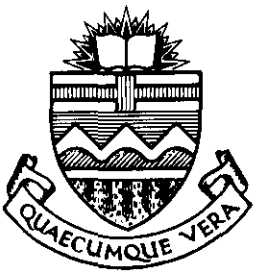

INSTITUTE OF LAW RESEARCH AND REFORM

THE UNIVERSITY OF ALBERTA

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Report No. 6

REPORT ON THE RULE AGAINST PERPETUITIES

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Report #6

THE RULE AGAINST PERPETUITIES

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INSTITUTE OF LAW RESEARCH & REFORM

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INSTITUTE OF LAW RESEARCH AND REFORM

REPORT ON
THE RULE AGAINST PERPETUITIES

I

INTRODUCTION

For centuries English real property law has permitted future estates in the form of remainders and executory interests. This being the case, owners of land were sometimes tempted to dispose of real property (either inter vivos or by will) so as to postpone the vesting of the fee simple for a long time. The Duke of Norfolk's case (22 E.R. 931) in the House of Lords in 1685 held that a postponement for an unreasonably long time is against public policy. In 1883 the House of Lords in Cadell v. Palmer (6 E.R. 956) crystallized this rule into its present form. It is usually called the Rule against Perpetuities though more accurately it is the Rule against Remoteness of Vesting. It extends to personal property as well as real. It says: 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.

We note here three random points in connection with the Rule. First, an interest in property vests when someone becomes the beneficial owner of that interest and even though he does not have possession or enjoyment. Second, the period within which an interest must vest is commonly called the "perpetuity period". Our recommendations do not abolish the common law period, but they do substitute other periods in specific cases. Third, Alberta's new Age of

Majority Act, 1971, c. 1, reduces the age of majority to 18 but the Act does not apply so as to affect the law relating to perpetuities (s. 11).

We think the policy of the Rule is sound. Property is for those who are living and the law should in general recognize their right and power to control it. We also think however that the law should recognize the right of an individual to make provision for those immediately succeeding generations in whom he may be expected to have a personal interest. We do not think that a man should be able to give his property to someone alive two hundred years hence, and most would agree that he should be able to give it, for example, to his children after his wife's death or to his grandchildren even though the gift will not vest immediately. In other words the owner of property should have some power to postpone its vesting after it leaves his hands, but that power should not be uncontrolled. As Professor Simes has said, "the Rule against Perpetuities strikes a fair balance between the desires of members of the present generation, and similar desires of succeeding generations, to do what they wish with the property they enjoy." To the extent that the Rule achieves a balance between these desiderata it should be retained.

One can suggest other reasons for preserving the Rule: fear of accumulation of property in a few hands; fear that property will remain unproductive; and fear of capricious dispositions. We think however that the main justification of the Rule is the one set out in the preceding paragraph.

Sometimes the suggestion is made that the Rule is no longer necessary; that tax laws operate to prevent the

result which the Rule was originally designed to preclude. In our opinion however, although tax laws may have a deterrent effect on efforts to postpone vesting for an undesirably long time, they do not provide a complete substitute for the Rule and should not be relied upon to effect the desired policy in connection with future dispositions of property.

The Rule was developed in connection with gifts made through trusts and wills. However, it has been applied to commercial transactions of which options to purchase land are the notable example. The argument has been made that the Rule should not apply at all to business transactions. We are not prepared to go this far, but we think that the Rule should be modified to ensure the validity of commercial transactions which contemplate the vesting of ownership at a future date, provided the maximum period for vesting is not unreasonably long. That period should be expressed in terms of years and not of lives in being.

The principal reason why dispositions are void is that the Rule applies, not to actual events that occur afterwards, but to possibilities considered from the date of the disposition. There is no "wait and see". In the case of a will the relevant date is that of the testator's death and in a disposition inter vivos it is the date when the instrument takes effect (usually the date of delivery). Then there is a sub-rule which says that persons are capable of having children no matter what their age, and another which says that in a class gift the whole gift is void whenever the interest of even one member of the class may vest beyond the period. The Rule too often operates as a trap which could have been avoided by careful drafting; and it defeats dispositions which do not violate the spirit of the Rule.

Examples:

(1) gift (in 1944) to my issue alive on the ceasing of hostilities in the present World War;

(2) gift to A (a bachelor) for life, then to his wife for life and on the death of the survivor to their children then alive;

(3) gift to the nephews and nieces of A at 21. This is void if A's parents are alive for even though they are 80 years old they may in contemplation of the Rule have another child who in turn may have a child who would of course be a nephew or niece of A;

(4) gift to my grandchildren who live to the age of 25;

(5) lease for 25 years with an option to the lessee to purchase the reversion at the end of that time.

Professor Barton Leach of the Harvard Law School has done much over many years to advocate reform of the Rule. In England in 1956 the Law Reform Committee recommended statutory modification of the Rule (Fourth Report, Cmnd. 18). Its report was the basis of a Perpetuities Act in Western Australia in 1962, of Acts in England and New Zealand in 1964, of two reports of the Ontario Law Reform Commission in 1965 and 1966 which resulted in a Perpetuities Act in that province in 1966, and of an Act in the State of Victoria in 1968.

The means of reform are:

(1) to establish a "wait and see" rule, which provides that the disposition is no longer void *ab initio* merely because vesting might occur too late, and that one waits to see whether in fact the vesting will be in time;

(2) to establish a *cy-près* rule, which empowers the court to modify a disposition that is void, and to do so in a way that will bring it into compliance with the Rule and yet come close to the intention of the person making the disposition;

(3) to make specific amendments to the Rule to remove the harshness of the sub-rules described above, and to improve the operation of the Rule in relation both to gifts and commercial transactions.

The reports and statutes to which we have referred make use of all of these avenues of reform. We propose an Act which will do the same, with "wait and see" as the fundamental and primary change from the common law rule; and we shall set out our recommendations in statutory form.

We have said we think the Rule should be retained; thus the proposed changes will not abolish the Rule. For this reason it is appropriate to include, as Ontario has done, a provision preserving the Rule as changed by the proposed Act.

RECOMMENDATION #1

THE RULE OF LAW KNOWN AS THE RULE AGAINST PERPETUITIES SHALL CONTINUE TO HAVE EFFECT EXCEPT AS PROVIDED IN THIS ACT.

We have next considered whether to state the common law Rule. Apart from the Model Rule Against Perpetuities Act of the United States, which merely restates the common law, we know of no statute which sets out the Rule. However, we think it convenient to have it appear on the face of the Act. It is not now customary to include preambles in statutes but in this case we think it appropriate to set out the Rule and the reasons for amending it, and that this can best be done in a preamble.

RECOMMENDATION #2

WHEREAS THE RULE OF LAW KNOWN AS THE RULE AGAINST PERPETUITIES PROVIDES THAT NO INTEREST IS GOOD UNLESS IT MUST VEST, IF AT ALL, NOT LATER THAN TWENTY-ONE YEARS AFTER SOME LIFE IN BEING AT THE CREATION OF THE INTEREST,

AND WHEREAS IT IS DESIRABLE TO AMEND THE RULE TO REMOVE CERTAIN HARDSHIPS WHICH ARISE IN ITS APPLICATION,

THEREFORE. . . .

II

WAIT AND SEE

As already noted, the common law Rule does not permit waiting to see whether the property will be vested in time. In one sense this is a good feature of the Rule because one can see at the outset whether the disposition

is good or bad. On the other hand, it operates to defeat many dispositions and hence to defeat the intention of the testator or settlor, even though subsequent events show that the property would have become vested within the period.

Both in the Commonwealth and the United States there has been a difference of opinion on the desirability of a "wait and see" rule. The objections to "wait and see" are forcibly put by Terence Sheard, Q.C., of Toronto, author of Sheard's Forms of Wills, in an article in Chitty's Law Journal, 1966, p. 3. He puts the objection on two grounds: (1) The waiting is often until the expiration of some life or other and it is sometimes hard to answer the question "Whose life?" (2) The trustee is in a difficult position with respect to accumulation of income during "wait and see". Mr. Sheard points out that Ontario has no counterpart of England's Trustee Act, 1925, ss. 31 and 32, which permit the court to allow payments out of both income and capital to contingent beneficiaries. He also refers to the difficulties that arise when income is "released" under the Accumulations Act, particularly tax problems and problems in ascertaining the persons entitled to the released income.

We appreciate these criticisms but on balance do not think they outweigh the advantages of the "wait and see" Rule. It is true that the ultimate disposition of the property cannot be known during the period of waiting but this is true of many other dispositions that have always been possible within the present law. The great virtue of "wait and see" is that it provides a maximum opportunity for giving effect to the testator's or settlor's intention. We adopt the position of the English Law Reform Committee

which says (para. 23) that the inconvenience of "wait and see" is justified by the preservation of interests which are now void merely because in events which did not happen they would have vested too late. The recent Statutes of England, Ontario, Western Australia, Victoria and New Zealand and of some of the American States all adopt the "wait and see" principle.

There are two special features of the position in Alberta which render Mr. Sheard's criticism of less force in Alberta than in Ontario: (1) Alberta has in its Trustee Act two sections (ss. 32 and 33) based on England's sections 31 and 32, though they are narrower in scope; (2) this report later recommends that the English Accumulations Act no longer be in force in Alberta so the problem of the disposition of "released" income will not arise.

Granted the acceptance of the "wait and see" principle, then it is desirable, though not strictly necessary, to state it in general terms as Ontario has done.

RECOMMENDATION #3

> *NO DISPOSITION CREATING A CONTINGENT INTEREST IN REAL OR PERSONAL PROPERTY SHALL BE TREATED AS OR DECLARED TO BE VOID AS VIOLATING THE RULE AGAINST PERPETUITIES BY REASON ONLY OF THE FACT THAT THERE IS A POSSIBILITY OF SUCH INTEREST VESTING BEYOND THE PERPETUITY PERIOD.*

It next becomes necessary to provide for the "wait and see" rule in detail. We think that Ontario's s. 4(1) is a suitable provision.

RECOMMENDATION #4

EVERY CONTINGENT INTEREST IN REAL OR PERSONAL PROPERTY THAT IS CAPABLE OF VESTING WITHIN OR BEYOND THE PERPETUITY PERIOD SHALL BE PRESUMPTIVELY VALID UNTIL ACTUAL EVENTS ESTABLISH,

(a) THAT THE INTEREST IS INCAPABLE OF VESTING WITHIN THE PERPETUITY PERIOD, IN WHICH CASE THE INTEREST, UNLESS VALIDATED BY THE APPLICATION OF SECTION__ OR SECTION__ [THE AGE-REDUCTION AND CLASS-SPLITTING PROVISION AND THE GENERAL CY-PRES PROVISION HEREAFTER RECOMMENDED] SHALL BE TREATED AS VOID OR DECLARED TO BE VOID; OR

(b) THAT THE INTEREST IS INCAPABLE OF VESTING BEYOND THE PERPETUITY PERIOD, IN WHICH CASE THE INTEREST SHALL BE TREATED AS VALID OR DECLARED TO BE VALID.

It will be seen that this recommendation does away with the sub-rule that the disposition is void merely because it might possibly violate the Rule. It applies where the disposition might vest too late but might vest in time.

We point out too that this remedial provision is designed to operate before the other remedial provisions save for the one hereafter recommended whereby the inability of certain persons to have children is recognized.

The last recommendation constitutes the basic "wait and see" provision. However, both England (s. 3(2) and (3)) and Ontario (s. 4(2) and (3)) found it advisable to enact special provisions in relation to powers of appointment.

It is necessary to remember that the disposition of property under a power of appointment takes place in two

stages: the creation of the power by will or deed by the owner of the property in favour of another, and the exercise of the power at a later date by that other. It is necessary too to bear in mind the distinction between a general and special power. We shall return to this subject later when we recommend a provision which in essence defines the two types. For the present it is necessary to set out the applicability of the Rule to general powers. We shall do so by quoting Morris and Leach on Perpetuities (1st Supp. to 2nd ed. p. 7).

> At common law, general powers are seldom too remote, because they are valid if they could be exercised within the period. But sometimes a general power is invalid at common law because the donee may not be ascertainable within the period . . . or because the power is not exercisable until the happening of an event which may not happen within the period.

As Morris and Leach then say, England's s. 3(2)

> . . . takes care of these rare situations by providing that the power shall be treated as valid until such time (if any) as it becomes established that it will not be exercisable within the period.

Ontario's s. 4(2) is to the same intent and we adopt it in the following recommendation.

RECOMMENDATION #5

> *A DISPOSITION CONFERRING A GENERAL POWER OF APPOINTMENT, WHICH BUT FOR THIS SECTION WOULD BE VOID ON THE GROUND THAT IT MIGHT BECOME EXERCISABLE BEYOND THE PERPETUITY PERIOD, SHALL BE PRESUMPTIVELY VALID UNTIL*

SUCH TIME, IF ANY, AS IT BECOMES ESTABLISHED BY ACTUAL EVENTS THAT THE POWER CANNOT BE EXERCISED WITHIN THE PERPETUITY PERIOD.

The next recommendation specifically applies to special powers of appointment.

RECOMMENDATION #6

A DISPOSITION CONFERRING ANY POWER OTHER THAN A GENERAL POWER OF APPOINTMENT, WHICH APART FROM THIS SECTION WOULD HAVE BEEN VOID ON THE GROUND THAT IT MIGHT BE EXERCISED BEYOND THE PERPETUITY PERIOD, SHALL BE PRESUMPTIVELY VALID, AND SHALL BE DECLARED OR TREATED AS VOID FOR REMOTENESS ONLY IF, AND SO FAR AS, THE POWER IS NOT FULLY EXERCISED WITHIN THE PERPETUITY PERIOD.

This is an adaptation of England's s. 3(3) and of Ontario's s. 4(3), though the former applies to all powers, while both extend to "options and other rights" as well as to powers. We have omitted this phrase, because we deal later with options and other rights.

The need for Recommendation #6 arises because a special power is void under the Rule if it may be exercised beyond the period (Morris and Leach, Perpetuities, 2 Ed., p. 141), and the period begins with the creation of the power, not its exercise (Morris and Leach, p. 149). The Recommendation provides for "wait and see" in this particular case.

We point out here that the creation of a "wait and see" rule makes it necessary to give the court power to make rulings on the question whether the property has vested within the "wait and see" period; and in addition it is

desirable to have provisions dealing with the disposition of income during the "wait and see" period. Ontario deals with these matters immediately after the creation of the "wait and see" rule, but we prefer to consider them later.

III

LENGTH OF THE PERIOD

We now come to the question, how long is the "wait and see" period to be? Sometimes the answer is given that the waiting period is that set out in the Rule, namely, lives in being (if any), and twenty-one years. However, there is sometimes difficulty in determining those persons whose lives can properly be chosen. Before examining this problem in detail we consider here a proposal which England has adopted as a possible waiting period as an alternative to lives in being plus 21 years. Under the English Act, it is possible for a testator or settlor, if he chooses, to prescribe a period of years during which vesting is to be postponed. England has fixed a maximum of 80 years. The main reason was to discourage settlors and testators from using royal lives clauses (Law Reform Committee, Fourth Report, paragraph 9). At common law a testator who wants to postpone vesting as long as possible and yet stay within the Rule can say "I give all my property to my issue alive at the death of the survivor of the issue of Queen Elizabeth II who are alive at my death". This is of course valid at common law, though if a testator dying in 1971 had substituted Queen Victoria for Queen Elizabeth II the number of persons included in the issue would be so great that the date of death of the survivor (many years hence) would be uncertain and hence the disposition would be void on that ground.

In England a testator may, if he chooses, now say "I give all my property to my issue alive 80 years after my death and for the purpose of this disposition I declare the perpetuity period to be 80 years". If he does not specifically avail himself of the provision that permits him to use a period of years up to 80 then he must use lives. If he does not use lives the period is 21 years as at common law.

The Ontario Law Reform Commission considered the English provision and recommended against its adoption. They thought it would encourage testators to use the 80 year period and hence postpone vesting for a long time. True they can do so now by use of a royal lives clause but should not be tempted by an additional method. An innovation of this kind in perpetuities law would be unwise. After long deliberation and considerable difference of opinion we have decided to take the Ontario position. As far as we can ascertain, royal lives clauses are rare in Alberta wills and settlements--indeed none has come to our attention. They have been used on occasion in commercial transactions where they are inappropriate and our subsequent recommendations in connection with commercial transactions provide for periods of years to the exclusion of lives in being. There is a further reason, though not the major one, for rejecting an 80-year period. The comments to date on the various Acts that have adopted it show that the draftsman of a will or settlement would have to be particularly careful to succeed in bringing his disposition within the provision.

The question then arises, What should be the period for "wait and see" for settlements and wills? The common law has always had reference to lives in being and we think

this should continue to be the case because future interests are often framed in relation to the expiration of lives in being. The further question then arises, Whose lives should be used for "wait and see"? This problem has caused more debate than any other in connection with modern "wait and see" legislation and we consider it in the next section.

IV

SELECTING LIVES IN BEING FOR "WAIT AND SEE"

In considering this subject we have had valuable assistance from the following:

> Morris and Wade, Perpetuities Reform at Last (1964), 80 L.Q.R. 486.
>
> Allen, Perpetuities: Who are the Lives in Being? (1965), 81 L.Q.R. 106.
>
> Maudsley, Measuring Lives Under a System of Wait and See (1970), 86 L.Q.R. 357.
>
> Gosse, Ontario's Perpetuities Legislation (1967), at 20-32.

The great controversy is on the question, What lives in being should be implied as ones that can be used to measure the "wait and see" period? Sometimes given lives are specified, as in a royal lives clause, and there is no problem as to whose lives are applicable (barring the possibility that the lives are so numerous as to be uncertain). However at common law, lives are often implied instead of being specifically named. In that case the difficult question is, Whose lives are implied?

One view is that the only lives are those which enable one to say that the gift must vest within 21 years after the dropping of the last of those lives. In this view there would never be occasion to wait and see.

Another is that all living persons are lives in being.

A third, which is between the other two, maintains that the lives are "built in"; that one can always tell who they are because they have a causal connection with the time of vesting, or are relevant to the time of vesting or in some way restrict the time of vesting.

On this third view, there is no need to spell out the lives in being in the statute. On either of the first views, it becomes necessary or at least highly desirable, to spell out the lives in the statute.

In England, the Law Reform Committee did not discuss the matter, apparently assuming that the lives would be self-evident. Western Australia's Act of 1962 included in its "wait and see" section a sub-section providing that nothing in the section makes any person a life in being for the purpose of ascertaining the perpetuity period, if he would not have been reckoned a life in being for that purpose at common law.

In England itself Parliament decided to enumerate a list of lives that could be used for "wait and see" and New Zealand adopted the English list.

In Ontario the original draft Act provided that for the purpose of wait and see

> . . . no lives shall be included other than those of,
>
> (a) the person by whom or any person to whom or in whose favour an interest is given or created;
>
> (b) a person or persons to whom an earlier interest in the same property may have been given;
>
> (c) a person or persons whose continued existence has a reasonable connection with the vesting or failure of the interest; or
>
> (d) a person or persons who would have been considered as a life or lives in being for the purpose of the rule against perpetuities if this Act had not been passed.

However the supplemental Report stated that criticism had been received and the Commission accordingly recommended instead the following provision which became s. 6(1) and (2).

> (1) . . . the perpetuity period shall be measured in the same way as if this Act had not been passed, but, in measuring that period by including a life in being when the interest was created, no life shall be included other than that of any person whose life, at the time the interest was created, limits or is a relevant factor that limits in some way the period within which the conditions for vesting of the interest may occur.
>
> (2) A life that is a relevant factor in limiting the time for vesting of any part of a gift to a class shall be a relevant life in relation to the entire class.

We were strongly inclined at one stage to recommend a section that would say in effect "for the purpose of wait and see the only lives in being are those that have a causal

connection with the vesting" or "those that are relevant to the vesting" or "those that in some way restrict the vesting" but were persuaded by the reasoning of Professor Allen and Professor Maudsley that these phrases do not give specific guidance as to the lives that can be selected and that it is preferable to list the lives along the lines of the English statute. This means a considerably longer section but we think the specificity desirable as a guide to conveyancers and to courts.

There is a difference of opinion among learned scholars as to whether the English Act has included all lives that should be included and excluded all lives that should be excluded. We have some diffidence in giving assurance on this point. We think however that the English provision is sound in policy and workable. The leading critics, Dr. Morris and Professor Wade, in a fair acknowledgment that there are two sides to the argument, say:

> It might be fair to add that previous property legislation, notably that of 1925, contains plenty of anomalies which cause singularly little difficulty in practice and produce little or no litigation. The new Act, it may be hoped, will be another such case. We believe ourselves that its approach to the problem of lives in being is wrong and that its detailed provisions are faulty. But for most practical purposes the provisions may still prove beneficial, and so justify the skill and care with which they have been drawn.

The next recommendation is largely based on the English enumeration of lives. Only the listed lives can be used. They must be living and ascertainable at the beginning of the period, and if they are so numerous that it is impractical to determine the death of the survivor, they are to be

disregarded. Professor Maudsley has conveniently paraphrased the English lives as follows:

(i) The settlor.

(ii) The holder of a prior interest "on the failure or determination of whose prior interest the disposition is limited to take effect."

(iii) A person on whom any power, option or other right is conferred. This will usually be the donee of a power of appointment.

(iv) Beneficiaries, potential beneficiaries, and objects or potential objects of a power; their parents and grandparents; and persons whose children or grandchildren would, if subsequently born, qualify as such.

We propose to treat the "unborn widow" as a life in being as Western Australia and Ontario have done, but we include her in the list of lives rather than in a separate section.

Under the English Act, it appears from the analysis of Morris and Wade that the lives to be used in connection with a gift over are not necessarily the same as those for the prior gift, and that they should be (80 L.Q.R. at 506). We have framed a provision to that end along the lines suggested by Professor Maudsley (86 L.Q.R. at 375).

RECOMMENDATION #7

(1) WHERE SECTION ___ [RECOMMENDATIONS 4, 5 AND 6] APPLIES TO A DISPOSITION, THE PERPETUITY PERIOD SHALL BE DETERMINED AS FOLLOWS:

(a) WHERE ANY PERSONS FALLING WITHIN SUBSECTION (2) OF THIS SECTION ARE INDIVIDUALS IN BEING AND ASCERTAINABLE AT THE COMMENCEMENT OF THE PERPETUITY PERIOD THE DURATION OF THE PERIOD SHALL BE DETERMINED BY REFERENCE TO THEIR LIVES AND NO OTHERS, BUT SO THAT THE LIVES OF ANY DESCRIPTION OF PERSONS FALLING WITHIN PARAGRAPH (b) OR (c) OF SUBSECTION (2) SHALL BE DISREGARDED IF THE NUMBER OF PERSONS OF THAT DESCRIPTION IS SUCH AS TO RENDER IT IMPRACTICAL TO ASCERTAIN THE DATE OF DEATH OF THE SURVIVOR;

(b) WHERE THERE ARE NO LIVES UNDER PARAGRAPH (a) THE PERIOD SHALL BE TWENTY-ONE YEARS.

(2) THE SAID PERSONS ARE AS FOLLOWS:

(a) THE PERSON BY WHOM THE DISPOSITION IS MADE:

(b) A PERSON TO WHOM OR IN WHOSE FAVOUR THE DISPOSITION WAS MADE, THAT IS TO SAY--

(i) IN THE CASE OF A DISPOSITION TO A CLASS OF PERSONS, ANY MEMBER OR POTENTIAL MEMBER OF THE CLASS;

(ii) IN THE CASE OF AN INDIVIDUAL DISPOSITION TO A PERSON TAKING ONLY ON CERTAIN CONDITIONS BEING SATISFIED, ANY PERSON AS TO WHOM SOME OF THE CONDITIONS ARE SATISFIED AND THE REMAINDER MAY IN TIME BE SATISFIED;

(iii) IN THE CASE OF A SPECIAL POWER OF APPOINTMENT EXERCISABLE IN FAVOUR OF MEMBERS OF A CLASS, ANY MEMBER OR POTENTIAL MEMBER OF THE CLASS;

(iv) WHERE, IN THE CASE OF A SPECIAL POWER OF APPOINTMENT EXERCISABLE IN FAVOUR OF ONE PERSON ONLY, THE OBJECT OF THE POWER IS NOT ASCERTAINED AT THE COMMENCEMENT OF THE PERIOD, ANY PERSON AS TO WHOM SOME OF THE CONDITIONS ARE SATISFIED AND THE REMAINDER MAY IN TIME BE SATISFIED;

(v) IN THE CASE OF A POWER OF APPOINTMENT THE PERSON ON WHOM THE POWER IS CONFERRED;

(c) A PERSON HAVING A CHILD OR GRANDCHILD WITHIN SUB-PARAGRAPHS (i) TO (iv) OF PARAGRAPH (b) ABOVE, OR SUCH A PERSON ANY OF WHOSE CHILDREN OR GRANDCHILDREN, IF SUBSEQUENTLY BORN, WOULD BY VIRTUE OF HIS OR HER DESCENT, FALL WITHIN THOSE SUB-PARAGRAPHS;

(d) ANY PERSON WHO TAKES ANY PRIOR INTEREST IN THE PROPERTY DISPOSED OF AND ANY PERSON ON WHOSE DEATH A GIFT OVER TAKES EFFECT;

(e) WHERE A DISPOSITION IS MADE IN FAVOUR OF ANY SPOUSE OF A PERSON WHO IS IN BEING AND ASCERTAINABLE AT THE COMMENCEMENT OF THE PERIOD, OR WHERE AN INTEREST IS CREATED BY REFERENCE TO THE DEATH OF THE SPOUSE OF SUCH A PERSON, OR BY REFERENCE TO THE DEATH OF THE SURVIVOR, THE SAID SPOUSE, WHETHER OR NOT HE OR SHE WAS IN BEING OR ASCERTAINABLE AT THE COMMENCEMENT OF THE PERIOD.

This recommendation is at the heart of the Act. It does not do away with the lives that may be used at common law to determine whether a disposition is valid. It is still necessary to apply the common law rule to determine whether

"wait and see" need be invoked. Once "wait and see" applies then the statutory list of lives is used. As Professor Maudsley has said, "wait and see" saves dispositions which fail to comply with the certainty rule rather than abolishing the certainty rule as such. He adds that if the statutory lives for "wait and see" include all those implied at common law then the common law rule can be forgotten (86 L.Q.R. at 367-8).

In connection with the 21-year period, it is still added after lives in being for purpose of "wait and see" though this is only implied in Recommendation 7(1)(a). Where there are no lives, then (b) makes it clear that "wait and see" is for 21 years, which of course corresponds with the common law period. This number of years had its origin in the age of majority but for long has been a period in gross. As stated earlier, it is not affected by the Age of Majority Act.

The catalogue of lives in subsection (2) requires detailed comment.

Comment on subsection (2)

Paragraph (a): this provides that a settlor is a life in being. (A testator could not be, because the period begins to run at his death.) Morris and Wade think the settlor's life is not relevant unless he takes an interest under the settlement. We see no harm however in including him.

Paragraph (b): The five sub-paragraphs (i) - (v) are designed to spell out in detail those who are included as persons in whose favour the disposition is made. Those

numbered (i) to (iv) may seem complex; but (iii) and (iv) are merely counterparts of (i) and (ii), and deal with persons who are objects of a special power of appointment. Morris and Wade say that (iii) and (iv) are unlikely to be invoked very often, because the donee of the power is a life in being under (v) and presumably his life will be all that is required. Our (iv) varies from England's in that it omits reference to the person who is the only one in whose favour the power could be exercised, for as Morris and Wade point out, in this situation the power is good at common law and there is no need for "wait and see". Turning now to (i) and (ii), we note the criticism of Morris and Wade to (i), in that it treats a potential member of a class as a life in being for the purpose not only of his own interest but also of the interests of other members of the class; and they make a similar criticism of (ii) on the ground that one potential beneficiary should not be treated as a life in being with respect to the interest of another potential beneficiary. As Maudsley points out their criticism is based on the assumption that the only lives are those that have a causal connection with the vesting, and it is not necessary to accept this assumption. We point out too that Ontario included a special subsection, quoted above, which specifically embodies the principle of England's (i). Turning now to (v) we point out that it varies from England's, which reads "in the case of any power, option or other right". We do not wish to include business transactions in this "wait and see" provision so we have excluded "options or other right". We note that Maudsley and also Morris and Wade agree that it is inept to use lives in being for business transactions.

Paragraph (c): We shall borrow the two examples of Morris and Leach (Supp. p. 8) which show the operation of

this provision in connection with a class gift under (b)(i) and then their example in connection with a gift to an individual under (b)(ii).

(1) Gift by will to such of the daughters of A as shall marry. At T's death, A is alive and has one spinster daughter, B. Another is born later, C. B counts as a life in being under para. (b)(i). She is a "potential member of the class", because in her case one of the conditions identifying a member of the class (i.e., being a daughter of A) is satisfied, and there is a possibility that the other condition (i.e., marrying) will in time be satisfied. A counts as a life in being under para. (c), because he has a child (B) within para. (b)(i). (He would equally count as a life in being even if he had no daughters living at T's death, because any of his daughters, if subsequently born, would fall within that subparagraph.) A and B would be the lives in being if B had been the only daughter. But if C had been the only daughter, only A would have been the life in being.

(2) Gift by will to the first grandchild of A to attain twenty-one. At T's death, A is alive and has two children, C1 and C2, and one minor grandchild, G, the child of C1. G counts as a life in being under para. (b)(ii); he is a person as to whom one of the conditions is satisfied (i.e., being a grandchild of A) and the other may in time be satisfied (i.e., attaining twenty-one). A counts as a life in being under para. (c), because he has a grandchild within para. (b)(ii). (He would equally count as a life in being, even if he had no grandchild living at T's death, because any of his grandchildren, if subsequently born, would fall within para. (b)(ii).) C1 also counts as a life in being under para. (c), because he has a child (G) within para. (b)(ii). C2 also counts as a life in being under para. (c), because any of his children, if subsequently born, would fall within para. (b)(ii).

We note here an article by Prichard, Two Petty Perpetuities Puzzles, 27 Camb. L.J. 284 (1969), which suggests some difficulties in applying (c). Professor Maudsley (86 L.Q.R. at 377-8) does not find the same difficulty and we are prepared to accept his opinion.

Paragraph (d): the English (d) reads "any person on the failure or determination of whose prior interest the disposition is limited to take effect". A defect in this provision can be shown by the following example which again is borrowed from Morris and Leach (Supp. p. 9): a bequest to A for life, B for life, remainder to the grandchildren of C. Under the English (d), A is not an appropriate life for the gift to the grandchildren of C, for that gift does not take effect on the failure or determination of A's interest but rather of B's interest. The opening clause in our (d) is designed to permit the inclusion of A. The latter part of (d) is new. One of the criticisms of Morris and Wade of the English lives has to do with gifts over. They make the point that the perpetuity period for a gift over should be the same as for the prior gift. However the prior gift and gift over are separate dispositions, and the authors demonstrate that the period for the gift over may expire before the period applicable to the prior gift (80 L.Q.R. 506). Professor Maudsley concedes that this criticism appears to be valid and suggests it can be met by enacting that the statutory lives which are applicable to one limb of a settlement may be used for any interest arising under the settlement (86 L.Q.R. at 375). We have incorporated this idea in the latter part of (d).

Paragraph (e): this makes the "unborn widow" a life in being. The English Act does not do so, but in effect eliminates her. The Ontario Act deems her to be a life in being but does so in a separate section. In

including her with the other lives we have excluded any question as to whether the "wait and see" provision or the "unborn widow" provision applies first.

[Note: the inclusion of the "unborn widow" with lives in being may create a drafting problem. Subsection (1)(a) says that the various lives listed in subsection (2) must be "individuals in being and ascertainable at the beginning of the perpetuity period". The "unborn widow" does not meet these requirements. There is no impropriety in treating her as a life in being but it is awkward to include her with others all of whom must be lives in being and ascertainable. It might be better to deal with the "unborn widow" in a separate subsection or to add to the clause quoted above from (1)(a) the words "or within paragraph (e) of subsection (2)"]

V

CY-PRES - REDUCTION OF AGE

Frequently a gift is void because it is to a person at an age beyond 21. There is no problem where the beneficiary is living when the period begins to run but there is where he is born later. For example, a bequest to the children of A at 25 is void where A is alive at the testator's death. The English Law of Property Act 1925 included a provision (s. 163(1)) which provided that where a gift is made to depend on the attainment by the beneficiary of an age exceeding twenty-one years, and thereby the gift would be void for remoteness the age of twenty-one shall be substituted for that in the gift. The New English Act replaces the 1925 provision with a different one (s. 4(1)

and (2). The first subsection is the principal one. It reduces the age not to 21 but only to an age sufficient to save the gift under the Rule. We point out that the age-reduction provision only comes into play after "wait and see" has been applied. Some persons argue that the legislation should make it apply immediately and before "wait and see". We favour the English solution because we think "wait and see" should be the primary form of relief from harsh operation of the Rule and that only if it fails to save the gift should the age be reduced. The result is that the gift is saved with a minimum alteration of the terms of the disposition.

An example will show the working of the provision. Gift to the children of A who attain 25. At the testator's death A had no children. To apply the provision one must wait to see the position at A's death. If at that time he has two children aged 4 and 6 it is not necessary to reduce the age because both children will be 25 within 21 years of A's death. However if the children were 2 and 4 at A's death, then the Act applies and reduces the age to 23, because the younger will attain that age at a time that is within the Rule (21 years after A's death).

Where the gift is not a class gift but a gift to an individual there has been a difference of opinion as to whether the Act is to be applied once or whether there should be "phased" reduction. The following example will show the problem. Gift to the first child of A to reach 25. When A dies he has a child of 3 and a child of 1. Should the age for the older be reduced to 24 and that of the younger to 22 or should they both be reduced to 22? We think it fairer to make one reduction to include both and

to remove any doubt we recommend below a special subsection to that end.

One situation that could occur is this: bequest to sons at 25 and daughters at 30. The English Act (s. 4(2)) provides for this. We think it wise to be on the safe side and to include it, though Ontario apparently thought that the problem is covered by the general age-reduction provision.

RECOMMENDATION #8

(1) WHERE A DISPOSITION CREATES AN INTEREST IN REAL OR PERSONAL PROPERTY BY REFERENCE TO THE ATTAINMENT BY ANY PERSON OR PERSONS OF A SPECIFIED AGE EXCEEDING TWENTY-ONE YEARS, AND ACTUAL EVENTS EXISTING AT THE TIME THE INTEREST WAS CREATED OR AT ANY SUBSEQUENT TIME ESTABLISH,

(a) THAT THE INTEREST, APART FROM THIS SECTION, WOULD BE VOID AS INCAPABLE OF VESTING WITHIN THE PERPETUITY PERIOD, BUT

(b) THAT IT WOULD NOT BE VOID IF THE SPECIFIED AGE HAD BEEN TWENTY-ONE YEARS,

THE DISPOSITION SHALL BE READ AS IF, INSTEAD OF REFERRING TO THE AGE SPECIFIED, IT HAD REFERRED TO THE AGE NEAREST THE AGE SPECIFIED THAT WOULD, IF SPECIFIED INSTEAD, HAVE PREVENTED THE INTEREST FROM BEING SO VOID.

(2) TO REMOVE DOUBT, ONE AGE REDUCTION TO EMBRACE ALL POTENTIAL BENEFICIARIES SHALL BE MADE PURSUANT TO SUBSECTION (1).

(3) WHERE IN THE CASE OF ANY DISPOSITION DIFFERENT AGES EXCEEDING TWENTY-ONE YEARS ARE SPECIFIED IN RELATION TO DIFFERENT PERSONS--

(a) THE REFERENCE IN PARAGRAPH (b) OF SUBSECTION (1) ABOVE TO THE SPECIFIED AGE SHALL BE CONSTRUED AS A REFERENCE TO ALL THE SPECIFIED AGES, AND

(b) THAT SUBSECTION SHALL OPERATE TO REDUCE EACH SUCH AGE SO FAR AS IS NECESSARY TO SAVE THE DISPOSITION FROM BEING VOID FOR REMOTENESS.

Little comment is required because the purpose of the recommendation has been explained. In (1) we have followed Ontario's wording rather than England's though there is no difference in the substance of the two. Subsection (2) is new and is designed to eliminate the argument that "phased" reduction is possible. Subsection (3) is the same as the English provision dealing with different ages in the same disposition (e.g., sons at 25 and daughters at 30).

VI

EXCLUSION OF CLASS MEMBERS TO AVOID REMOTENESS

One of the sub-rules which has attracted criticism has to do with class gifts. It says that if the interest of even one member of the class can possibly vest too late then the whole gift is void (Professor Leach in 51 Harv. L. Rev. at 1338).

The following example is from Morris and Leach at 125-26. Gift to A for life and then to such of A's children as attain 25. At T's death A has two children, C1 and C2 both under 25. After T's death (1) C1 attains 25, (2) a third child C3 is born, (3) A dies, (4) C2 attains 25, (5) C3 attains 25. The interest of C3 vests too late and the consequence is that the interests of C1 and C2 are also void even though they vested in time since they were lives in being. It seems harsh to deprive C1 and C2 of their shares.

The English Act and those based on it have changed the law and have done so in the same section that provides for age-reduction. The new provision saves the gift for those whose interest becomes vested within the period and excludes those whose interest vests too late. In other words the class is "split". (The provision is sometimes called the "class-splitting" provision.) Morris and Leach (Supp. p. 12) give the following example: Gift by will to A for life and then to A's grandchildren. A is alive but has no children so he is the only life in being for the purpose of "wait and see". A dies leaving children but no grandchild. Under the "wait and see" provision we wait for 21 years from A's death to see if any grandchildren are born. If so the gift is good to them but any further grandchildren that may be born are excluded.

We favour a provision like England's and Ontario's and so provide in subsection (2) of Recommendation #9 below.

There remains a special problem which though it may not arise often has been given special treatment in England and Ontario. It is the case of a gift to a composite class, such as children and grandchildren, at an age above 21. The example of Morris and Leach (Supp. p. 12) is as follows: Gift by will to A for life and then to such of A's children as shall attain 25 and the children of such of them as shall die under 25 leaving children who attain 25, such children to take the share their parent would have taken. Assume that when T dies A has as yet no children. The age-reduction provision will not operate to save the gift. The "wait and see" provision might do so but if it does not, then the provision we recommend (Recommendation #9(1)) operates to exclude the grandchildren and the age-reduction provision

can apply, if necessary, to the children. We have explained the principal provision first and then the special one, though in the following recommendation the order is reversed. Incidentally, the following recommendation will be in the same section as the age-reduction provision, as is the case in England and Ontario.

RECOMMENDATION #9

> *(1) WHERE THE INCLUSION OF ANY PERSONS, BEING POTENTIAL MEMBERS OF A CLASS, OR UNBORN PERSONS WHO AT BIRTH WOULD BECOME POTENTIAL MEMBERS OF THE CLASS, PREVENTS [THE AGE-REDUCTION PROVISIONS IN RECOMMENDATION #8(1) AND (3)] FROM OPERATING TO SAVE A DISPOSITION FROM BEING VOID FOR REMOTENESS, THOSE PERSONS SHALL BE EXCLUDED FROM THE CLASS FOR THE PURPOSES OF THE DISPOSITION AND THE SAID PROVISIONS [RECOMMENDATION #8(1) AND (3)] SHALL HAVE EFFECT ACCORDINGLY,*
>
> *(2) WHERE, IN THE CASE OF A DISPOSITION TO WHICH SUBSECTION (1) DOES NOT APPLY, IT IS APPARENT AT THE TIME THE DISPOSITION IS MADE, OR BECOMES APPARENT AT A SUBSEQUENT TIME THAT, APART FROM THIS SUBSECTION THE INCLUSION OF ANY PERSONS BEING POTENTIAL MEMBERS OF A CLASS OR UNBORN PERSONS WHO AT BIRTH WOULD BECOME MEMBERS OR POTENTIAL MEMBERS OF THE CLASS, WOULD CAUSE THE DISPOSITION TO BE TREATED AS VOID FOR REMOTENESS, SUCH PERSONS SHALL FOR ALL THE PURPOSES OF THE DISPOSITION BE EXCLUDED FROM THE CLASS*

There is general agreement that the English and Ontario Acts contemplate that "wait and see" applies before age-reduction and that age-reduction applies before class-splitting. We think it helpful to spell this out and later we so recommend.

VII

GENERAL CY-PRES

Some modern statutes have as their basic reform a general cy-près provision which enables the court to re-write void dispositions in a way that will validate them under the Rule and yet keep them as close as possible to the donor's intention. This would of course have the virtue of validating the disposition immediately and so avoid "wait and see" but we agree with England and Ontario that on balance the main remedial provision should be "wait and see", with specific cy-près provisions in the form of age-reduction and class-splitting as supplemental devices where "wait and see" does not save the gift.

The question then arises whether it is desirable to add a further general cy-près provision which the court could invoke if the other provisions already recommended do not save the gift. Neither England nor Ontario has included such a provision but the New Zealand Act of 1964 (No. 47) which is in general based on the English Act includes a general cy-près section. We have been in considerable doubt as to whether to recommend a general cy-près section. We have concluded so to do, as a final "safety-net" as New Zealand has done. Unlike New Zealand however we do not propose to make the provision retroactive. Subsection (1) of the following recommendation is based on New Zealand's section 10(1).

RECOMMENDATION #10

(1) WHERE IT HAS BECOME APPARENT THAT, APART FROM THE PROVISIONS OF THIS SECTION, ANY DISPOSITION WOULD BE VOID SOLELY ON THE GROUND THAT IT

INFRINGES THE RULE AGAINST PERPETUITIES, AND WHERE THE GENERAL INTENTION ORIGINALLY GOVERNING THE DISPOSITION CAN BE ASCERTAINED IN ACCORDANCE WITH THE NORMAL PRINCIPLES OF INTERPRETATION OF INSTRUMENTS AND THE RULES OF EVIDENCE, THE DISPOSITION SHALL, IF POSSIBLE AND AS FAR AS POSSIBLE, BE REFORMED SO AS TO GIVE EFFECT TO THAT GENERAL INTENTION WITHIN THE LIMITS OF THE RULE AGAINST PERPETUITIES.

(2) SUBSECTION (1) SHALL NOT APPLY WHERE THE DISPOSITION OF THE PROPERTY HAS BEEN SETTLED BY A VALID COMPROMISE.

We think the purpose of subsection (2) is obvious and desirable. We are satisfied too that the terms of subsection (1) make clear that it applies only as a last resort. In any case we specifically so provide in a later recommendation.

VIII

CAPACITY TO HAVE CHILDREN

Where a forty-year-old testator with grown-up brothers and sisters makes a bequest "to the children of my brothers and sisters", one would think as a matter of construction that he means his living brothers and sisters. One would think too that the law would assume that his seventy-year-old parents will not have any more children. However each of these assumptions is incorrect and the bequest will be void under the Rule. The parents are deemed capable of having more children. Such hypothetical persons are brothers and sisters within the bequest and their "children" are within the gift which is thus rendered void under the Rule (Ward v. Van der Loeff [1924] A.C. 653).

Professor Leach has described the aged person whom the law has deemed capable of having children as the "fertile octogenarian" (Morris & Leach 76-84). He has also postulated the case in which a gift will be void only on the assumption that a young child will himself have a child. Hence his "precocious toddler" (Morris & Leach at 85-86). Leaving aside the effect of lack of capacity to marry, it is clear that a gift should not be void because of a presumption that a young child is capable of having children.

The English and Ontario Acts establish a presumption that males cannot have children when under 14, and that females cannot have children when under 12 or over 55. They also permit evidence to show that a specific person, e.g., a man or woman of 35, is unable to have a child.

Both Acts provide for a judicial declaration of inability to have further children. Then they contemplate the possibility that notwithstanding the declaration the person does in fact have a child. Such a situation would indeed be rare, except for the possibility of adoption or legitimation of a child which we discuss below. In the event of a child being born after the declaration of inability, the court is empowered to make such order as it deems just, the purpose being to do what is possible for the after-born child without disrupting more than necessary the interests of other beneficiaries. Neither Act specifically gives the after-born child the right to trace property that has been conveyed to other beneficiaries. The reason is that it would be harsh to treat those beneficiaries as though they had been overpaid trust property by mistake (Morris and Leach, Supp. p. 4; Gosse, p. 37). The matter of doing justice as between the other beneficiaries and the after-born child is simply left to the court's discretion. We think this proper.

In connection with the possibility of a legitimation or adoption after the judicial declaration, Ontario simply says that any such possibility is to be excluded in deciding on a person's ability to have children. The English Act we find harder to interpret but according to Morris and Leach (Supp. p. 4) the English Act excludes the possibility of legitimation or adoption only in the case of a woman over 55. We have been concerned with the possibility that application would be made for a declaration of inability with respect to a man or woman of 35 (the evidence showing inability to procreate) when that person intends to adopt a child. We note s. 60(3) of the Child Welfare Act, R.S.A. 1970, c. 45, which provides that a reference to a "child" in a "will conveyance or other document, whether heretofore or hereafter made, shall unless the contrary is expressed be deemed to include an adopted child." We think however that there is very little risk that a person will be tempted to conceal the fact that he intends to adopt a child.

Accordingly we recommend Ontario's provisions, save that Ontario, like England, refers to the possibility that a person may have a child by "legitimation, adoption or other means". We are not aware of "other means" and propose to omit that phrase.

RECOMMENDATION #11

(1) *WHERE, IN ANY PROCEEDING RESPECTING THE RULE AGAINST PERPETUITIES, A QUESTION ARISES THAT TURNS ON THE ABILITY OF A PERSON TO HAVE A CHILD AT SOME FUTURE TIME, THEN,*

(a) *IT SHALL BE PRESUMED,*

(i) *THAT A MALE IS ABLE TO HAVE A CHILD AT THE AGE OF FOURTEEN YEARS OR OVER, BUT NOT UNDER THAT AGE, AND*

(ii) THAT A FEMALE IS ABLE TO HAVE A CHILD AT THE AGE OF TWELVE YEARS OR OVER, BUT NOT UNDER THAT AGE OR OVER THE AGE OF FIFTY-FIVE YEARS; BUT,

(b) IN THE CASE OF A LIVING PERSON, EVIDENCE MAY BE GIVEN TO SHOW THAT HE OR SHE WILL OR WILL NOT BE ABLE TO HAVE A CHILD AT THE TIME IN QUESTION.

(2) SUBJECT TO SUBSECTION (3) WHERE ANY QUESTION IS DECIDED IN RELATION TO A DISPOSITION BY TREATING A PERSON AS ABLE OR UNABLE TO HAVE A CHILD AT A PARTICULAR TIME, THEN HE OR SHE SHALL BE SO TREATED FOR THE PURPOSE OF ANY QUESTION THAT MAY ARISE CONCERNING THE RULE AGAINST PERPETUITIES IN RELATION TO THE SAME DISPOSITION NOTWITHSTANDING THAT THE EVIDENCE ON WHICH THE FINDING OF ABILITY OR INABILITY TO HAVE A CHILD AT A PARTICULAR TIME IS PROVED BY SUBSEQUENT EVENTS TO HAVE BEEN ERRONEOUS.

(3) WHERE A QUESTION IS DECIDED BY TREATING A PERSON AS UNABLE TO HAVE A CHILD AT A PARTICULAR TIME AND SUCH PERSON SUBSEQUENTLY HAS A CHILD OR CHILDREN AT THAT TIME, THE COURT MAY MAKE SUCH ORDER AS IT SEES FIT TO PROTECT THE RIGHT THAT SUCH CHILD OR CHILDREN WOULD HAVE HAD IN THE PROPERTY CONCERNED AS IF SUCH QUESTION HAD NOT BEEN DECIDED AND AS IF SUCH CHILD OR CHILDREN WOULD, APART FROM SUCH DECISION, HAVE BEEN ENTITLED TO A RIGHT IN THE PROPERTY NOT IN ITSELF INVALID BY THE APPLICATION OF THE RULE AGAINST PERPETUITIES AS MODIFIED BY THIS ACT.

(4) THE POSSIBILITY THAT A PERSON MAY AT ANY TIME HAVE A CHILD BY ADOPTION OR LEGITIMATION SHALL NOT BE CONSIDERED IN DECIDING ANY QUESTION THAT TURNS ON THE ABILITY OF A PERSON TO HAVE A CHILD AT SOME PARTICULAR TIME, BUT, IF A PERSON DOES SUBSEQUENTLY HAVE A CHILD OR CHILDREN BY SUCH MEANS, THEN SUBSECTION 3 APPLIES TO SUCH CHILD OR CHILDREN.

We have considered the question, when is a male at the age of fourteen years or over and when is a female at

the age of twelve years or over, and when is a female over the age of fifty-five? Clearly, in the first case it is the fourteenth anniversary of birth (commonly called the fourteenth birthday), and in the second it is at the twelfth anniversary of birth. In the third case the preposition "at" is omitted and one could argue that a woman is not over fifty-five until she has reached her fifty-sixth anniversary of birth. We reject this interpretation. We think she is over fifty-five immediately after her fifty-fifth anniversary of birth. If the legislative draftsman thinks there is doubt, there should be no difficulty in removing it.

A matter not related to perpetuities but relevant in the law of trusts is this: There are cases where a trustee can do or be required to do certain things when it is clear that there are no unborn beneficiaries. Thus it would be convenient to enable the court to declare that a specific person can have no more children quite apart from perpetuities. Ontario so provided by an amendment of 1966 to its Trustee Act (1966, c. 157). We prefer to leave this matter until completion of a study of the rule in Saunders v. Vautier so make no recommendation here.

IX

ORDER OF APPLICATION OF REMEDIAL PROVISIONS

We have mentioned that the recommendations already made for the reform of the Rule are intended to indicate the order in which they are to be applied. However there has been considerable debate in connection with some of the English and Ontario provisions. We think we have eliminated any question in connection with the "unborn widow" for we have made her a life in being. It seems proper that the

provision dealing with capacity to have children can be invoked at any time, where applicable. In many cases of course it has nothing to do with the time of vesting. In these cases the intent of our recommendations is to apply "wait and see", then age-reduction, then class-splitting and then general cy-près.

We think it best to remove doubts, and specifically to permit applications to the court. The Trustee Act already has a provision (s. 38) which permits applications for the opinion, advice or direction of the court in connection with the administration of trust property. This section should specifically be made applicable to questions arising under the Perpetuities Act. Ontario's s. 5(1) authorizes applications to the court. The following recommendation is designed to the same end and also to prescribe the order of application of the remedial provisions.

RECOMMENDATION #12

AN EXECUTOR OR A TRUSTEE OF ANY PROPERTY OR ANY PERSON INTERESTED UNDER, OR IN THE VALIDITY OR INVALIDITY OF, AN INTEREST IN SUCH PROPERTY MAY AT ANY TIME APPLY FOR THE OPINION, ADVICE OR DIRECTION OF THE COURT PURSUANT TO S. 38 OF THE TRUSTEE ACT WITH RESPECT TO THE VALIDITY OR INVALIDITY WITH RESPECT TO THE RULE AGAINST PERPETUITIES OF AN INTEREST IN THAT PROPERTY AND WITH RESPECT TO THE APPLICATION OF ANY PROVISION OF THIS ACT; AND TO REMOVE DOUBT IT IS DECLARED THAT THE REMEDIAL PROVISIONS OF THIS ACT SHALL APPLY IN THE FOLLOWING ORDER:

(a) CAPACITY TO HAVE CHILDREN [RECOMMENDATION #11];

(b) WAIT AND SEE [RECOMMENDATIONS #4, #5 AND #6];

(c) AGE-REDUCTION [RECOMMENDATION #8];

(d) CLASS-SPLITTING [RECOMMENDATION #9];

(e) GENERAL CY-PRES [RECOMMENDATION #10].

X

DISPOSAL OF INTERMEDIATE INCOME: ADVANCES ON CAPITAL

Maintenance has reference to payments from income (and possibly from capital) to support a beneficiary, especially an infant, while advancement has reference to payments from capital to set a beneficiary up in life. In the absence of a statute or express power in the instrument, a trustee's powers to make payments from income for maintenance is extremely narrow as the Ontario case Re Wright, [1955] 1 D.L.R. 213 shows; and trustees have no power to make payments from capital by way of advancement.

When trustees are holding property during "wait and see" the period may be long and income may accumulate for many years until it appears that the disposition is either valid or invalid. It will be recalled that one of Mr. Sheard's main objections to "wait and see" was that the accumulation of income creates serious problems for the trustee; and he observed that Ontario had no statute providing for payments to contingent beneficiaries whereas England does in ss. 31 and 32 of the Trustee Act, 1925. Incidentally, Dr. Gosse recommended that Ontario consider legislation on these lines (Gosse, p. 20). Section 31 gives to trustees powers to make payments out of income for maintenance, education and benefit of an infant beneficiary and payment of the income to an adult beneficiary even where the interest of the beneficiary is contingent, provided the disposition carries intermediate income. Section 32 gives to trustees the power to make payments out of capital money (but not land) for the advancement or

benefit of the beneficiary whether his interest is absolute or contingent or defeasible, with an upper limit of one-half of the beneficiary's share.

Alberta has in its Trustee Act, R.S.A. 1970, c. 373, two sections, 32 and 33, which are narrower than England's s. 31. They come down from the Trustee Ordinance ss. 24 and 25. Section 32 is clearly based on an English Statute of 1860 called Lord Cranworth's Act (23 and 24 Vict., c. 145). It applies where property is held in trust for an infant either absolutely or contingently on reaching 18 (at the latest), and empowers the trustees to apply the income for maintenance or education of the infant. Accumulations of the residue of income are to be held for the person ultimately entitled to the property, save that the trustees may apply the accumulations as though they were current income. Section 33 applies to the same property and in the same circumstances as s. 32 and permits trustees by leave of the Court to dispose of the property and apply the proceeds for maintenance and education of the infant. Any surplus may be applied to the same purpose and the residue is to be held for those ultimately entitled to the property.

It will be seen that these provisions are confined to maintenance of infants and do not deal with advancement at all. Moreover the Age of Majority Act in 1971 reduces the period of infancy from 21 years to 18, and thus curtails the scope of the provisions. We think that consideration should be given to the replacement of these provisions by others on the lines of England's ss. 31 and 32.

Originally we had intended to include as an Appendix to this report our recommendations on this subject. However our study is not yet complete, so we plan to submit in due course a separate report on powers of maintenance and advancement.

In the meantime we think that it is best to provide specifically, as Ontario has done, that during the "wait and see" period income not otherwise disposed of shall be treated as income arising from a valid contingent interest; and further to provide specifically that ss. 32 and 33 shall apply during "wait and see". We think that the following recommendation ensures that even if the disposition is ultimately void, the validity of payments made under ss. 32 and 33 is not affected though we do not use the explicit words found at the end of England's s. 3(1) and quoted earlier.

RECOMMENDATION #13

> *PENDING THE TREATMENT OR DECLARATION OF A PRESUMPTIVELY VALID INTEREST WITHIN THE MEANING OF SECTION ___ [RECOMMENDATION #4] AS VALID OR INVALID, THE INCOME ARISING FROM SUCH INTEREST AND NOT OTHERWISE DISPOSED OF SHALL BE TREATED AS INCOME ARISING FROM A VALID CONTINGENT INTEREST, AND ANY UNCERTAINTY WHETHER THE DISPOSITION WILL ULTIMATELY PROVE TO BE VOID FOR REMOTENESS SHALL BE DISREGARDED; AND SECTIONS 32 AND 33 OF THE TRUSTEE ACT SHALL APPLY.*

XI

DEPENDENT AND INDEPENDENT LIMITATIONS

One of the subrules which seems oppressive is this: even though a gift taken by itself will vest within the time

required by the Rule, it is invalid if it is dependent on a prior invalid gift. The following example is from Morris and Leach (p. 179). Example: Residuary bequest to A for life, then to A's grandchildren for their lives, and then to B absolutely. The gift to the grandchildren is void. The gift to B is "dependent" upon the gift to the grandchildren so it likewise fails. This result is supposed to be based on the testator's intent whereas it probably defeats his intent. Besides it is hard to say when the gift is "dependent" on a prior invalid gift. Both England and Ontario have abolished the Rule. Since the disposition is now good the question arises whether it should be accelerated. The English and Ontario Acts are worded negatively in that they both say that the valid disposition "shall not be prevented from being accelerated". It appears from Morris and Leach (Supp. p. 14) that the negative form was chosen because there are cases where the beneficiary entitled to the subsequent interest had only a contingent interest so it should not be accelerated where the contingency has not been met.

There is little to choose between the wording of the English and Ontario provisions. We recommend the latter, save that we substitute "disposition" for "limitation".

RECOMMENDATION #14

> (1) *A DISPOSITION THAT, IF IT STOOD ALONE, WOULD BE VALID UNDER THE RULE AGAINST PERPETUITIES IS NOT INVALIDATED BY REASON ONLY THAT IT IS PRECEDED BY ONE OR MORE DISPOSITIONS THAT ARE INVALID UNDER THE RULE AGAINST PERPETUITIES, WHETHER OR NOT SUCH DISPOSITION EXPRESSLY OR BY IMPLICATION TAKES EFFECT AFTER, OR IS SUBJECT TO, OR IS ULTERIOR TO AND DEPENDENT UPON, ANY SUCH INVALID DISPOSITION.*

(2) WHERE A PRIOR INTEREST IS INVALID UNDER THE RULE AGAINST PERPETUITIES, ANY SUBSEQUENT INTEREST THAT, IF IT STOOD ALONE, WOULD BE VALID SHALL NOT BE PREVENTED FROM BEING ACCELERATED BY REASON ONLY OF THE INVALIDITY OF THE PRIOR INTEREST.

XII

POWERS OF APPOINTMENT

We referred to powers of appointment earlier in connection with the "wait and see" rule. However the subject requires further examination. It will be recalled that there are two steps: (1) the creation of the power of appointment, and (2) the exercise of the power, or making the appointment. The instrument creating the power could itself violate the Rule. Assuming that it does not then the exercise of the power may do so.

It becomes important here to note the difference between a general power and special power. To quote Morris and Leach, "a general power is one which permits appointment to anyone including the donee of the power or his estate. . . . A special (sometimes called limited) power is one which permits appointment only to specified persons or classes" (p. 135).

A good example of a general power is found in Re Mewburn, [1939] S.C.R. 75 where A was given the power to dispose of property to whomsoever she should by deed or will appoint. The Supreme Court held she could appoint to herself.

Dealing first with the validity of the instrument creating the power there is a distinction between general

and special powers. A general power is regarded as tantamount to the conferring of ownership on the donee of the power so it is valid as long as the donee is of necessity ascertainable within the perpetuity period. In the case of a special power it is void if it may be exercised beyond the period.

As to the exercise of the power, that is to say the appointment itself, an appointment under a general power is the same as a disposition of the donee's own property and the perpetuity period runs from the date of the appointment rather than from the earlier date when the power was created. In the case of a special power the donee is not the owner of the property over which he has power of appointment. The appointment he makes is "read back" into the instrument conferring the power and the period is computed from the date of that instrument, though facts existing at the date of the appointment may be considered.

A general power exercisable only by will is treated as a special power when the validity of the power is in question, because the donee cannot appoint to himself. However when the validity of the appointment is in question English law treats the power as a general one (Morris & Leach 135-6) with the consequence that the period runs from the date of the appointment. It appears that in the United States such a power is treated as a special power for all purposes.

Both England (s. 7) and Ontario (s. 11) have embodied the English law. While recognizing that the rule may appear anomalous we think it should be retained.

The following recommendation follows the Ontario provision.

RECOMMENDATION #15

(1) FOR THE PURPOSE OF THE RULE AGAINST PERPETUITIES, A POWER OF APPOINTMENT SHALL BE TREATED AS A SPECIAL POWER UNLESS,

(a) IN THE INSTRUMENT CREATING THE POWER IT IS EXPRESSED TO BE EXERCISABLE BY ONE PERSON ONLY; AND

(b) IT COULD, AT ALL TIMES DURING ITS CURRENCY WHEN THAT PERSON IS OF FULL AGE AND CAPACITY, BE EXERCISED BY HIM SO AS IMMEDIATELY TO TRANSFER TO HIMSELF THE WHOLE OF THE INTEREST GOVERNED BY THE POWER WITHOUT THE CONSENT OF ANY OTHER PERSON OR COMPLIANCE WITH ANY OTHER CONDITION, NOT BEING A FORMAL CONDITION RELATING ONLY TO THE MODE OF EXERCISE OF THE POWER.

(2) A POWER THAT SATISFIES THE CONDITIONS OF CLAUSES (a) AND (b) OF SUBSECTION (1) SHALL, FOR THE PURPOSE OF THE RULE AGAINST PERPETUITIES, BE TREATED AS A GENERAL POWER.

(3) FOR THE PURPOSE OF DETERMINING WHETHER AN APPOINTMENT MADE UNDER A POWER OF APPOINTMENT EXERCISABLE BY WILL ONLY IS VOID FOR REMOTENESS, THE POWER SHALL BE TREATED AS A GENERAL POWER WHERE IT WOULD HAVE BEEN SO TREATED IF EXERCISABLE BY DEED.

XIII

ADMINISTRATIVE POWERS

Often a trustee is given administrative powers, e.g., power to sell or lease land which forms the subject matter of the trust. It is possible for a disposition to be valid and yet for the power to be exercised beyond the period. The following example is from Morris and Leach

(p. 235): Devise on trust to A for life, then to any widow of A for life, and then for the children of A at 21, with power in the trustees to sell and lease at any time. The interests are all valid under the Rule. However, the power to sell and lease may be exercised at any time during the life of the widow who is not a life in being and she may still be alive more than 21 years after A's death. The consequence is that the power of sale and lease is void. There is general agreement that this should not be so, for the power does not impede the disposition of property but rather facilitates it (Morris & Leach, p. 237). The English Act (s. 8) and the Ontario Act (s. 12) abolish the Rule. The English Act does so only where the sale, lease, etc. is for full consideration. The purpose is to prevent colourable "sales" to beneficiaries at low prices as a means of creating beneficial interests beyond the period of the Rule. We think however that there might be difficulty in determining whether there is full consideration and think the courts will be on guard against colourable dispositions. Thus we recommend the Ontario wording.

RECOMMENDATION #16

(1) *THE RULE AGAINST PERPETUITIES DOES NOT INVALIDATE A POWER CONFERRED ON TRUSTEES OR OTHER PERSONS TO SELL, LEASE, EXCHANGE OR OTHERWISE DISPOSE OF ANY PROPERTY, OR TO DO ANY OTHER ACT IN THE ADMINISTRATION (AS OPPOSED TO THE DISTRIBUTION) OF ANY PROPERTY INCLUDING, WHERE AUTHORIZED, PAYMENT TO TRUSTEES OR OTHER PERSONS OF REASONABLE REMUNERATION FOR THEIR SERVICES.*

(2) *SUBSECTION (1) APPLIES FOR THE PURPOSE OF ENABLING A POWER TO BE EXERCISED AT ANY TIME AFTER THIS ACT COMES INTO FORCE, NOTWITHSTANDING THAT THE POWER IS CONFERRED BY AN INSTRUMENT THAT TOOK EFFECT BEFORE THAT TIME.*

Subsection (2) gives the section retrospective effect to the extent that it is made to apply to instruments in effect before the Act, but only with respect to the exercise of administrative powers after the Act comes into force. There can be no objection to this mild degree of retrospectivity.

XIV

OPTIONS: COMMERCIAL INTERESTS GENERALLY

There has been much debate as to whether commercial transactions in general, and options in particular, are actually within the Rule. It is now settled that they are. We appreciate the argument that the Rule should not apply to them at all, but on balance think that it should, provided the law is made clear and provided the time is a substantial one and provided lives in being are excluded. With this introductory observation we now turn to options.

Frobisher Ltd. v. Canadian Pieplines Ltd., [1960] S.C.R. 126 decided that an option creates an interest in land. Thus if the option is for a period beyond that permitted by the Rule one would think it simply void. However there are cases which say that notwithstanding the fact that the option is void under the Rule, the option-holder can assert his contractual rights and bring action for specific performance or damages against the option-giver who has failed to perform.

Prudential Trust Co. v. Forseth, [1960] S.C.R. 210 appears to accept this anomalous doctrine, though the court held it premature to decide the perpetuities question. Forseth was a case of an option to grant a "top lease" of

oil and gas; this transaction is one whereby the owner who has already granted an oil and gas lease to A gives to B an option of a further oil and gas lease on the expiration of the one in favour of A.

In Harris v. MNR, [1966] S.C.R. 489, Harris took a lease of a service station for 200 years with an option to purchase. His purpose was to obtain a substantial capital cost allowance for purposes of income tax. He failed, but the point of interest here is that the Supreme Court held the option void under the Rule, even as between the original parties. As Cartwright C.J. said, where a contract creates an interest in land, it is hard to see how it can also be merely personal.

In enacting its Perpetuities Act, England recognized this anomaly and included a provision (s. 10) which brings the English law into line with Harris. Ontario dealt with the subject in the same way but put its provision in the section dealing with options in gross, which we discuss below. We think the English provision better for the reason that it is not confined to options in gross but applies to all contracts. The following recommendation is the same as England's s. 10.

RECOMMENDATION #17

> *WHERE A DISPOSITION INTER **VIVOS** WOULD FALL TO BE TREATED AS VOID FOR REMOTENESS IF THE RIGHTS AND DUTIES THEREUNDER WERE CAPABLE OF TRANSMISSION TO PERSONS OTHER THAN THE ORIGINAL PARTIES AND HAD BEEN SO TRANSMITTED, IT SHALL BE TREATED AS VOID AS BETWEEN THE PERSON BY WHOM IT WAS MADE AND THE PERSON TO WHOM OR IN WHOSE FAVOUR IT WAS MADE OR ANY SUCCESSOR OF HIS, AND NO REMEDY SHALL LIE IN CONTRACT OR OTHERWISE FOR GIVING EFFECT TO IT OR MAKING RESTITUTION FOR ITS LACK OF EFFECT.*

We now examine in detail the subject of options. The principal ones are:

(1) an option in a lease of land and which gives to the lessee the option to purchase the reversion,

(2) an option in gross (as in Frobisher),

(3) an option to renew a lease.

Under present law the first two are within the Rule. The English Law Reform Committee (p. 36; also Morris & Leach, 224-227) thought that an option in a lease should be valid no matter the length of the lease but provided the period for exercising the option is short. The reason is that lessees should be encouraged to develop the land in which they have possession and the existence of an option to buy gives this encouragement. Both England (s. 9(1)) and Ontario (s. 13(1) and (2)) give effect to this policy. We recommend a similar provision. However there are three minor points which we think should be covered.

(1) The existing provisions seem to be confined to an option in a lease of land. We do not know the prevalence of lease-options of personal property. They may be rare and the period of the lease may always be short. We think however it will be as well to include them even though they are now outside the Rule (except perhaps for the case of a rare chattel).

(2) The existing provisions do not extend to a right of first refusal in a lease. There has been a difference of opinion as to whether a right of first refusal creates an interest in land. Mr. Justice Riley in Italian Village Restaurant v. Van Ostrand (1970), 9 D.L.R. (3d) 512 held it does not for the purpose of the Statute of Frauds. In any case we think a right of first refusal should be treated in the same way as an option.

(3) The existing provisions do not apply to an option contained in the renewal of a lease. They might be interpreted to include such an option, but we think it best to make a specific provision.

The following recommendation is based on the Ontario provision, with the three additions just discussed.

RECOMMENDATION #18

(1) *THE RULE AGAINST PERPETUITIES DOES NOT APPLY TO AN OPTION TO ACQUIRE FOR VALUABLE CONSIDERATION AN INTEREST REVERSIONARY ON THE TERM OF A LEASE OR RENEWAL OF A LEASE AND WHETHER THE LEASE OR RENEWAL BE OF REAL OR PERSONAL PROPERTY*

(a) *IF THE OPTION IS EXERCISABLE ONLY BY THE LESSEE OR HIS SUCCESSORS IN TITLE; AND*

(b) *IF IT CEASES TO BE EXERCISABLE AT OR BEFORE THE EXPIRATION OF ONE YEAR FOLLOWING THE DETERMINATION OF THE LEASE OR RENEWAL.*

(2) SUBSECTION (1) APPLIES TO AN AGREEMENT FOR A LEASE AS IT APPLIES TO A LEASE, AND "LESSEE" SHALL BE CONSTRUED ACCORDINGLY.

(3) SUBSECTION (1) APPLIES TO A RIGHT OF FIRST REFUSAL OR PREEMPTION AS IT APPLIES TO AN OPTION.

[Note: in connection with the references in subsection (1) to renewal of a lease, the legislative draftsman may prefer to remove them from subsection (1) and to deal with them in a separate subsection on the lines of subsection (2).]

Before considering options in gross we will deal with options to renew a lease. It may seem that they should be within the Rule, particularly if the lease can be renewed indefinitely. However the Rule does not apply to them. One view is that an option to renew is simply an exception to the Rule. The other is that a covenant by a lessor giving the lessee an option to renew is a vested right not a future right, as Duff J. held in Guardian Realty Co. v. Stark (1922), 64 S.C.R. 207 at 211-213. Whichever view is correct, we think the law should remain as it is, as Ontario's s. 13(4) provides.

RECOMMENDATION #19

THE RULE AGAINST PERPETUITIES DOES NOT APPLY TO OPTIONS TO RENEW A LEASE OF REAL OR PERSONAL PROPERTY.

We have considered the following possibility remote though it be: a lease renewable in perpetuity at the lessee's option and with an option in the lessee to purchase the reversion. In Auld v. Scales, [1947] S.C.R. 543 the lease was for 10 years with a provision for renewal on a year to

year basis, and with an option to purchase the reversion. The lessor contended that the option to purchase was void under the Rule. The Supreme Court held to the contrary, because the lessor could himself terminate the yearly lease in any given year. If however the renewed lease had been for a term certain and the lessor had no power to terminate it, we conceive that the option to purchase would be void at common law. Under our last two recommendations read together we think it would be valid, and see no objection to this result.

We come now to options in gross. Both England (s. 9(2)) and Ontario (s. 13(3)) provide a perpetuity period of 21 years. Lives in being have no place. Ontario includes a clause specifying that if the option by its terms is exercisable for more than 21 years it is void after 21 years. We think this sound in principle for it does not make void ab initio an option for a period longer than that prescribed. It merely reduces the length of time within which the option may be exercised.

We would be prepared to recommend a provision like Ontario's for options in gross, subject to a reconsideration of the period. However we think that the provision should include other commercial transactions which provide for future interests.

In Ontario the original report of the Law Reform Commission covered only options in a lease and options in gross, on the lines of the English enactment. Then in its supplementary report the Commission considered future easements, profits à prendre and "other similar interests". This recommendation became s. 14, which fixes a perpetuity

period of 40 years. "Wait and see" applies, for the section provides that the validity or invalidity of the interest depends on actual events. It is valid if it becomes a present exercisable right within the 40-year period. One could argue that the Rule should not apply to easements. However in Dunn v. Blackdown, [1961] 2 All E.R. 62, Cross J. held that it does. In that case a vendor of land gave the purchaser the right to use sewers and drains "now passing or hereafter to pass" under certain other lands owned by the vendor. The agreement to confer a right to use sewers subsequently built was void.

England's Law of Property Act, 1925, s. 162, exempts certain easements from the Rule but Dunn holds that this applies only to easements ancillary to some other validly created interest.

We think it best to continue to treat easements as within the Rule and to require that the easement be vested within a specified number of years. The term "easement" should include rights of way for pipelines and power lines and rights of user of land as an intermediate aedrome, which s. 71 of the Land Titles Act specifically provides for. They are not easements in the technical common-law sense for there is no dominant tenement.

Restrictive covenants are much like easements. A helpful article is Easements and the Rule Against Perpetuities, by G. Battersby (1961) 25 Conveyancer 415. The author contends that if easements are within the Rule then restrictive covenants should be. We agree, though it is harder to imagine a future restrictive covenant than a future easement.

As to profits à prendre we have noted that Ontario links them with easements in s. 14. Agreements for the

grant of a future profit are probably infrequent in Alberta though they could occur in connection with petroleum or coal or timber. The "top lease" mentioned earlier in connection with Forseth is an example, though in that case the agreement provided for an option to acquire the "top lease".

At this point we are prepared to recommend special provisions for options in gross, easements and profits as Ontario has done, save for reconsideration of the period. We think however that there are other future interests which should be treated in the same way. Cases in which a person agrees to sell or to lease land in future may not be commonplace, but they can occur. For example an agreement to sell land at St. Albert when Athabasca University has 1,000 students; or an agreement to grant a lease of land when a proposed building has been erected thereon. The Rule applies to these dispositions. We think they should be treated in the same way as options, easements and profits rather than as dispositions in a will or inter vivos trust. We have heard of cases in Alberta where royal lives clauses have been used in transactions of this kind and they could still be used in England and Ontario. As indicated earlier, the use of lives in commercial transactions is inappropriate.

The next question is whether provisions of this kind should extend to personal property. At one time future interests in personal property were not possible but this is not so today. Perhaps the commonest example is a type of agreement made between shareholders of a company and known as a "buy-sell" agreement. We think that agreements for a future interest in personal property should be included,

even though one can argue that we are bringing within the Rule interests that so far have been outside.

How long should the period be? In England and in Ontario it is 21 years for options in gross and in Ontario it is 40 years for easements and profits. We think it is desirable to have a single period, unless there are compelling reasons for different periods, and we are aware of none.

As to the length of the period, any number of years is, in a sense, arbitrary. It should be long enough to embrace commercial transactions without violating the spirit of the Rule. We recommend a period of 80 years. Under present and foreseeable conditions this period will accommodate the needs of those engaged in commercial transactions and will approximate the time available under a royal lives clause.

Sometimes a will or settlement contains a clause permitting a specific person (and by implication his personal representative) to buy property included in the will or settlement. Sometimes this is in the form of a right of first refusal (see e.g., Re Seldon (1970), 10 D.L.R. (3d) 306, (Ont. C.A.)). Assuming the provision is void under the Rule at common law, then do the general recommendations made earlier apply or does the recommendation now under discussion and applicable to commercial transactions apply? On balance we think it should be the former and the following recommendation so provides.

RECOMMENDATION #20

(1) IN THE CASE OF A CONTRACT WHEREBY FOR VALUABLE CONSIDERATION AN INTEREST IN

REAL OR PERSONAL PROPERTY MAY BE ACQUIRED AT A FUTURE TIME, THE PERPETUITY PERIOD IS 80 YEARS FROM THE DATE OF THE CONTRACT, AND IF THE CONTRACT PROVIDES FOR THE ACQUISITION OF SUCH AN INTEREST AT A TIME GREATER THAN 80 YEARS, THEN THE INTEREST MAY BE ACQUIRED UP TO 80 YEARS AND NOT THEREAFTER.

(2) *IN PARTICULAR AND NOT SO AS TO RESTRICT THE GENERALITY OF THE FOREGOING THIS PROVISION APPLIES TO ALL CONTRACTS RELATING TO A FUTURE SALE OR LEASE, TO OPTIONS IN GROSS, RIGHTS OF PRE-EMPTION OR FIRST REFUSAL, AND TO FUTURE PROFITS A PRENDRE, EASEMENTS AND RESTRICTIVE COVENANTS.*

(3) *TO REMOVE DOUBT THIS PROVISION DOES NOT APPLY TO ANY PROVISION IN A WILL OR INTER VIVOS TRUST.*

[Note: in terms of drafting, one might compare Recommendation #20(1) with Ontario's s. 14 which has a similar object though confined to easements and profits.]

XV

POSSIBILITIES OF REVERTER, RIGHTS OF ENTRY FOR CONDITION BROKEN AND RESULTING TRUSTS

Where a determinable fee has been granted, the interest of the grantor is called a possibility of reverter. Example: grant of Blackacre for so long as it is used for a school. Most of the cases hold that the possibility of reverter is a vested interest so the Rule does not apply to it. The consequence is that if Blackacre is used for a school for 100 or 200 years and then is no longer so used, the possibility of reverter is realized and the representative of the grantor takes the land.

By a change in wording the grant can become subject to the Rule. Example: grant of Blackacre, but if it should cease to be used as a school then the grantor or his representatives may enter and repossess Blackacre. This grant does not create a determinable fee; it gives a fee defeasible on breach of a condition subsequent. The grantor has a "right of entry for condition broken". This right of entry is within the Rule and the consequence at common law is that the grantee takes Blackacre free of the right of entry; he has a fee absolute. This distinction has been accepted in a modern Ontario case, Re Tilbury West Public School Board and Hastie (1966), 55 D.L.R. (2d) 407.

We assume that the distinction between a determinable fee and a right of entry applies in Alberta though we know of no case on the subject; and indeed there may be doubt whether either type of interest is registerable under the Land Titles Act. In any case we think it advisable to deal with them. Morris and Leach (209-218) think that both types of interest should be treated in the same way. The next question is whether they should both be within the Rule or outside it. Both England (s. 12) and Ontario (s. 15) have brought determinable fees within the Rule. On balance we agree with this policy. The determinable fee, like a right of entry, creates a cloud on the title and it may remain indefinitely in favour of some one who can be identified only with difficulty.

Analogous to the determinable fee is the resulting trust. Income may be given to a corporation until the happening of a specified event. If the event occurs than there is a resulting trust in favour of the settlor or his estate. This event may occur after the perpetuity period. The Rule does not apply, so the resulting trust, like the

right of reverter in a determinable fee, may come into effect at a distant date. Both the English and Ontario Acts bring resulting trusts within the Rule.

Once it is decided that the Rule applies to these interests they should not be void ab initio, but should be valid during the perpetuity period. In other words, the possibility of reverter or resulting trust is effective throughout the perpetuity period but not after.

A subsidiary point is this: a right of reverter and the analogous resulting trust in the case of personal property are not strictly speaking dispositions, and even a right of entry may not be. They should all be treated as dispositions. The English Act (s. 12(2)) declares them so to be. We think that this can properly be covered in the definition of "disposition", and that Ontario's definition of "limitation" is suitable.

The last question is as to the length of the period. The English Act does not specify any special period so the general provision applies. Ontario has an intricate provision setting 21 years as the period but where there are relevant lives, the maximum period consists of those lives plus 21 years or 40 years, whichever is the lesser. We prefer a period of years without reference to lives in being. How long should it be?

We have had difficulty in fixing the period. At one time we were inclined to make it 80 years, the same as for commercial transactions in Recommendation #20. However we think a shorter period advisable, largely because of the difficulty in tracing the person entitled to the benefit of

the right of reverter or right of entry or resulting trust and so we recommend a period of 40 years which is the maximum period under Ontario's more complicated provision.

A special problem arises where a disposition of the type now under consideration is for a charitable purpose. If the gift became absolute at the end of the period then the donee could retain his interest in the property without applying it to the charitable purpose. This would be improper so we recommend below that in such a case the subject matter of the disposition should be applied for charitable purposes on the basis of cy-près.

(Cy-près means "near". Here we use the word in a different context from that of age-reduction and "general cy-près". Where a testator makes a gift to a specific charity and that gift cannot take effect, then equity determines whether the testator had a general charitable intent. If so then equity will direct a scheme disposing of the property for a charitable purpose near (cy-près) to that of the original donee. Our Appellate Division did this in Re Burns (1961), 25 D.L.R. 427.)

Another minor point, and also related to charitable gifts, has to do with the common law rule that a gift to charity followed by a gift over to another charity is not affected by the Rule against Perpetuities. To remove doubt, it should be made clear that the present provision does not affect the common law rule just described.

The following recommendation is intended to embody the above views.

RECOMMENDATION #21

(1) IN THE CASE OF,

(a) A POSSIBILITY OF REVERTER ON THE DETERMINATION OF A DETERMINABLE FEE SIMPLE; OR

(b) A POSSIBILITY OF A RESULTING TRUST ON THE DETERMINATION OF ANY DETERMINABLE INTEREST IN REAL OR PERSONAL PROPERTY,

THE RULE AGAINST PERPETUITIES AS MODIFIED BY THIS ACT APPLIES IN RELATION TO THE PROVISION CAUSING THE INTEREST TO BE DETERMINABLE AS IT WOULD APPLY IF THAT PROVISION WERE EXPRESSED IN THE FORM OF A CONDITION SUBSEQUENT GIVING RISE ON ITS BREACH TO A RIGHT OF RE-ENTRY OR AN EQUIVALENT RIGHT IN THE CASE OF PERSONAL PROPERTY, AND, WHERE THE EVENT THAT DETERMINES THE DETERMINABLE INTEREST DOES NOT OCCUR WITHIN THE PERPETUITY PERIOD, THE PROVISION SHALL BE TREATED AS VOID FOR REMOTENESS AND THE DETERMINABLE INTEREST BECOMES AN ABSOLUTE INTEREST.

(2) THE PERPETUITY PERIOD FOR THE PURPOSE OF A POSSIBILITY OF REVERTER OR A POSSIBILITY OF A RESULTING TRUST OR OF A RIGHT OF RE-ENTRY ON BREACH OF A CONDITION SUBSEQUENT OR EQUIVALENT RIGHT IN PERSONAL PROPERTY SHALL BE 40 YEARS.

(3) SUBSECTION (1) SHALL NOT APPLY WHERE THE EVENT, WHICH DETERMINES THE PRIOR INTEREST, OR ON WHICH THE PRIOR INTEREST COULD BE DETERMINED, IS THE CESSATION OF A CHARITABLE PURPOSE BUT IN SUCH A CASE IF THE CESSATION OF THE CHARITABLE PURPOSE TAKES PLACE AFTER THE EXPIRATION OF THE PERPETUITY PERIOD THE PROPERTY SHALL BE TREATED AS IF IT WERE THE SUBJECT OF A CHARITABLE TRUST TO WHICH THE *CY-PRÈS* DOCTRINE APPLIES.

(4) THIS SECTION DOES NOT APPLY, NOR DOES THE RULE AGAINST PERPETUITIES APPLY, TO A GIFT OVER FROM ONE CHARITY TO ANOTHER.

XVI

NON-CHARITABLE PURPOSE TRUSTS

A trust must normally have a person as beneficiary or must be within the category of a charitable trust. However a settlor or testator may attempt to create a trust for a purpose which is not charitable and which is for some purpose other than the benefit of any person. Generally these are void. However exceptions have been made so that certain "non-charitable purpose trusts" are valid though not enforceable. They are: trusts for animals, tombs, masses and miscellaneous. The last category is required because of a decision upholding a trust to promote fox hunting. The purpose must be specific. The tendency is to restrict the categories, and if the trust is outside the recognized types, the court will not treat it as a valid power of appointment (Re Endacott, [1959] 3 All E.R. 562).

The disposition may purport to establish the trust for an indefinite period. Strictly speaking this does not violate the Rule against Perpetuities but by analogy it is void if it may last longer than the perpetuity period. As Hanbury says, (Hanbury, Equity, 9 Ed. 197) the Rule is one against perpetual duration of a trust for non-charitable purposes.

In England the Committee had recommended that perpetual trusts for tombs be permitted with a maximum capital of one thousand pounds. The Act however did not adopt the recommendation, and s. 15(4) provides that the Act does not affect the Rule which renders void for remoteness "certain dispositions of property for purposes other than the benefit of any person."

Ontario adopted the position taken by the Restatement on Trusts (and by Morris and Leach) which says that these specific non-charitable purpose trusts in effect give to the trustee a power to appoint the property for the designated purpose. Ontario's s. 16 embodies this view. It renders the purpose trust valid for 21 years and then provides for disposition of the corpus at the end of that period. It contains a clause which enables the court to pronounce it void if the court is of the opinion that so to do would approximate the testator's intention more closely than maintaining it for 21 years would do. The following recommendation is Ontario's s. 16.

RECOMMENDATION #22

(1) *A TRUST FOR A SPECIFIC NON-CHARITABLE PURPOSE THAT CREATES NO ENFORCEABLE EQUITABLE INTEREST IN A SPECIFIC PERSON SHALL BE CONSTRUED AS A POWER TO APPOINT THE INCOME OR THE CAPITAL, AS THE CASE MAY BE, AND, UNLESS THE TRUST IS CREATED FOR AN ILLEGAL PURPOSE OR A PURPOSE CONTRARY TO PUBLIC POLICY THE TRUST IS VALID SO LONG AS AND TO THE EXTENT THAT IT IS EXERCISED EITHER BY THE ORIGINAL TRUSTEE OR HIS SUCCESSOR, WITHIN A PERIOD OF TWENTY-ONE YEARS, NOTWITHSTANDING THAT THE DISPOSITION CREATING THE TRUST MANIFESTED AN INTENTION, EITHER EXPRESSLY OR BY IMPLICATION, THAT THE TRUST SHOULD OR MIGHT CONTINUE FOR A PERIOD IN EXCESS OF THAT PERIOD, BUT, IN THE CASE OF SUCH A TRUST THAT IS EXPRESSED TO BE OF PERPETUAL DURATION, THE COURT MAY DECLARE THE DISPOSITION TO BE VOID IF THE COURT IS OF OPINION THAT BY SO DOING THE RESULT WOULD MORE CLOSELY APPROXIMATE THE INTENTION OF THE CREATOR OF THE TRUST THAN THE PERIOD OF VALIDITY PROVIDED BY THIS SECTION.*

(2) *TO THE EXTENT THAT THE INCOME OR CAPITAL OF A TRUST FOR A SPECIFIC NON-CHARITABLE PURPOSE IS NOT FULLY EXPENDED WITHIN A PERIOD OF*

TWENTY-ONE YEARS, OR WITHIN ANY ANNUAL OR OTHER RECURRING PERIOD WITHIN WHICH THE DISPOSITION CREATING THE TRUST PROVIDED FOR THE EXPENDITURE OF ALL OR A SPECIFIED PORTION OF THE INCOME OR THE CAPITAL, THE PERSON OR PERSONS OR HIS OR THEIR SUCCESSORS, WHO WOULD HAVE BEEN ENTITLED TO THE PROPERTY COMPRISED IN THE TRUST IF THE TRUST HAD BEEN INVALID FROM THE TIME OF ITS CREATION, ARE ENTITLED TO SUCH UNEXPENDED INCOME OR CAPITAL.

We conclude this part with a comment on efforts by testators to ensure maintenance of their individual graves or tombstones. We understand the position to be this:

(1) A trust for this purpose, while valid, is not charitable so prima facie cannot subsist beyond the perpetuity period. Under Recommendation #22 this is 21 years.

(2) If the draftsman employs the language of Re Chardon, [1928], c. 464 (gift of income to cemetery company for so long as the company should maintain the tomb) he can succeed in preserving the trust at common law. Under our Recommendation #21 the gift of income persists to the end of the perpetuity period unless there is failure to maintain the tomb during the period. The gift of the income to the cemetery then becomes absolute and as commentators have said, this scarcely is what the testator intended.

(3) If the draftsman makes the gift, e.g., of a sum of money, to a charity on condition

> that the charity maintain the tomb, with a gift over to another charity on breach of the condition, neither the original gift nor the gift over is within the Rule, so the original donee has a strong inducement to maintain the tomb indefinitely (Re Tyler, [1891], 3 Ch. 252). Morris and Leach (pp. 192-194) have criticized this exception to the Rule.

Looking at the law apart from statute and also as it will be affected by our recommendations, one is tempted to say that neither is completely satisfactory. However we think that on balance our recommendations are an improvement and we are not prepared to make a recommendation like that of the English Committee (#51, 53) and which Parliament did not enact, namely to permit a trust in perpetuity up to a specified amount to maintain a grave, tomb or monument.

XVII

THE RULE IN WHITBY v. MITCHELL

This rule is otherwise known as the "old" Rule against Perpetuities and the rule against double possibilities. Example: Grant of Blackacre to A for life, then to his first-born son for life and then in fee simple to that son's first-born son. The purported devise of the fee simple is void. The Rule applies only to dispositions of real property. There has long been a consensus that this Rule is no longer necessary. The modern Rule inevitably invalidates such a gift. The gift in the example above could be rendered valid under the modern Rule by providing that A's grandson must

be born within 21 years of A's death. However the rule in Whitby v. Mitchell even then makes the remainder bad. British Columbia abolished this rule long ago, England did so in its Law of Property Act, 1925, s. 161, and Ontario enacted the English provision in its Perpetuities Act, s. 17. The following recommendation is the same.

RECOMMENDATION #23

> *THE RULE OF LAW PROHIBITING THE DISPOSITION, AFTER A LIFE INTEREST TO AN UNBORN PERSON, OF AN INTEREST IN LAND TO THE UNBORN CHILD OR OTHER ISSUE OF AN UNBORN PERSON IS HEREBY ABOLISHED, BUT WITHOUT AFFECTING ANY OTHER RULE RELATING TO PERPETUITIES.*

XVIII

EXEMPTION OF PENSION TRUSTS

In 1954 the Conference of Commissioners on Uniformity of Legislation in Canada adopted a Uniform Act to provide that the law relating to perpetuities and accumulations does not and never did apply to pensions and retirement funds for employees. Alberta enacted this provision in 1955 and it now appears as s. 43 of the Trustee Act, R.S.A. 1970, c. 373. Ontario's Perpetuities Act has the same provision (s. 18) save that it omits any reference to accumulations for the reason that a separate Accumulations Act covers the subject ((1966), c. 2, s. 2).

The Perpetuities Acts of Western Australia and Victoria have extended their provisions to include pension funds for the self-employed. We do not know whether there are many such plans in Alberta but think it best to include

them. With this change, the following recommendation provides in effect for removal of s. 43 of the Trustees Act to the Perpetuities Act. If this is done s. 43 must of course be repealed.

In England pension schemes are within the Rule: Re Meadows & Co., [1971] 1 All E.R. 239.

RECOMMENDATION #24

> *THE RULES OF LAW AND STATUTORY ENACTMENTS RELATING TO PERPETUITIES AND TO ACCUMULATIONS DO NOT APPLY AND SHALL BE DEEMED NEVER TO HAVE APPLIED TO THE TRUSTS OF A PLAN, TRUST OR FUND ESTABLISHED FOR THE PURPOSE OF PROVIDING PENSIONS, RETIREMENT ALLOWANCES, ANNUITIES, OR SICKNESS, DEATH OR OTHER BENEFITS TO EMPLOYEES OR PERSONS NOT BEING EMPLOYEES ENGAGED IN ANY LAWFUL CALLING OR TO THEIR WIDOWS, DEPENDANTS OR OTHER BENEFICIARIES.*

Whether the Perpetuities Act is the best place for this provision might be debated. It might be better to put Recommendation #24 in the Trustee Act as a replacement of the present s. 43; or alternately to remove s. 43 (as re-enacted by Recommendation #24) and s. 44 (which deals with designation of beneficiaries of pension plans), from the Trustee Act, and put them in the Pension Benefits Act, R.S.A. 1970, c. 272.

XIX

APPLICATION OF THE ACT TO THE CROWN

There is uncertainty as to whether the Rule applies to the Crown. In Cooper v. Stuart (1889), 14 A.C. 286,

the Governor of New South Wales in 1823 had made a grant of 1400 acres, reserving to the Crown, inter alia, any quantity of land not exceeding 10 acres as may be required for public purposes. In 1882 the Governor accordingly took 10 acres for a public park. The owner of the land contended that this taking was in violation of the Rule. The Privy Council declined to decide whether the Rule applied to the Crown in England. Even if it did, conditions in New South Wales in 1823 were such that the Government should not be held incapable of granting land subject to the right to resume such parts as may be necessary for the use of an increased population.

The point was considered by counsel in Att. Gen. of Alberta v. Huggard Assets (1953), 8 W.W.R. (N.S.) 562. The Crown in right of Canada had in 1913 granted certain lands including petroleum and natural gas rights subject to such royalty on those rights from time to time prescribed by regulation, with provision that the grant should be void on default in payment of royalties. At the time, no royalty was exacted but after the transfer of natural resources to the Province in 1930 the Province imposed royalties. The issue was not as to the right to invoke the forfeiture clause but the right to impose the royalty. After a notable difference of opinion in the Alberta courts and the Supreme Court the Privy Council held the royalty to be validly imposed. Nowhere in the judgments is there a direct discussion of the Rule. However it is proper to ask, should the Rule apply in a case of this kind to prevent the Crown from invoking the forfeiture clause on failure to pay royalties, even if the perpetuity period has expired? We think not. An exception should be made.

The English Act simply binds the Crown (s. 15(7)). The Ontario Act is silent. Thus the Interpretation Act

R.S.O. 1960, c. 191, s. 11, applies, and the Crown is not bound. The New Zealand and Victoria Acts provide that the Crown is bound except when the disposition is by the Crown. They embody the principle we think correct and we recommend accordingly.

RECOMMENDATION #25

THIS ACT AND THE RULE AGAINST PERPETUITIES SHALL BIND THE CROWN EXCEPT IN RESPECT OF DISPOSITIONS OF PROPERTY MADE BY THE CROWN.

XX

ACCUMULATIONS

Under the common law a testator or settlor could validly direct an accumulation of income subject only to the Rule against Perpetuities. Peter Thellusson, who died in 1797, directed an accumulation of income of the residue of a large estate, the accumulation to continue during the lives of all his sons, grandsons, and great-grandsons living at his death. On the death of the survivor the residue including the accumulations was to go to the testator's male descendants then alive. The House of Lords upheld the disposition in Thellusson v. Woodford (1805), 11 Vesey 112 (32 E.R. 1030). The estimates as to the amount of the fortune when the date of distribution should arrive were very high so Parliament in 1800 passed the Accumulations Act. It restricted accumulations to one of the following periods:

(a) the life of the grantor or settlor; or

(b) a term of twenty-one years from the death of the grantor, settlor or testator; or

(c) the duration of the minority or respective minorities of any person or persons living or en ventre sa mere at the death of the grantor, settlor or testator; or

(d) the duration of the minority or respective minorities only of any person or persons who under the limitations of the instrument directing the accumulations would, for the time being, if of full age, be entitled to the income directed to be accumulated.

A large number of cases has established that:

(a) the direction to accumulate is not void ab initio but is effective during the period permitted by the Act;

(b) only one of the statutory periods can be used, and it is the one most appropriate to the circumstances. In most of the cases the 21-year period has been applied;

(c) although the Act speaks of "directing" an accumulation and of a "direction" to accumulate, the direction need not be specific. It can be implied, as in Re Hammond, [1935] S.C.R. 550;

(d) the "released" income from a specific trust or fund falls into residue while the "released" income from a gift of residue goes as on intestacy.

We shall discuss this point later.

The original Act has been replaced by ss. 164-166 of the Law of Property Act 1925. The 1964 Perpetuities Act (s. 13) amends it by adding two more periods, which are applicable to inter vivos settlements:

(a) a term of 21 years from the making of the disposition, and

(b) the duration of the minority or respective minorities of any person or persons in being at that date.

In Canada, British Columbia and Ontario have long had statutes based on the original English Act while New Brunswick has the same provisions in its Property Act, R.S.N.B. 1952, c. 177, ss. 1 and 2. After England amended its provisions in 1964, Ontario (Accumulations Amendment Act 1966, c. 2) and British Columbia (Accumulations Act 1967, c. 2) adopted the English changes. Then in 1968 the Conference of Commissioners on Uniformity of Legislation adopted a Uniform Act based on British Columbia's. We know of no province that has enacted it to date.

Prince Edward Island's Perpetuities Act, R.S.P.E.I. 1951, c. 108, allows lives in being plus sixty years not only as the perpetuity period but also as the period in which income is allowed to accumulate.

Nova Scotia took the English law as of 1758 and Newfoundland as of 1832 so the English Accumulations Act is not proprio vigore in force in Nova Scotia though it may be in Newfoundland.

As to the prairie provinces, the English law of 15 July 1870 was put in force so far as applicable to the respective provinces. In each province there has been at least one case holding or assuming the English Accumulations Act to be in force:

Alberta: Re Burns (1961), 25 D.L.R. 427 (App. Div.)

Saskatchewan: Re Fossum (1960), 32 W.W.R. 372.

Manitoba: Re Aikins (1961), 35 W.W.R. 143.

In Re Burns, Porter J.A. wrote a careful and persuasive judgment in which he examined in detail conditions in the Territories (later Alberta and Saskatchewan) in the period following 1870 and concluded that the Act was not applicable. The majority applied the Act, Ford C.J.A. stating that the point had not been argued.

Sometimes the beneficiary can demonstrate that he has a vested interest in the corpus and that no one else has an interest in the income so that he can at any time demand payment or delivery of the corpus to him and so put an end to the accumulation quite apart from the statute. This is the rule of Saunders v. Vautier. The House of Lords in Wharton v. Masterman. [1895] A.C. 186 applied it in favour of a charity in a case where the statutory period had expired and the next of kin claimed the "released" income. However in the later case of Berry v. Geen, [1938] A.C. 575 the House of Lords distinguished Wharton on the ground that certain annuitants had an interest in the income, because any deficiency in the annuities could be made up from surplus income of any other year. From a practical standpoint the interest of the annuitants in the income was almost as vestigial as in Wharton. Yet the House of Lords used it to distinguish Wharton and to release the income to the next of kin. In Re Burns a daughter-in-law of the testator had a small interest in very substantial income and it could have been

secured by setting aside a comparatively small amount of capital. However the Appellate Division applied Berry. The "released" income went to the next of kin save for the share that came from the portion of capital ultimately destined to five charitable objects; the court directed that share to go to charity on cy-près principles.

In cases like Berry and Burns the next of kin succeed in persuading the court that some third party has an interest in the income. The purpose of this ostensible solicitude for the third party is to block the charity in its effort to invoke Saunders v. Vautier. The Accumulation Act thus comes into play, and the next of kin receive the "released" income.

Another aspect of Berry is that the House of Lords took the position that the next of kin always have a potential interest in the income from residue, because they will receive it once the Act is applied. On this reasoning, the person attempting to invoke Saunders v. Vautier can never succeed. Indeed in Re Robertson, [1939] 4 D.L.R. 511 (Ont.) the court doubted that Wharton is still good law.

Where the statutory period has expired, then future income goes to "such person as would have been entitled thereto if such accumulation had not been so directed". Who is that person? The will might specify him as in Re Fasken, [1953] 2 S.C.R. 10, where the testator specified his next of kin at the time of release of income, though there was an issue as to which blood relation filled that description. In most cases the will does not specify. One might think that the released income should go to the person for

whose benefit the accumulation had been directed, at least where he is ascertainable. It is clear however that it does not. The testator did not intend that person to receive the income until later in the form of an addition to capital. Thus the courts sometimes emphasize that the awarding to him of the released income would defeat the testator's intent. One is tempted to reply that payment of the released income to some one else defeats it even more.

The following rules cover most cases:

(1) Where the income is from a specific fund or trust, it falls into residue.

(2) Where it is from residue, it goes as on intestacy.

Re Hammond, [1935] S.C.R. 440 is the leading Canadian case on the second rule. Since that decision however there have been a number of other cases from Ontario that show there is often a genuine question as to the disposition of the released income. To an extent these issues have to do with construction of the will, but the point is that the scheme of the Act almost invites a contest. The result is usually a series of questions to the court and three, four, five or more separate interests are represented on the hearing.

In most of the cases the next of kin have succeeded. For present purposes there is no need to describe the facts or reasoning in detail. We cite the Ontario decisions to show that problems are not infrequent.

Re Robertson, [1939] 4 D.L.R. 511.

Re Orford, [1944] 1 D.L.R. 277.

Re Davis, [1946] 2 D.L.R. (2d) 281.

Re Wood (1962), 28 D.L.R. (2d) 583.

Re Owens (1968), 66 D.L.R. (2d) 328.

Re Major (1970), 10 D.L.R. (3d) 107.

Cases in which the residuary beneficiary succeeded are:

Re Herman (1961), 25 D.L.R. (2d) 93 (C.A.).

Re Benor (1963), 36 D.L.R. (2d) 122.

In some of the cases the amount of the released income was small. In others it was large. Assuming there had been no Accumulations Act, how much longer would the accumulation have lasted? As far as we can tell from the reported judgments, the answer is: usually for the balance of the life of an elderly or middle-aged person. As best we can judge no great harm would befall the economic or social fabric were the accumulation to continue pursuant to the will; and the testator's intention would have been fulfilled.

This discussion has centred on Ontario because most of the Canadian cases applying the Act are from that province. It is our opinion that the judgment of our Appellate Division

in Re Burns (1961), 25 D.L.R. 427 supports the case against the Act.

The English Law Reform Committee recommended preservation of the Act with minor changes. However, Western Australia in passing an Act based on the English report, departed from the recommendation respecting accumulations and specifically permitted them as long as they remained within the Rule (The Law Reform (Property, Perpetuities and Succession) Act 1962, s. 17). New Zealand (Perpetuities Act, 1964, s. 21) and Victoria (Perpetuities and Accumulations Act, 1968, s. 19) have followed Western Australia.

The draftsman of the Western Australian Act, Professor Allen, gave the following reasons for the rejection of the Accumulations Act:

(1) it has always been hard to apply,

(2) taxation will prevent accumulations of the magnitude feared when the Act was passed,

(3) the Rule which regulates "dead hand" control over capital is adequate for income; no separate rule is needed (Allen, The Rule Against Perpetuities Restated (1963-64) 6 U. of W.A.L.R. 27 at 70-72).

Morris and Leach (pp. 303-306) emphatically favour repeal: the Act was passed in a "panic" and the panic was based on an unfounded fear; it is loosely drafted and one of the most difficult statutes to apply; it frustrates reasonable dispositions and is a hindrance to conveyancers; repeal would be attended by no untoward consequences.

The discussion above has indicated our own objections to the Act on the basis of the Canadian experience. To restate them:

(1) the Act is hard to apply and productive of litigation,

(2) the Act defeats the donor's intention,

(3) there is no countervailing benefit; the accumulation of income is still controlled by the Rule aginst Perpetuities and such accumulation will not produce inordinately large estates in future nor harm the economy or society during the period of accumulation.

We recommend that the Accumulations Act no longer be in force in Alberta. The recommendation can be carried out by a provision which declares the Accumulations Act no longer to apply in Alberta, followed by another which specifically says that an accumulation is valid where the disposition of the accumulated income is valid; in other words the accumulation is valid provided the disposition is within the Rule. It is desirable specifically to provide that the new provision does not affect the rule in Saunders v. Vautier (which, as already explained, permits the beneficiaries in certain circumstances to terminate accumulations) and also that the new provision does not affect any statutory power to pay maintenance or support out of accumulations. Provisions of this kind appear in the Western Australia, New Zealand and Victoria Acts.

One important question: should this recommendation be retroactive? It would clearly be unwise and indeed

improper to attempt to affect dispositions where the allowable period has expired so as to take away the released income from the person in whom it has vested pursuant to the Accumulations Act. This is so even if judgment has not been given; and a fortiori where it has, as in Re Burns. One could go to the other extreme and make the "cease to apply" provision applicable only to instruments that take effect after it comes into force (along the lines of our general recommendation in the next Part of this report). There is however an intermediate course: the change can be made to apply to instruments that have taken effect (e.g., the will of a testator who died in 1960) as long as the period of accumulation which Thellusson's Act allows has not expired. We think this is appropriate. It will not divest anyone of "released" income to which he has become entitled. It may put an end to the hope of a residuary beneficiary or next of kin that in the fullness of time income from an existing disposition will be "released" for his benefit. However we see nothing confiscatory or unfair in terminating his hope. The purpose of our recommendation is remedial and it should come into effect immediately.

RECOMMENDATION #26

(1) *THE ACT OF THE PARLIAMENT OF GREAT BRITAIN, 39 AND 40 GEO. III (KNOWN AS THE ACCUMULATIONS ACT, 1800), CEASES TO APPLY IN THE PROVINCE.*

(2) *WHERE PROPERTY IS SETTLED OR DISPOSED OF IN SUCH MANNER THAT THE INCOME THEREOF MAY OR SHALL BE ACCUMULATED WHOLLY OR IN PART, THE POWER OR DIRECTION TO ACCUMULATE THAT INCOME IS VALID IF THE DISPOSITION OF THE ACCUMULATED INCOME IS OR MAY BE VALID BUT NOT OTHERWISE.*

(3) NOTHING IN THIS SECTION AFFECTS THE RIGHT OF ANY PERSON OR PERSONS TO TERMINATE AN ACCUMULATION THAT IS FOR HIS OR THEIR BENEFIT OR ANY JURISDICTION OR POWER OF THE COURT TO DIRECT PAYMENTS FROM ACCUMULATIONS PURSUANT TO ANY STATUTE.

(4) THIS SECTION APPLIES TO INSTRUMENTS TAKING EFFECT BEFORE OR AFTER THIS ACT COMES INTO FORCE EXCEPT WHERE THE PERIOD OF ACCUMULATION PERMITTED BY THE ACCUMULATIONS ACT, 1800 HAS EXPIRED BEFORE THIS ACT COMES INTO FORCE.

XXI

PROSPECTIVE OPERATION

One might be tempted to provide that a Statute of this kind should operate retrospectively, since its purpose is to remove unfairness from the common law. However we think difficulties could arise if the Act were to be made to apply to dispositions already made.

England's s. 15(5) and Ontario's s. 19 provide that the Act shall apply to instruments taking effect after the Act comes into force.

The Ontario Act applies to an instrument exercising a power of appointment after the Act has come into force even though the instrument creating the power was in existence before. The English Act does not. We prefer the Ontario provision, which follows the recommendation of the English Law Reform Committee.

Both Acts make an exception in connection with administrative powers and our recommendation 16(2) does the same.

Ontario makes a further exception in connection with pension trusts and our recommendation 24 is similar.

RECOMMENDATION #27

> *EXCEPT AS PROVIDED IN [RECOMMENDATION 16(2) AND RECOMMENDATION #24 AND RECOMMENDATION #26] THIS ACT APPLIES ONLY TO INSTRUMENTS TAKING EFFECT AFTER THIS ACT COMES INTO FORCE, AND SUCH INSTRUMENTS INCLUDE AN INSTRUMENT MADE IN THE EXERCISE OF A GENERAL OR SPECIAL POWER OF APPOINTMENT AFTER THIS ACT COMES INTO FORCE EVEN THOUGH THE INSTRUMENT CREATING THE POWER TOOK EFFECT BEFORE THIS ACT COMES INTO FORCE.*

XXII

DEFINITIONS

We have used throughout the term "disposition" as England does whereas Ontario uses "limitation". England's definition of "disposition" and Ontario's definition of "limitation" are each acceptable. England specifically includes the conferring of a power of appointment while Ontario's does not specifically include them but covers them in other words. We think the definition of "disposition" should make specific reference to a right of reverter or resulting trust which is not literally a disposition. England deals with this in s. 12(2) but we think it better to do so in the definition of "disposition" and we do not want to make any reference to "exception or reservation" which England does in s. 12(2). Such a reference might raise the possibility that every exception and reservation appearing on a title under the Land Titles Act is subject to the Rule and no such possibility should be raised.

The next term is "power of appointment". Ontario does not include it while England does in s. 15(2). This definition is suitable.

The other terms which we define below require no comment here.

RECOMMENDATION #28

(1) IN THIS ACT

(a) "COURT" MEANS THE SUPREME COURT OF ALBERTA,

(b) "DISPOSITION" INCLUDES THE CONFERRING OF A POWER OF APPOINTMENT AND ANY PROVISION WHEREBY ANY INTEREST IN PROPERTY OR ANY RIGHT, POWER OR AUTHORITY OVER PROPERTY IS DISPOSED OF, CREATED OR CONFERRED AND ALSO INCLUDES A POSSIBILITY OF REVERTER OR RESULTING TRUST, AND A RIGHT OF RE-ENTRY ON BREACH OF A CONDITION SUBSEQUENT,

(c) "IN BEING" MEANS LIVING OR EN VENTRE SA MERE,

(d) "PERPETUITY PERIOD" MEANS THE PERIOD WITHIN WHICH AT COMMON LAW AS MODIFIED BY THIS ACT AN INTEREST MUST VEST,

(e) "POWER OF APPOINTMENT" INCLUDES ANY DISCRETIONARY POWER TO TRANSFER A BENEFICIAL INTEREST IN PROPERTY WITHOUT THE FURNISHING OF VALUABLE CONSIDERATION,

(f) "WILL" INCLUDES CODICIL

(2) FOR THE PURPOSES OF THIS ACT A DISPOSITION CONTAINED IN A WILL SHALL BE DEEMED TO BE MADE AT THE DEATH OF THE TESTATOR.

Subsection (2) is not strictly necessary for it represents the existing law. However we think it wise to make this clear on the face of the Act to eliminate any argument.

XXIII

ACKNOWLEDGEMENTS

(1) To Professor A. J. McClean, now Dean of the Faculty of Law, University of British Columbia, for the thorough and helpful research paper he prepared for the Institute and for his subsequent advice.

(2) To Professor A. R. Thompson of the Faculty of Law, University of British Columbia, and a former member of the Board of the Institute, for his valuable advice, particularly in connection with commercial transactions.

(3) To Professor Donovan Waters of the Faculty of Law, McGill University, for his assistance in connection with ss. 32 and 33 of The Trustee Act.

(4) To Allan Leal, Q.C., Chairman of the Ontario Law Reform Commission, for various helpful suggestions.

(5) To H. G. Field, Q.C., who was until early in 1971 both a member and Chairman of the Board of the Institute, for his contribution which continued to completion of the Report.

(6) To Professor D. Trevor Anderson, who until June 30, 1971, was a member of the Board of the Institute and now the Faculty of Law, University of Manitoba, for his contribution which has continued to completion of the Report.

The help we have received from the various texts and articles cited in the body of the Report is gratefully acknowledged.

W. F. Bowker
R. P. Fraser
G. H. L. Fridman
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by _____
CHAIRMAN

August 3, 1971

_____
DIRECTOR

Note: Dr. Kreisel is not a lawyer but as Vice-President (Academic) of the University of Alberta is a member of the Board of the Institute. He has no responsibility for nor did he participate in the preparation of this Report.

The acknowledgements (Part XXIII) refer to H. G. Field, Q.C., and Professor D. Trevor Anderson. We have not included their names with those of the members of the Board of the Institute because their appointments have expired. We wish to record that their participation throughout has been most active and that the report is as much the product of their efforts as of anyones'.

APPENDIX A

AN ACT TO MODIFY THE RULE AGAINST PERPETUITIES

Preamble

WHEREAS the rule of law known as the rule against perpetuities provides that no interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest,

AND WHEREAS it is desirable to amend the rule to remove certain hardships which arise in its application,

THEREFORE, Her Majesty, with the advice and consent of the Legislative Assembly of the Province of Alberta enacts as follows: (Rec. #2)

Interpretation

1.(1) In this Act

(a) "Court" means the Supreme Court of Alberta,

(b) "disposition" includes the conferring of a power of appointment and any provision whereby any interest in property or any right, power or authority over property is disposed of, created or conferred and also includes a possibility of reverter or resulting trust, and a right of re-entry on breach of a condition subsequent,

(c) "in being" means living or en ventre sa mere,

(d) "perpetuity period" means the period within which at common law as modified by this Act an interest must vest,

(e) "power of appointment" includes any discretionary power to transfer a beneficial interest in property without the furnishing of valuable consideration,

(f) "will" includes codicil.

(Rec. #28)

Rule to continue; saving

2. The rule of law known as the rule against perpetuities shall continue to have effect except as provided in this Act.

(Rec. #1)

Possibility of vesting beyond period

3. No disposition creating a contingent interest in real or personal property shall be treated as or declared to be void as violating the rule against perpetuities by reason only of the fact that there is a possibility of such interest vesting beyond the perpetuity period.

(Rec. #3)

Presumption of validity; "wait and see"

4.(1) Every contingent interest in real or personal property that is capable of vesting within or beyond the perpetuity period shall be presumptively valid until actual events establish,

(a) that the interest is incapable of vesting within the perpetuity period, in which case the interest, unless validated by the application of section 6 or 7 shall be treated as void or declared to be void; or

(b) that the interest is incapable of vesting beyond the perpetuity period, in which case the interest shall be treated as valid or declared to be valid.

(Rec. #4)

General power of appointment

(2) A disposition conferring a general power of appointment, which but for this section would be void on the ground that it might become exerciseable beyond the perpetuity period, shall be presumptively valid until such time, if any, as it becomes established by actual events that the power cannot be exercised within the perpetuity period.

(Rec. #5)

Special power of appointment

(3) A disposition conferring any power other than a general power of appointment, which apart from this section would have been void on the ground that it might be exercised beyond the perpetuity period,

shall be presumptively valid, and shall be declared or treated as void for remoteness only if, and so far as, the power is not fully exercised within the perpetuity period.

(Rec. #6)

Measurement of perpetuity period: lives in being

5.(1) Where section 4 applies to a disposition, the perpetuity period shall be determined as follows:

(a) where any persons falling within subsection (2) of this section are individuals in being and ascertainable at the commencement of the perpetuity period the duration of the period shall be determined by reference to their lives and no others, but so that the lives of any description of persons falling within paragraph (b) and (c) of subsection (2) shall be disregarded if the number of persons of that description is such as to render it impractical to ascertain the date of death of the survivor;

(b) where there are no lives under paragraph (a) the period shall be twenty-one years.

Idem

(2) The said persons are as follows:

(a) the person by whom the disposition is made;

(b) a person to whom or in whose favour the disposition was made, that is to say--

(i) in the case of a disposition to a class of persons, any member or potential member of the class;

(ii) in the case of an individual disposition to a person taking only on certain conditions being satisfied, any person as to whom some of the conditions are satisfied and the remainder may in time be satisfied;

(iii) in the case of a special power of appointment exercisable in favour of members of a class, any member or potential member of the class;

(iv) where, in the case of a special power of appointment exercisable in favour of one person only, the object of the power is not ascertained at the commencement of the period, any person as to whom some of the conditions are satisfied and the remainder may in time be satisfied;

(v) in the case of a power of appointment the person on whom the power is conferred.

(c) a person having a child or grandchild within sub-paragraphs (i) to (iv) of paragraph (b) above, or such a person any of whose children or grandchildren, if subsequently born, would by virtue of his or her descent, fall within those sub-paragraphs;

(d) any person who takes any prior interest in the property disposed of and any person on whose death a gift over takes effect;

(e) where a disposition is made in favour of any spouse of a person who is in being and ascertainable at the commencement of the period, or where an interest is created by reference to the death of the spouse of such a person, or by reference to the death of the survivor, the same spouse whether or not he or she was in being or ascertainable at the commencement of the period.

(Rec. #7)

Reduction of age

6.(1) where a disposition creates an interest in real or personal property by reference to the attainment by any person or persons of a specified age exceeding twenty-one years,

and actual events existing at the time the interest was created or at any subsequent time establish,

(a) that the interest, apart from this section, would be void as incapable of vesting within the perpetuity period, but

(b) that it would not be void if the specified age had been twenty-one years,

the disposition shall be read as if, instead of referring to the age specified, it had referred to the age nearest the age specified that would, if specified instead, have prevented the interest from being so void.

Idem

(2) To remove doubt, one age reduction to embrace all potential beneficiaries shall be made pursuant to subsection (1).

Idem

(3) Where in the case of any disposition different ages exceeding twenty-one years are specified in relation to different persons--

(a) the reference in paragraph (b) of subsection (1) above to the specified age shall be construed as a reference to all the specified ages, and

(b) that subsection shall operate to reduce each such age so far as is necessary to

save the disposition from being void for remoteness.

(Rec. #8)

Exclusion of class members to avoid remoteness

(4) Where the inclusion of any persons, being potential members of a class, or unborn persons who at birth would become potential members of the class, prevents subsections (1) and (3) from operating to save a disposition from being void for remoteness, those persons shall be excluded from the class for the purposes of the disposition and the said subsections shall have effect accordingly.

Idem

(5) Where, in the case of a disposition to which subsection (4) does not apply, it is apparent at the time the disposition is made, or becomes apparent at a subsequent time that, apart from this subsection the inclusion of any persons being potential members of a class or unborn persons who at birth would become members or potential members of the class, would cause the disposition to be treated as void for remoteness, such persons shall for all the purposes of the disposition be excluded from the class.

(Rec. #9)

General Cy-près

7.(1) Where it has become apparent that, apart from the provisions of this section, any disposition would be void solely on the ground that it infringes the rule against perpetuities, and where the general intention originally governing the disposition can be ascertained in accordance with the normal principles of interpretation of instruments and the rules of evidence, the disposition shall, if possible and as far as possible, be reformed so as to give effect to that general intention within the limits of the rule against perpetuities.

(2) Subsection (1) shall not apply where the disposition of the property has been settled by a valid compromise.

(Rec. #10)

Presumptions and evidence as to future parenthood

8.(1) Where, in any proceeding respecting the rule against perpetuities, a question arises that turns on the ability of a person to have a child at some future time, then,

(a) it shall be presumed,

(i) that a male is able to have a child at the age of fourteen years or over, but not under that age, and

x

(ii) that a female is able to have a child at the age of twelve years or over, but not under that age or over the age of fifty-five years; but,

(b) in the case of a living person, evidence may be given to show that he or she will or will not be able to have a child at the time in question.

Idem

(2) Subject to subsection (3), where any question is decided in relation to a disposition by treating a person as able or unable to have a child at a particular time, then he or she shall be so treated for the purpose of any question that may arise concerning the rule against perpetuities in relation to the same disposition notwithstanding that the evidence on which the finding of ability or inability to have a child at a particular time is proved by subsequent events to have been erroneous.

Idem

(3) Where a question is decided by treating a person as unable to have a child at a particular time and such person subsequently has a child or children at that time, the court may make such order as it sees fit to protect the right that such child or children would have had in the property concerned as if such question had not been decided and as if such child or children would, apart from

such decision, have been entitled to a right in the property not in itself invalid by the application of the rule against perpetuities as modified by this Act.

(4) The possibility that a person may at any time have a child by adoption or legitimation shall not be considered in deciding any questions that turns on the ability of a person to have a child at some particular time, but, if a person does subsequently have a child or children by such means, then subsection (3) applies to such child or children.

(Rec. #11)

Applications to determine validity; order of application of remedial provisions

9. An executor or a trustee of any property or any person interested under, or in the validity or invalidity of, an interest in such property may at any time apply for the opinion, advice or direction of the Court pursuant to section 38 of the Trustee Act with respect to the validity or invalidity with respect to the rule against perpetuities of an interest in that property and with respect to the application of any provision of this Act; and to remove doubt it is declared that the remedial provisions of this Act shall apply in the following order:

(a) capacity to have children; (section 8)

(b) wait and see; (section 4)

(c) age reduction; (section 6, subsections (1), (2) and (3))

(d) class splitting; (section 6, subsections (4) and (5))

(e) general cy-près. (section 7)

(Rec. #12)

Interim income; ss. 32 and 33 Trustee Act

10. Pending the treatment or declaration of a presumptively valid interest within the meaning of section 4 as valid or invalid, the income arising from such interest and not otherwise disposed of shall be treated as income arising from a valid contingent interest, and any uncertainty whether the disposition will ultimately prove to be void for remoteness shall be disregarded; and sections 32 and 33 of the Trustee Act shall apply.

(Rec. #13)

Saving

11.(1) A disposition that, if it stood alone, would be valid under the rule against perpetuities is not invalidated by reason only that it is preceded by one or more dispositions that are invalid under the rule against perpetuities, whether or not such disposition expressly or by implication takes effect after, or is subject to, or is ulterior to and dependent upon, any such invalid disposition.

(2) Where a prior interest is invalid under the rule against perpetuitites, any subsequent interest that, if it stood alone, would be valid shall not be prevented from being accelerated by reason only of the invalidity of the prior interest. Acceleration of expectant interests

(Rec. #14)

12.(1) For the purpose of the rule against perpetuities, a power of appointment shall be treated as a special power unless, Powers of appointment

(a) in the instrument creating the power it is expressed to be exercisable by one person only; and

(b) it could, at all times during its currency when that person is of full age and capacity, be exercised by him so as immediately to transfer to himself the whole of the interest governed by the power without the consent of any other person or compliance with any other condition, not being a formal condition relating only to the mode of exercise of the power.

(2) A power that satisfies the conditions of clauses (a) and (b) of subsection (1) shall, for the purpose of the rule against Idem

perpetuities, be treated as a general power.

Idem

(3) For the purpose of determining whether an appointment made under a power of appointment exercisable by will only is void for remoteness, the power shall be treated as a general power where it would have been so treated if exercisable by deed.

(Rec. #15)

Administrative powers of trustees

13. (1) The rule against perpetuities does not invalidate a power conferred on trustees or other persons to sell, lease, exchange or otherwise dispose of any property, or to do any other act in the administration (as opposed to the distribution) of any property including, where authorized, payment to trustees or other persons of reasonable remuneration for their services.

Application of ss. (1)

(2) Subsection (1) applies for the purpose of enabling a power to be exercised at any time after this Act comes into force, notwithstanding that the power is conferred by an instrument that took effect before that time.

(Rec. #16)

Avoidance of contractual rights in cases of remoteness

14. Where a disposition inter vivos would fall to be treated as void for remoteness if the rights and duties thereunder were capable of transmission to persons other than the original parties and had been so transmitted, it shall be treated as void as between the person by whom it was made and the person to whom or in whose favour it was made or any successor of his, and no remedy shall lie in contract or otherwise for giving effect to it or making restitution for its lack of effect.

(Rec. #17)

Options to acquire reversionary interests

15.(1) The rule against perpetuities does not apply to an option to acquire for valuable consideration an interest reversionary on the term of a lease, or renewal of a lease and whether the lease or renewal be of real or personal property

(a) if the option is exercisable only by the lessee or his successors in title; and

(b) if it ceases to be exercisable at or before the expiration of one year following the determination of the lease or renewal.

Application of ss. (1)

(2) Subsection (1) applies to an agreement for a lease as it applies to a lease, and "lessee" shall be construed accordingly.

Idem

(3) Subsection (1) applies to a right of first refusal or preemption as it applies to an option.

(Rec. #18)

Rule not applicable to options to renew

(4) The rule against perpetuities does not apply to options to renew a lease of real or personal property.

(Rec. #19)

Commercial transactions

16.(1) In the case of a contract whereby for valuable consideration an interest in real or personal property may be acquired at a future time, the perpetuity period is 80 years from the date of the contract, and if the contract provides for the acquisition of such an interest at a time greater than 80 years, then the interest may be acquired up to 80 years and not thereafter.

Idem

(2) In particular and not so as to restrict the generality of subsection (1), it applies to all contracts relating to a future sale or lease, to options in gross, rights of pre-emption or first refusal, and to future profits à prendre, easements and restrictive covenants.

(3) To remove doubt this section does not apply to any provision in a will or inter vivos trust. Wills & trusts excepted

(Rec. #20)

17.(1) In the case of, Possibilities of reverter and conditions subsequent

(a) a possibility of reverter on the determination of a determinable fee simple; or

(b) a possibility of a resulting trust on the determination of any determinable interest in real or personal property,

the rule against perpetuities as modified by this Act applies in relation to the provision causing the interest to be determinable as it would apply if that provision were expressed in the form of a condition subsequent giving rise on its breach to a right of re-entry or an equivalent right in the case of personal property, and, where the event that determines the determinable interest does not occur within the perpetuity period, the provision shall be treated as void for remoteness and the determinable interest becomes an absolute interest.

(2) The perpetuity period for the purpose of a possibility of reverter or a possibility of a resulting trust or of a right of Perpetuity period

re-entry on breach of a condition subsequent or equivalent right in personal property shall be 40 years.

Charitable purposes; cy-près

(3) Subsection (1) shall not apply where the event, which determines the prior interest, or on which the prior interest could be determined, is the cessation of a charitable purpose but in such a case if the cessation of the charitable purpose takes place after the expiration of the perpetuity period the property shall be treated as if it were the subject of a charitable trust to which the cy-près doctrine applies.

Exception

(4) This section does not apply, nor does the rule against perpetuities apply, to a gift over from one charity to another.

(Rec. #21)

Specific non-charitable purpose trusts

18. (1) A trust for a specific non-charitable purpose that creates no enforceable equitable interest in a specific person shall be construed as a power to appoint the income or the capital, as the case may be, and, unless the trust is created for an illegal purpose or a purpose contrary to public policy the trust is valid so long as and to the extent that it is exercised either by the original trustee or his successor, within a period of twenty-one years, notwithstanding that the disposition creating the trust manifested an intention,

either expressly or by implication, that the trust should or might continue for a period in excess of that period, but, in the case of such a trust that is expressed to be of perpetual duration, the court may declare the disposition to be void if the court is of opinion that by so doing the result would more closely approximate the intention of the creator of the trust than the period of validity provided by this section.

Idem

(2) To the extent that the income or capital of a trust for a specific non-charitable purpose is not fully expended within a period of twenty-one years, or within any annual or other recurring period within which the disposition creating the trust provided for the expenditure of all or a specified portion of the income or the capital, the person or persons or his or their successors, who would have been entitled to the property comprised in the trust if the trust had been invalid from the time of its creation, are entitled to such expended income or capital.

(Rec. #22)

Rule in Whitby v. Mitchell abolished

19. The rule of law prohibiting the disposition, after a life interest to an unborn person, of an interest in land to the unborn child or other issue of an unborn person is hereby abolished, but without affecting any other rule relating to perpetuities.

(Rec. #23)

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Employee benefit trusts: rule not applicable

20. The rules of law and statutory enactments relating to perpetuities and to accumulations do not apply and shall be deemed never to have applied to the trusts of a plan, trust or fund established for the purpose of providing pensions, retirement allowances, annuities, or sickness, death or other benefits to employees or persons not being employees engaged in any lawful calling or to their widows, dependants or other beneficiaries.

(Rec. #24)

Crown

21. This Act and the rule against perpetuities shall bind the Crown except in respect of dispositions of property made by the Crown.

(Rec. #25)

Accumulations of income

22.(1) The Act of the Parliament of Great Britain, 39 and 40 Geo. III (known as the Accumulations Act, 1800), ceases to apply in the province

Idem

(2) Where property is settled or disposed of in such manner that the income thereof may or shall be accumulated wholly or in part, the power or direction to accumulate that income is valid if the disposition of the accumulated income is or may be valid but not otherwise.

Idem

(3) Nothing in this section affects the right of any person or persons to terminate an accumulation that is for his or their benefit or any jurisdiction or power of the Court to

direct payments from accumulations pursuant to any statute.

(4) This section applies to instruments taking effect before or after this Act comes into force except where the period of accumulation permitted by the Accumulation Act, 1800 has expired before this Act comes into force. Application of section

(Rec. #26)

23. Except as provided in subsection (2) of section 13 and section 20 and subsection (4) of section 22 this Act applies only to instruments taking effect after this Act comes into force, and such instruments include an instrument made in the exercise of a general or special power of appointment after this Act comes into force even though the instrument creating the power took effect before this Act comes into force. Application of Act

(Rec. #27)