Del. Ch. 1951) (dictum) (no authority cited); *Murphy v. Johnston*, 190 Ga. 23, 8 S.E. 2d. 23 (1940) (dictum); *Fitchie v. Brown*, 18 Haw. 52 (1906), *aff'd*, 211 U.S. 321 (1908) (holding) (no authority cited); *Smith v. Kelley*, 387 Ill. 213, 56 N.E.2d 360 (1944) (holding); *Smith v. Renne*, 382 Ill. 26, 46 N.E.2d 587 (1943) (holding); *Andrews v. Lincoln*, 95 Me. 541, 50 A. 898 (1901) (holding); *Kimball v. Crocker*, 53 Me. 263 (1865) (holding); *Fitzpatrick v. Mercantile-Safe Deposit & Trust Company*, 220 Md. 534, 155 A.2d 702 (1959) (holding by implication) (no authority cited); *Loats Female Orphan Asylum of Frederick City v. Essom*, 220 Md. 11, 150 A.2d 742 (1959) (holding by implication) (no authority cited); *Marty v. First National Bank of Baltimore*, 209 Md. 210, 120 A.2d 841 (1956) (holding by implication) (no authority cited); *Billingsley v. Bradley*, 166 Md. 412, 171 A. 351 (1934) (holding by implication) (no authority cited); *Sutton v. Safe Deposit & Trust Company*, 155 Md. 483, 142 A. 627 (1928) (holding, by implication, on the facts; Rule not raised); *Robinson v. Bonaparte*, 102 Md. 63, 61 A. 212 (1905) (holding by implication) (no authority cited); *Mercer v. Hopkins*, 88 Md. 292, 41 A. 156 (1898) (holding, by implication on the facts; Rule not raised); *Gardner v. City Nat. Bank & Trust Co.*, 267 Mich. 270, 255 N.W. 587 (1934) (holding); *In re Helme's Estate*, 95 N.J.Eq. 197, 123 A. 43 (Prerog. Ct. N.J. 1923) (holding); *Van Riper v. Hilton*, 78 N.J.Eq. 371, 78 A. 1055 (N.J. Ch. 1911) (dictum); *Farnan v. First Union National Bank*, 263 N.C. 106, 139 S.E.2d 14 (1964) (holding); *Melcher v. Camp*, 435 P.2d 107 (Sup. Okla. 1967) (dictum); *Closset v. Burtchaell*, 112 Ore. 585, 230 P. 554 (1924) (holding); *In re Lilley's Estate*, 272 Pa. 143, 116 A. 392 (1922) (holding); *In re Johnston's Estate*, 185 Pa. 179, 39 A. 879 (1898) (holding); *Henderson v. Moore*, 189 S.W.2d 59 (Tex. Ct. Civ. App. 1945), *aff'd*, 144 Tex. 398, 190 S.W.2d 800 (1945) (holding); *Inglis v. Trustees of the*

in fact, subsequent cases indicated, by express reference to *Cadell*, that it is part of their received common law.¹⁷⁴

In Maryland, for example, despite some initial uncertainty concerning the nature of the evil to be guarded against by the Rule,¹⁷⁵ its maximum permissible period uniformly has been considered to be "a life or lives in being at the time of its commencement and twenty-one years and a fraction of a year beyond to cover the period of gestation" Maryland, however, like

Sailor's Snug Harbour in the City of New York, 28 U.S. (3 Pet.) *99 (1830) (holding); *Gertman v. Burdick*, 123 F.2d 924 (D.C. Cir. 1941), *rev'g* *Burdick v. Burdick*, 33 F. Supp. 921 (D. D.C. 1940), *cert. den. sub nom. Burdick v. Burdick*, 315 U.S. 824 (1942) (holding).

174. *Towle v. Doe*, 97 Me. 427, 54 A. 1072 (1903), cited note 169 *supra*, was decided subsequent to both *Andrews v. Lincoln*, 95 Me. 541, 50 A. 898 (1901) and *Kimball v. Crocker*, 53 Me. 263 (1865), both cited note 173 *supra*; *Safe Deposit & Trust Company v. Sheehan*, 169 Md. 93, 179 A. 536 (1935), cited note 169 *supra*, was decided subsequent to *Billingsley v. Bradley*, 166 Md. 412, 171 A. 351 (1934), *Sutton v. Safe Deposit & Trust Company*, 155 Md. 483, 142 A. 627 (1928), *Robinson v. Bonaparte*, 102 Md. 63, 61 A. 212 (1905), and *Mercer v. Hopkins*, 88 Md. 292, 41 A. 156 (1898), all of which are cited note 173 *supra*; *First Camden Nat. Bank & Trust Co. v. Collins*, 114 N.J.E. 59, 168 A. 275 (Ct. Errors & Appeals N.J. 1933), cited note 167 *supra*, was decided subsequent to *In re Helme's Estate*, 95 N.J.Eq. 197, 123 A. 43 (Prerog. Ct. N.J. 1923) and *Van Riper v. Hilton*, 78 N.J.Eq. 371, 78 A. 1055 (N.J. Ch. 1911), both cited note 173 *supra*; *Barton v. Thaw*, 246 Pa. 348, 92 A.312 (1914), cited note 169 *supra*, was decided subsequent to *In re Johnston's Estate*, 185 Pa. 179, 39 A. 879 (1898), cited note 173 *supra*; *McArthur v. Scott*, 113 U.S. 340 (1884), cited note 169 *supra*, was decided subsequent to *Inglis v. Trustees of the Sailor's Snug Harbour in the City of New York*, 28 U.S. (3 Pet.) *99 (1830), cited note 173 *supra*.

175. *Compare* *Barnum v. Barnum*, 26 Md. 119 (Perkins' Annot. Ed.), 90 Am. Dec. 88 (1866) (holding that the Rule is concerned with the duration of restraints on alienation as well as with remoteness of vesting) *with* *Gambrill v. Gambrill*, 122 Md. 563, 89 A. 1094 (1914), and *Graham v. Whitridge*, 99 Md. 248, 57 A. 609, 58 A. 36 (1904) (which settled that, in Maryland as elsewhere, the Rule is directed solely against remoteness of vesting). See *Commonwealth Realty Corporation v. Bowers*, 261 Md. 285, 274 A.2d 353 (1971); *J. GRAY, supra* note 2, § 245.2; *E. MILLER JR., supra* note 2, §§ 317-321.

176. *Graham v. Whitridge*, 99 Md. 248, 275, 57 A. 609, 611 (1904). *Accord*, *Ringgold v. Carvel*, 196 Md. 26, 76 A.2d 327 (1950); *Perkins v. Inglehart*, 183 Md. 520, 39 A.2d 672 (1944); *Deets v. Riggins*, 176 Md. 520, 6 A.2d 239 (1939); *Gambrill v. Gambrill*, 122 Md. 563, 89 A. 1094 (1914); *Levenson v. Manly*, 119 Md. 517, 87 A. 261 (1913); *Missionary Society of the Methodist Episcopal Church v. Humphreys*, 91 Md. 131, 46 A. 320 (1900); *In re Stickney's Will*, 85 Md. 79, 36 A. 654 (1897); *Starr v. The Minister and Trustees of the Starr Methodist Protestant Church*, 112 Md. 171, 76 A. 595 (1910); *Thomas v. Gregg*, 76 Md. 169, 24 A. 418 (1892); *Dulany v. Middleton*, 72 Md. 67, 19 A. 146 (1890); *Pennington v. Pennington*, 70 Md. 418, 17 A. 329 (1889); *Albert v. Albert*, 168 Md. 352, 12 A. 11 (1888); *Combs v. Combs*, 67 Md. 11, 8 A. 757 (1887); *Gambrill v. Forest Grove Lodge*, 66 Md. 17, 5 A. 548, 10 A. 595 (1886); *Heald v. Heald*, 56 Md. 300 (1881); *Goldsborough v. Martin*, 41 Md. 488 (1875); *Deford v. Deford*, 36 Md. 168 (1872); *Wallis v. Woodland*, 32 Md. 101 (1870); *Barnum v. Barnum*, 26 Md. 119 (Perkins' Annot. Ed.), 90 Am. Dec. 88 (1866); *Biscoe v. Biscoe*, 6 G. & J. 232 (Md. 1834); *Hoxton v. Archer*, 3 G. & J. 199 (Md. 1831); *Dashiell v. Dashiell*, 2 H. & G. 127 (Md. 1828); *Newton v. Griffith*, 1 H. & G. 111 (Md. 1827); *Dallam v. Dallam's Lessee*, 7 H. & J. 220 (Md. 1826). *Accord*, but phrased differently, *Barnitz's Lessee v. Casey*, 11 U.S. (7 Cranch) 456 (1813) (error to the Circuit Court for the District of Maryland); *Commonwealth Realty Corp. v. Bowers*, 261 Md. 285, 274 A.2d 353 (1971); *Murphy v. Mercantile-Safe Deposit & Trust Co.*, 236 Md. 282, 203

most of the other jurisdictions presently affected by the problem, never has expressly stated what it considers the 21 year element of the permissible period of the Rule to represent. Even the basis of the Rule's reception into Maryland's common law is obscure, to say the least,¹⁷⁷ despite dicta¹⁷⁸ from which it might be inferred that *Cadell v. Palmer*¹⁷⁹ is part of the Rule as it exists in Maryland.

Nonetheless, Maryland clearly considers the 21 year element

A.2d 889 (1964); *Fitzpatrick v. Mercantile-Safe Deposit & Trust Co.*, 220 Md. 534, 155 A.2d 702 (1959); *Ryan v. Ward*, 192 Md. 342, 64 A.2d 258 (1949); *Chism v. Reese*, 190 Md. 311, 58 A.2d 643 (1948); *Vickery v. Maryland Trust Co.*, 188 Md. 178, 52 A.2d 100 (1947); *Safe Deposit & Trust Co. v. Sheehan*, 169 Md. 93, 179 A. 536 (1935); *Turner v. Safe Deposit & Trust Co.*, 148 Md. 371, 129 A. 294 (1925); *Ortman v. Dugan*, 130 Md. 121, 100 A. 82 (1917); *Bowerman v. Taylor*, 126 Md. 203, 94 A. 652 (1915); *Gable v. Ellender*, 53 Md. 311 (1880); *Budd v. State*, 22 Md. 48 (1864); *Tongue v. Nutwell*, 13 Md. 415 (1859).

177. The Rule apparently was first *applied* in Maryland in *Davidge v. Chaney*, 4 H. & McH. 393 (Md. 1799) and *Johnson v. Negro Lish*, 4 H. & J. 441 (Md. 1819). Both of these cases held that an executory devise limited over on the indefinite failure of issue of the devisee (or legatee or grantee) of the preceding absolute (fee simple) interest (in personalty in these cases) is too remote, and thus is void. Neither case, however, either stated or referred to the Rule, except by implication from the holding therein. The Rule first was *stated* in Maryland in *Dallam v. Dallam's Lessee*, 7 H. & J. 220 (Md. 1826), which involved the construction and validity of a limitation which, in substance, may be stated as follows: "To A and his heirs, but if A dies before the age of twenty-one years, and without issue, then to B and his heirs." In holding that A took a fee simple subject to a valid executory limitation in favor of B, rather than a fee tail, the Court of Appeals stated that "no limitation can be good as an executory devise, unless it be on a contingency, that must happen, if at all, within a life or lives in being, and twenty-one years and a fraction of a year afterwards." [*Dallam v. Dallam's Lessee*, 7 H. & J. 220, 236 (Md. 1826)]. The court, however, cited no authority for this proposition, although, elsewhere in its opinion, it cited *Barnitz's Lessee v. Casey*, 11 U.S. (7 Cranch) 456 (1813) (error to the Circuit Court for the District of Maryland), which itself simply stated, without citation of authority, that "[i]t is the acknowledged rule, that an executory devise is not too remote, if the contingency may happen within a life or lives in being, or twenty-one years and a few months after." [*Id.* at 469 (1813).] Moreover, the subsequent Maryland cases stating and/or applying the Rule apparently regard *Dallam* as the basis of the Rule in Maryland. See, e.g., in chronological order, *Newton v. Griffith*, 1 H. & G. 111 (Md. 1827); *Barnum v. Barnum*, 26 Md. 119 (Perkins' Annot. Ed.), 90 Am. Dec. 88 (1866); *Gambrill v. Gambrill*, 122 Md. 563, 89 A. 1094 (1914); *Safe Deposit & Trust Co. v. Sheehan*, 169 Md. 93, 179 A. 536 (1935).

178. In *Safe Deposit & Trust Co. v. Sheehan*, 169 Md. 93, 105, 179 A. 536, 542 (1935), the court, in tracing the evolution of the Rule, stated:

Prior to that case [*Duke of Norfolk's Case*, 3 Ch. Cas. 1, 22 Eng. Rep. 931 (Ch. 1682)], *aff'd*, 3 Ch. Cas. 1, 53, 22 Eng. Rep. 931, 963 (H.L. 1685)], it had been held in *Taylor v. Biddall*. . . that an executory devise to the heirs of a living person when they attained the age of twenty-one years was good; other extensions were established in *Gore v. Gore*. . . , *Staines v. Maddox*. . . , *Lloyd v. Carew*. . . , until finally in *Cadell v. Palmer*. . . , it was decided that a 'gross term of twenty-one years, without reference to any period of minority, might be taken, with the addition, when necessary, of the period of gestation.' *Holdsworth's History, Eng. Law*, 227. *And so the rule now stands.*

(emphasis in final sentence added).

179. 1 Cl. & F. 372, 6 Eng. Rep. 956 (H.L. 1833).

of the permissible period of the Rule to be a period in gross, which is not, and need not be, related to any actual minority. Certainly, the Maryland Court of Appeals has so held in at least five cases.¹⁸⁰ In fact, the Maryland Court of Appeals appears to feel that, in so holding, it is stating the obvious, for it has not found such holdings worthy of discussion.¹⁸¹ *Robinson v. Bonaparte*,¹⁸² for example, involved a proceeding to construe a testamentary trust, the income of which was to be applied to the support of the testator's issue "until the expiration of the period of twenty years after my death and the death of my wife; at which period of time"¹⁸³ the trust corpus was limited to vest in, and be distributed to, the testator's then living issue. The testator was survived by his wife and three children. The basic issue before the court was whether the trust was limited to terminate on the last to occur of the death of the testator's wife and the expiration of 20 years from the death of the testator, or whether it was limited to terminate 20 years after the death of the last to die of testator and his wife. After holding that the latter construction was the correct one, the court further held the limitation, as so construed, to be valid under the Rule, stating only, and without citation of authority, that "inasmuch as the period prescribed by the testator does not contravene the policy of the law, and is not and cannot possibly be repugnant to the rule against perpetuities, he had a perfect right to prolong the trust for the period which he designated

180. *Fitzpatrick v. Mercantile-Safe Deposit & Trust Co.*, 220 Md. 534, 155 A.2d 702 (1959) (by implication); *Loats Female Orphan Asylum of Frederick City v. Essom*, 220 Md. 11, 150 A.2d 742 (1959) (by implication); *Marty v. First National Bank of Baltimore*, 209 Md. 210, 120 A.2d 841 (1956) (by implication); *Billingsley v. Bradley*, 166 Md. 412, 171 A. 351 (1934) (by implication); *Robinson v. Bonaparte*, 102 Md. 63, 61 A. 212 (1905) (by implication). In two other cases, moreover, wherein the vesting of the interests therein limited was held, in will construction proceedings, to be postponed for a period in gross of 20 years after lives in being at their creation, such postponement must be deemed to have been *assumed* valid, since the question of violation of the rule against perpetuities was not even raised. See *Sutton v. Safe Deposit & Trust Co.*, 155 Md. 483, 142 A. 627 (1928); *Mercer v. Hopkins*, 88 Md. 292, 41 A. 156 (1898). Cf. *Hardgrove v. Hardgrove*, 240 Md. 634, 215 A.2d 183 (1965) (validating an equitable charge on an outright devise of property in fee simple, which charge was limited to endure for a period in gross of 20 years); *Clark v. Clark*, 99 Md. 356, 58 A. 24 (1904) (invalidating a direct restraint on alienation for a ten year period in gross).

181. See *Fitzpatrick v. Mercantile-Safe Deposit & Trust Co.*, 220 Md. 534, 155 A.2d 702 (1959); *Loats Female Orphan Asylum of Frederick City v. Essom*, 220 Md. 11, 150 A.2d 742 (1959); *Marty v. First National Bank of Baltimore*, 209 Md. 210, 120 A.2d 841 (1956); *Billingsley v. Bradley*, 166 Md. 412, 171 A. 351 (1934); *Robinson v. Bonaparte*, 102 Md. 63, 61 A. 212 (1905).

182. 102 Md. 63, 61 A. 212 (1905).

183. 102 Md. 63, 65, 61 A. 212, 213 (1905).

. . . .”¹⁸⁴ Similarly, *Loats Female Orphan Asylum of Frederick City v. Essom*¹⁸⁵ involved the construction of a will which devised realty to the testator’s niece until the first to occur of her death or marriage, then to a described corporation, if in fact incorporated within 20 years after the testator’s death. The corporation, though non-existent at the testator’s death, was incorporated two years thereafter. The court held the limitation to the corporation to be valid as an executory devise. It further held, in its only reference to the Rule and without citation of authority, that “[i]n the instant case there is no problem as to the rule against perpetuities, because of the time limitation.”¹⁸⁶ Even less consideration was given to the period in gross problem in *Fitzpatrick v. Mercantile-Safe Deposit & Trust Co.*¹⁸⁷ *Fitzpatrick* involved the validity of the exercise by the life beneficiary-co-settlor of an inter vivos trust of her testamentary special power of appointment. She had duly exercised her power to create a further trust: income to be paid to her children for their lives; the trust, with relation to each child’s share, to continue for a period in gross of 20 years after such child’s death, at the end of which time it would terminate and the corpus thereof vest and be distributed. However, only one of the power holder’s children was in existence in 1876, when the power was created, although all were in existence both in 1895, when the power to revoke the trust expired, and in 1924, when the power holder died. The sole question for decision, so far as the court was concerned, was when the period of the Rule began to run. In fact, in holding that the period of the Rule began to run in 1895, and thus validating the secondary interests limited to vest 20 years after the respective deaths of the power holder’s children, the court stated, without citation of authority:

All parties agree that if the referable date of the Rule is that of the deed of trust in 1876, all of the secondary estates involved herein are invalid; because they would not necessarily have vested [and, in fact, did not vest] within a life or lives in being and twenty-one years plus the usual period of gestation, thereafter. On the other hand, they also agree that if the referable date is either 1895, when Mrs. Hawkins’ authority to revoke the deed of trust expired, or 1924, when her will became effective, all of the secondary limitations are good, as they would then have had to become vested within

184. 102 Md. 63, 72, 61 A. 212, 216 (1905).

185. 220 Md. 11, 150 A.2d 742 (1959).

186. 220 Md. 11, 20, 150 A.2d 742, 747 (1959).

187. 220 Md. 534, 155 A.2d 702 (1959).

the time prescribed by the Rule.¹⁸⁸

This cursory approach of the Maryland Court of Appeals to the period-in-gross problem is not, however, either surprising or unwarranted. For, these holdings of the Maryland Court of Appeals not only are in accord with the judicial authority hereinbefore discussed,¹⁸⁹ but also are in accord with the uniform opinion of the textwriters in this area.¹⁹⁰ Fratcher, for example, states:

The common law of England was received as the law of Michigan in the last decade of the eighteenth century. . . .

By the end of the seventeenth century it had been settled that a future interest which must necessarily vest within lives in being plus an actual minority plus one or more actual periods of gestation did not offend the rule. It had also been settled that a future interest which must necessarily vest within lives in being plus one year in gross did not violate the Rule. When English law came to Michigan, the only question relative to the permissible period of postponement of vesting under the Rule Against Perpetuities which was still undecided was that of the maximum allowable number of years in gross. Before that numerous dicta had suggested that this was twenty-one years. . . . and this was established as the law of England by a decision in 1833. Such a decision was predictable when Michigan adopted the common law, and the rule it announced may be considered as part of that law.¹⁹¹

Likewise, according to Frank, "[t]here is no decision in this State [Maryland] upon the question as to whether or not an estate to arise within twenty-one years, in gross, (*i.e.*, without reference to any lives,) would be good, but undoubtedly such an estate would be held valid. *Cadell v. Palmer*, 1 Cl. & F. 372."¹⁹²

In fact, the nearest any jurisdiction has come to repudiating *Cadell* is the *dictum* of the New Hampshire Supreme Court that

188. 220 Md. 534, 542-543, 155 A.2d 702, 706 (1959). Similarly, in each of *Marty v. First National Bank of Baltimore*, 209 Md. 210, 120 A.2d 841 (1956), and *Billingsley v. Bradley*, 166 Md. 412, 171 A. 351 (1934), the Maryland Court of Appeals, without discussion or citation of authority, validated a postponement of vesting for a period in gross of 21 years after lives in being at the creation of the interest in question.

189. See notes 167-174 *supra*, and accompanying text.

190. See Frank, Note (c)3 to *Barnum v. Barnum*, 26 Md. 119 (1866) (Perkins' Annot. Ed.); W. FRATCHER, *supra* note 29, at 270, 271; J. GRAY, *supra* note 2, §§ 186, 200, 223; 4 J. KENT, *supra* note 4, at *17-*18, *267-*271 & n.(g); E. MILLER, JR., *supra* note 2, § 323; 3 L. SIMES & A. SMITH, *supra* note 2, § 1225.

191. W. FRATCHER, *supra* note 29, at 270-271.

192. Note (c)3 to *Barnum v. Barnum*, 26 Md. 119 (1866) (Perkins' Annot. Ed.).

adding a term of twenty-one years in gross without reference to the infancy of a beneficiary. . . are open questions in this jurisdiction. A devise to trustees for accumulation during the lives of all the testator's descendants living at his death, and twenty-one years more, without reference to a case of infancy, and then to his most wealthy heir bearing his name, would require an examination of the reasons of the law, and of the reasons given for the judgments rendered in. . . *Cadell v. Palmer*. . . There are many English rules the adoption of which is not necessary here to prevent a disturbance of titles. . . .¹⁹³

CONCLUSION

It thus is clear that, at the time as of which we received the English common law,¹⁹⁴ the 21 year element of the permissible period of the Rule was potentially, if not actually, a period in gross unrelated to any actual minority-*i.e.*, unrelated to any person's status as a minor or adult. As the United States Supreme Court put it, albeit as dictum,

The rule of the common law, by which an estate devised must at all events vest within a life or lives in being and twenty-one years afterwards, has reference to time and not to persons. . . the twenty-one years afterwards are not regulated by the birth or the coming of age of any person, for they begin, not with a birth, but with a death, and are twenty-one years in gross, without regard to the life, or to the coming of age, of any person soever. *Cadell v. Palmer*. . . .¹⁹⁵

Consequently, a reduction in the age of majority should have *no* effect on the permissible period of the Rule, irrespective of its historical origin. In fact, to the extent that evidence thereof is available, this would appear to have been the legislative intent in reducing the age of majority below 21 for all purposes in those jurisdictions in which the permissible period of the Rule is a creation of the common law. Four of these jurisdictions, at least, have statutes which reduce an age contingency to 21, if it is contained in a limitation which would violate the Rule because contingent upon someone's attainment of, or failure to attain, an age

193. *Edgerly v. Barker*, 66 N.H. 434, 461, 31 A. 900, 909 (1891). *Edgerly v. Barker*, *supra*, was quoted from and approved in *Rolfe & Rumford Asylum v. Lefebvre*, 69 N.H. 238, 45 A. 1087 (1898) (dictum).

194. Even if prior to the decision in *The Duke of Norfolk's Case*, 3 Ch. Cas. 1, 22 Eng. Rep. 931 (Ch. 1682), *aff'd*, 3 Ch. Cas. 1, 53, 22 Eng. Rep. 931, 963 (H.L. 1685). See *Chilcott v. Hart*, 23 Colo. 40, 45 P. 391 (1896), and text accompanying notes 35-38 *supra*.

in excess of 21.¹⁹⁶ Three of these four jurisdictions,¹⁹⁷ however, made no change in these statutes when they reduced the age of majority below 21. One of them, in fact, *after* reducing the age of majority to 18 in 1973, reenacted in 1974, without substantive change, its statute reducing age contingencies to twenty-one.¹⁹⁸ The fourth jurisdiction, when it reduced the age of majority to 18, did concurrently amend its age contingency statute to provide for the reduction of age contingencies to 18 rather than 21.¹⁹⁹ This amendment, however, apparently was by mistake. For, at the next session thereof, its legislature once more amended its age contingency statute, to provide that age contingencies are to be reduced only to 21 to prevent violation of the Rule.²⁰⁰ Thus, since reduction of an age contingency to 21 would not prevent violation of the Rule if a reduction in the age of majority were deemed to reduce the permissible period of the Rule to eighteen years after a life or lives in being, the legislative intent in reducing the age of majority must be presumed, at least in these four jurisdictions, to be that such reduction have *no* effect on the permissible period of the Rule. But, even absent such indications of legislative intent, the same result must obtain. For, the judicial adoption, in this country, of the common law rule against perpetuities,²⁰¹ exemplifies the dictum of Mr. Justice Buller, in *Thellusson v. Woodford*,²⁰² that

Whether our predecessors acted wisely or unwisely in the line, they took in adopting the rules as to executory devise, is not now the question; for the rule allowing any number of lives in being, a reasonable time for gestation, and twenty-one years, is now the clear law, that has been settled and followed for ages; and we cannot shake that rule without shaking the foundations of the law. . . . As a matter of history or curiosity an inquiry into the origin of the rule may be the amusement of a leisure hour; but it will not afford any assistance in the decision of a Court of Justice.

195. *McArthur v. Scott*, 113 U.S. 340, 383 (1884).

196. CONN. GEN. STAT. ANN. § 45-96 (1970), *as amended* in 1972 by § 68 [1972] Conn. P.A. 127 (Supp. 1973), and *as further amended* in 1973 by [1973] Conn. P.A. 73-35; ILL. ANN. STAT. ch. 30. § 194 (c)(2) (Smith-Hurd 1961), *added* in 1969 (Supp. 1974); ME. REV. STAT. ANN. tit. 33, § 102 (1964); MD. ANN. CODE, Est. & Tr. Art., § 11-103(b) (1974), *formerly* Md. Ann. Code, art. 93, § 11-103 (b) (1969).

197. Illinois, Maine and Maryland.

198. MD. ANN. CODE, Est. & Tr. Art., § 11-103 (b) (1974), *formerly* Md. Ann. Code art. 93, § 11-103 (b) (1969).

199. CONN. GEN. STAT. ANN. § 45-96 (1970), *as amended* in 1972 by § 68 [1972] Conn. P.A. 127 (Supp. 1973).

200. [1973] Conn. P.A. 73-35.

201. See notes 166-193 *supra* and accompanying text.

202. 4 Ves. Jr. 227, 319, 31 Eng. Rep. 117, 162 (Ch. 1799).

