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REFORMING THE LAW—THE RULE AGAINST PERPETUITIES

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HISTORY AND PURPOSE OF THE RULE

For nearly three centuries the Rule Against Perpetuities (hereinafter referred to as the Rule) has plagued the courts and the legal profession. Beginning with the now famous *Duke of Norfolk's Case*[1] and ending one hundred and fifty years later with *Cadell v. Palmer*[2] the courts slowly worked out the limits of the Rule which, as formulated by Gray, reads:

> "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."[3]

As thus stated there is a disarming simplicity about the Rule; it seems almost mechanical in its application. This, however, is not so. Even the most cursory reading of the cases and literature on the subject will indicate that the Rule has been the source of a great deal of litigation. For although the limits of the time period within which a future interest must vest were fixed by the decision in *Cadell v. Palmer*,[4] the application of that period to particular cases, the determination of the lives in being, and whether the interest is vested, within the meaning of the Rule,[5] have not always been obvious. The draftsman has

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[1] 3 Ch. Cas. 1 (1682).

[2] 1 Cl. & F. 372 (1833).

[3] GRAY, THE RULE AGAINST PERPETUITIES (4th ed. 1942) § 201.

[4] *Supra*, n. 2.

[5] I have discussed the concepts of vested and contingent interests as those concepts are used by the courts in solving problems, and will not reconsider the subject in this article except to point out that the meaning of the term vested in perpetuities cases is not necessarily the same as that given it when other problems are before the courts. See Jones, *Vested and Contingent Remainders, A Suggestion With Respect to Legal Method*, 8 Md. L. Rev. 1 (1943). For another criticism of the distinction between

been the primary victim, for it is he who, in the first instance, must determine the effect which the Rule may have on the dispositions he is making, and there are many pitfalls along the way into which anyone except the most experienced may stumble. The greatest criticism of the Rule has been directed at the traps and technicalities which are likely to snare the unwary but which may be easily avoided by the expert. In fact, it is difficult to find many cases where dispositions have been held invalid for violating the Rule, in which the draftsman could not have achieved his purpose and avoided the perpetuities problem by a slight change in the wording of the instrument.

This raises the issue of the basic purpose and philosophy of the Rule. What is it trying to achieve, or, looking at the problem from the other side, what is it trying to prevent? Until comparatively recently there has been very little consideration of these matters.[6] The assumption has been that the Rule is designed to promote free alienability of interests in property and that the restriction against remotely contingent interests will accomplish that result. The assumption, however, has been questioned; several recent articles have noted that present day dispositions consist almost entirely of beneficial (equitable) interests under trusts, and that such interests do not in fact withdraw the property from commerce or restrict its alienability.[7] This is because of the powers given trustees to invest the corpus of the trust, to sell specific property, and, in the case of charitable trusts, the cy pres power of the courts to alter provisions where a change of circumstances has taken place. However, these powers are not unlimited, and to some extent there is a restriction on the free use of the property.

Similarly, the existence of several persons who by joining together may convey good title to the property does not avoid the impact of the Rule.[8] On the other hand,

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vested and contingent interests as the test for applying the Rule see, Schuyler, *Should the Rule Against Perpetuities Discard Its Vest?* 56 Mich. L. Rev. 683, 887 (1958).

[6] For a comparatively early discussion of the rationale of the Rule see Fraser, *The Rationale of the Rule Against Perpetuities*, 6 Minn. L. Rev. 560 (1922).

[7] Leach, *Perpetuities: New Absurdity, Judicial and Statutory Correctives*, 73 Harv. L. Rev. 1318 (1960); Schuyler, *op. cit. supra*, n. 5; Simes, *The Policy Against Perpetuities*, 103 U. of Pa. L. Rev. 707 (1955); Waterbury, *Some Further Thoughts on Perpetuities Reform*, 42 Minn. L. Rev. 41 (1957).

[8] At one time this was not clear but as the Rule developed the insistence on vesting as the test, particularly by Gray, determined it. GRAY, THE

where one person has unlimited power to convey title, future interests, however remote, do not violate the Rule. This is illustrated by limitations following a fee tail where the limitation is one which must vest if at all, at or before the termination of the estate tail; and in fully revocable inter vivos trusts where the period of the Rule is counted from the death of the settlor rather than from the time of the creation of the trust.[9] Thus, the prevention of the suspension of the power of alienation or the promotion of free alienability is not the sole basis or explanation of the Rule; at least in modern times this is no longer a valid reason. The Rule, however, does prevent past generations (the so-called Dead Hand) from restricting, for too long a period, the present generation in its control of the property. It tends to insure that those who have the present use and enjoyment of property shall also have the control over it and the right to dispose of it as they think fit.[10] This is the justification for the continuance of the Rule in modern times.

THE COMMON LAW RULE

What is the Rule and what are the criticisms which have given rise to the recent trend toward statutory modifications of it? As stated by Gray it merely requires all interests to vest, if at all, within a period of lives in being and twenty-one years from the time the instrument creating the interests takes effect. Actually there are three measuring periods which may be used to determine the validity of interests under the Rule. The first is the period of lives in being; the second is a period of twenty-one years in gross; and the third is a combination of these two.

Beginning with the *Duke of Norfolk's Case*,[11] it was settled that an interest which must vest within a life in being when the interest is created is not too remote. From there the law moved slowly to the proposition that any reasonable number of lives might be used as the measuring period, and if the interest will vest by the time of

RULE AGAINST PERPETUITIES (4th ed. 1942) §§ 268-278.4; MORRIS AND LEACH, THE RULE AGAINST PERPETUITIES (1956) 2-3.

[9] As regards limitations following a fee tail see GRAY, *op. cit. supra* n. 8, §§ 443-453; MORRIS AND LEACH, *op. cit. supra* n. 8, 189-190. With respect to revocable trusts see GRAY, *op. cit. supra* n. 8, § 524.1; 1 SCOTT, THE LAW OF TRUSTS (2nd ed. 1956) § 62.10. Generally as to the effect of destructibility. See 4 RESTATEMENT, PROPERTY (1944) § 373.

[10] SIMES, PUBLIC POLICY AND THE DEAD HAND (1955) 55-63; Simes, *The Policy Against Perpetuities*, 103 U. of Pa. L. Rev. 707 (1955).

[11] 3 Ch. Cas. 1 (1682).

the death of the last survivor it is valid. Thus, a gift contingent upon survivorship of children and grandchildren living at the time of the testator's death is valid.[12] Indeed the measuring lives need not be persons connected with the limitations or the conveyor in any way. Of course they must either be selected for that purpose or it must be possible to say that the limitations will, with absolute certainty, be determined within the period of the Rule; thus there must in a sense be some relationship between the measuring lives and the limitations. The famous Royal Lives clause is an illustration of the use of a selected group of persons, who are in no way connected with the testator or his limitations, as the measuring lives.[13] In such instances the lives selected must be definitely defined and not so large that it is impossible for the court to locate them.[14] Gifts are also valid where there are no persons selected as measuring lives and where there are no life interests created if it is possible to determine that the interests created will vest within the lifetimes of ascertained persons, as in gifts to the testator's own grandchildren.[15]

The second measuring period which may be used is a period of twenty-one years in gross. Commencing as the period of the minority of the ultimate taker, this was allowed on the theory that it did not restrain alienation any longer than the law would because of the infancy of the taker.[16] This soon developed into a period of twenty-one years and finally into an absolute period of years unconnected with lives or infancy.[17] Where it is impossible

[12] Thellusson v. Woodford, 11 Ves. 112 (1805). The rationale for this proposition is that the life of the survivor is but one life, or as "Twisden used to say, the candles were all lighted at once." Scattergood v. Edge, 1 Salk. 229 (1692); Love v. Wyndham, 1 Mod. 50 (1681); 4 RESTATEMENT, PROPERTY (1944) § 374(a). However, a similar clause making a gift contingent upon survivorship of the children and grandchildren of the grantor or settlor under an inter vivos instrument is bad. Ryan v. Ward, 192 Md. 342, 64 A. 2d 258 (1949).

[13] In re Villar, [1929] 1 Ch. 243.

[14] See the discussion in In re Leverhulme, [1943] 2 All E.R. 274 (Ch.) as to the possible limits on such clauses; also SIMES AND SMITH, THE LAW OF FUTURE INTERESTS (2nd ed. 1956) § 1223. See In re Moore, [1901] 1 Ch. 936 for a case which exceeded the limits.

[15] B. M. C. Durfee Trust Co. v. Taylor, 325 Mass. 201, 89 N.E. 2d 777 (1950); Simes and Smith, *op. cit. supra* n. 14, § 1223; 4 RESTATEMENT, PROPERTY (1944) § 374, comment j. Compare In re Helme's Estate, 95 N.J. Eq. 197, 123 A. 43 (1923) an obviously erroneous decision.

[16] Stephens v. Stephens, Cas. Temp. Talb. 228 (1736); GRAY, *op. cit. supra* n. 8, §§ 171-4.

[17] Cadell v. Palmer, 1 Cl. & F. 372 (1833); GRAY, *op. cit. supra* n. 8, §§ 176-85. The extension of the Rule to include the period of twenty-one years may have been accidental. Code v. Sewell, 2 H. L. Cas. 186 (1848), aff'g 4 D. & War. 1 (1842); GRAY, *supra* §§ 186-8.

to find any related lives, the period of the Rule thus becomes the period of twenty-one years. The grant of an option to purchase which is not limited to the grantee, or a clause which will cause title to shift from one taker to another upon the happening of an uncertain event must be limited to a period of twenty-one years to be valid.[18]

The third possible measuring period is merely a combination of the other two, a period of lives in being plus twenty-one years. This represents the maximum period allowed by the Rule during which future interests may remain contingent; any contingent limitation extending beyond this is invalid. The most typical limitation of this type is a gift to a person for life followed by a remainder to his children contingent on their attaining the age of twenty-one.[19] Similarly a gift to the grandchildren of the testator who attain twenty-one is valid,[20] or a gift to persons not to be determined until twenty-one years after the death of the last of a selected group of lives.[21]

In addition to the measuring period of lives in being and twenty-one years, periods of gestation may be included for in applying the Rule persons are considered as in being once conception has taken place.[22] In the *Thellusson Case*[23] two periods of gestation were involved, one preceding the determination of the lives and one at the termination of the lives. Professor Gray proposed a

[18] Options: London & South Western Railway Co. v. Gomm, L.R. 20 Ch. Div. 562 (1882); Starcher Bros. v. Duty, 61 W. Va. 373, 56 S.E. 524 (1907); 4 RESTATEMENT, PROPERTY (1944) §§ 393-4. But options in leases permitting the lessee to renew the lease or acquire the fee are valid providing they do not extend beyond the term of the lease. Hollander v. Central Metal Co., 109 Md. 131, 71 A. 442 (1908); SIMES AND SMITH, *op. cit. supra* n. 14, §§ 1243-4; Abbott, *Leases and the Rule Against Perpetuities*, 27 Yale L.J. 878 (1918); 4 RESTATEMENT, PROPERTY (1944) § 395. Executory interests: McMahon v. Saint Paul's Ref. Church, 196 Md. 125, 75 A. 2d 122 (1950); Inst. for Savings v. Roxbury Home for Aged Women, 244 Mass. 583, 139 N.E. 301 (1923); Proprietors of the Church in Brattle Square v. Grant, 3 GRAY 142 (Mass. 1855).

[19] This proposition is inherent in the statement of the basic rule that all interests must vest, if at all, within twenty-one years after some life in being; the dicta in accord are innumerable although most cases deal with limitations violating the rule. See Safe Deposit & Trust Co. of Baltimore v. Sheehan, 169 Md. 93, 179 A. 536 (1935); Billingsley v. Bradley, 166 Md. 412, 171 A. 351 (1934); 4 RESTATEMENT, PROPERTY (1944) § 386, illus. 3.

[20] Otterback v. Bohrer, 87 Va. 548, 12 S.E. 1013 (1891); 4 RESTATEMENT, PROPERTY (1944) § 374, comment j. Compare In re Helme's Estate, 95 N.J. Eq. 197, 123 A. 43 (1923).

[21] Fitchie v. Brown, 211 U.S. 321 (1908); In re Villar, [1929] 1 Ch. 243.

[22] This is considered as true whether or not it is a benefit to the individual concerned. Equitable Trust Co. v. McComb, 19 Del. Ch. 387, 168 A. 203 (1933).

[23] 11 Ves. 112 (1805).

hypothetical case in which three periods are involved.[24] However, in applying the Rule only actual periods of gestation are included, and these have never been extended into an absolute period of months in addition to the lives in being and twenty-one years, although there is some dicta in a few cases hinting at such a result.[25]

The application of these periods to specific dispositions gives rise to many problems some of which are the result of the courts' insistence that if under any possibility a limitation might violate the Rule it is invalid. This principle is applied relentlessly and has caused much of the criticism of the Rule. In many instances a remote and improbable possibility, existing at the time the interest is created, is held to offend the Rule even though at the time the case is decided it is known the event will not occur. The Unborn Widow[26] and Administrative Contingency[27] situations are examples of this type. Similar problems occur in the case of options which are not specifically limited to named persons or times.[28] Although all of these difficulties may be easily eliminated by good draftsmanship, the careless or perhaps ignorant scrivener is likely to find himself in trouble.[29] The ultimate victims, of course, are the innocent legatees and devisees who fail to receive the property which the testator intended them to have.[30]

Another principle which causes much difficulty is the irrebuttable presumption of the possibility of issue which the courts apply in perpetuities cases. This may cause trouble by bringing persons not in being into the group of measuring lives. Thus, in the case of gifts for life to

[24] GRAY, THE RULE AGAINST PERPETUITIES (4th ed. 1942) § 222.

[25] Fitzpatrick v. Mer.-Safe etc. Co., 220 Md. 534, 155 A. 2d 702 (1959); Safe Dep. & Tr. Co. v. Sheehan, 169 Md. 93, 179 A. 536 (1935); *Ibid. Supra*, n. 5.

[26] Perkins v. Iglehart, 183 Md. 520, 39 A. 2d 672 (1944); SIMES AND SMITH, FUTURE INTERESTS (2d ed. 1956) § 1293(c).

[27] In re Campbell's Estate, 28 Cal. App. 2d 102, 82 P. 2d 22 (1938); Ryan v. Beshk, 339 Ill. 45, 170 N.E. 699 (1930); SIMES AND SMITH *op. cit. supra* n. 26, § 1293 (d).

[28] See authorities cited "Options", *supra* n. 18.

[29] For discussions of the typical problem situations and suggestions as to how to avoid them through good draftmanship, see SIMES AND SMITH, *op. cit. supra* n. 26, §§ 1293-7; Leach and Logan, *Perpetuities: A Standard Saving Clause to Avoid Violations of the Rule*, 74 Harv. L. Rev. 1141 (1961). The Clause proposed in the last article seems somewhat complicated and gives very broad powers to the designated trustee to make over the challenged limitations; this approach may be unacceptable to many persons.

[30] It is entirely possible that the draftsman, whose poor workmanship resulted in the violation of the Rule and the loss of the bequest or devise by the intended beneficiary, may be liable to the latter for the amount lost because of the violation. See Lucas v. Hamm, 364 P. 2d 685 (Cal. 1961) indicating such a possibility.

the children of a living person followed by contingent gifts over, or gifts to the grandchildren of a living person, the ultimate dispositions violate the Rule because of the possibility of afterborn children.[31] Or it may be that the possibility of future issue may allow the group of eventual takers to increase for too long a time as in the case of class gifts where all members of the class will not be determined within the period of the Rule.[32] This raises another question concerning the rules for determining when a class gifts vests — will the courts split the class? The answer has been no.[33] A similar problem is presented where the stated contingency involves several possibilities; again the courts have refused to split the contingencies unless the draftsman has stated them in the alternative.[34] In fact, the concept of vested as distinguished from contingent interests is dependent on considerations foreign to the Rule and seems a poor test for its application.[35] For example, in the cases of possibilities of reverter and rights of entry the English and American courts have differed as to whether such interests are vested within the meaning of the Rule.[36]

In applying the Rule to powers of appointment there are two problems, one involving the creation of powers and the other their exercise. Any power which cannot possibly be exercised within the period of the Rule is bad; on the other hand some powers which may be exercised beyond the period of the Rule are valid.[37] The second problem involves the exercise of powers of appointment. Interests created by the donee when he exercises

[31] Marty v. First Nat'l Bk. of Balto., 209 Md. 210, 120 A. 2d 841 (1956); Ryan v. Ward, 192 Md. 342, 64 A. 2d 258 (1949); Vickery v. Maryland Trust Co., 188 Md. 178, 52 A. 2d 100 (1947); Heald v. Heald, 56 Md. 300 (1881); GRAY, *op. cit. supra* n. 24, § 370; 4 RESTATEMENT, PROPERTY (1944) § 371, illus. 2, § 383, illus. 1.

[32] Gifts to a class contingent upon the members reaching an age greater than twenty-one, or gifts over on death of a member prior to attaining an age greater than twenty-one are typical. Safe Dep. & Tr. Co. v. Sheehan, 169 Md. 93, 179 A. 536 (1935); GRAY, *op. cit. supra* n. 24, §§ 369, 372.

[33] Goldberg v. Erich, 142 Md. 544, 121 A. 365 (1923); Bowerman v. Taylor, 126 Md. 203, 94 A. 652 (1915); Leake v. Robinson, 2 Mer. 363 (1817); SIMES AND SMITH, *op. cit. supra* n. 26, § 1265. For a critical analysis of the Rule as applied to class gifts, see Leach, *The Rule Against Perpetuities and Gifts to Classes*, 51 Harv. L. Rev. 1329 (1938).

[34] Hancock v. Watson, [1902] A. C. 14; Proctor v. The Bishop of Bath and Wells, 2 H. Bl. 358 (1794); SIMES AND SMITH, *op. cit. supra* n. 26, § 1257.

[35] See *supra*, n. 5; also GRAY, THE RULE AGAINST PERPETUITIES (4th ed. 1942) § 110.1, n. 1.

[36] McMahon v. Saint Paul's Ref. Church, 196 Md. 125, 75 A. 2d 122 (1950); MORRIS AND LEACH, THE RULE AGAINST PERPETUITIES (1956) 203-11.

[37] Jones, *The Rule Against Perpetuities as Applied to Powers of Appointment in Maryland*, 18 Md. L. Rev. 93, 96-9, 108-9 (1958).

the power must vest within the period allowed by the Rule. However, in applying the Rule to powers of appointment, all interests created by the exercise of a power, other than a power presently exercisable, must vest within the period allowed by the Rule measuring from the time the power was created by the donor.[38] In the case of powers presently exercisable the interest is valid if it will vest within the period of the Rule measuring from the time the donee exercises the power.[39] These rules raise difficult problems in Maryland because of the peculiar interpretation the Court of Appeals has placed on general powers in this state. Thus, it is doubtful whether the exception just mentioned is applicable in Maryland.[40]

There are also some problems in applying the Rule to trusts. It is settled that the beneficial interests under a trust must obey the Rule and, therefore, are invalid if they will not vest within the period allowed by the Rule.[41] However, whether the Rule imposes a limit upon the duration of trusts or whether interests which vest within the period of the Rule may continue in trust beyond that period is not so clear. Although it is now generally accepted that private trusts may continue beyond the period of the Rule, there have been decisions opposed, and it is sufficiently doubtful that careful draftsmen advise against such.[42] It is agreed that charitable trusts may be created to last indefinitely.[43]

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[38] *Id.*, 100-1, 109.

[39] *Ibid.*

[40] *Id.*, 108-10.

[41] Turner v. Safe Dep. & Trust Co., 148 Md. 371, 129 A. 294 (1925); Gambrill v. Gambrill, 122 Md. 563, 89 A. 1094 (1914); GRAY, *op. cit. supra* n. 35, §§ 322-3; 4 RESTATEMENT, PROPERTY (1944) Ch. 26, Topic 2, Limitations Involving the Duration of Trusts or of Powers of a Trustee, Introductory Note.

[42] 4 RESTATEMENT, PROPERTY (1944) § 378. The early Maryland cases held that a trust which might continue for more than the period of the Rule was invalid, but these have been overruled by later cases. Jones, *supra* n. 37, 93-4; GRAY, *op. cit. supra* n. 35, §§ 234-5, 245.2 where the Maryland cases are cited and discussed in detail; *infra* at 282-283. By terminating the trust and vesting all interests within the period allowed by the Rule, one can guard against the possibility a court might construe a remote interest as contingent and invalidate it.

[43] 4 RESTATEMENT, PROPERTY (1944) § 380 (2) (a). On this point also the Maryland law was unorthodox and in doubt for many years. See, GRAY, *loc. cit. supra* n. 42. However, subsequent statutes seem to have corrected the situation and validated perpetual charitable trusts. *Infra* at 282. In the absence of statutes authorizing them, so-called "Honorary Trusts" and trusts for unincorporated associations may be invalid unless restricted to the period allowed by the Rule. SIMES AND SMITH, FUTURE INTERESTS (2d ed. 1956) §§ 1394-5. RESTATEMENT, *supra* §§ 379-80. See *infra* at 283, n. 77 for Maryland statutes providing for the creation and maintenance of private burial lots.

Two other closely related problems should be mentioned. The first is that of restraints on alienation in the form of spendthrift restrictions in a trust or provisions for the accumulation of income. Are such limitations invalid if they may exceed the period of the Rule? Although the Rule is not a restriction against the suspension of the power of alienation, it now seems settled that there is a policy against the accumulation of income for a period exceeding that of the Rule.[44] Whether this is an application of the Rule to accumulations or another rule in which the measuring period is the same as that for perpetuities is not too clear, although the current theory is that the Rule Against Accumulations is distinct from the Rule Against Perpetuities.[45] Similarly spendthrift restrictions in a trust may be bad even though all the interests vest within the period of the Rule if the trust is allowed to continue beyond that period.[46] Again, the theory upon which this is based is not settled. The second problem is that of settlement options under life insurance policies. Insofar as the proceeds of insurance are made payable to a trustee under an insurance trust agreement, the normal rules relating to trusts are applicable, and it is clear that the interests of the beneficiaries are subject to the Rule. But where the proceeds are left with the insurance company a trust relationship is not involved; it is merely a contract for the payment of the debt owed to the beneficiaries in installments, and the Rule is not applicable.[47] However, for some purposes such agreements have been treated as analogous to trusts and similar rules applied.[48] This leaves the validity of settlement options where the payments may continue beyond the period allowed by the Rule in doubt.

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[44] Wilson v. D'Atro, 109 Conn. 563, 145 A. 161 (1929); SIMES AND SMITH, *op. cit. supra* n. 43. §§ 1461-5; 4 RESTATEMENT, PROPERTY (1944) § 441. Accumulations which do not exceed the period of the Rule are valid. Gertman v. Burdick, 123 F. 2d 924 (1941); Thellusson v. Woodford, 11 Ves. 112 (1805).

[45] Gertman v. Burdick, *supra*, n. 44; SIMES AND SMITH, *loc. cit. supra*, n. 44; RESTATEMENT, *supra*, n. 44.

[46] See GRISWOLD, SPENDTHRIFT TRUSTS (2d ed. 1947) §§ 290-6; 1 SCOTT, THE LAW OF TRUSTS (2d ed. 1956) § 62.10 (3) p. 554; 1 RESTATEMENT, TRUSTS 2d (1959) § 62, comment p. all indicating that such a restriction is valid. But compare 4 RESTATEMENT, PROPERTY (1944) § 381.

[47] See Holmes v. John Hancock Mut. Life Ins. Co., 288 N.Y. 106, 41 N.E. 2d 909 (1942) involving the New York statutory rule against perpetuities rather than the common law rule.

[48] Michaelson v. Sokolove, 169 Md. 529, 182 A. 458 (1936) upholding a spendthrift provision in a settlement option on analogy to a trust.

STATUTORY MODIFICATIONS OF THE RULE

The above review of the Common Law Rule Against Perpetuities, its development and application, indicates some of the difficulties which have caused resentment against it. Attempts to reform the Rule go back a long way and have consisted mainly in statutes directed at specific evils. Thus, following the decision in the *Thellusson Case*[49] the English Parliament enacted a statute limiting the period during which income may be accumulated.[50] And in the Law of Property Act of 1925 a provision was included reducing to age twenty-one any limitation contingent on attaining a greater age which violated the Rule.[51] Suggestions for more general reforms had been made, and in 1830 the New York Revised Statutes made extensive changes in the Common Law Rule Against Perpetuities which in effect limited the permissible period in that state to two lives plus a period of minority in some instances.[52] These statutes were copied in several other states but did not prove very successful and have been substantially modified or repealed.[53] These early attempts to reform the law relating to perpetuities gave rise to much litigation and controversy and discouraged further statutory changes for many years.

However, about ten years ago a new reform movement began, resulting in the enactment of statutes in several states which make substantial changes in the impact of the Rule on limitations which violate it. An article by Professor Leach published in 1952[54] is generally given credit for beginning this new movement, although it actually began five years earlier with the enactment of the Pennsylvania Estates Act of 1947.[55] This act adopted what has been termed the "wait and see" principle; that is, in determining the validity of limitations under the Rule, the court waits until the actual events happen or until

[49] 11 Ves. 112 (1805).

[50] 39 & 40 Geo. III, c. 98 (1800).

[51] Law of Property Act, 1925, 15 & 16 Geo. 5, c. 20, § 163.

[52] New York Rev. Stats. c. 1, Tit. 2, §§ 14-21, 23, 24, 36-40 and c. 4, Tit. 4.

[53] Those states were Arizona, California, Idaho, Indiana, Kentucky, Michigan, Minnesota, Montana, North Dakota, Oklahoma, South Dakota, Wisconsin, and the District of Columbia. For a discussion of these statutes see, 4 RESTATEMENT, PROPERTY (1944) Appendix on The Statutory Rules Against Perpetuities, Ch. A and B; SIMES AND SMITH, *op. cit. supra* n. 43, §§ 1415-36.

[54] Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 Harv. L. Rev. 721 (1952); a similar article was published in England under the title *Perpetuities: Staying the Slaughter of the Innocents*, 68 L. Q. Rev. 35 (1952).

[55] PURDON'S PENNA. STATS. ANNO., §§ 301.4 and 301.5.

it becomes apparent that the interest cannot vest within the allowed period rather than considering the possibilities at the time the interest is created. There is no change in the measuring period of lives in being plus twenty-one years, but merely the substitution of actual events for possibilities in determining the validity of interests. This approach overcomes one of the criticisms of the Rule at the expense of delaying the determination of the validity of all limitations until the expiration of the full period allowed under the Rule. Whether this delay will prove more burdensome than the evils it is designed to correct remains to be seen; only time and the process of litigation can provide the answer.[56]

The Law Reform Committee in England made a report in 1956 in which it recommended the adoption of the "wait and see" principle along with several other specific reforms designed to correct some of the abuses resulting from the traditional application of the Rule.[57] For example, it was recommended that there be a presumption, rebuttable by evidence to the contrary, that a woman of fifty-five or over is incapable of bearing a child, that a male or female who has not attained the age of fourteen is incapable of procreating or bearing a child, and that medical evidence should be admissible to estabilsh that a male or female of any age is incapable of procreating or bearing a child. It was further recommended that class gifts should not be invalidated by the failure of the limitation to some only of the members, but that the limitation should take effect as to those members of the class who comply with the perpetuity rule; and that any limitation which would be void solely by reason of the possibility of some person marrying a spouse who is not a life in being should take effect as if the spouse were confined to a person who was born before the date of the limitation. Although no general change was proposed for the per-

[56] There are some who have anticipated the results and forsee disaster for the "wait and see" principle. Bordwell, *Perpetuities From the Standpoint of the Draftsman*, 11 Rutgers L. Rev. 429 (1956); Mechem, *Further Thoughts on the Pennsylvania Perpetuities Legislation*, 107 U. of Pa. L. Rev. 965 (1959); Simes, *Is the Rule Against Perpetuities Doomed? The "Wait and See" Doctrine*, 52 Mich. L. Rev. 179 (1953); Sparks, *A Decade of Transition in Future Interests*, 45 Va. L. Rev. 493 (1959). But there are others who have no such fears. Cohan, *The Pennsylvania Wait-And-See Perpetuity Doctrine — New Kernels From Old Nutshells*, 28 Temple L. Q. 321 (1955); Leach, *Perpetuities Legislation: Hail, Pennsylvania!* 108 U. of Pa. L. Rev. 1124 (1960). As the student of two of the critics (Bordwell and Mechem) and the teacher of one (Sparks), I perhaps should be opposed to the current reforms, but I am not!

[57] LAW REFORM COMMITTEE, FOURTH REPORT (1956).

petuity period it was recommended that the instrument might provide for an absolute period of eighty years in substitution for the Common Law period.[58]

A variant of the "wait and see" type of statute has been enacted in Massachusetts and several other states,[59] by which, when applying the Rule to interests limited to take effect after one or more life estates or lives of persons in being when the period of the Rule commences to run, the validity of the interest is determined on the basis of the facts existing at the termination of the life estates or lives. In addition some of these statutes contain other provisions designed to correct specific abuses in the application of the Rule, but none of them goes as far as the English recommendations.

Another type of statute, found in a few states, combines the "wait and see" principle with what has been called the "cy pres" approach.[60] In these statutes the court is given the power to reform any interest which might violate the Rule so as to approximate, within the limits of the Rule, the intention of the creator; in determining whether an interest violates the Rule actual rather than possible events are considered. Such statutes are obviously based on the "cy pres" principle as applied in the case of charitable trusts and perhaps can trace their beginnings back to the famous decision of Chief Justice Doe in *Edgerly v. Barker*.[61] It is interesting to note that the Law Reform Committee in making its report considered the possibility of such an approach but rejected it, saying:

> "We have considered whether the court should be given a general power to remodel limitations which infringe the rule, and give effect to the nearest possible approximation to the intention of the settlor or testator that will comply with the rule. The impact of such a *cy-pres* doctrine . . . would not be easy to foretell, and the jurisdiction would be difficult in its exercise. We are far from convinced that the complexities inherent in such a vague and uncertain

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[58] *Id.*, ¶ 9.

[59] 6 MASS. LAWS ANNO., Ch. 184A, §§ 1-6; CONN. STAT. ANNO. (1958) Tit. 45, §§ 45-95 thru 45-99; MAINE REV. STATS., Ch. 160 (Cum. Supp. 1959) § 27-33. The Maryland statute, discussed *infra* at 283-289, is also modeled after the Massachusetts act.

[60] 7 VT. STATS. ANNO. (1959) Tit. 27, §§ 501-503; KY. REV. STATS. ANNO. (1962 Cum. Issue) §§ 381.215 thru 381.223; WASH. REV. CODE, Tit. 11,, §§ 11.98.010 thru 11.98.050.

[61] 66 N.H. 434, 31 A. 900 (1891).

jurisdiction would be outweighed by any practical advantage."[62]

New York, after abandoning its original statutory scheme and adopting what is approximately the Common Law measuring period, has attempted to prevent the abuses of the Rule by a statute designed to correct individual instances in which it is considered the Rule has worked badly.[63]

THE MARYLAND LAW (COMMON AND UNCOMMON)

With a few notable exceptions, the Court of Appeals has applied the Common Law Rule Against Perpetuities in orthodox fashion. Maryland cases have been cited in the above discussion of the development and application of the Rule and no attempt will be made here to review them in detail. It is important, however, to note those instances in which the Maryland cases have differed from the generally accepted view or in which there is some doubt whether that view will be followed. Because of the peculiar and limited interpretation of general powers of appointment in Maryland, it is questionable whether the usual rules applicable to such powers will be applied in Maryland or whether the more restrictive rules applicable to special powers will be followed. For example, a general power presently exercisable is normally held valid if it is possible that it may be exercised within the period of the Rule even though it is not certain that it will be exercised within that period.[64] All other powers must be so limited that it is certain they will be exercised within the period allowed by the Rule.[65] In Maryland it is doubtful whether the exception relating to general powers will be recognized.[66] There are similar doubts regarding the rules governing the exercise of general powers presently exercisable.[67]

The Court of Appeals has also shown less inclination than other courts to split a gift to a class into sub-classes where such a technique might result in avoiding the appli-

[62] LAW REFORM COMMITTEE, FOURTH REPORT (1956) ¶ 30.

[63] 40 MCKINNEY'S CONSOL. LAWS ANNO. (1945) §§ 11, 11-a & b; 49 MCKINNEY'S CONSOL. LAWS ANNO. (Cum. Supp. 1962) §§ 42, 42-b & c, 178; the changes were made in 1958 and 1960.

[64] Jones, *The Rule Against Perpetuities as Applied to Powers of Appointment in Maryland*, 18 Md. L. Rev. 93, 97 (1958).

[65] *Ibid.*

[66] *Id.*, 97-99.

[67] *Id.*, 100-104.

cation of the Rule.[68] As previously indicated, there is some dicta in Maryland treating the period of gestation as an absolute period of a stated number of months rather than a factual matter to be considered only in those instances in which it is actually involved.[69] However, it is believed these dicta will not be followed.

Another instance in which the Maryland law originally differed from the normal application of the Rule was in relation to trusts. It is conceded that the beneficial interests under a trust must vest within the period allowed by the Rule, but following the decision by the Supreme Court in the *Baptist Case*[70] the Court of Appeals held there was no special law relating to charitable trusts in Maryland and that such trusts were void because of the lack of definite beneficiaries and because they violated the Rule.[71] Although the Supreme Court subsequently reversed its early decision and upheld charitable trusts, the Court of Appeals has never changed its position, and insofar as charitable trusts are valid in Maryland they are dependent on various statutory provisions which will be discussed below.

With respect to private trusts, the Court not only required that all interests must vest within the period allowed by the Rule, but also took the position that any trust which might continue beyond the period allowed by the Rule was invalid.[72] These cases were subsequently overruled and the law of perpetuities as it is now applied to private trusts in Maryland seems to be completely

[68] The general rule is that both the maximum and minimum membership of the class must be determined within the period allowed by the Rule, and, if it is possible that any member may not qualify within that period, the gift fails as to all members of the class. See *supra* at 275, n. 33. However, where the class is split into sub-classes within the period allowed by the Rule, the courts in some instances may uphold the gifts to some of the sub-classes even though the gifts to others fail. Turner v. Safe Dep. & Trust Co., 148 Md. 371, 129 A. 294 (1925); Bowerman v. Taylor, 126 Md. 203, 94 A. 652 (1915); Smith's Estate v. Commissioner of Internal Revenue, 140 F. 2d 759 (1944); Second Bank-State Street Trust Co. v. Second Bank-State Street Trust Co., 335 Mass. 407, 140 N.E. 2d 201 (1957); Cattlin v. Brown, 11 Hare 372 (Ch. 1853); SIMES AND SMITH, FUTURE INTERESTS (2d ed. 1956) § 1267; 4 RESTATEMENT, PROPERTY (1944) § 389. For the form of limitations which will permit a court to split the gift into sub-classes, see RESTATEMENT, *supra*, Comments b and c; compare Ryan v. Ward, 192 Md. 342, 64 A. 2d 258 (1949) where the Court of Appeals failed to find the necessary splitting.

[69] *Supra* at 274, n. 25.

[70] Baptist Association v. Hart's Executors, 17 U.S. (4 Wheat.) 1 (1819).

[71] For a thorough review of the history and development of the law of charitable trusts in Maryland see, Howard, *Charitable trusts in Maryland*, 1 Md. L. Rev. 105 (1937).

[72] *Supra*, n. 42.

orthodox.[73] Closely related to the problems involving trusts is the question of the validity of spendthrift restrictions in insurance settlement options. The one Maryland case[74] involving such a provision upheld the restrictions on analogy to spendthrift trusts; this, as previously indicated, casts some doubt on their validity if they exceed the period of the Rule.[75]

In view of the peculiarities of the Maryland law, it was inevitable that statutory reforms should be enacted to correct some of the situations noted above. This is especially true in the case of charitable trusts where donors were limited in making gifts to existing charitable corporations. Therefore, in 1888 the legislature passed a statute providing that no devise or bequest for charitable uses shall be held void provided the will contains directions for the formation of a corporation to take the same and such corporation is formed within twelve months after the probate of the will or the termination of any prior life estates.[76] Without such a statute gifts to corporations to be formed violate the Rule because of the possibility the corporation might not be organized within the period allowed by the Rule. After the statute gifts to charitable corporations in existence or to be formed were valid but unincorporated charitable trusts remained invalid until further legislation was enacted. In 1906 two more statutes were passed validating the devise or conveyance of burial lots, and the bequest of sums, not exceeding $5,000, in trust for the care and maintenance of such lots or graves.[77] Again in 1908 another statute was passed which expressly exempted from the operation of the Rule any contingent gift over from a charitable corporation to an individual.[78] Such executory interests designed to control the use of the preceding charitable gift usually are held to violate the Rule.[79]

The next statute to be enacted apparently was intended to establish in Maryland the law of charitable trusts as

[73] Jones, *supra*, n. 64, 93-4.

[74] Michaelson v. Sokolove, 169 Md. 529, 182 A. 458 (1936).

[75] *Supra* at 277.

[76] 8 MD. CODE (1957) Art. 93, § 357.

[77] 8 MD. CODE (1957) Art. 93 §§ 345, 358.

[78] 8 MD. CODE (1957) Art. 93 § 348. At Common Law the gift over is valid providing both the first and second takers are charities. GRAY, THE RULE AGAINST PERPETUITIES (4th ed. 1942) § 597.

[79] McMahon v. Saint Paul's Ref. Church, 196 Md. 125, 75 A. 2d 122 (1950). But see 2 MD. CODE (1957) Art. 16, §§ 124-5 establishing procedures by which educational or charitable corporations may be required to comply with such restrictions and conditions even though the gifts over are too remote under the Rule.

applied by the English courts.[80] Although it did not entirely succeed in so doing, it did expressly provide that "it shall be no objection to the validity or enforceability of such trusts or of such gift, deed, bequest, devise, etc., . . . that such trusts or the limitations under such settlement are limited to extend for a perpetual or indefinite period."[81] This definitely removes the previous objection that perpetual charitable trusts violated the Rule.

There are two other statutes relating to perpetuities which should be mentioned. The first does nothing more than prohibit the creation of a perpetuity.[82] This apparently has had no impact on the course of the law and is nothing more than an attempt to codify the Common Law restriction. The other statute exempts profit sharing and pension trust plans from the operation of the Rule.[83] The popularity of such plans in recent years has raised some doubts as to their possible violation of the Rule, and as a result statutes of this type have been enacted in many states.

This then brings us to the 1960 statute[84] which adopts a limited "wait and see" approach. There are six subsections in the act the first of which provides:

> "*Basis of determination of validity of interest.* In applying the rule against perpetuities to an interest in real or personal property limited to take effect at or after the termination of one or more life estates in, or lives of, persons in being when the period of said rule commences to run, the validity of the interest shall be determined on the basis of facts existing at the termination of such one or more life estates or lives. In this section an interest which must terminate not later than the death of one or more persons is a 'life estate' even though it may terminate at an earlier date."[85]

This is identical with the Massachusetts statute.[86] What does it mean? What changes will it effect? How will it

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[80] See, Howard, *supra*, n. 71, 123-5.

[81] 2 MD. CODE (1957) Art. 16, § 195. Other statutes have been enacted to give the courts the cy pres powers exercised by the English equity courts. 2 MD. CODE (1957) Art. 16, §§ 127 and 196 (Uniform Charitable Trusts Administration Act); the latter statute was applied and upheld in Miller v. Mer.-Safe Dep. & Tr. Co., 224 Md. 380, 168 A. 2d 184 (1961).

[82] 8 MD. CODE (1957) Art. 93, § 347.

[83] 8 MD. CODE (1957) Art. 93, § 197.

[84] 8 MD. CODE (Cum. Supp. 1962) Art. 16, § 197A.

[85] 8 MD. CODE (Cum. Supp. 1962) Art. 16, § 197A (a).

[86] 6 MASS. LAWS ANNO., Ch. 184A, § 1.

be applied? These are the questions which must be answered, but, unfortunately, the process of litigation takes time; however, some predictions may be made. This provision applies only in cases in which the interest is preceded by a life estate or in which the lives of some persons are used as the measuring period upon the termination of which the limitation is to take effect. It does not in any way change the measuring period of the Rule. In cases to which it is applicable the facts as they exist at the termination of the life estate or lives are considered in applying the Rule, rather than the possibilities which might occur at the time the interest was created. The following examples illustrate the difference between the traditional and statutory approaches.

(1) X to A for life, remainder to the children of A who attain 25.

If A is alive when this instrument takes effect, the possibility of afterborn children makes the remainder void according to the Common Law application of the Rule irrespective of whether any such children are born or not. Under the statute if at A's death he has had no afterborn children, or if all of his children, including those born after the instrument took effect, are over four years old the limitation is valid.

(2) X to A for life, then to the children of A for their lives, remainder to the grandchildren of A.

Here again the possibility of afterborn children invalidates under the traditional interpretation of the Rule, the gift to the grandchildren, but under the statute, if there are no such children born to A, the remainder is valid.

(3) X to A for life, then to A's widow, if he leaves one surviving him, for her life, and upon the death of A and his widow remainder to such of their children as survive them.

The remainder to the surviving children would be bad at Common Law because of the possibility A's widow might be a person not born at the time the instrument took effect, but under the statute we can tell at the time of A's death whether his widow was in being at the time the instrument became effective and thus sustain the remainder in such cases.

(4) X to T in trust to accumulate the income during the lives of A, B, and C, and on the death of the last

survivor to divide the principal and income among the children of A, B, and C who attain the age of 25.

Although there is no life estate preceding the gift to the children, there is a measuring period of selected lives and under the statute we determine the validity of the gift to the children by considering the facts at the death of the survivor of A, B, and C; thus it is possible for the gift to be valid if there are no afterborn children or if they are all over four years old at the death of the measuring lives.

(5) X by his will leaves property to T in trust, the income to be accumulated until the youngest of X's grandchildren attains the age of 30; at that time the corpus of the trust shall be divided equally among such of X's grandchildren as are then living.

If at the time of X's death he leaves children surviving him, the contingent gift to the grandchildren attaining thirty is too remote because of the possibility of afterborn grandchildren. However, under the statute it may be possible to consider the facts at the time of the death of the children of X, and if at that time it appears there were no grandchildren born after the death of X, or if all the grandchildren, including those born after the death of X, are over four years old at the time of the death of the last child, the gift possibly may be valid. Although there are no life estates and no selected lives mentioned in the above limitation, the children in fact are lives in being so that the facts existing at the time of their death should be considered. In applying the Rule at Common Law the courts would consider the children as measuring lives, and it is submitted that in any case in which, in applying the Rule at Common Law, the courts would consider lives of persons as part of the measuring period we should, under the statute, look to the facts at the time of the termination of those lives.[87]

The last sentence of this subsection merely defines a life estate so as to include any estate which is not certain to terminate sooner than the death of some person, the so-called terminable life estate.

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[87] This may be doubtful because the children do not have life estates and are not mentioned or identified in the instrument, but they are lives in being, and it seems to me, should be considered as satisfying the requirements of the statute. See Leach, *Perpetuities Legislation, Massachusetts Style*, 67 Harv. L. Rev. 1349, 1359 (1954).

(6) X to T in trust to pay the income to X's wife W, if she survives him, for the term of her natural life or until she remarries, and upon the happening of either event to distribute the proceeds among their grandchildren who attain 25.

The estate given to W is a life estate even though it may terminate prior to her death, and the facts existing at the termination of the estate may be considered in applying the Rule.

This subsection does not apply where there are no life estates or measuring lives; thus a gift to A and his heirs followed by a gift over to B and his heirs upon a remote contingency, such as the violation of restrictions on the use of the property, is not affected by the statute and the gift over is still a violation of the Rule.[88] Similarly, gifts which are expressly contingent on the probate of a will or the administration of the testator's estate are not affected by the statute and may be held void under the Rule.[89]

Subsection (b) of the statute provides:

> "*Reduction of age contingency to twenty-one.* If an interest in real or personal property would violate the rule against perpetuities as modified by subsection (a) of this section because such interest is contingent upon any person attaining or failing to attain an age in excess of twenty-one, the age contingency shall be reduced to twenty-one as to all persons subject to the same age contingency."[90]

This subsection is also identical with the provision in the Massachusetts statute,[91] and is similar to a provision in the English Law of Property Act of 1925.[92] The purpose of the provision is to provide for the many instances in which limitations violate the Rule because the testator or grantor has made his gift contingent on the takers attaining an age greater than twenty-one. Thus, in the first, fourth, fifth, and sixth examples stated above in the discussion of subsection (a), if there are afterborn children or grand-

[88] Such interests were void under the Common Law application of the Rule and remain so under the statute. At Common Law there is an exception where the gift is to one charity followed by a gift over to a second charity; in Maryland, by statute, the gift over is valid even though it is to an individual, provided the first taker is a charity. See *supra* at 283, ns. 78 and 79.

[89] *Supra*, at 274, n. 27.

[90] 2 MD. CODE (Cum. Supp. 1962) Art. 16, § 197A (b).

[91] 6 MASS. LAWS ANNO., Ch. 184A, § 2.

[92] Law of Property Act, 1925, 15 & 16 Geo. 5, c. 20, § 163.

children who have not attained the age of four at the termination of the life estate or lives, the gift to them would be void except for this provision which then comes into operation and by reducing the stated age to twenty-one saves the gift. The section does not provide for splitting the class but treats all members of the group alike merely reducing the stated age to twenty-one. However, if the stated age is valid as to some parts of the disposition and invalid as to other portions, the section is applied only to those parts which would be invalid. Also subsection (b) is applied only if after applying subsection (a) the stated age still makes the gift invalid; in other words subsection (a) is applied first and then subsection (b) if necessary to save the gift.

The remaining subsections of the act relate to the application of the statute and make no changes in the Rule other than those already mentioned. Subsection (c)[93] provides that the act shall apply to both legal and equitable interests. Since the Rule itself applies to both types of interests, it is necessary for the statute to apply to both types of interests. Subsection (d)[94] limits the application of the act so as not to invalidate or modify the terms of any limitation which would have been valid prior to its passage. The statute is designed to validate certain interests, which would have been void at Common Law, through the use of a modified "wait and see" principle which allows the court to take a look at the facts, or by modifying the limitation where the stated age makes the gift invalid, and is not intended to change the Rule generally; this section makes that clear by providing that any limitation which is good under the Common Law interpretation of the Rule is not affected by the act. Subsection (e)[95] is the usual severability clause common in modern legislation; it is inserted to avoid any possible constitutional difficulties. Subsection (f)[96] is also designed to avoid constitutional problems which might arise if the statute were given a broader application. In general it limits the application of the act to instruments which take effect after the effective date of the statute; this is clear as to inter vivos instruments[97] and wills[98] but with respect to powers of appointment a further explanation is necessary.

[93] 2 MD. CODE (Cum. Supp. 1962) Art. 16, § 197A (c).
[94] 2 MD. CODE (Cum. Supp. 1962) Art. 16, § 197A (d).
[95] 2 MD. CODE (Cum. Supp. 1962) Art. 16, § 197A (e).
[96] 2 MD. CODE (Cum. Supp. 1962) Art. 16, § 197A (f).
[97] 2 MD. CODE (Cum. Supp. 1962) Art. 16, § 197A (f)(1).
[98] 2 MD. CODE (Cum. Supp. 1962) Art. 16, § 197A (f)(2).

The statute provides that it shall be applicable to appointments made after the effective date of the act, including appointments by inter vivos instruments or wills under powers created before that date.[99] In view of the traditional theory that the exercise of a power is merely an event which causes the transfer to take effect under the instrument creating the power, it might seem as if the act were being given a retroactive operation. However, that is not really the case; the traditional theory concerning powers is not universally applied. It is used by the courts only in some instances in order to explain certain results; it is merely a fiction, not a fact.[100] Actually two things are necessary in order to transfer property subject to a power of appointment: one is the creation of the power by the donor, and the other is the exercise of the power by the donee. Both events are essential to the transfer, and there is no reason why the rules regulating the exercise of a power cannot be changed after the power has been created. The act does not take away any rights of the donor or the donee; it merely allows the court, in applying the Rule to an appointment *made by the donee after the statute becomes effective,* to use the new approach provided in the statute. It is believed there are no constitutional problems in applying the statute in such cases.

COMMENTS AND CONCLUSIONS

Having surveyed briefly the Rule in its Common Law applications, the current statutory reforms, and the Maryland law, past and present, the time has come to draw conclusions and make recommendations.

The Rule, as it was developed in England and applied by the courts in this country, has deserved much of the criticism which has been directed at it. Although there is undoubtedly need for some restriction on the freedom of disposition, it is questionable whether the Rule serves its purpose at the present time. As we have seen, within the limits of the Rule, absurd and useless dispositions may be made; it does not prevent settlors and testators from tying up property and imposing their own peculiar ideas re-

[99] 2 MD. CODE (Cum. Supp. 1962) Art. 16, § 197A (f) (3).

[100] This theory of the operation of powers is frequently referred to as the "relation back" doctrine. The courts speak of reading the exercise of the power back into the instrument creating the power and treating the exercise as if it were part of the instrument creating the power; but this theory is not carried to its logical conclusion in all cases. Jones, *The Rule Against Perpetuities as Applied to Powers of Appointment in Maryland,* 18 Md. L. Rev. 93, 100-5 (1958).

garding its use on succeeding generations. The "dead hand" is still with us in spite of the Rule. On the other hand it does impose a limit, albeit a rather long one, beyond which property must be freed from control. The criticisms have been directed mostly at the traps into which the unwary frequently fall, and the fact that the ill advised person may be defeated in his legitimate attempt to dispose of his property. I am, therefore, in favor of the current reforms, and I do not believe they will cause such difficulties and complications as the original New York statute did for they do not attempt to provide a substitute for the Rule but merely modify its application. We still have the Rule, but in the future we shall apply it with a little more sense and a little less guess work.

As stated above, the recent Maryland legislation does not abolish the Rule; it does not change the measuring period which still remains one of lives in being and twenty-one years, plus possible periods of gestation. Although the maximum period allowed under the Rule has been criticized as being too long, it has worked fairly well over the years; in fact much better than the shortened two lives period of the New York statutes. It is, therefore, probably best to continue with it rather than attempt to create a new period.[101]

The test for determining the validity of an interest is also unchanged; the Rule continues to apply only to contingent interests, vested interests being excluded. This concept of "vestedness" has been a prolific source of litigation; it is a very indefinite and intangible idea. There is probably no such thing as a vested, as distinguished from a contingent, interest in the abstract; it all depends upon what problem is before the court.[102] This makes the Rule difficult to apply, but it also makes for flexibility and variation from jurisdiction to jurisdiction, and is probably such an inherent part of the Rule that it would be almost impossible to abandon it so long as we retain the Rule itself.[103]

Neither does the statute change the effect of violating the Rule; a violation still makes the entire gift void.

[101] The only serious suggestion for a change in the measuring period for the Rule is the recommendation by the Law Reform Committee that an alternative period, not exceeding eighty years, may be specified in the instrument creating the limitation. *Supra* at 279-280, n. 58.

[102] See *Jones, Vested and Contingent Remainders, A Suggestion With Respect to Legal Method,* 8 Md. L. Rev. 1 (1943).

[103] For a suggestion that the vesting test should be abandoned, see Schuyler, *Should the Rule Against Perpetuities Discard Its Vest?* 56 Mich. L. Rev. 683, 887 (1958).

There has been much criticism of this application of the Rule, and the "cy pres" type of statute attempts to avoid such a result by giving the court the power to rephrase the limitation, within the limits allowed by the Rule, so as to carry out as nearly as possible the intent of the testator or settlor. Though there are many arguments in favor of such an approach, it gives the court very broad authority to remake the dispositions where a violation has occurred and for this reason was rejected by the English commission.[104] If the experience in jurisdictions adopting the "cy pres" type of statute proves successful, the Maryland statute can easily be amended to include such power.

The Maryland act will allow the court to take account of the facts existing at the termination of the life estates or lives in being, and thus uphold many limitations formally declared invalid. But it does not go as far as the full "wait and see" principle, and will not tie up property for longer than a lifetime; the possibility that such may happen is one of the objections to the "wait and see" type of statute.[105]

There are a number of instances which are violations of the Rule at Common Law which the Maryland legislation does not affect. Among these are limitations contingent upon the administration of the testator's estate, contingent gifts following a life estate in an unborn widow, unlimited options, gifts to classes, where the contingency is an event other than attaining a stated age, executory interests contingent upon an uncertain event, and possibilities of reverter or rights of entry. In none of these cases does the Maryland statute specifically apply. If, however, there is a preceding life estate or measuring lives then the statute may offer some assistance by allowing the court to consider the facts at the time of the termination of the life estate or lives. The full "wait and see" principle does give relief in the above situations, although there may be difficulties in determining the measuring period in some of the cases. Many of the statutes specifically deal with one or more of the above situations, and it would seem desirable that they should be provided for. A simple statute could limit the administrative contingency events to a reasonable period, not exceeding twenty-one years, and validate such gifts.[106] The same could be done for options, other than those in

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[104] *Supra* at 280-281, n. 62.

[105] *Supra* at 278-279, n. 56.

[106] 40 McKINNEY'S CONSOL. LAWS ANNO. (1945) § 11-b (4); 49 McKINNEY'S CONSOL. LAWS ANNO. (1945) § 42-c (4).

leases.[107] The unborn widow problem could be remedied by providing that such phrases shall refer only to persons in being at the death of the testator.[108] Whether the splitting of classes or contingencies should be allowed is, perhaps, more questionable.[109] Validating executory interests, even for a relatively short period, has the disadvantage of making the preceding estate unmarketable, and, therefore, is probably not desirable.[110] As for possibilities of reverter and rights of entry, their existence for long periods also has the effect of making the preceding estates unmarketable and in many instances unusable. It would, therefore, seem desirable to put a limit on such interests as has been done in some jurisdictions.[111]

Although the recent Maryland statute reforming the Rule is, I believe, a step in the right direction, it probably should be supplemented by specific provisions designed to provide for the situations just mentioned.

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[107] See the suggestions regarding options in LAW REFORM COMMITTEE, FOURTH REPORT (1956) ¶¶ 35-8; options in leases are exempt from the Rule. See *supra* at 273, n. 18.

[108] See the suggestion in LAW REFORM COMMITTEE, FOURTH REPORT (1956) ¶ 28; 40 MCKINNEY'S CONSOL. LAWS ANNO. (1945) § 11-b (3); 49 MCKINNEY'S CONSOL. LAWS ANNO. (1945) § 42-c (3). Since the widow in most instances is given a life estate, a contingent gift over can usually be upheld under the Maryland statute by the court considering the facts at that time.

[109] The report of the LAW REFORM COMMITTEE, FOURTH REPORT (1956) ¶¶ 24-5 approves the splitting of classes.

[110] See, Leach, *Perpetuities Legislation, Massachusetts Style*, 67 Harv. L. Rev. 1349, 1354-5 (1954). This raises serious questions regarding the desirability of the Maryland statute validating such an interest where it is in the form of a gift over to an individual following a gift to a charity. *Supra* at 283, ns. 78 and 79, also at 287, n. 88. Also the statutes establishing a procedure for enforcing such restrictions and conditions even though the gifts over are too remote under the Rule. *Ibid.*

[111] Such interests are as objectionable as executory interests when they are unlimited as to time and should be given similar treatment. See, 6 MASS. LAWS ANNO., Ch. 184A, § 3 which limits such interests to a term of thirty years; LAW REFORM COMMITTEE, FOURTH REPORT (1956) ¶ 39; Leach, *supra* n. 110, at 1362-4.