

## THE RULE AGAINST PERPETUITIES RESTATED.

### I. Introduction.\*

"It is a dangerous thing to make such a radical change in a part of the law which is concatenated with almost mathematical precision."<sup>1</sup>

It is barely possible that when he wrote this sentence, John Chipman Gray could have had in mind legislation such as the Law Reform (Property, Perpetuities, and Succession) Act 1962<sup>2</sup> of Western Australia, even as a fantastic possibility. Gray denied that he was a blind admirer of the Rule against Perpetuities, but in section 870 of his book he proclaimed its virtues:

"... it has grown to fit the ordinary dealings of the community. It is, too, a well established, simple, and clear rule . . . the process of adjudication has been a process of clearing and simplification . . ."

Nevertheless, it is because few lawyers today could agree with this assessment of the rule that there have been so many attempts, including our own, to reform the rule. But again Gray speaks:<sup>3</sup>

"... the tendency of legislation, so far as it has touched the matter at all, has been to make the rule more stringent."

One of the objects of this paper is to endeavour to show that it would be unfair to apply this dictum to the new legislation in this State.

The Law Reform (Property, Perpetuities, and Succession) Act 1962 (which seems destined to receive an even shorter title 'the Perpetuities Act') is necessarily a very complicated measure. This time Professor Barton Leach can be cited for the defence:

"This is lawyers' law, made by lawyers for the use of lawyers, completely incomprehensible to the public. If it is working badly, it is the job of lawyers to change it."<sup>4</sup>

- \* This paper, delivered at the Third Law Summer School of the University of Western Australia held in February 1963, is the product of three years' work on the reform of the rule against perpetuities in this State. During that time many people, both inside and outside Western Australia, have contributed suggestions and criticisms. Whilst I accept full responsibility for all the views expressed in this paper, I acknowledge that it could not have been written without their assistance and encouragement (and sometimes even discouragement!)—D.E.A.

<sup>1</sup> GRAY, *THE RULE AGAINST PERPETUITIES* (2nd ed.), s. 871.

<sup>2</sup> No. 83 of 1962. (The short title seems fated, in common usage, to lose its second comma.)

<sup>3</sup> GRAY, *op. cit.*, s. 870.

<sup>4</sup> Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, (1951-52) 65 HARV. L. REV. 721, at 728.

Nevertheless, it speaks highly for Parliament's confidence in the Law Reform Committee of the Law Society that a measure as complex as this found its way on to the Statute Book. It is hoped, however, to show in this paper that when the terms of the Act are read into the existing law and the effect observed—the rule restated—it will be a clearer and more simple rule, fitting the ordinary dealings of the contemporary community, and showing more reason, justice, and plain common-sense than it ever did in the past. Proposals for perpetuities reform are sometimes exposed to the charge of curing the illness by killing the patient,<sup>5</sup> but it is possible for surgery to give the patient a more healthy and useful life than he enjoyed before.

## II. The History and Policy of the Rule.

Before one sets out to reform a rule of law it is useful to begin by asking what purpose that rule is expected to serve—how, and why, did we get the rule in the first place; do we still need it today and, if so, for what purpose?

The rule against perpetuities was first formulated to regulate settlements of land as such and not settlements of capital funds. As purchasers of land will normally purchase only a fee simple absolute or a lease for a fixed term, its object was to prevent land being kept out of the market for too long a period and to keep the land productive. It is therefore closely connected with other rules preventing restraints on alienation, although it is now generally accepted that it is a quite separate rule, being concerned not with suspensions of the power of alienation but with the remote vesting of future interests which may always be freely alienable. However, many of the less logical aspects of the modern rule are explicable by the fact that in cases since the *Duke of Norfolk's Case*<sup>5a</sup> in 1681 many judges were concerned with remoteness of vesting only to the extent that it rendered land inalienable.

The history of property law is marked by the smouldering debris of many ancient conflicts and, although the immediate cause of the rule was a form of family settlement that created virtually unbarrable entails, the struggle for alienability can be traced back at least as far as the Statute *Quia Emptores* 1290 (the course of this struggle has been described in some detail by D. E. C. Yale in the introduction to Volume 73 of the Selden Society publications). In 1472 the judges

<sup>5</sup> See, for example, Bordwell, *Perpetuities from the Point of View of the Draftsman*, (1956-57) 11 RUTGERS L. REV. 429, at 435.

<sup>5a</sup> (1681) 3 Ch. Cas. 1, 22 E.R. 930.

in *Taltarum's Case*<sup>6</sup> approved the device of the common recovery as a means of defeating unbarrable entails which had been possible since the Statute *De Donis Conditionalibus* of 1285. At the beginning of the 17th century they held void<sup>7</sup> "clauses of perpetuity" which provided that, if a tenant in tail attempted to bar his entail, the land should pass as if he were dead or as if he were dead without issue. Contingent remainders, as a means of tying up land, offered little attraction owing to their destructibility, until at the end of the 17th century the courts accepted the validity of the device of trustees to preserve contingent remainders. Executory interests arising after the Statute of Uses 1535 were, however, indestructible and therefore would have offered possibilities of tying up the land but for the courts' holding that they should be construed as contingent remainders, and accordingly be liable to destruction, if they might have taken effect as contingent remainders.<sup>8</sup> Successive life interests were struck down by the doubtful rule against double possibilities or the rule in *Whitby v. Mitchell*<sup>9</sup> which, if it ever existed, prevented, after a limitation for life to an unborn person, any limitation to his issue.

New possibilities, however, were opened up by the decisions in *Manning's Case*<sup>10</sup> and *Lampet's Case*,<sup>11</sup> at the beginning of the 17th century, that executory devises of long terms of years were valid and indestructible, and with the extension of these decisions to executory devises of freeholds by the Court of King's Bench in *Pells v. Brown*<sup>12</sup> in 1620 it became clear that some check would have to be placed on the power of testators. In a series of cases<sup>13</sup> throughout the 17th century, the courts wrestled with this problem until in 1681, in the *Duke of Norfolk's Case*,<sup>14</sup> Lord Nottingham propounded a new principle, which was to become the modern rule against perpetuities, and which was binding on both Chancery and common law courts.

<sup>6</sup> (1472) Y.B. 12 Edw. IV, Mich. f. 19. pl. 25.

<sup>7</sup> *Corbet's Case*, (1599) 1 Co. Rep. 83b, 76 E.R. 187; *Mildmay's Case*, (1606) 6 Co. Rep. 40a, 77 E.R. 311; *Mary Portington's Case*, (1614) 10 Co. Rep. 35b, 77 E.R. 976.

<sup>8</sup> *Chudleigh's Case*, (1595) 1 Co. Rep. 113b, 76 E.R. 261; *Purefoy v. Rogers*, (1669) 2 Wms. Saund. 380, 85 E.R. 1181.

<sup>9</sup> (1889) 42 Ch. D. 494, (1890) 44 Ch. D. 85 (C.A.).

<sup>10</sup> (1609) 8 Co. Rep. 94b, 77 E.R. 618.

<sup>11</sup> (1612) 10 Co. Rep. 46b, 77 E.R. 994.

<sup>12</sup> (1620) Cro. Jac. 590, 79 E.R. 504.

<sup>13</sup> *Child v. Baylie*, (1618) Cro. Jac. 459, 79 E.R. 393; *Goring v. Bickerstaffe*, (1662) 2 Freeman Ch. 163, 22 E.R. 1132; *Burges v. Burges*, (1674) 1 Ch. Cas. 229, 22 E.R. 775; *Chalfont v. Okes*, (1674) 1 Ch. Cas. 239, 22 E.R. 779; *Knight v. Knight*, (1674) Rep. t. Finch 181, 23 E.R. 99.

<sup>14</sup> (1681) 3 Ch. Cas. 1, 22 E.R. 930.

The principle, that limitations which take effect within lives in being are good, established that validity depends on remoteness of vesting and liberated the rule from its association with problems of unbarrable entails and suspensions of the power of alienation. Lord Nottingham based this principle on considerations of convenience: "And therefore where no Perpetuity is introduced, nor any Inconveniency doth appear, there no Rule of Law is broken;"<sup>15</sup> and in answer to the question where he would stop, he replied: "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."<sup>16</sup>

Professor Plucknett<sup>17</sup> describes the rule enunciated by Lord Nottingham as "a reasonable and simple proposition." It developed, however, with increasing technicality. The period for vesting was first extended to cover the time necessary for the birth of posthumous children and the minority of a devisee unborn at the death of the testator,<sup>18</sup> and then the House of Lords in 1833 in *Cadell v. Palmer*<sup>19</sup> settled that the period to be added to lives in being was a term of 21 years in gross. It was also settled that any number of lives might be selected, as long as it was possible to ascertain the survivor, and the lives need not necessarily be those of beneficiaries. Meanwhile, the method of applying the rule, with its insistence on initial certainty of vesting in time, was determined in 1787 by Lord Kenyon in *Jee v. Audley*.<sup>20</sup> Ultimately, the rule that started as a rule against "visible inconvenience" emerged, according to Gray,<sup>21</sup> in the form:—

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.

—and as such it is capable of invalidating many limitations that do not infringe the principle and permitting some that do.

This original policy of the rule, to prevent the withdrawal of land from commerce, no longer holds good today. In the first place, the rule has been extended from realty to all forms of property. It has been applied to interests in personalty with little thought as to whether it was appropriate and, so far as personalty is concerned, the capital

<sup>15</sup> (1681) 3 Ch. Cas. 1, at 32; 22 E.R. 930, at 950.

<sup>16</sup> (1681) 3 Ch. Cas. 1, at 49; 22 E.R. 930, at 960.

<sup>17</sup> CONCISE HISTORY OF THE COMMON LAW (5th ed., 1956), 598.

<sup>18</sup> *Stephens v. Stephens*, (1736) Cas. t. Talb. 228, 26 E.R. 751.

<sup>19</sup> (1833) 1 Cl. & F. 372, 6 E.R. 956.

<sup>20</sup> (1787) 1 Cox 324, 29 E.R. 1186.

<sup>21</sup> GRAY, *op. cit.*, s. 201.

fund which is invested remains productive and can not be said to have been withdrawn from commerce. Secondly, the long family settlement seems now to be a thing of the past; and thirdly, even where land is subject to successive interests, there is invariably today a power of sale vested in someone. Where land was not held subject to an express trust for sale, a statutory power was conferred by the Settled Land Act. In Western Australia, the Settled Land Act of 1892 has now been repealed by the Trustees Act 1962<sup>22</sup> as part of a policy to treat land forming part of a settlement as far as possible as just one form of trustee investment; and, even where there is no express power in the settlement to sell the land and the statutory powers under Part IV of the Trustees Act are excluded by the trust instrument, nevertheless the land may be dealt with and sold with the assistance of the Court under Part VII of the Trustees Act, in particular under section 89. This jurisdiction of the Court cannot be excluded by the trust instrument.<sup>23</sup>

It seems clear today, therefore, that the rule against perpetuities has no relation to marketability insofar as it concerns land, chattels or investments. It is virtually impossible today to create an interest in any form of property than cannot be freely dealt with. Accordingly, many attempts have been made in recent years to justify the continued existence of the rule on other grounds, both economic and social. Some of these grounds might be listed briefly:

(1) *Trusts reduce risk capital.* It is said that modern conditions demand speculation and the maintenance of a proper balance between risk capital and trust capital. The rule against perpetuities restricts trusts and therefore ensures the availability of risk capital. This view was summarized most neatly and forcefully by F. H. Lawson:—<sup>24</sup>

The economic progress of a nation is often measured by the number of its bankruptcies. Trusts exist to prevent bankruptcies. Hence they should be curbed.

However, as Leach has pointed out,<sup>25</sup> the economic arguments in support of the rule have never been adequately explored and most of them are pure hypothesizing by lawyers. In any event, the rise of the stock market and the fall of the bond market in the past 15 years does not point to any shortage of risk capital. In fact, in Australia in 1961 the Commonwealth Parliament had to legislate to woo superannuation, provident, and life insurance funds back to public and governmental securities by offering the incentive of special income tax concessions

<sup>22</sup> No. 78 of 1962.

<sup>23</sup> Trustees Act 1962, s. 89 (3).

<sup>24</sup> INTRODUCTION TO THE LAW OF PROPERTY (1958), 145.

<sup>25</sup> (1959-60) 108 U. PA. L. REV. 1135.

depending upon a minimum proportion of such securities being held in the fund.<sup>26</sup>

(2) *Trust capital is not available for expenditure on consumer goods.* Again it is not really for the lawyer to say whether this is a good or a bad thing, and similar considerations apply as in the case of the first ground.

(3) *Trusts need periodic review.* Granted the right of testators to control the devolution of their property, changing conditions make it desirable that the trusts should be reconsidered and resettled every so often, and the rule against perpetuities ensures a periodic resettlement. If this is so, it ignores how fast conditions are capable of changing today.

(4) *Trusts produce undue concentrations of wealth.* The rule against perpetuities limits this. However, even if this is true, the result is achieved more effectively and appropriately today by taxation.

(5) *The social undesirability of protecting some members of society from the struggle for survival.* As a justification for the rule against perpetuities, this is a sweeping condemnation of the welfare state.

(6) *The social undesirability of "dead-hand" control.* It is the natural desire of each generation to provide for future generations by distributing the assets it has amassed in the manner it thinks will be most beneficial for those future generations. Similarly, it is the natural desire of each generation to shape its own destiny, which it can not do if an earlier generation has already prescribed for it. "The far-reaching hand of the testator who would enforce his will in distant future generations destroys the liberty of other individuals, and presumes to make rules for distant times."<sup>27</sup> Hence the rule against perpetuities holds a balance between the aspirations and interests of the living and of the dead and is a compromise to secure that the control of property is not withheld from the living for too long a period, but on social rather than economic grounds.

This last ground, it is submitted, is the major justification of the rule today. However, it raises acutely the important policy question (which underlies most of the new trustee legislation of 1962) of how far we should permit testators freedom to dispose of their assets as regards (a) the proportion of assets, (b) the period of control, and (c) the capriciousness of purpose. The rule against perpetuities is directed towards the second of these aspects, the period of control, and it may be that it is not the most satisfactory and efficient way of

<sup>26</sup> Income Tax and Social Services Contribution Assessment Act, No. 17 of 1961.

<sup>27</sup> KOHLER, *PHILOSOPHY OF LAW* (1921), 205-6.

tackling the problem. Nevertheless, in the absence of anything else, it finds here its justification.

Modern settlements generally contain wide powers of investment, falling not far short of those of absolute owners; where these are lacking, most investments and transactions can be effected if a court can be persuaded of their desirability. The modern settlement usually contains discretionary trusts over income and powers to appoint or advance capital; and there exist both statutory and common law powers to vary or even terminate the trust. It can not be alleged today that trust property is withdrawn from commerce and is rendered unproductive. In the absence of a rule against perpetuities, the only consequence would be that it would not be necessary to limit the duration of the trust, but it is doubtful if any dire economic consequences would follow. It is only in the need to limit the period of testamentary control for social reasons that the rule today is required.

We can, however, learn here from the experience of those American States that sought to replace the rule against perpetuities by substituting other rules based on different principles. In all these cases it was found necessary to restore the rule against perpetuities. What we can do is to limit the scope of the rule by excluding its application from those areas where no justification can be found for it. Hence section 19 of the Perpetuities Act provides that the rule no longer applies to superannuation funds, on the ground that the continuation of these funds is more desirable than their termination. Similarly, section 14 exempts from the rule options to purchase contained in leases, because these encourage the leaseholder to develop the land. Section 29 of the Trustees Act exempts many administrative powers of trustees from the rule, because they enable the trustees to keep the land productive and marketable.

It might be asked whether it would be feasible to scrap the modern technicalities of the rule and return to Lord Nottingham's principle of "visible inconvenience." A proposal for legislation somewhat along these lines has recently been made for Saskatchewan.<sup>28</sup> It is undoubtedly a fine principle on which the rule should be based and against which any application of the rule should be judged, but it lacks the certainty that settlors and draftsmen must require. Testators and settlors need to know whilst they are alive that their dispositions as they have set them out are valid. The problem today, apart from confining the rule to its proper field, is to restate it on a basis of avoiding visible inconvenience, but as a clear and certain rule.

<sup>28</sup> Lang, *A Perpetuities Act for Saskatchewan*, (1962) 40 CAN. BAR REV. 294.

### III. Reform in Other Jurisdictions.

Legislation reforming the rule against perpetuities has concentrated chiefly on two new proposals:

- (i) "*Wait and see*"—which removes from the rule the requirement that the validity of a limitation must be determined initially and in the light of possibilities as they existed solely at the moment when the limitation was created<sup>29</sup> and without regard to any events since that date. Under a "wait and see" rule, a limitation is valid if in fact the interest vests within the perpetuity period, no matter what the possibilities were at the date of its creation.
- (ii) *Cy-près*—a proposal that limitations which infringe the rule should not be invalid, but should be re-fashioned by the court to accord, within the limits of the rule, as closely as possible with the intention of the settlor or testator.

The various statutes can be grouped as follows:—

#### 1. *The (English) Law of Property Act 1925, section 163.*

This section gave effect to a proposal by the Real Property Commissioners made as early as 1832, and applied the *cy-près* rule in one instance only—namely, the reduction of invalid age contingencies to 21. Where a limitation infringed the rule solely because the interest it created was contingent upon the beneficiary's attaining an age in excess of 21, the limitation was to take effect as if the contingency had been the attainment of the age of 21, if the limitation would thereby be saved. This rule had already been achieved by statute in Victoria in 1918 and New South Wales in 1919 and judicially in New Hampshire in 1891,<sup>30</sup> where "wait and see" was similarly adopted in 1953.<sup>31</sup> Gray considered the step a dangerous and radical change,<sup>32</sup> but nevertheless it has been copied in other jurisdictions including Western Australia,<sup>33</sup> although in this instance only after the invalidation of Mrs. Hassell's gift to her grandchildren in 1940.<sup>34</sup>

#### 2. *Delaware.*

A Delaware statute of 1933<sup>35</sup> provides that where appointments are made under a power, whether general or special, the perpetuity period is to be reckoned from the date of the appointment rather

<sup>29</sup> *I.e.*, generally, the date of execution in the case of deeds and the date of the testator's death in the case of wills.

<sup>30</sup> *Edgerly v. Barker*, (1891) 66 N.H. 434, 31 A. 900.

<sup>31</sup> *Merchants National Bank v. Curtis*, (1953) 98 N.H. 225, 97 A. 2d. 207.

<sup>32</sup> GRAY, *op. cit.*, s. 871.

<sup>33</sup> Law Reform (Miscellaneous Provisions) Act 1941, s. 5.

<sup>34</sup> *Re Hassell*, (1940) 43 West. Aust. L.R. 36.

<sup>35</sup> Delaware Code Ann. (1953), C. 5, s. 501.



than from the date of creation of the power. This provision, which appears to make possible perpetual trusts, has not been followed in any other jurisdiction.

### 3. *Pennsylvania.*

The Pennsylvania Estates Act 1947 introduced the full "wait and see" rule by providing that interests should be valid if "as measured by actual rather than possible events" they vest within the perpetuity period.

### 4. *Massachusetts.*

The Massachusetts Perpetuities Act 1954 applies "wait and see" to interests following life estates of persons in being when the period starts to run, and provides that the validity of those interests is to be determined on the basis of facts existing at the termination of those life estates or lives. This is a modified form of "wait and see" in that the period of waiting is limited to the duration of those prior life estates or lives. The Act also introduced the *cy-près* rule limited to invalid age contingencies; it has since been followed in Connecticut, Maine, and Maryland.

### 5. *Vermont.*

A Vermont statute<sup>36</sup> in 1957, drafted by Professor Leach, introduces full "wait and see" by providing that "the period of perpetuities shall be measured by actual rather than possible events," and full *cy-près* by directing the Court to reform an interest which would violate the rule to make it approximate most closely to the intention of the creator of the interest within the permitted limits. This was copied in Washington in 1959, except that it was applied only to trusts, and in Kentucky in 1960. Kentucky added a proviso (which will be considered later in this paper) to the "wait and see" provision, that "the period shall not be measured by any lives whose continuance does not have a causal relationship to the vesting or failure of the interest."

The Law Reform Committee in England was invited in 1954 to consider the rule against perpetuities and it reported in 1956.<sup>37</sup> It recommended that there should be no general *cy-près*, due to the uncertainty of the effect of the application of such a doctrine, but that limited instances of *cy-près* application should be permitted, *e.g.*, the reduction of invalid age contingencies in the same manner as since 1925, and the saving of those class gifts which, after the application of the "wait and see" rule, would have failed because some members

<sup>36</sup> Vt. Stat. Ann. tit. 27, s. 501 (1957).

<sup>37</sup> Law Reform Committee, Fourth Report (The Rule against Perpetuities), Cmd. 18.

of the class failed to qualify in time, for the benefit of those members who did qualify in time. It also recommended that the "wait and see" rule should be introduced as long as the need for it could be minimized by the elimination of as many fantastic possibilities as possible. Nothing has yet been done in England to implement these recommendations, in spite of the valiant attempts by Professor Barton Leach to "needle the British."

The Law Reform Committee in Western Australia, as part of its task of considering the reform of the law of trusts, considered problems arising from the application of the rule against perpetuities. It considered, however, that its recommendations on perpetuities should not be limited to trusts but should be of general application. It found itself broadly in agreement with the report of the English Committee, differing only on some few matters. The result is the Law Reform (Property, Perpetuities, and Succession) Act 1962.

#### **IV. The General Nature of the Reforms.**

Before starting on a detailed consideration of the provisions of the new Act, it is important to appreciate two things. The first is that, apart from section 5 which permits the postponement of the vesting of an interest for a definite period of years not exceeding 80, and section 17 which repeals the Accumulations Act 1800 and therefore makes possible a direction to accumulate income for the full perpetuity period, the Act is not intended to open new vistas for the estate planner and conveyancer, nor even to involve him in new techniques of drafting. There are indications already that sections 5 and 17 will form an important part of the estate planner's portfolio, but, for the rest, the Act is mainly concerned to prevent injustice and the unnecessary frustration of the legitimate wishes of settlors and testators by removing the traps that lie in wait for the incautious, and sometimes even the skilful, draftsman. For example, in relation to the new "wait and see" rule, the Law Reform Committee said in its report (at page 42):—

We think that testators, settlors, and their draftsmen will continue to regard it as important that the validity of their dispositions should be beyond doubt from the outset; we find it difficult to imagine the draftsman who would tempt disaster by consciously including a disposition which might or might not in 100 years' time prove to be void. We think that the "wait and see" rule would rarely have to be invoked; its existence, however, would facilitate conveyancing and would prevent injustice in the rare and isolated case.

The second point to be clearly understood is that, apart from the introduction, as a result of "wait and see", of a new type of interest, *viz.*, one that is presumptively valid but which may later prove to be invalid, the Act makes no change in the nature of the rule. It is still a rule against remoteness of vesting in interest. It is still not concerned with the duration of a trust or of interests that are already vested. It is still not concerned with suspensions of the power of alienation.

It is suggested, therefore, that the best way to approach these reforms is to see the Act set against the background of the existing general law and modifying it in several particulars. It does not purport to be a code and no attempt has been made in the Act to restate the rule against perpetuities. In section 5, for example, in introducing the new alternative perpetuity period of 80 years, the date from which the time will begin to run has not been stated and this will therefore be calculated in the same way as for the original perpetuity period under the general law.

## **V. The Application of the Reforms.**

In general, nothing in the Act will affect existing trusts or settlements, or limitations contained therein. Section 3 applies the Act, except where otherwise expressly stated, only to the wills of testators dying after the commencement of the Act and to instruments (other than wills) executed after the commencement of the Act. The date of commencement was 6th December 1962. It should be noted that in section 4, the interpretation section, "will" is defined to include a codicil and "instrument" to include an instrument exercising a power of appointment, whether general or special, even though the power were created before the Act came into force. Hence, limitations created by an appointment made in any manner on or after 6th December 1962 will have their validity determined according to the provisions of the new Act, even if the power of appointment was special and was created before the Act.

Retrospective effect is, however, given to section 19 exempting superannuation and other similar funds from the rule against perpetuities, and also to section 29 of the Trustees Act 1962 which exempts from the rule administrative powers attached to valid trusts and provisions for the remuneration of trustees.

Section 3 (2) provides that the Act binds the Crown. However, it was not appreciated when this provision was prepared that the Judicial Committee of the Privy Council had held in *Cooper v. Stuart*<sup>38</sup>

<sup>38</sup> (1889) 14 A.C. 286.

that the rule against perpetuities did not bind the Crown in New South Wales in 1823. It is likely that the reasoning behind that decision would apply also in Western Australia today. The result is that there now applies to the Crown a statute modifying a rule that does not bind the Crown. The effect must be a matter of some speculation. It is clear, however, that in some respects the Crown will now be bound by the rule as amended and this will be considered later in relation to the application of section 15 to reservations and conditions of disfeasance in Crown grants.

## VI. The Perpetuity Period.

The perpetuity period under the general law, of lives in being at the creation of the interest plus 21 years plus appropriate periods of gestation, remains unaffected by the new provisions. So too, subject to the note below on the effect of "wait and see", does the selection of the appropriate lives in being. Any number of lives in being, whether necessarily involved in the limitations or not, may be selected provided they are reasonably ascertainable and certain.

The main problem, in relation to the perpetuity period, arises from the practice of securing the longest possible postponement through the inclusion of a "royal lives" clause, i.e., postponing the vesting of the interests until 20 or 21 years after the death of the survivor of all the lineal descendants of Queen Victoria living at the testator's death, as in *Re Villar*.<sup>39</sup> During the course of this century these clauses have shifted from the descendants of Queen Victoria to those of King Edward VII and then of King George V,<sup>40</sup> but they are still capable of producing an extremely long postponement with consequent inconvenience and uncertainty as to when the period has ended. It was not thought practical to abolish these clauses by directly restricting the selection of lives in being, and therefore indirect methods have had to be resorted to in order to curb them.

Some assistance here is achieved by the exemption, by section 19, of superannuation funds from the rule against perpetuities, as, in the absence of such a provision, these funds are among the chief offenders. However, the main method has been to offer settlors and testators an

<sup>39</sup> [1929] 1 Ch. 243; and cf. *Re Moore*, [1901] 1 Ch. 936, in which a postponement until "21 years from the death of the last survivor of all persons who shall be living at my death" was held void for uncertainty.

<sup>40</sup> However, in *Re Warren's Will Trusts*, reported in the *Times* on 2nd June 1961, Cross J. upheld a "Queen Victoria" clause in the will of a testatrix who died in 1944, on the ground that the science of genealogy was sufficiently exact to cope with the problem.

alternative long but certain period of postponement by providing in section 5 that the perpetuity period shall be such period of years, not exceeding 80, as may be specified in the instrument creating the limitation or, if no such period of years is specified, "lives plus 21" as at common law. This, it is hoped, will woo draftsmen away from "royal lives" clauses and there is every indication that the 80-year period will prove extremely popular with estate planners.

It must be stressed that section 5 requires the *express* selection of a period of years not exceeding 80; it cannot be implied or inferred. If no such period is selected, then, in the absence of any appropriate lives in being, the period will be simply 21 years as in the past. It was thought that the requirement of an express selection was essential in order to avoid the possibility of a judge "waiting and seeing" for 80 years simply because no lives were mentioned.

A further problem arises under section 5 in relation to powers of appointment, and it must be confessed that the Act in this respect is not quite as clear as it might be.<sup>41</sup> Suppose, for example, an instrument coming into effect in 1960 which creates a special power of appointment, and a will of a testator dying in 1963 (after the commencement of the Act) which exercises that power by appointing for an interest that will vest in the year 2040. Two questions spring to mind—

- (i) Does the will of 1963 "create" the limitation, within the meaning of section 5, so that the 80-year period may be specified therein?

It seems to be settled now by the case law on the English Law of Property Act 1925, section 161, that the instrument creating the limitation is the instrument which makes the appointment and not that which created the power.<sup>42</sup> This, it is submitted, is the only reasonable conclusion, as it would hardly be possible for the instrument creating the power to specify the date of vesting of interests that have yet to be appointed. Moreover, it is supported by the definition of "instrument" in section 4, which states expressly that "instrument includes . . . an instrument . . . exercising a power of appointment . . . even if the power were created before the Act came into force."

- (ii) Does section 5 apply in the case of an appointment under a power created before the commencement of the Act?

<sup>41</sup> There is some consolation in the fact that the draftsman of s. 161 of the English Law of Property Act 1925 fell into a similar trap. See *Re Leigh's Marriage Settlement*, [1952] 1 Times L.R. 1463.

<sup>42</sup> *Re Leigh's Marriage Settlement*, [1952] 1 Times L.R. 1463, and cases cited therein.

Again, it is submitted that it must. Section 4 defines "instrument" to include a will and section 5 therefore envisages an appointment either by deed or by will. Section 3 (1) provides that the Act applies to wills of testators dying after the commencement of the Act and to other instruments executed after the commencement. Further, the express reference to powers of appointment in the definition of "instrument" must put the matter beyond doubt.

The conclusion therefore is that under section 5 a period of up to 80 years for the postponement of the vesting of interests may be specified in an instrument creating those interests, including a will exercising a power of appointment, whether the power is general or special, and even though it was created before the commencement of the Act, provided that, if the instrument is a will, the testator died after the commencement of the Act, or, if it is an instrument other than a will, it was executed after the commencement of the Act. The 80-year period will be calculated in the same manner as the perpetuity period at common law, *i.e.*, from the date of the testator's death or the date of execution of the instrument except that, in the case of an exercise of a special power of appointment, it will be calculated from the date of the creation of the power.

## **VII. The "Wait and See" Rule.**

### **A. Policy and "Wait and See".**

At common law it must be absolutely certain at the time when the instrument takes effect that the interests that it creates must vest within the perpetuity period. Any possibility, however slight, that an interest might not do so renders that interest invalid. This produces the absurd situation that it is immaterial that an interest does in fact vest within the period, or even that it has already vested at the time at which it is challenged, if it might possibly not have done so; and an edifice of fantastic possibilities has been erected by the cases as traps for the unwary and as grounds for frustrating the legitimate wishes of settlors and testators as to the disposition of their property. Accordingly, one of the more important, and certainly the most keenly argued, proposals for reform has been that, instead of determining validity in the light of initial possibilities, we should wait and see whether the interest does or does not vest within the period.

The most vigorous opposition to "wait and see" has come from those American States such as Illinois and Missouri, where the doctrine of "infectious invalidity" exists. Under this doctrine, if a limitation is held void as infringing the rule against perpetuities, not only do all

subsequent limitations fail with it, but also all valid prior ones, on the supposition that the testator would have preferred to die intestate if he could not have the entirety of his dispositions. In Illinois this is apparently merely a rule of construction, but it would appear that in Missouri it is a binding rule of law. If the "wait and see" rule is applied against this background, it would mean that the validity of even present possessory life estates could not be determined until the conclusion of perhaps a long period of waiting and seeing in respect of some subsequent doubtful interest. The opposition from these States is therefore understandable.

"Infectious invalidity" is not part of the law of Western Australia. So far as we are concerned, therefore, the question of whether or not we should adopt a "wait and see" rule was a matter of balancing the initial certainty and convenience which the present rule produces against the better justice under a "wait and see" rule. The Law Reform Committee in Western Australia agreed with the conclusion of the English Law Reform Committee:—<sup>43</sup>

But convenience may be too dearly bought, and we do not consider that such inconvenience as may inevitably attend the application of the "wait and see" principle in the manner above proposed affords any sufficient justification for avoiding an interest which would otherwise in fact have vested in due time merely because, in events which did not happen, it might not have done so.

It is small consolation to a beneficiary to be informed that at least he has the certainty and convenience of knowing that a gift to him is void because of the possibility of events that might have happened.

#### B. *The "wait and see" section.*

Accordingly, section 7 of the Act introduces the "wait and see" principle. Nevertheless, the importance of being able to determine the validity of a limitation at the earliest possible date is recognized. Under the Massachusetts-type provision an artificial limit is set to the waiting and seeing at the end of the prior life estate. Both the English and Western Australian Law Reform Committees ultimately rejected the imposition of an artificial limit in this way. However, under section 7 it is not necessary to wait until the interest actually vests, for the court is not limited to a consideration only of events which have actually occurred. Validity will be determined as soon as it becomes possible to say either that the interest must, or that it can not, vest within the period.

<sup>43</sup> *Op. cit.*, para. 23.

Section 7 is necessarily an involved section. Subsection (1) deals with ordinary direct gifts and with general powers of appointment (as distinct from appointments made under general powers). It requires that, if the validity of these gifts or powers cannot be determined initially, then the verdict is to be suspended. If there is a doubt whether an interest will vest within the perpetuity period or not, it remains presumptively valid until that doubt is resolved one way or the other. Similarly with general powers. At common law these are valid if they can be exercised during the perpetuity period even though they may be exercised beyond it; but if there is any possibility that they may not be exercisable within the period then they are void. Under subsection (1), however, their validity need not be determined initially, and they will be valid if in fact they become exercisable within the period.

Subsection (2) deals with powers over or in connexion with property, other than general powers of appointment which are dealt with by subsection (1) and those administrative powers which are exempted from the application of the rule by section 29 of the Trustees Act 1962. They are in fact all powers to affect the beneficial interest in the property and they may be considered under the following groups:—

- (a) *Powers of advancement.* Generally these are valid if they are annexed to valid trusts because the exercise of the power operates as an acceleration of the interest under the trust and therefore cannot infringe the rule if the interest itself is valid. (The recent decision of the House of Lords in *Pilkington v. I.R.C.*<sup>44</sup> should, however, be noted. The House of Lords held that, if it is proposed to resettlement the property advanced, the interests under the new settlement must vest within the perpetuity period calculated from the date of the original settlement. The power of advancement is for this purpose likened to a special power of appointment and “the new settlement is only effected by the operation of a fiduciary power which itself ‘belongs’ to the old settlement”<sup>45</sup>). The inclusion of powers of advancement in this subsection confirms the validity of these powers by declaring them to be valid if and to the extent that they are exercised during the perpetuity period.
- (b) *Powers of distribution under discretionary trusts.* These are valid at common law if their exercise is confined to the perpetuity period. Thus a power to allocate income in a discretionary trust for the

<sup>44</sup> [1962] 3 All E.R. 622.

<sup>45</sup> *Ibid.* at 632, *per* Viscount Radcliffe.



life of an unborn person is void unless it is specifically restricted to the perpetuity period. Gray considered<sup>46</sup> that such powers should be regarded as a series of separate powers, exercisable from time to time, and therefore valid for the perpetuity period but not thereafter; this view is supported only by an Alabama case<sup>47</sup> and an Irish case,<sup>48</sup> and is opposed by a Massachusetts' case.<sup>49</sup> There is no other direct authority.<sup>50</sup> Section 7 (2) therefore gives effect to Gray's view and, in future, unlimited discretionary trusts will be valid for the appropriate perpetuity period.

- (c) *Special powers of appointment.* These are valid at common law only if they must be exercisable during the perpetuity period. A special power that might be exercisable beyond the period is void. Subsection (2) makes these powers valid—
- (i) if they are limited to the perpetuity period, or
  - (ii) if they are in fact exercised during the perpetuity period, even though they might have been exercised beyond it.

*C. Identifying the Lives in Being under "wait and see".*

One of the major difficulties under a "wait and see" rule is that it is possible to argue that the effect of the rule is that if, when the interest finally vests, it is possible to find any person at all who was alive at its creation and who died within 21 years of its vesting, then the interest must be valid as it has in fact vested within 21 years of the death of a life in being at its inception. Morris and Leach make light of this difficulty and suggest that a court, applying the rule intelligently, would not arrive at such an absurd result but would "determine the measuring lives substantially as they were determined before it [the Pennsylvania statute] was passed."<sup>51</sup> With respect, however, it is suggested that the problem cannot be disposed of as easily as this.

The trouble really arises because there is apparently no rule of common law that the lives in being must be referred to in the instrument or connected with its dispositions. The only reason why, under

<sup>46</sup> GRAY, *RULE AGAINST PERPETUITIES* (4th ed.), ss. 410.1-410.5.

<sup>47</sup> *Lyons v. Bradley*, (1910) 168 Ala. 505, 33 So. 244.

<sup>48</sup> *Re Kelly*, [1932] Ir. R. 255.

<sup>49</sup> *Bundy v. United States Trust Co.*, (1926) 257 Mass. 72, 153 N.E. 337.

<sup>50</sup> The point was not argued, and the trust held invalid, in *Re Bullen*, (1915) 17 West. Aust. L.R. 73.

<sup>51</sup> MORRIS AND LEACH, *THE RULE AGAINST PERPETUITIES* (2nd ed.), 90. See too Leach, *Perpetuities Legislation: Hail, Pennsylvania*, (1959-60) 108 U. PA. L. REV. 1124, at 1142-1146.

common law, the lives are in fact so limited is that the lives and the validity of the limitations must be determined at the date the instrument takes effect. At the time when section 7 was drafted it was thought that we had neatly side-stepped the problem by providing in subsection (3) that nothing in section 7 makes any person a life in being for the purpose of ascertaining the perpetuity period if he would not have reckoned a life in being for that purpose at common law. In other words, first ascertain the lives in being as under common law and then wait and see if the interests vest within 21 years of the termination of those lives. However, subsequent consideration indicates that this may not be so and an example may serve to illustrate the difficulty.

Suppose T. leaves property on trust for such of the grandchildren of A. as shall attain 25 and, at T.'s death, A. is alive with 2 children, B. and C., but no grandchildren. At common law this gift would be too remote as A. might have grandchildren who attain 25 more than 21 years after A.'s death, and reducing the age to 21 would not save the gift either. Under the Act, however, it will be necessary to wait and see, under section 7, how many grandchildren qualify in time, and if necessary to reduce the age to 21 under section 9 and to exclude any further grandchildren under section 10. *But how long do you wait?* For 21 years after A.'s death or for 21 years after the death of the survivor of A., B., and C.?

The answer to this conundrum seems to depend on whether B. and C. would be regarded as lives in being at common law. Who then are the lives in being at common law? One ignores those lives in being that would invalidate the gift and considers only those that would validate it, because one has only to find one life that would validate it and the limitation is therefore valid. But now, if one has to wait and see, it will be because there are no lives which at common law would validate the gift—it is invalid at common law and one is therefore waiting to see whether it will in fact vest within 21 years of the death of one or other of the lives in being. Discussing a similar example at common law, Morris and Leach contend, at page 62 of the 2nd edition of their book, that "A. and A. alone is the measuring life; A.'s children cannot count as measuring lives because he may have more children after T.'s death." However, it is suggested with respect that the gift to the grandchildren in the example fails, not because A. is the only measuring life and it will not necessarily vest within 21 years of his death (as suggested by Morris and Leach) but because no life can be postulated with any certainty within 21 years of which the gift must vest. If A. has children at T.'s death (which, admittedly,

is not shown in the problem as stated by Morris and Leach), then they equally with A. are lives in being. But the possibilities calculated on the basis of A. as the measuring life show that the gift might not vest in time; the same is true of B. and C. as the measuring lives. How long then does one wait? And, furthermore, the possibilities calculated on the basis of all the babies born in Australia in the previous 12 months as measuring lives produce the same result. Should one therefore wait until 21 years after the death of the survivor of all of them?

The position would be different if A. as a measuring life would save the gift, *e.g.*, as in a limitation to A. for life, remainder to his children at 21. One would not then have to enquire into the possibilities through treating B. and C. or anyone else as measuring lives; nor would one have to wait and see.

The problem is largely one of the formulation, as a matter of law, of the method of ascertaining the lives in being at common law. Is it correct to say that anyone who is alive at the relevant date will count? Or should one say that only those lives that show the limitation to be valid will count?<sup>52</sup> Or is there a rule that only those who are mentioned, expressly or by implication, either as individuals or as a total class, will serve? The trouble is that at common law it does not seem to matter how one puts it and therefore the problem has no practical significance and has never had to be answered directly. However, section 7 (3) throws the ascertainment of the lives in being for "wait and see" purposes back on to the common law and under "wait and see" the answer will determine how long one must wait. It is the writer's submission that the lives at common law are not limited other than by the practical dictates of the need to assess the possibilities initially. Under "wait and see" that need is removed. The problem, therefore, in preparing a "wait and see" statute, is how to limit those other lives in being which are not in fact limited under the general law. It is not sufficient to say "would have been reckoned a life in being for that purpose if this section had not been enacted" as it was never necessary at common law to consider whether B. and C. *et al.* should be reckoned as lives in being or not.

The Kentucky Perpetuities Act 1960 solves this problem by adding the proviso that "the period shall not be measured by any lives whose continuance does not have a causal relationship to the vesting or failure of the interest." There may be doubt in some cases as to what is meant

<sup>52</sup> Problem: If lives in being at common law are restricted to those that show the limitation to be valid, is there anything left of "wait and see" as a result of section 7 (3)?

by "a causal relationship to the vesting or failure of the interest," but presumably, in the example under consideration, B. and C. have it whilst all the babies in Australia do not. One would therefore wait, if this were our law, until 21 years after the death of the survivor of A., B., and C.

The Kentucky proviso is possibly too restrictive in that it excludes an express selection by the testator of lives in being that do not have the necessary relationship to the vesting or failure of the interest, but it might be desirable to consider, when Parliament next meets, seeking an amendment to section 7 (3) along lines similar to the Kentucky proviso, but including lives expressly selected as such in the instrument creating the limitation. The problem, however, should not be overstated, for it is likely to arise only where the lives are not specified in the instrument and the limitation is not initially valid.

#### *D. Jurisdiction of the Court under "wait and see".*

The "wait and see" rule should remove the danger of most of the traps that the rule against perpetuities sets for the unwary. But, having introduced "wait and see", the Act then goes on to restore as much initial certainty as possible by removing the need for the "wait and see" rule wherever possible. The "wait and see" rule in effect is a rule of last resort and should rarely be needed.

The first method of doing this is found in section 8, which authorizes a trustee or any person interested under or on the invalidity of any limitation to apply to the Court for a declaration of the validity of a limitation in respect of the rule against perpetuities. The Court may take into account facts existing at the time of the application and events that have already occurred, but, to avoid determining the validity or invalidity of a limitation according to the facts at some arbitrarily selected date for the application, the Court is directed to make no declaration in respect of any limitation the validity of which cannot be conclusively determined under section 7 at that time. Hence, the Court may say—

- (i) These interests, it is now clear, must vest within the period and are therefore valid;
- (ii) Those interests, it is now clear, cannot possibly vest within the period and are therefore invalid; and
- (iii) The rest—we cannot say yet—come back later.

This "come back later" aspect has provoked some criticism on the ground that it may produce a costly series of successive applications. With respect, it is submitted that this is not likely. The parties,

or at any rate their professional advisers, should be every bit as competent as the Court to work out the possibilities. Disputes on perpetuities may be about the construction of the limitation or about the law; but they are rarely about the facts and the possibilities arising therefrom. Hence, once the construction and the relevant law are settled even if the validity cannot at that time be positively affirmed, only one more formal application (if that) will be required. Most applications, it is thought, will involve a determination of capacity to procreate or bear children under section 6, and such a determination, it is devoutly hoped, will in fact be final.

The undetermined or "presumptively valid" interests raise a further question concerning the destination of the intermediate income of the property involved. In this case, section 22, which deals generally with the question of the intermediate income of executory or contingent gifts, provides in subsection (3) that in determining whether a gift carries the intermediate income, any possibility that it may ultimately prove to be void for perpetuity must be disregarded. Accordingly, if the interest would carry the intermediate income if valid, it will still carry it even though it is not possible to say yet whether it complies with the rule against perpetuities or not. This will also enable maintenance to be paid from the income of such gifts under section 58 of the Trustees Act 1962 notwithstanding that the gift is contingent and may ultimately be void for perpetuity provided it carries the intermediate income under section 22. Similarly it will be possible to advance capital under and subject to the provisions of section 59 of the Trustees Act.

#### *E. Fantastic possibilities.*

The second method of securing initial certainty is by abolishing most of the fantastic possibilities that would otherwise require the "wait and see" rule to be applied. A number of these fantastic possibilities must be considered.

##### *1. The "fertile octogenarian."*

T. leaves property on trust for A. (a widow of 80 who has 3 children living at T.'s death) for life, with remainder to her children for their lives, and ultimate remainder to the children of such children. The ultimate remainder to A.'s grandchildren is void. This is because firstly the gift to the children of A. is construed to include the after-born children (a ridiculous construction in a case like this) and secondly A. is conclusively presumed to be capable of bearing children until her death (which is even sillier). Hence she might re-marry

after T.'s death and have further children who would not be lives in being, and their children might be born more than 21 years after the death of the last life in being.

The absurdity of the first ground is best illustrated by a dictum of Lord Dunedin in *Ward v. Van Der Loeff*:<sup>53</sup> "He [the testator] has used the words 'brother and sister' without explanation or glossary, and I am afraid he must take the consequences." The second ground is generally attributed to the decision of Lord Kenyon in *Jee v. Audley*<sup>54</sup> at a time when knowledge of gynaecology was derived largely from the Bible; and even Gray could support the rule only on the grounds of "the difficulty and delicacy of determining the question involved."<sup>55</sup> To add to the absurdity, it appears that not only will the law not recognize an incapacity to bear children due to advanced age, but neither will it recognize an incapacity due to any other cause such as surgical operation.<sup>56</sup>

## 2. The "precocious toddler."

This happy counter-part of the fertile octogenarian appeared in the case of *Re Gaites's Will Trusts*.<sup>57</sup> In that case there was a bequest on trust for A. for life, remainder for such of her grandchildren living at the death of the testatrix or born within 5 years therefrom who should attain the age of 21. At the death of the testatrix, A. was a widow aged 65 and had 2 children living as well as one grandchild aged 8. The only possibility that could prevent the gift to the grandchildren vesting in time would be if A. were to marry again and have another child after the testatrix's death, and that child were to produce a child within five years of the death of the testatrix. Roxburgh J., however, contrived to side-step this possibility and to uphold the bequest on the ground that, as under the Age of Marriage Act 1929 a marriage between persons either of whom was under the age of 16 was void, it was legally impossible for a child of A. born after the death of the testatrix to produce a legitimate child within those 5 years. His lordship, however, overlooked the possibility that this child of A. might acquire a domicile in some country in which the age for marriage was less than 16. The question whether, on grounds of

<sup>53</sup> [1924] A.C. 653, at 667.

<sup>54</sup> (1787) 1 Cox 324, 29 E.R. 1186; and see also *Re Dawson*, (1888) 39 Ch. D. 155.

<sup>55</sup> GRAY, *THE RULE AGAINST PERPETUITIES* (2nd ed.), s. 215. Perhaps, in Gray's time, lawyers were not as hard-boiled as matrimonial causes legislation has now made them.

<sup>56</sup> See *per* Dean J. in *Re Fawaz*, [1958] Victorian R. 426, at 431.

<sup>57</sup> (1949) 65 Times L.R. 194.

public policy, a British Court should decline to recognize a marriage between five year-olds, is one that at one time divided the team of Morris and Leach.<sup>58</sup>

The twin hazards of fertile octogenarians and precocious toddlers have been sterilized by the introduction of the "wait and see" rule. But, to avoid the absurdity of waiting to see, for example, whether a 65-year-old spinster bears any children, they have been excised altogether from the law as fantastic possibilities by section 6 of the Act. Section 6 is given the widest application possible. It is to be applied, not merely in determining whether a limitation infringes the rule against perpetuities, but also in determining the right of any person or persons to put an end to a trust or accumulation under the rule in *Saunders v. Vautier*,<sup>59</sup> and generally whenever, in the management or administration of a trust, estate or fund, or for any purposes relating to the disposition, devolution or transmission of property, it becomes relevant to enquire whether a person is or at a relevant date was or will be capable of procreating or bearing a child.

The section provides two presumptions, which may be rebutted by evidence tendered at the time the matter falls for decision but not subsequently. The first is that a woman who has attained the age of 55 is incapable of bearing a child, and the second that a person who is under the age of 12 is incapable of procreating or bearing a child. In the former case, statistics and the opinion of the medical profession would indicate that the age of 55 is perfectly safe for the application of the presumption.<sup>60</sup> In the latter case, the English Law Reform Committee recommended an age of 14; the difference is accounted for, not wholly by any difference in the comparative rates at which children in England and Australia may mature, but also by a suspicion that the English Law Reform Committee may have been a little too complacent about the potentialities of the young. The section also makes admissible, in any proceedings to which the section applies, medical (including surgical) evidence of incapacity to procreate or bear children, and the Court is authorized to accept evidence of a high degree of improbability of incapacity as establishing that incapacity.

<sup>58</sup> See Morris, *Rule Against Perpetuities and Age of Marriage*, (1949) 13 CONVEY. (n.s.) 289, and Leach, *Perpetuities: Staying the Slaughter of the Innocents*, (1952) 68 L. Q. REV. 46, n. 22. See too, for the result, MORRIS AND LEACH, *RULE AGAINST PERPETUITIES* (2nd ed.), 86, n. 32.

<sup>59</sup> (1841) 4 Beav. 115, 49 E.R. 282.

<sup>60</sup> See MORRIS AND LEACH, *op. cit.*, 82, n. 20.

Decisions in which these presumptions are applied or such evidence is accepted remain, according to subsection (4), effective, notwithstanding the subsequent birth of a child. However, if a child is born, in defiance of the section, and he or his spouse, or his issue or the spouse of any of his issue, is entitled under a limitation that is not itself void for perpetuity, their rights to the property are not affected. This will presumably include a limitation which has been declared valid under the section through the "impossibility" of further children, because of the provision that the decision that the limitation is valid remains effective notwithstanding the birth of the child. The trustee who has distributed the property on the faith of the decision is, however, personally protected by the decision, and the claimant's right will accordingly be limited to following the property. Claims to follow the property will be regulated by section 65 of the Trustees Act 1962 which, amongst other things, confers on the Court a "greater hardship" discretion to be exercised between the claimant and the recipient.<sup>61</sup> Section 6 (4) of the Perpetuities Act is one of the least happily drafted of the Act and is capable of giving rise to a number of difficulties. Most of these, however, can probably be dismissed as purely theoretical, as the chances of a child being born, after a decision of the Court that this is impossible, must be so remote that the subsection will probably never need to be invoked.

A number of points should be specially noted in relation to section 6:—(i) It is not sufficient to presume, for example, that a lady of 55 cannot bear another child if she might possibly adopt one who would qualify as a child for the purposes of the limitation in question. The difficulty is met to some extent by section 7 of the Adoption of Children Act 1896-1959, the proviso to which prevents adopted children taking under instruments made prior to the date of adoption unless there is a statement to the contrary in the instrument. This deals adequately with a gift to the children of the lady of 55, but if the limitation were to her grandchildren, so that her children (including adopted children) were merely the measuring lives for gifts to their own children, section 7 would not save the gift. Accordingly, section 7 of the Adoption of Children Act has been amended<sup>62</sup> to exclude not only the adopted children from taking under instruments made before their adoption

<sup>61</sup> Section 24 of the Law Reform (Property, Perpetuities, and Succession) Act 1962 was intended to confer a similar discretion in the case of all claims for relief against payments made under mistake, whether of law or fact. However, an amendment moved to cl. 24, whilst the Bill was before the Legislative Assembly, succeeded in deleting the comparison between claimant and recipient, thereby rendering the section virtually useless.

<sup>62</sup> By the Adoption of Children Act Amendment Act, No. 84 of 1962.



but also the issue of such adopted children. It is not suggested that this is likely to happen with any frequency; however, the possibility that it might would nullify section 6 and require the persons interested to wait and see during the remainder of the life of the grandparent.

(ii) Section 6 applies to the determination of the question of whether the beneficiaries are entitled to terminate the trust under the rule in *Saunders v. Vautier*. It was held in *MacRae v. Walsh*<sup>63</sup> that, where there was a possibility of further children, however unlikely, the beneficiaries in existence could not claim to be solely and absolutely entitled to the whole beneficial interest and so to terminate the trust. Nevertheless, it was held that the Court might authorize the trustee to distribute the property and protect him against claims by any future children. The trouble with this is that the trustee might decline to make a distribution; and the advantage of *Saunders v. Vautier* is that the beneficiaries can compel a distribution. However, section 6, by permitting the judicial elimination of the possibility of further children, will enable the beneficiaries to bring themselves under the rule in *Saunders v. Vautier* and to compel a distribution. If for any reason it is not possible to eliminate the possibility of further children under section 6, it may still be possible for the Court to approve on behalf of future children a rearrangement of the trust under section 90 of the Trustees Act 1962 that would have the desired effect.

(iii) The presumptions introduced by section 6 are rebuttable. It would have been neater to have made them conclusive, but in practice they are likely to be so. However, if someone should discover, for example, an 11-year-old boy who is already a proud, or perhaps shamefaced, father, it would be a little bit ridiculous to apply the presumption to him.

(iv) Similarly, in regard to future children born after a judicial decision as to their impossibility, it would have been neater to cut them out completely instead of trying to preserve their rights. But it might not have been just. In any event, they are unlikely to occur and, if they do, the Court is suitably armed with a greater hardship discretion.

(v) Finally, it should be stressed that no attempt has been made to stipulate an upper age limit for masculine virility. The fertile octogenarian as a male cannot be described as a fantastic possibility. In fact since the information was released that the Americans have established a sperm bank for their astronauts so that their widows may continue to have children by them after they have failed to make

<sup>63</sup> (1927) 27 State R. (N.S.W.) 290.

a successful return from orbit, or have returned after having been exposed to harmful radiation, a new and gruesome fantastic possibility has arisen, described by Professor Leach<sup>64</sup> as "the fertile decedent." In the pre-orbital age, a bequest for such of the testator's grandchildren as attain the age of 21 has always been regarded as clearly valid; the testator's children are the lives in being and the grandchildren must attain 21 within 21 years, plus appropriate periods of gestation, of their parent's death. Now, however, either the testator or any of his sons might become an astronaut or otherwise be entitled to avail himself of the services of a sperm bank, so that the grandchildren might not be born for many years after the death of the last surviving life in being. In fact, the iota of rationality perceived in this corner of the law by Dean J. in *Re Fawaz*,<sup>65</sup> that "it [the Law] is prepared to concede that a deceased person cannot have children," can now no longer be said to hold good, at any rate so far as males are concerned. It is not yet known what the Courts are going to make of the fertile decedent but, in case the Supreme Court of Western Australia should ever be faced with the temptation, it should be pointed out that under the new Act a limitation to a class composed of the issue or descendants of a man might still be upheld under the combined effect of "wait and see" and the new class gift rule in section 10. In other words, wait and see whether anyone does make a deposit at a sperm bank and, if he does, then exclude those beneficiaries who are born too late. Nevertheless, it all goes to show what a silly rule it is in the second half of the twentieth century.

### 3. *The "Unborn Widow."*

Another trap for the unwary is the "unborn widow." Suppose T. has a son A. who is married and has grown-up children. T. leaves property in trust for A. for life, then for A.'s widow if any for her life, and then for the children of A. then living. The ultimate gift to A.'s children fails at common law because A.'s wife may die and he may marry again a person unborn at T.'s death. If his second wife survives him by more than 21 years, the gift would vest in the grandchildren beyond the perpetuity period and is therefore void. As far as can be discovered there has never been a reported case of an unborn widow; the nearest seems to be *Re Stern*<sup>66</sup> where there was a bequest to N. for life and after his death to any widow, born in the lifetime of the testator, who might survive him. The testator died on 25th December

<sup>64</sup> Leach, *Perpetuities in the Atomic Age: The Sperm Bank and the Fertile Decedent*, (1962) 48 A.B.A.J. 942.

<sup>65</sup> [1958] Victorian R. 426, at 431.

<sup>66</sup> [1962] 2 Weekly L.R. 161.

1915 and N.'s widow was born on 13th July 1916. Nevertheless, she was held to be a life in being.

However, it is the possibility of the unborn widow that invalidates limitations at common law and in this instance, waiting and seeing, under section 7, whether she is in fact a life in being will not save the gift because, by virtue of section 7 (3), as she would not have been reckoned a life in being if section 7 had not been enacted, she will not be reckoned a life in being under the "wait and see" rule even if in fact she is one. It has therefore been necessary in section 12 to resort to the expedient of deeming the widow to be a life in being; in most cases she is one and in the rest there is no great harm done nor any great violation of the perpetuity principle through this device.

Section 12 provides that the widow or widower of a person who is a life in being for the purpose of the rule shall be deemed to a life in being for two purposes:—

- (i) a limitation in favour of a person who attains, or a class the members of which attain, according to the limitation, a vested interest on or after the death of the survivor of the life in being and his spouse. This seems to deal effectively with the "unborn widow" trap as, by deeming her to be a life in being, a gift to vest on her death must be valid.
- (ii) a limitation in favour of that widow (or widower) herself. This is not intended to deal with a limitation in the form of a direct and absolute gift, or even a life estate, which would be valid even if she was not a life in being because it would vest on her husband's death. It is intended to validate a discretionary trust exercisable during the life of the widow and of which she is one of the objects. Such a trust would be invalid at common law because of the possibility that she might not be a life in being and she might outlive her husband by more than 21 years, so that the discretion could be exercised beyond the perpetuity period.<sup>67</sup> Even the "wait and see" rule would permit such a discretionary trust to be valid and exercisable only for 21 years after the husband's death. However, as there appears to be no "visible inconvenience" in treating such a trust as valid for the whole of her life, even if she is an unborn widow, section 12 validates the trust.

Dr. Morris has pointed out that one effect of section 12 is that, if the unborn widow is deemed to be a life in being, then it is arguable that she is a life in being for the purposes of section 12; and, therefore, her unborn widower is also deemed to be a life in being . . .

<sup>67</sup> See *Re Coleman*, [1936] Ch. 528, and *Re Allan*, [1958] 1 All E.R. 401.

and so, property might be tied up for ever under a limitation to A. for life, then to any widow who survives him for her life, then to any widower who survives her for his life, etc. The draftsman's answer is that, having abolished so many fantastic possibilities, he is surely entitled to the luxury of creating just one more; and he will worry about this one when the facts actually occur.

#### 4. *Administrative Contingencies* ("Magic Gravel Pits," etc.).

It sometimes happens that a testator foresees the possibility that some of his intended beneficiaries may die during the relatively short time required for the administration of his estate or for the carrying out of short trusts for specific purposes, and he therefore provides that the interests under his will shall vest only on the completion of the administration or the trusts, or on distribution. Normally this is a very short time; but the possibility that it might be beyond the perpetuity period invalidates his gifts at common law.

So, in *Re Wood*,<sup>68</sup> T. owned gravel pits which at the time of his death should have been exhausted in four more years. He devised them to trustees on trust to work them until they were exhausted and then to sell them and to divide the proceeds among his issue then living. In fact they were exhausted in six years, but nevertheless the gift to his issue failed through the possibility that they might not have been exhausted within 21 years.

Similar dangers attach to such expressions as "when my debts are paid," "when my will is proved," "when my estate is realised." In *Re Lord Stratheden and Campbell*<sup>69</sup> a gift of property to a volunteer corps "on the appointment of the next lieutenant-colonel" was held to involve a perpetuity and therefore to be void. In *Haggarty v. City of Oakland*<sup>70</sup> a municipal corporation leased a municipal building in the course of construction to a management company for ten years, the lease to begin on the first day of the second month after the completion of the building. The lease, in spite of the fact that it contained a covenant by the corporation to complete the building with all due diligence, was held void for perpetuity.

The courts are sometimes able to save such gifts by construing the reference, not to the time when the event actually happened, but to the time at which it ought to have happened. Hence, in *Re Petrie*<sup>71</sup> the words "when the residue of my estate is realized as aforesaid" were construed to mean either the date when the administration was in

<sup>68</sup> [1894] 3 Ch. 381.

<sup>69</sup> [1894] 3 Ch. 265.

<sup>70</sup> (1958) 161 Cal. App. 2d. 407, 32d P. 2d. 957.

<sup>71</sup> [1961] 3 Weekly L.R. 1348.

fact completed or the expiration of the executor's year, whichever first happened. However, the will did not confer any power to postpone realization and it may be considered doubtful whether this construction would have been possible if it had done so.

The difficulty of compiling an adequate list of dangerous administrative contingencies compelled both the English Law Reform Committee and the Law Reform Committee in Western Australia to abandon any thought of legislation dealing specifically with these dangers. Accordingly, where a benevolent construction is not available to validate the gift initially, it will be necessary to wait and see for the short time until the contingency occurs. In the vast majority of cases, this should present no real hardship or inconvenience.

### VIII. The Cy-Pres Rules.

The *cy-près* doctrine, as applied to perpetuities, would permit the modification of limitations which infringe the rule against perpetuities so that they might still take effect, approximating as closely as possible to the testator's or settlor's intention consistently with what the law allows. This was rejected by both the English and Western Australian Law Reform Committees in the form of a power in the Court to remodel invalid limitations generally, but was recommended in two particular cases.

#### A. Invalid age contingencies.

The history of the legislation which permits the reduction of invalid age contingencies to 21 has been noted above. The provision has existed in Western Australia since 1941 in section 5 of the Law Reform (Miscellaneous Provisions) Act of that year; that section has, however, now been repealed and re-enacted as section 9 of the Perpetuities Act.

As in the past, a contingency that a beneficiary should attain an age in excess of 21 may be cut down to 21 only if the gift would otherwise be void and the alteration would save the gift. If the limitation is valid as it stands, as in a bequest to the testator's own children at 30, the age will not be reduced. Also as in the past, the section does not remove any other contingency affecting the gift. However, in view of criticisms of the earlier provision by Professor I. D. Campbell, two alterations have been incorporated in section 9 of the new Act:

- (i) Instead of the section applying only where the age contingency related to the age of the donee or donees, it will now apply where

the contingency relates to the age of any person. Hence, it will now apply in the case of a gift to the wife of X. if X. attains 25; and it will also apply where there is a gift to X. at 25, and provision is made for X. from the income of a separate fund until he attains 25, the capital of the separate fund to go to X.'s estate if he fails to attain that age or to Y. if he does attain that age.

- (ii) The absurdity of describing the limitation as one that "is void" when the whole purpose of the section is to make it valid has been removed.

There are other problems that are capable of arising in connexion with this section but, as the section has caused no real difficulty in 45 years, it was decided not to venture a more extensive redrafting.

### B. Class gifts.

At common law, a gift of property to be divided among a class of persons is subject to the "all or nothing" rule and is totally void if by any possibility the interest of any member of the class might vest outside the perpetuity period. It is void even as to those members who satisfy the contingency within the period because, under the rule against perpetuities, the interest of a member of a class is not regarded as vested until both the maximum and minimum size of his share is ascertained.<sup>72</sup>

The class-closing rules, known as "the rule in *Andrews v. Partington*,"<sup>73</sup> sometimes modify the harshness of the "all or nothing" rule by artificially closing the class within the perpetuity period; but they do not always have this effect because, even where they apply, they are directed more at discovering a date for distribution than at saving the gift from the rule against perpetuities. The "wait and see" rule would help only if no member of the class did qualify outside the perpetuity period and, until that was known, those members of the class who had satisfied the contingency would not know whether their interest was valid or not. Hence section 10 of the Act will now save these gifts by making the limitation effective in respect of those members of the class who do in fact qualify in time—in effect, the limitation is remoulded as a limitation to those members of the class who attain<sup>74</sup> a vested interest within the perpetuity period.

<sup>72</sup> *Leake v. Robinson*, (1817) 2 Mer. 363, 35 E.R. 979; *Jee v. Audley*, (1787) 1 Cox 324, 29 E.R. 1186.

<sup>73</sup> (1791) 3 Bro. C.C. 404, 29 E.R. 610.

<sup>74</sup> It might have been less elegant but more accurate had we said "who would attain a vested interest within the perpetuity period if the class were to close at the end of that period."

Justification for the "all or nothing" rule is sometimes urged on the ground that a testator might well have preferred that the whole of his gift should fail if some members of the class do not qualify in time rather than that perhaps one member of a large class should take all the property. This may sometimes be true, but it was thought that generally the rule works unjustly and that therefore it would be better to make the gift effective for those members who do qualify within the period. If a testator foresees a situation in which only one member of a large class might qualify, and if he would wish to make some other provision in that event, there is nothing to prevent his doing so in his will provided he is competently advised.

### **IX. The order of application of the new rules.**

Different results can be produced according to the order in which sections 7, 9, and 10 are applied to a limitation, and it was therefore necessary to prescribe the preferred order in the Act. This is done in section 11.

There has been no doubt, either on the English or Western Australian Law Reform Committee, that section 10 should be applied only in the last resort, as it operates by excluding some of the potential beneficiaries and increasing the shares of the remainder. The difficulty has been to decide which should be applied first, "wait and see" under section 7 or the reduction of invalid age contingencies under section 9. The English Law Reform Committee was divided on the issue, the majority preferring to reduce the age contingencies before "waiting and seeing." They saw difficulties in any other course. They argued the example of a pecuniary legacy to be divided among the children of X. at 30, and 35 years later X. died leaving children aged 25, 16, and 8; it would then be known that the youngest could not attain the age of 30 within 21 years of a life in being; if the reduction of invalid age contingencies was to be made at that stage, the eldest child would then find that he should have attained a vested interest four years previously. Accordingly the majority recommended that age contingencies should be reduced first. The minority preferred first to "wait and see", as the reduction of invalid age contingencies involved an interference with the testator's wishes, generally perfectly legitimate, that property interests should not vest at 21. Moreover, the reduction of age contingencies would alter the class by enlarging it to include persons whom the testator did not intend to take, thereby diminishing the shares of the others. They challenged the example argued by the majority, pointing out that it was not true to say that the eldest child would find that he had attained a vested interest four years previously,

as he attained a vested interest only by attaining the age of 30 or by the operation of the section reducing the age contingency. There was therefore no element of retrospectivity or administrative inconvenience. The minority put forward an example of its own: "To A. for life, and then to his children at 25." If A.'s youngest child was over four at A.'s death, there would be no need to reduce the age contingency as the gift must vest within the period, if at all, and so could then be declared valid under "wait and see". It is doubtful, they argued, whether the testator would have preferred the earlier vesting when he might have had the one he stipulated. It is true that it would be uncertain during A.'s lifetime whether his children would take at 21 or 25, but there would be little inconvenience in that. Finally, they pointed out, the Massachusetts Perpetuities Act 1954 had preferred to put "wait and see" before the reduction of invalid age contingencies.

The Law Reform Committee in Western Australia, after some shuffling, lined itself up with the minority of the English Committee and recommended that age contingencies should not be reduced until it was clear that the limitation could not take effect under the "wait and see" rule according to its terms. Accordingly section 11 provides that, where a limitation cannot initially be declared valid, the "wait and see" rule should be applied; if and when it becomes certain that the limitation as worded will infringe the rule against perpetuities, invalid age contingencies should be reduced if that, or that in conjunction with the class-closing rule in section 10, would save the gift; and finally, if necessary to save the gift, close the class under section 10. In other words:—

- (i) "wait and see"—(section 7) ; then
- (ii) reduce age contingencies—(section 9) ; then
- (iii) close the class—(section 10).

## **X. The effect of invalidity.**

At common law, a limitation which itself complies with the rule against perpetuities, perhaps because it was vested from the start, is invalid if it is subsequent to<sup>75</sup> and "dependent upon" a void limitation.<sup>76</sup> The main difficulty under this rule lies in determining what is meant by "dependent upon" and a study of the relevant cases was described by the English Law Reform Committee as being "more depressing than illuminating."

<sup>75</sup> As explained earlier, there is no rule of "infectious invalidity" in Western Australia and prior valid interests are therefore not affected by subsequent invalid interests.

<sup>76</sup> *Re Abbott*, [1893] 1 Ch. 54; and see also *Re Hubbard*, [1962] 2 All E.R. 917.



Section 13 of the new Act, therefore, removes the test of dependency and provides that a subsequent limitation, which itself complies with the rule, remains valid notwithstanding the failure of prior limitations. Naturally, however, if the subsequent limitation is “dependent”, in the sense of being contingent upon the same remote contingency, as the prior limitation, it too will fail.

To remove any possible doubts or difficulties, section 13 (2) provides that, where a limitation is invalid as infringing the rule against perpetuities, any subsequent valid limitations are thereby accelerated.

## **XI. Application to particular interests.**

### *A. Options.*

The rule against perpetuities applies to interests in property and not to contracts; hence, it is no objection to a contract that the liability under it will not accrue within the perpetuity period. However, contracts for the transfer of an interest in property that are specifically enforceable create in the promisee an equitable interest in the property, and it is in relation in particular to options to purchase that the rule against perpetuities may become relevant, for options are regarded as vesting a proprietary right in the option-holder contingently upon his electing to exercise the option. Accordingly, if the option may be exercised beyond the perpetuity period and the option-holder is driven to rely on the proprietary right rather than on the contract, the option is void.<sup>77</sup>

Difficulties arise owing to the fact that the right of the option-holder may be both contractual and proprietary. Hence—

- (i) although specific performance cannot be obtained if the option is too remote, an action for damages apparently remains against the option-giver or his estate;<sup>78</sup>
- (ii) the option can be specifically enforced against the original option-giver even though the option-giver is a corporation and even though the action is brought by the option-holder's assigns,<sup>79</sup> as the jurisdiction to grant specific performance against him is not based on the presence of an equitable interest but on the inadequacy of damages as a mode of enforcing the contractual obligation.

<sup>77</sup> *Woodall v. Clifton*, [1905] 2 Ch. 257.

<sup>78</sup> *Worthing Corporation v. Heather*, [1906] 2 Ch. 532; *aliter* in the United States—*Eastern Marble Co. v. Vermont Marble Co.*, (1919) 236 Mass. 138, 128 N.E. 177.

<sup>79</sup> *Hutton v. Watling*, [1948] Ch. 26.

Following the recommendations of the English Law Reform Committee, the new Act treats only options to acquire an interest in land, because options to purchase chattels or shares create no problem and require no change in the law. As regards options to acquire an interest in land a distinction is drawn between—

- (1) options in a lease enabling the lessee to purchase the reversion (“leasehold options”), and
- (2) other options to acquire an interest in land (“options in gross”).

#### 1. *Leasehold options.*

As leasehold options encourage the lessee to develop the land by enabling him to secure the benefit of his improvements for himself, the present law, under which an option to the lessee to enable him to purchase the land during the currency of a 30-year lease is void against the lessor’s assigns, was considered unduly restrictive.

Section 14 (1) (a), therefore, exempts from the application of the rule against perpetuities altogether an option contained in a lease enabling the lessee or the lessee for the time being to purchase the demised property, if the option is exercisable only during the currency of the lease or within one year after its termination. Accordingly, the option remains valid and enforceable whatever the duration of the lease—in fact, the longer the lease, the more the lessee’s interest approximates to ownership of the freehold, and accordingly the greater the need for the option.

#### 2. *Options in gross.*

Options granted independently of any lease to the option-holder tend to discourage the development of land, because the control of the land remains with the option-giver who, unless the purchase price fluctuates with the improved value, may at any time be deprived of the benefits of his improvements by the exercise of the option.

Accordingly, section 14 (2) exempts these options from the application of the rule against perpetuities, but this time, in its place, enacts a new and more stringent rule. An option in gross which, according to its terms, is or may be exercisable at a date more than 21 years from its grant becomes void 21 years after the grant as between both the original parties and all persons claiming through them. In other words, it may be exercised for 21 years but thereafter it is void—no specific performance and no damages. Options sometimes granted, to purchase within one year of the testator’s widow’s death, will be valid if the widow dies within 20 years of the testator.

For the avoidance of doubt, section 14 is declared expressly not to apply to two types of interest, *viz.*—

- (i) Pre-emptive rights to acquire units of accommodation in a building containing several units.<sup>80</sup> Unit ownership agreements, as they are now commonly called, generally confer rights of pre-emption or first refusal on the other co-owners in the event of one co-owner wishing to sell, and it was thought better that these should be left as at common law rather than be confined to 21 years. It may be doubted, anyhow, whether they could properly be regarded as options so as to be caught by a section dealing with “options to acquire an interest in land,” but they are generally called “options” in the agreement and it might be argued that they are a form of contingent option so that, contingently on one owner deciding to sell, the other owners acquire an option. It is clear that they fall within the mischief of the rule against perpetuities and therefore should be subject to some limitation, but the only reported case on this point appears to be *Albay Realty Ltd. v. Dufferin-Lawrence Developments Ltd.*<sup>81</sup> in which it was assumed that they were options for the purpose of the rule, though with no detailed consideration of the point.
- (ii) Options for renewal contained in leases. This is purely declaratory as such options were never subject to the rule and they remain free from it.

*B. Possibilities of reverter and rights of entry for condition broken.*

A possibility of reverter is the interest that remains in a grantor or testator after he has conveyed or devised land on a fee simple determinable, *e.g.*, “to the X. Church for so long as the premises are used for Church purposes.”

A right of entry for condition broken is the interest left in a grantor or testator who has conveyed or devised a fee simple subject to a condition subsequent, *e.g.*, “to X. and his heirs, but if the family ceases to dwell on the land the grantor or his heirs may re-enter and re-possess themselves of the land as of their former estate.”

Possibilities of reverter probably were not subject to the rule against perpetuities at common law, firstly because they are in the nature of reversions and are therefore vested, and secondly because

<sup>80</sup> In the Bill this read “rights of first refusal in a unit ownership agreement” but was changed by an amendment in the Legislative Assembly; as to which, see STROUD’S JUDICIAL DICTIONARY (3rd ed.) under “Pre-emption. Right of: see . . . First Refusal”!

<sup>81</sup> [1956] 2 D.L.R. 2d. 604.

"the rule against perpetuities is not dealing with the duration of interests but with their commencement."<sup>82</sup> There is, however, a decision of the Chancery Court of Lancaster<sup>83</sup> holding that they are subject to the rule.

As a matter of policy, it was agreed by both the English and Western Australian Law Reform Committees that the Palatine Court was right and that they should be subject to the rule. Their indefinite duration is an inconvenience with little real utility and effectively ties up the land in a manner the rule against perpetuities was designed to prevent; they are perhaps the worst offenders against the principle of alienability; and they give rise to considerable difficulties in tracing the persons entitled to the reverter, to whom it no doubt comes as a surprise windfall. For example, in *Brown v. Independent Baptist Church of Woburn*<sup>84</sup> the interest determined after 90 years and the land then reverted to the successors in interest of the testatrix's ten residuary devisees.

Rights of entry for condition broken, on the other hand, have always been subject to the rule against perpetuities in England, and there are dicta in Australia supporting this view.<sup>85</sup>

Similar considerations must also apply to resulting trusts of personality analogous to possibilities of reverter in land. At common law, if T. leaves a fund to a charitable<sup>86</sup> or non-charitable<sup>87</sup> body so long as a certain state of affairs continues to exist, he retains a valid interest in the property which will pass under the gift of residue in his will, if and when that state of affairs ceases to exist. This device is used chiefly to secure the maintenance in perpetuity of graves and monuments, but there are other means of doing this, if it is considered desirable. No great hardship would therefore result from the reversal of the present rule which, as pointed out by the English Law Reform Committee, produces the bizarre result that a bequest to a corporation until some specified event occurs, and then to X., is ineffective to give X. any interest, whereas a bequest to a corporation until some specified event occurs, coupled with a gift of residue to X., operates to carry the property to X. when the event occurs.

<sup>82</sup> *Re Chardon*, [1928] Ch. 464, at 468.

<sup>83</sup> *Hopper v. Corporation of Liverpool*, (1944) 88 Sol. J. 213.

<sup>84</sup> (1950) 325 Mass. 645, 91 N.E. 2d. 922; and see also *Re Cooper's Conveyance*, [1956] 3 All E.R. 28.

<sup>85</sup> *Williams v. Perpetual Trustee Co.*, (1913) 17 Commonwealth L.R. 469, at 485 and 495; *Will of Brett*, [1947] Victorian L.R. 483, at 488.

<sup>86</sup> *Re Randell*, (1888) 38 Ch. D. 213.

<sup>87</sup> *Re Chardon*, [1928] Ch. 464.

Accordingly, section 15 provides that possibilities of reverter, rights of entry for condition broken, and resulting trusts in personalty analogous to possibilities of reverter in land, that come into existence after the commencement of the Act shall be subject to the rule against perpetuities. The effect is, therefore, that they will remain valid, in the absence of any relevant lives in being, for such period of years not exceeding 80 as is specified in the grant or, if no such period is specified, for 21 years. Thereafter, the fee simple, or the interest under the trust, becomes absolute and indefeasible.

Two further points should be noted—

- (i) The section applies whether the determinable or conditional interest or estate is charitable or not. However, the rule in *Re Tyler*,<sup>88</sup> whereby the rule against perpetuities does not apply to a gift over from one charity to another, is expressly preserved, in spite of the doubts cast on its validity by Dixon C.J. in *R.S.P.C.A. of New South Wales v. Benevolent Society of New South Wales*.<sup>89</sup>
- (ii) The section will apply also to reservations and conditions in Crown grants made after the commencement of the Act, although previously these were probably not subject to the rule.<sup>90</sup> There may be some doubts as to whether or not this was wise, but one advantage of “wait and see” is that the Crown will have 21 years in which to make up its mind whether any amending legislation is desirable, or 80 years if it makes use of section 5 in framing its grants.

### C. Powers of appointment.

At common law, a general power is valid if it could be exercised within the perpetuity period, even though it could also be exercised beyond the period. Section 7 preserves this, merely postponing the determination of validity, so that if the power in fact becomes exercisable during the period it remains valid. At common law, a special power is valid if it is exercisable only within the period but, as a result of section 7, it is now valid to the extent that it is exercised during the period even though it was not limited in terms to the period.

So far as appointments under powers are concerned, an appointment under a general power is valid if the interests it creates must

<sup>88</sup> [1891] 3 Ch. 252.

<sup>89</sup> (1959-1960) 102 Commonwealth L.R. 629, at 641.

<sup>90</sup> See *Cooper v. Stuart*, (1889) 14 A.C. 286, and discussion of this case *supra*.

(or now do) vest within the perpetuity period calculated from the exercise of the power. An appointment under a special power is valid if the interests it creates must (or now do) vest within the perpetuity period calculated from the creation of the power. In other words, in the case of an appointment under a special power, the limitations are read back into the instrument creating the power, although at common law it is permissible to consider the possibilities in the light of circumstances as they existed at the date of the exercise of the power.

It is apparent that no further change is required in the application of the rule against perpetuities to powers of appointment. However, obviously everything depends on the ease with which one can classify powers as general or special; and at common law this is not as simple as it might be.

The distinction is usually stated to be that a power is general if the objects are unlimited so that they include the donee himself who is therefore free at any time to appoint as if he were seised in fee. A power is special, on the other hand, if the objects are limited. The English Law Reform Committee stressed, in paragraph 44 of its report, the need for preserving this distinction:—

“However, this distinction between general and special powers corresponds in most cases to a real distinction between the two types of power, in that the property is tied up at the date when the power is created, if it is special, but only when the power is exercised, if it is general.”

Unfortunately the distinction becomes blurred if, as sometimes happens, the power is limited but includes the donee amongst its objects. For example—

- (i) the objects of the power may be unlimited, but the power may be limited as to the manner of its exercise—as when certain consents are required for its exercise or when it is a power vested in several persons jointly;<sup>91</sup>
- (ii) the objects of the power may be unlimited, but the power may be limited as to the time of its exercise—as when the power is exercisable only by will;

<sup>91</sup> There is some dispute as to whether an unlimited but joint power should be regarded as general or special—see and *cf.* *Re McEwan*, [1955] N.Z.L.R. 575 (general) and *Re Churston Settled Estates*, [1954] Ch. 334 (special). It is submitted that, as a joint power requires the concurrence of all the donees in its exercise, it falls within the same reasoning as a power to a sole donee exercisable only with the consent of other persons, and should therefore be regarded as special.

- (iii) the power may exclude certain specified persons as objects, but the objects may be otherwise unlimited and include the donee—as with a power to appoint to anyone except X.;
- (iv) the power may authorize an appointment among a limited class of persons, but the donee may be a member of that class—as with a power to the testator's son to appoint among the testator's issue.<sup>92</sup>

There is some authority in England for regarding powers such as these as forming a third class of “hybrid” powers,<sup>93</sup> but in Australia the majority of the High Court in *Tatham v. Huxtable*<sup>94</sup> (a difficult case capable of supporting many propositions) took the view that powers are either general or special and, where the objects of the power are limited, even though the donee of the power is within the range of objects, the power is special.

It should, however, be possible to provide expressly for the classification of powers for the purpose of the rule against perpetuities without reference to the classification for other purposes. The basis of the classification for the purpose of the rule against perpetuities was dealt with most ably by Miss K. M. Ainslie in an unpublished paper whilst she was a student in this Law School:—

“Because of the practical aspects of a general power it is treated for the purpose of the Rule against Perpetuities as if the donee were himself the owner of the property. This is clearly stated by Lord St. Leonards in *SUGDEN ON POWERS* (8th ed., (1861), p. 329 *et seq.*) in a passage which is often repeated in judgments—

‘In regard to the limitations they are merely such as a man seised in fee might create and as the power is equivalent to the fee the same estates may be created by force of both. To take a distinction between a general power and a limitation in fee is to grasp at a shadow whilst the substance escapes. By the creation of the power no perpetuity, not even a tendency to perpetuity, is effected. The donee may sell the estate the next moment, and when he exercises the power in strict settlement as if he were seised in fee he creates those estates only which the law permits with reference to the time at which they were raised.’

<sup>92</sup> *Trustees Executors and Agency Co. Ltd. v. Margottini*, [1960] Victorian R. 417; *Taylor v. Allhusen*, [1905] 1 Ch. 529; *Re Penrose*, [1933] 1 Ch. 793.

<sup>93</sup> *Re Park*, [1932] 1 Ch. 580, at 584; *Re Jones*, [1945] Ch. 105, at 106; *Re Harvey*, (1950) 66 Times L.R. (Pt. 1) 609, at 611; *Re Triffitt's Settlement*, [1958] Ch. 852; and see *JARMAN ON WILLS* (7th ed.), 763.

<sup>94</sup> (1950) 81 Commonwealth L.R. 639.

"It is then stated that particular powers have a tendency to perpetuity which is not obviated by enabling the donee to limit the fee. For the question is not whether the donee can limit the fee but whether he can through the medium of his power dispose of the estate as if seised in fee of it.

"It is submitted that the test of whether a power is a general power for the purposes of the Rule is whether on a construction of the instrument creating the power the donee can dispose of the property subject to the power "as if seised in fee." The ability by the stroke of a pen to make himself the owner is present when the donee is one of a confined class of objects as when there is no restriction on the objects and, at least for the purposes of the Rule against Perpetuities, it should be treated as a general power. If the donee is within the class of objects to which he can appoint the property, the property is not tied up to any greater extent than if there were no restriction on the objects to which the donee can appoint. As the Rule against Perpetuities is designed to prevent the tying up of property so that it would vest at a period later than that deemed desirable, there would seem no practical reason for not construing a power as a general power, which permits the donee to vest the property in himself absolutely.

"This would mean overruling *Tatham v. Huxtable* (unless it is distinguishable in that the point was whether it was an invalid delegation of the power of testamentary disposition) and would also be contrary to the decision of Kekewich J. in *Re Byron's Settlement*.<sup>95</sup> The question there was whether a power of appointment which excluded the husband of the donee or any friend or relative of his was a power 'to appoint in any manner she might think proper' within section 27 of the Wills Act. It was held that this was not a power to appoint in any manner the donee may think proper. It is submitted the question there before the court is distinguishable in that (1) as pointed out in Jarman (7th ed.), p. 763, section 27 does not use the words 'general powers' but the words 'power to appoint in any manner the donee may think proper'; (2) the question of perpetuities was not before the court and, as stated in Morris and Leach (1st ed.), p. 128, a power can be treated as special for some purposes and general for others."

Section 16 of the Perpetuities Act, following the recommendations of the English Law Reform Committee, attempts a classification, for

<sup>95</sup> [1891] 3 Ch. 474.



the purposes of the rule against perpetuities only, of general and special powers, based on this principle, discussed above, of whether the property is effectively tied up from the date of the creation or the date of exercise of the power.

For the purpose of the rule against perpetuities, a power of appointment in an instrument taking effect after 6th December 1962 will be construed as general if there is a sole donee who is at all times free to appoint the whole of the property to himself without the concurrence of any other person. All other powers are special. It is no longer therefore relevant, for the purposes of the rule, to enquire whether the class of objects is unlimited or not.

The following points should be noted—

- (i) the donee must be able to appoint the whole of the property to himself—a power to appoint to a class of which he is a member, but where he cannot wholly exclude all other members, is special;
- (ii) a testamentary power, as it is exercisable only on the death of the donee, is special even though the objects are unlimited;
- (iii) a joint power is special, even though the joint donees might appoint to themselves.

Section 16 also deals with one anomalous situation: An appointment made by will under a power that would have been general but for the fact that it is exercisable only by will is to be treated as an appointment made under a general power, so that the perpetuity period will be calculated from the exercise of the power. This gives effect to the decision in *Rous v. Jackson*<sup>96</sup> and continues the validity of precedents based on that decision. However—

- (i) the power itself remains special even if the objects are unrestricted;<sup>97</sup> and
- (ii) the fact that the power is exercisable only by will must be the only reason why the donee cannot appoint to himself—the power must be of such a nature that, had he been able to exercise a power given in those terms by deed, he could have appointed to himself. Hence, whether it is an unlimited power or a power to appoint among a class of which he would be a member but for his death, the appointment made under that power is to be treated as if made under a general

<sup>96</sup> (1885) 29 Ch. D. 521.

<sup>97</sup> *Wollaston v. King*, (1868) L.R. 8 Eq. 165; *Morgan v. Gronow*, (1873) L.R. 16 Eq. 1.

power. Cases such as *Re Jones*,<sup>98</sup> where the objects were restricted to persons living at the donee's death, would not be caught by the section; the power is special ("of a special kind," *per Vaisey J.*) and the appointments also will be treated as made under a special power because, even if the power given in those terms could have been exercised by deed, he still could not have appointed to himself.

#### D. Administrative Powers.

Administrative powers, *e.g.*, powers of sale and leasing, contained in settlements are void at common law unless they are limited, either expressly or by implication, to the perpetuity period.<sup>99</sup> The only problem here is to understand how a rule that was designed to keep land marketable ever came to be applied so as to invalidate powers of sale!<sup>1</sup>

Section 29 of the Trustees Act 1962 deals with the problem by exempting from the rule against perpetuities—

- (i) a trust or power to sell property, where a trust of the proceeds of sale is valid;
- (ii) a trust or power to lease or exchange property, where the lease or exchange directed or authorized by the trust or power is ancillary to the carrying out of a valid trust;
- (iii) any other power that is ancillary to the carrying out of a valid trust or the giving effect to a valid disposition of property; and
- (iv) any provision for the remuneration of trustees.

This section is given retrospective application. It should be noted that it does not apply to powers affecting the beneficial interest, such as powers of advancement or appointment, or of distribution under a discretionary trust.

#### E. Superannuation Funds.

Trusts to provide superannuation allowances attract the rule against perpetuities and therefore, in the absence of special legislation, their duration must be limited to the perpetuity period. This has

<sup>98</sup> [1945] Ch. 105.

<sup>99</sup> *Ware v. Polhill*, (1805) 11 Ves. 257, 32 E.R. 1087. *Re Allott*, [1924] 2 Ch. 498; *David v. Samuel*, (1926) 28 State R. (N.S.W.) 1.

<sup>1</sup> This rule does not apply in America—see *Melvin v. Hoffman*, (1921) 290 Mo. 464, 235 S.W. 107.

generally been achieved by the inclusion of a "royal lives" clause. There is, however, little if any danger or inconvenience in such trusts and therefore in most jurisdictions the legislature has intervened to preserve them.

In Western Australia, section 421 of the Companies Act 1943 exempted from the rule funds or schemes for the benefit of employees (as defined) of a company. No equivalent of this section appears in the uniform Companies Act 1961, presumably as in most other States the problem is dealt with in other legislation.

Section 19 of the Perpetuities Act now deals with these funds in this State. It exempts from the rule a trust or fund for the purpose of making provision by way of assistance, benefits, superannuation, allowances, gratuities or pensions for the employees of any employer or their widows, widowers, children, grandchildren, parents or dependants, or for such other persons nominated for that purpose pursuant to the provisions of the trust or fund. "Employee" is very widely defined in subsection (2) in terms of all forms of commercial organization, because the section is not of much value unless it is going to cater for all possible superannuation schemes.

It was also desired to grant a similar exemption to those superannuation schemes that are not run for the benefit of employees. There is today a tendency, as members of the Law Society well know, for persons self-employed in various occupations to organize their own superannuation schemes. Accordingly, section 19 also exempts a trust or fund for the purpose of making superannuation provision for persons (other than employees) engaged in any lawful profession, trade, occupation or calling, their widows, widowers, children, grandchildren, parents or dependants, or persons nominated for that purpose under the provisions of the trust or fund.

The interregnum between the commencement of the Companies Act 1961 and the Perpetuities Act has been spanned by making section 19 retrospective in effect.

## **XII. Associated Rules.**

### ***A. The Rule in *Whitby v. Mitchell*.***

Section 18 of the Act, following the precedent set by England,<sup>2</sup> New South Wales,<sup>3</sup> Victoria,<sup>4</sup> and New Zealand,<sup>5</sup> abolishes the rule in

<sup>2</sup> Law of Property Act 1925, s. 161.

<sup>3</sup> Conveyancing Act 1918-54, s. 23 (a).

<sup>4</sup> Property Law Act 1958, s. 161 (1).

<sup>5</sup> Property Law Act 1952, s. 26.

*Whitby v. Mitchell*,<sup>6</sup> under which the limitation of an interest in land to unborn issue of an unborn beneficiary was invalid.

Outside England, the rule has only been applied in Tasmania,<sup>7</sup> and serious doubts have been expressed as to whether it ever existed. It is sometimes supposed to have been derived from the old rule against double possibilities (a rule described by Morris and Leach<sup>8</sup> as "a conceit invented by Popham C.J., fostered to some extent by Lord Coke, repudiated in no uncertain terms by Lord Nottingham in the *Duke of Norfolk's Case*, and regarded by all modern commentators as sheer fantasy"). Gray thought<sup>9</sup> it was "a non-existent rule based on an exploded theory"; he saw the rule as based on an unsupported opinion in WILLIAMS ON REAL PROPERTY. There is, however, some evidence in support of its existence as an old rule of the common law derived from the rule against unbarrable entails. Moreover the suspicion, that if a case ever does arise the Court might be tempted to rely on *Whitby v. Mitchell* as authority for striking down a limitation that does not infringe the modern rule against perpetuities, seemed to justify the removal of the rule by legislation; and this has accordingly been done.

#### B. *The Accumulations Act 1800.*

The repeal, by section 17 of the Perpetuities Act, of the Accumulations Act 1800 in its application to Western Australia, so that accumulations are now valid for the full perpetuity period, seems to have produced more controversy among lawyers than any other provision of the new legislation. It is therefore probably desirable to consider in some detail why this has been done.

The power to direct or authorize an accumulation of income, whether at simple or at compound interest, was restricted by the provisions of the Accumulations Act 1800 which was passed as a result of the case of *Thellusson v. Woodford*.<sup>10</sup> In that case the Courts held that, apart from the rule against perpetuities itself, there was no restriction upon the period for which an accumulation could be directed. Peter Thellusson had by his will directed an accumulation of the residue of his estate, totalling some £600,000, during the lives

<sup>6</sup> (1889) 42 Ch. D. 494; the rule, however, as explained in an earlier part of this paper, originated in the late 16th century—if it ever existed at all.

<sup>7</sup> *Re Hume's Estate*, (1939) 34 Tas. L.R. 22; *Re Lawrence*, [1943] Tas. State R. 33.

<sup>8</sup> RULE AGAINST PERPETUITIES (2nd ed.), 258.

<sup>9</sup> RULE AGAINST PERPETUITIES (2nd ed.), s. 290 *et seq.*

<sup>10</sup> (1799) 4 Ves. 227, 31 E.R. 117.

of all his sons, grandsons, and great-grandsons living at his death. (He might, had he wished to achieve the longest accumulation possible, have added a further 21 years). It was variously estimated that this accumulation might produce a fortune of as much as £30,000,000. In fact it did not; the accumulation ended in 1856 and the greater part of the estate had by that time been dissipated in legal expenses. However, to prevent future accumulations of this nature, the "Thelluson Act" restricted testators and settlors to a choice of four periods for which they could direct an accumulation, in effect permitting accumulations for 21 years and no longer.

This Act has always been extremely difficult to apply. It has introduced technicalities and complexities into conveyancing,<sup>11</sup> and it frequently frustrates reasonable dispositive schemes. Its chief danger lies in its threat to unobserved implied directions to accumulate in even the best drawn settlements. In the view of the Law Reform Committee in this State, it serves no valid purpose under present conditions. It was passed in an age when there was an almost superstitious fear of the power of compound interest, and it was considered that the power to direct accumulations of this nature would enable a man to leave his immediate family destitute, to withdraw capital and property from ordinary commerce, and ultimately to wreck the economy by unleashing vast funds upon the community. However, none of these fears seems to be justified today.

The power of compound interest today, mitigated by the levelling effect of taxation and duty, is incapable of producing any accumulation of the extent feared. It may in fact be considered doubtful whether there would ever have been an Accumulation Act if there had been income tax in 1800. Property which is the subject of an accumulation is not withdrawn from commerce, for the trustee's duty in respect of that property is to invest it—both capital and income are working, but the income is not distributed. It is said that the power to accumulate for the full perpetuity period will enable property to be left to remote descendants, to the neglect of the immediate family; but the testator has always been able to defeat his family by leaving his property to charity. The problem in fact is the whole problem of "dead hand" control which, if it is to be tackled, should be tackled directly and not cuffed with an indiscriminate side sweep of a statute. In any event, there are existing statutory provisions (*e.g.*, the Testa-

11 See SIMES, PUBLIC POLICY AND THE DEAD HAND, 100: "The moment you have a separate rule for accumulations with a shorter permissible period, the volume of litigation on the subject increases enormously."

tor's Family Maintenance Act 1939-1962, and statutory powers of maintenance and advancement) which protect the interest of the immediate family of the testator and enable provision to be made for them out of both capital and accumulated income.<sup>12</sup> Section 90 of the Trustees Act 1962, which enables trusts to be varied if the Court consents on behalf of unborn and unascertained beneficiaries, expressly directs the Court to have regard to the welfare and honour of the family. It should also be remembered that any person or persons absolutely entitled to the property being accumulated may put an end to an accumulation for their benefit under the rule in *Saunders v. Vautier*.<sup>13</sup>

Finally, it should be observed that no convincing reason has ever been put forward to explain why, if the rule against perpetuities is adequate to regulate "dead hand" control over capital, a separate rule should be needed for income; and in those American States (and in Northern Ireland and Nova Scotia) where there is no separate rule the economy nevertheless continues to flourish with no "visible inconvenience" or injustice to individual citizens.

It is almost certainly too late now to argue, as Porter J.A. did in respect of Alberta in a dissenting judgment in *Re Burns*,<sup>14</sup> that the Accumulation Act is not part of the law of Western Australia because at the date of reception it was not applicable to local conditions.

Section 17, therefore, departing from the recommendations of the English Law Reform Committee, repeals the Act and substitutes the period of the rule against perpetuities, by providing that a power or direction to accumulate is valid if the disposition of the accumulated income is, or may be, valid and not otherwise. If, as a result of the "wait and see" rule, it can not yet be determined whether the disposition of the accumulated income will fail for perpetuities or not, the direction to accumulate nevertheless remains effective until the interest either vests or fails. The section does not apply to powers or directions to accumulate in instruments executed before the date of the Act or in wills of testators dying before the commencement of the Act.

<sup>12</sup> In *Re Lesser*, [1954] Victorian L.R. 435, the Accumulations Act actually prevented the statutory provision for maintenance from operating for the benefit of beneficiaries contingently entitled. The writer has heard of a similar case recently in this State.

<sup>13</sup> (1841) Cr. and Ph. 240, 41 E.R. 482.

<sup>14</sup> (1960) 25 D.L.R. 2d. 427, at 435-440. The population of Alberta in 1887, the date of reception, consisted of a mere 16,000 people, including Indians, to share an area of some 163 million acres. Most of them had gone there "for no other purpose than to accumulate."

### C. The Rule against Inalienability.

The expression "the rule against inalienability" is here used to describe the rule that a trust for non-charitable purposes which may last longer than the perpetuity period is void, if by the terms of the trust the capital is to be kept intact so that only the income can be used for a period exceeding the perpetuity period. This rule does not apply—

- (i) to trusts for charitable purposes;
- (ii) where it is possible to treat an indefinite gift of income as a gift of capital; or
- (iii) presumably where capital can be resorted to.<sup>15</sup>

One result of the "wait and see" rule in section 7 (2) is that these trusts, if otherwise valid, will presumably now be valid if and to the extent that they are performed during the perpetuity period. The Law Reform Committee in Western Australia decided that no other reform of this particular rule was desirable, for the following reasons:

- (i) It is doubtful, in any event, since *Re Astor's Settlement Trusts*<sup>16</sup> and cases based thereon in both England and Australia, whether such trusts for non-charitable purposes are valid, except for the maintenance of graves, animals, and monuments, due to the absence of any beneficiary capable of enforcing them.
- (ii) Most of the seemingly "hard cases" involve what is known as an "imperfect trust provision" and now, therefore, will be confined to charitable purposes and will be valid as such, as a result of section 102 of the Trustees Act 1962. This section, which is based on similar legislation in New South Wales and Victoria, is capable not merely of striking out non-charitable purposes listed separately, but also of severing a compendious expression.<sup>17</sup> It is probable therefore that if, for example, *Re Endacott*<sup>18</sup> arose in Western Australia today it might take effect as a charitable trust, and the rule against inalienability does not apply to trusts for charitable purposes.

<sup>15</sup> See *Provincial Bank of Ireland v. General Cemetery Co.*, (1958) 93 Ir. L.T.R. 86; *Re Searight's Estate*, (1950) 87 Ohio App. 417, 95 N.E. 2d. 779.

<sup>16</sup> [1952] Ch. 534.

<sup>17</sup> See *Leahy v. A.G. for N.S.W.*, [1959] A.C. 457.

<sup>18</sup> [1960] Ch. 232.

- (iii) The English Law Reform Committee in paragraph 53 of its report recommended that it should be possible to subject £1000 to a trust valid in perpetuity to use the income for the maintenance of any grave, tomb or monument, and that an ancillary power to resort to capital should be valid. However, decaying graveyards are no real problem in Western Australia at present, though perpetual trusts might well make them so.

For these reasons, no further change has been made in the law on this subject.

### **XIII. Conclusion.**

The perpetuities part of the Law Reform (Property, Perpetuities, and Succession) Act 1962 is concerned principally to remove old traps; only a few of its provisions introduce new principles, of which the most important are the following:—

- (i) Section 5, which introduces an alternative perpetuity period of such period of years not exceeding 80 as is specified in the instrument creating the limitation;
- (ii) section 14, which exempts leasehold options from the rule altogether but makes options in gross valid only for a period of 21 years from their grant;
- (iii) section 15, which applies the rule to possibilities of reverter and interests in personality by way of resulting trust analogous to possibilities of reverter;
- (iv) section 17, which opens new vistas for the tax and estate planners by repealing the Accumulations Act 1800.

The rest, including the “wait and see” rule which engenders controversy out of all proportion to its likely effect, should not affect greatly the practice of drafting wills and settlements. These provisions are designed merely to facilitate conveyancing and avoid injustice by removing the hazards, not to pioneer new techniques. As stated earlier, it is to be hoped that no one would be so foolhardy as to prepare deliberately a limitation which would attract “wait and see.” “Wait and see” should be regarded as an admission of ineptitude by any draftsman whose limitations have to depend for their validity on the application of section 7.

Accordingly, the cardinal rules for will-drafting, in respect of perpetuities, remain largely unaffected. It is still necessary to examine every will carefully for possible violations, bearing in mind that limitations are construed in the first place without any regard to the



question of whether one construction would render them void for perpetuities whilst under another they would be valid.<sup>19</sup> The rule often strikes where it is little expected and, although most of the traps are removed, your client will not thank you if you are unable to affirm the validity of his will initially. In particular, most of the hazards are encountered when a class of persons is designated as the beneficiaries under a limitation; and, although these hazards will now not necessarily render the limitation invalid owing to the operation of sections 6-12, they may nevertheless cause expense, delay, and inconvenience. It is still important, therefore, that whenever possible beneficiaries should be specifically named rather than designated as members of a class.

D. E. ALLAN.\*

### Discussion.

MR. J. H. WHEATLEY:—I have been asked to comment on the effect of the Perpetuities Act on tax and estate planning. So far as the period for deferment of vesting of capital is concerned, the Act allows any period of up to 80 years to be fixed for the vesting of the capital under a will or settlement in addition to the periods otherwise permissible at law. This will not excite much enthusiasm in the draftsman as he already had the ability to defer the vesting of capital for a greater period by use of the royal lives clause. It will certainly be less laborious, however, for the draftsman to be able to specify a definite period of years.

The more important provision is that which repeals the Statute of Accumulations, with the consequent effect of enabling the trust instrument to provide for income to be accumulated as long as the capital can be validly accumulated. To appreciate the effect of this it is necessary to examine briefly the periods of accumulation permissible under the old law and the provisions of the Income Tax Assessment Act for the taxing of trust income.

The permitted periods for the accumulation of income under the Thellusson Act were (i) the life of the settlor, or (ii) the duration of

<sup>19</sup> The "remorseless" construction. See *Pearks v. Moseley*, (1880) 5 App. Cas. 714, at 719; *Re Hume*, [1912] 1 Ch. 693, at 698. We might possibly have done something about the rule had we thought of it in time—if amending legislation is necessary for section 7 (3), it might be possible to include a new section dealing with this rule as well.

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the minority of the person entitled to the income, or (iii) 21 years from the death of the grantor or settlor, or (iv) the duration of the minority or respective minorities of any person or persons living at the death of the grantor or settlor. By permitting accumulation of income for any period during which the vesting of the capital can be postponed, the vesting of both capital and income can now be deferred with certainty for any period up to 80 years stipulated in the will or settlement. Under the (Commonwealth) Income Tax Assessment Act the question as to whether income tax is to be levied on the trust income in the hands of the trustee or on the beneficiary depends on whether the beneficiary is presently entitled to the trust income, or is, by the Income Tax Assessment Act, deemed to be so presently entitled. The important provisions of the Income Tax Assessment Act for our purposes are sections 97 and 99. Under section 97, where there is a beneficiary who is presently entitled to the trust income, and is not under a disability, *that* income is included in the assessable income of the beneficiary. Under section 99, if there is any income of the trust to which no beneficiary is presently entitled, then the trustee is separately assessed on such income.

Obviously, therefore, in the case of a trust for the benefit of a person who could have other income, it will be advantageous from the income tax point of view for the income of the trust to be able to be accumulated for whatever period is deemed to be advantageous to the beneficiary.

The fact that the income can now be validly accumulated for as long as the vesting of the capital can be deferred will enable settlements to provide potentially greater tax advantages than they have previously been able to do. It must be borne in mind, however, that the benefit to the beneficiary under the trust is usually the paramount thing for consideration, and although a direction for accumulation of income for a long period may save income tax, it may not be a wise practical scheme in many cases. "Hope deferred maketh the heart sick," and the effect of such trusts on the beneficiary of the long deferment of benefit in such cases could be very bad. The draftsman therefore is urged to approach this matter with caution and not to allow an enthusiasm for a newly enlarged field of tax saving to outweigh the other considerations for the beneficiary, which are necessarily involved in constructing the trust.

**MR. D. K. MALCOLM:**—There is no doubt that the reforms contained in the Perpetuities Act (as it has been called) are an improvement in that, although the operation of the rule is initially less certain

by the adoption of the "wait and see" principle, it is more just in that it is less of a frustration to the intentions of testators while retaining the general policy of striking a balance between the aspirations and interests of the living and the dead.

It may be lamented by some practitioners, judges, and especially teachers of law that they are denied the opportunity to engage in heady flights of imagination and fantasy now that the fertile female octogenarian has been presumptively removed from the procreative arena at the comparatively early age of 55 and the precocious toddler is presumptively prevented from reaching the age of puberty until the age of 12 (although I understand that a Chinese girl recently gave birth to a normal healthy child at the age of eleven). Instead of speculating on the magical qualities of gravel pits we must now wait and see.

However, the thirst of those who haunt the spectral halls of perpetuity is not yet quenched. As Mr. Allan mentions, Professor Leach has introduced the gruesome problem of the "fertile decedent", the astronaut, who established an account in a "sperm bank" before shooting off to Venus. For the moment we may be thankful that Australia cannot afford to engage in improper relationships with the celestial bodies.

Dr. Morris has raised the argument that under section 12 of our Act property might be tied up for ever under a limitation to A. for life, then to any widow who survives him for her life, then to any widower who survives her for his life, and so on. I agree with Mr. Allan that if this is so the draftsman, having eliminated so many fantastic possibilities, is entitled to the luxury of creating one more.

I would like to refer specifically to that part of the paper, "Identifying the lives in being" under "wait and see".<sup>20</sup> Section 7 provides in subsection (1) that a limitation shall not be declared or treated as invalid, as infringing the rule against perpetuities, unless and until it is certain that the interest that it creates cannot vest within the perpetuity period, and in subsection (3) that "nothing in this section makes any person a life in being for the purpose of ascertaining the perpetuity period unless that person would have been reckoned a life in being for that purpose if this section had not been enacted."

Mr. Allan raises what he describes as "one of the major difficulties" under a "wait and see" rule. He suggests that it is possible

<sup>20</sup> See 43 *et seq.*, *supra*.

to argue that if, when the interest finally vests, it is possible to find *any person at all* who was alive at its creation and died within 21 years of its vesting, then the interest must be valid as it has in fact vested within twenty-one years of the death of a life in being at its inception.

Mr. Allan says that the trouble really arises because there is apparently no rule at common law that the lives in being must be referred to in the instrument or connected with its dispositions. However, he concedes that at common law the lives are in fact so limited, but says that the only reason for this is that the lives and the validity of the limitations must be determined at the date the instrument takes effect.

In other words what he is saying is that in fact the lives must be referred to in the instrument or connected with its dispositions because of the absence of a "wait and see" rule. Thus he argues that once a "wait and see" rule is enacted, it is pointless to say that lives in being are to be determined as at common law prior to the enactment when the enactment itself has removed the negative proposition from which the determination of lives in being followed. Having removed the proposition we cannot afterwards cling to the conclusion from it.

The argument is attractive but with respect I cannot see that it can be supported. In the first place, take a second look at Gray's formulation which Mr. Allan adopts:—

"No interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest" (or if there are no lives in being, not later than 21 years after the creation of the interest).

The effect of section 7 is to change Gray's rule so that it would now read—

"A limitation shall not be declared or treated as invalid for infringing the rule against perpetuities, unless and until it is certain that the interest that it creates cannot vest within 21 years after some life in being at the creation of the interest" or, presumably, if there are no lives in being within 21 years after the creation of the interest.

What is changed then is that it is no longer necessary to determine the validity of the instrument on the possibilities which may exist when the interest is created; the Court must "wait and see." What is not changed is that the lives in being must still be determined

at the date the interest is created, and consequently whether it be a rule or a limitation in fact the lives must be referred to in the instrument or connected with its dispositions.

If this is no longer so under the "wait and see" rule then there is now little meaning in the well established principle that if no lives in being are specified or necessarily involved in the dispositions contained in the instrument the period of the rule is 21 years. Thus if no lives in being are specified or implied the "wait and see" period under section 7 will be 21 years from the creation of the interest.

The point I want to make is that the lives in being, whether one is waiting and seeing or not, must be determined at the date of the creation of the interest, and that it is meaningful in this regard to have a provision such as subsection (3).

In the problem discussed by Mr. Allan<sup>21</sup> the facts are that T. leaves property on trust for such of the grandchildren of A. as shall attain 25, and at T.'s death A. is alive with two children, B. and C. It is submitted that Mr. Allan is correct when he asserts that Morris and Leach are in error in saying that A.'s children cannot count as lives in being for the purposes of the rule as he may have more children after T.'s death (the date of the creation of the interest). There is no reason why, if B. and C. are alive at the death of T., they cannot be used as measuring lives as they are lives in being at the date of creation of the interest and necessarily involved in the limitations. Of course *subsequent* children cannot be regarded as measuring lives.

Mr. Allan does not give the answer to the question, "How long must one wait?" An answer would of course be difficult to give, but if one looks at sections 7, 9, 10, and 11 of the Act it could be said that, once it is conceded that B. and C. are measuring lives,

- (i) any grandchild who attains 25 during the lifetime of any one of A., B. or C. will take;
- (ii) any grandchild who attains 25 within 21 years after the death of the survivor of A., B., and C. will take;
- (iii) any grandchild who attains 21 within 21 years of the death of the survivor of A., B., and C. will take (section 9);
- (iv) The fact that there are grandchildren who have not attained 21 within 21 years of the death of the survivor of A., B., and C. will not affect the validity of the interest of any grandchild who takes under (i), (ii) or (iii).

Section 10 closes the class at the expiration of the perpetuity period.

<sup>21</sup> Sec. 44-45, *supra*.

The answer to the question is that one will have to wait until it is certain that no grandchildren will fall into category (iv). For example, this may occur where C. is the survivor and is a female who has attained 55. In this case it will be presumed that there will be no more grandchildren so that at that stage it is certain that the limitation is valid. It is no longer necessary to wait and see.

In my submission the problem raised by Mr. Allan in this part of his paper does not arise because

- (i) Lives in being must still be determined at the date of the creation of the interest.
- (ii) In most cases those lives will be specified, so that there will be no problem as to their limitation.
- (iii) Where they are not specified the lives will be limited to those in being at the creation of the interest which are necessarily involved in the dispositions made. In cases such as the problem dealt with B. and C. would be such lives.
- (iv) Where no lives in being are specified or can be implied the "wait and see" period will be 21 years.

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