

# Michigan Law Review

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Volume 62 | Issue 1

---

1963

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### Recommended Citation

Olin L. Browder Jr., *Construction, Reformation, and the Rule Against Perpetuities*, 62 MICH. L. REV. 1 (1963).

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# MICHIGAN LAW REVIEW

Vol. 62

NOVEMBER 1963

No. 1

## CONSTRUCTION, REFORMATION, AND THE RULE AGAINST PERPETUITIES

*Olin L. Browder, Jr.\**

Not long ago, in all the commotion about the doctrine of wait-and-see, a different principle for dealing with the pitfalls in perpetuities law unobtrusively emerged. This was an adaptation of the principle of cy pres to require that provisions, void under the Rule Against Perpetuities, be reformed within the limits of that Rule so as to give effect as closely as possible to the intention of the donor.

The proposal of a generally applicable cy pres doctrine was first advanced in 1946 by James Quarles,<sup>1</sup> although cy pres treatment of specific kinds of perpetuities violations is a rather old idea.<sup>2</sup> Nothing came of it then, and it was heard only in low key as a basis for argument pro and con over wait-and-see. When the guns of that controversy had begun to spend themselves, the idea emerged again in a Vermont statute enacted in 1957.<sup>3</sup> A similar statute was enacted in Kentucky in 1960.<sup>4</sup> The language of both statutes does more than authorize the reformation of invalid interests. Both further provide that in determining the validity of an interest, the period of the Rule Against Perpetuities shall be measured by actual rather than possible events. This language apparently must be

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<sup>1</sup> Quarles, *The Cy Pres Doctrine: Its Application to Cases Involving the Rule Against Perpetuities and Trusts for Accumulation*, 21 N.Y.U.L. REV. 384 (1946).

<sup>2</sup> See notes 31, 38, 39 *infra*.

<sup>3</sup> VT. STAT. ANN. tit. 27 § 501 (1959). "Reformation of interests violating rule against perpetuities. Any interest in real or personal property which would violate the rule against perpetuities shall be reformed, within the limits of that rule, to approximate most closely the intention of the creator of that interest. In determining whether an interest would violate said rule and in reforming an interest the period of perpetuities shall be measured by actual rather than possible events."

<sup>4</sup> KY. REV. STAT. § 381.216 (Supp. 1962). "Wait-and-see doctrine; reformation. In determining whether an interest would violate the rule against perpetuities the period of perpetuities shall be measured by actual rather than possible events; provided, however, the period shall not be measured by any lives whose continuance does not have a causal relationship to the vesting or failure of the interest. Any interest which would violate said rule as thus modified shall be reformed, within the limits of that rule, to approximate most closely the intention of the creator of the interest."

construed to enact the wait-and-see principle and to postpone reformation until after a period of waiting has ended, although the full extent of the duty to wait remains in some doubt.<sup>5</sup> In fact, if only the text of the statutes were read, it could be argued that they do no more than enact the principle of the "second look," so that a court would simply be free at the time any suit is brought to consider actual events which had occurred since the effective date of an instrument.<sup>6</sup>

<sup>5</sup> Professor Leach presumably was largely responsible for the enactment of the Vermont statute. Leach, *Perpetuities Legislation: Hail, Pennsylvania!*, 108 U. PA. L. REV. 1124, 1127 n.8 (1960). In commenting upon the Vermont statute, Professor Leach observed that "this simple statute does the whole necessary job," and added, "in my view cy pres offers a total and simple solution." *Id.* at 1127, 1149. In the summary of his testimony in support of the Vermont statute he states that it would be "desirable" for a court to decline to pass on the validity of a future interest until previous interests had expired, but that if "for any reason it proves impossible to postpone decision," the court would proceed to reform the interest. LEACH & TUDOR, *THE RULE AGAINST PERPETUITIES* 228 (1957). Apparently there is no intention to require a court to wait in all events. Presumably the matter is left in a court's discretion, and the grounds for not waiting are not indicated, nor is it explained why waiting is the more "desirable" alternative. Professor Leach's statement about cy pres as a total and simple solution sticks in the mind at this point. Is the Vermont statute a deliberation and ingenious equivocation intended to allow a court as much latitude as possible in the adjustment of reformation to wait-and-see?

The Kentucky statute contains some interesting differences in language, apart from the effort to provide a standard for selecting measuring lives. In that statute the second sentence of the Vermont statute, relating to the consideration of actual events, is placed first. Then follows the sentence dealing with reformation, which in the Vermont statute comes first. In the titles to the two sections, Vermont refers only to reformation, while Kentucky refers also to wait-and-see. The initial proponent of the Kentucky statute, Professor Dukeminier, in his excellent analysis of Kentucky perpetuities law, makes it clear that waiting to see is the first and primary duty of a court in Kentucky. All his explanations and illustrations proceed from wait-and-see to reformation. DUKEMINIER, *PERPETUITIES LAW IN ACTION* 83-91 (1962). In fact, under both statutes, if wait-and-see is imported to any extent, it can be said that reformation is necessarily postponed, because the statutes authorize the reformation only of invalid interests. But it seems that Professor Dukeminier also would not be adamant about this *modus operandi*. In his commentary he includes the following sentence, "If other cases arise which these rules do not fit, the court will have to work out interpretive rules to implement the wait-and-see principle, bearing in mind that it can reform the gift to vest within the period when serious inconvenience would result from waiting longer." *Id.* at 83.

Apparently the intriguing language of these statutes concerning the perpetuities period is an attempt to state as tersely as possible the wait-and-see principle, which may be difficult to state in other words or without undue complexity. And the conclusion to be drawn from the Leach and Dukeminier commentary seems to be that a court may wait and see before reforming, with in fact a strong preference for waiting, the only difference between the two statutes in this regard, if any, relating to the strength of the preference.

<sup>6</sup> This principle is established in the application of the Rule Against Perpetuities to powers of appointment. In other settings, and standing alone, such a principle is of little value, for it can be subverted by bringing a lawsuit before events which might produce a timely vesting have had a chance to occur. But where the reformation of invalid interests is required, no party can produce invalidity by the timing of his lawsuit. The most that he can produce is the reformation of invalid interests.

In presuming to add a further commentary on perpetuities reform, it is my purpose to endorse the reformation principle and to suggest that in fact, and as asserted by Professor Leach,<sup>7</sup> it does provide "a total and simple solution." By this I mean also that it can do so without any attendant imposition of a wait-and-see requirement. This amounts to proposing a very simple statute, which, borrowing language from Vermont, would provide:

"Any interest in real or personal property which would violate the rule against perpetuities shall be reformed, within the limits of that rule, to approximate most closely the intention of the creator of the interest."

It would be advisable, however, to make such a provision applicable only if other specific accompanying provisions were not. These would include rules of construction such as those recently enacted in New York to deal with the "unborn widow" and "administrative contingency" problems,<sup>8</sup> since such provisions would be sufficient to resolve most of those problems without reformation. Specific treatment should also be given to possibilities of reverter and powers of termination, as has been done in Massachusetts<sup>9</sup> and Kentucky,<sup>10</sup> and hopefully to powers in gross to

<sup>7</sup> Leach, *supra* note 5, at 1149.

<sup>8</sup> N.Y. REAL PROP. LAW § 42-c. "Determination of period of suspension of absolute power of alienation by instrument creating estate or interest; rules of construction. 1. In the construction of an instrument by which an estate or interest is created, the rules of construction provided in this section shall govern for the purpose of ascertaining the intention of the person by whom the estate or interest was created with respect to matters determining the period during which the absolute power of alienation is suspended by such estate or interest. 2. It shall be presumed that such person intended the estate or interest to be valid. 3. Where an estate or interest would, except for this subdivision, be invalid because of the possibility that the person to whom it is given or limited may be a person not in being at the time of the creation of the estate or interest, and such person is described in the instrument as the spouse of another person, without other identification, it shall be presumed, unless a contrary intention appears, that such phrase was intended to refer to a person in being on the effective date of the instrument. 4. Where the duration or vesting of an estate or interest is conditioned upon the probate of a will, the appointment of an executor or trustee, the location of an heir, the payment of debts, the sale of assets, the settlement of an estate, or the determination of questions relating to estate or transfer tax, or the happening of any like contingency, it shall be presumed that the person who created the estate or interest intended that such contingency must occur, if at all, within twenty-one years from the effective date of the instrument."

<sup>9</sup> MASS. ANN. LAWS ch. 184A, § 3 (Supp. 1962). "Fee Simple Determinable in Land, etc., When to Become Fee Simple Absolute; Exceptions. A fee simple determinable in land or a fee simple in land subject to a right of entry for condition broken shall become a fee simple absolute if the specified contingency does not occur within thirty years from the date when such fee simple determinable or such fee simple subject to a right of entry becomes possessory. If such contingency occurs within said thirty years the succeeding interest, which may be an interest in a person other than the person

purchase land, for which the traditional limits of the common-law rule seem peculiarly inappropriate.<sup>11</sup>

As an instrument for perpetuities reform, the *cy pres* principle goes well beyond the thrust of the wait-and-see doctrine. The latter, by forcing a court to wait for the appearance of actual events which are relevant to vesting, and to take them into account, saves interests which in the light of such events vest in due time. The reformation principle, unless restricted in some way which has not yet been suggested, reaches all perpetuities violations. Compared with the wait-and-see controversy, there has been surprisingly little commotion over the legislative enlargement of perpetuities law to embrace a reformation doctrine. Perhaps this indicates tacit approval, at least in those quarters from which vocal dissent might be expected to be heard. At the same time, I am not aware of any spate of reformation bills in legislative hopers

creating the interest or his heirs, shall become possessory or the right of entry exercisable notwithstanding the rule against perpetuities. [But if a fee simple determinable in land or a fee simple in land subject to a right of entry for condition broken is so limited that the specified contingency must occur, if at all, within the period of the rule against perpetuities, said interests shall take effect as limited. This section shall not apply where both such fee simple determinable and such succeeding interest, or both such fee simple and such right of entry, are for public, charitable or religious purposes; nor shall it apply to a deed, gift, or grant of the commonwealth or any political subdivision thereof.]” The bracketed portion was part of the section as originally enacted in 1954. MASS. ANN. LAWS ch. 184A, § 3 (1955). See also CONN. GEN. STAT. REV. § 45-97 (1958); ME. REV. STAT. ANN. ch. 160, § 29 (Supp. 1961). These sentences were deleted in 1961. The amending statute further contains detailed provisions under which rights of entry and possibilities of reverter which would have been valid under the section prior to amendment may be preserved by recording. See MASS. ANN. LAWS ch. 184A (Supp. 1962).

<sup>10</sup> KY. REV. STAT. §§ 381.218-222 (1960). These sections introduce a new feature, not related to perpetuities law, which ought to be accepted elsewhere. The determinable fee is abolished, and words which would at common law create such an estate shall create a fee simple subject to a right of entry. This estate is limited in duration to thirty years, as in the manner of the Massachusetts statute, if created after July 1, 1960. If created before that date, a five-year period of limitation is provided in which the holder of the right of entry may preserve it by executing and recording an appropriate written instrument.

<sup>11</sup> I know of no legislative effort in this direction. Language such as the following might be considered:

“An option or right of first refusal in gross to purchase land, if otherwise valid and enforceable, shall not be invalid for violation of the rule against perpetuities; but where the exercise of such option or right of first refusal is not by its terms limited to a shorter period, it shall be valid and enforceable for a period of — years from the time of its creation.”

It seems desirable to include even those options which by their terms are limited to the life of the optionee or some other person. In such cases, if the measuring life ended before the end of the stated period of years, the option, of course, would end. Otherwise the option would end upon the expiration of the period of years.

generally. It is with some hesitation that I presume to break in upon this relatively quiescent situation.<sup>12</sup>

The extension of the cy pres principle to perpetuities law is not, I believe, an alarming or objectionable development, for at least two reasons. One reason is developed in the second section of this article; the other in the third. One section relates to what the courts have been doing all along; the other purports to demonstrate the special and limited features of the process which the courts would be empowered to use. One section suggests, by analogy, the existence of precedents for reformation in perpetuities cases; the other suggests the ease with which the perpetuities job can be done without unhinging the traditional limits of construction.

Reformation has been offered in Vermont and Kentucky in tandem with wait-and-see. I have suggested that reformation would do as well alone. Some preliminary comments, therefore, are in order on this particular aspect of the problem.

If we could separate those cases in which, after a period of waiting, invalidity remains and reformation is necessary, there would, of course, be no reason to require such a waiting period, for the result would likely be two lawsuits where one would do. The Vermont and Kentucky statutes draw no such distinction and cover these cases as well as those in which a period of waiting would produce a valid instrument. The reason is obvious. You cannot categorize cases in advance on the basis of the actualities of vesting.

But those cases which wait-and-see would save can also be saved by reformation without waiting. In fact those cases in which there is a reasonable prospect that vesting will occur in due time are also the cases for which the appropriate cy pres remedy is most obvious. These include the cases where the possibility of remote vesting is virtually only theoretical, the famous booby trap cases which produced the original demand for wait-and-see: the "fertile octogenarian" and the rest of the company of improbable possibilities. These cases can readily be disposed of either by construing the remote contingencies out of existence or by an obvious

<sup>12</sup> In fact, I have in some measure already been anticipated in this endeavor by my colleague, Professor Joseph R. Julin. See Julin, *Perpetuities—The Nutshell Cracks Again*, SEVENTEENTH ANNUAL MISSISSIPPI LAW INSTITUTE ON REAL PROPERTY LAW 157 (1962). This is essentially a commentary on *Carter v. Berry*, 140 So. 2d 843 (1962), cited note 40 *infra*.

verbal reformation in the form of a saving clause which leaves the intention of the donor intact.

In cases where the improbability of actual remote vesting is not so clear as in the celebrated cases just mentioned, the pattern of *cy pres* amendment will take a similar form. Anyone who deals with saving clauses at the drafting level will perceive that the greatest utility in such a device is to permit many desired arrangements under which remote vesting is possible but not probable. Suppose a testator wants to provide by trust for his son for life and then for the son's children, with ultimate distribution to be a share of the corpus upon each child's attaining the age of thirty, and with alternative provisions in case of a child's death under thirty.<sup>13</sup> It is not expected that the son will have any more children than he now has, and the testator would prefer not to distribute at so young an age as twenty-one. The basic scheme could, therefore, be stated in accordance with the arrangement outlined above, which would provide for the circumstances as they were expected to develop. A saving clause would then be added which would provide for a kind of emergency distribution of all undistributed shares upon the expiration of twenty-one years after the death of the last survivor of all the children and grandchildren of the testator's son who were living at the testator's death. Thus, in the event circumstances were to develop as expected, the dispositive scheme would operate intact and, if properly drafted, no perpetuities problem would be presented. Suppose now the draftsman lays out the initial plan but overlooks the necessary safeguard. If the will is attacked, the course of reformation seems clear. In fact, reformation of this kind may more closely approximate the intention of a testator in the age-contingency cases than a specific rule of reformation which in all cases reduces the stated age to twenty-one.

Even in cases at the other extreme on the scale of vesting probabilities, where it appears very improbable that the interest will vest in due time, the way to approximate the donor's intention as closely as possible within the limits of the Rule may be evident from the face of the instrument. As an example, consider the case of a gift in trust for the benefit of a testator's children and issue per stirpes, with a contingent disposition of corpus on the termi-

<sup>13</sup> *Nelson v. Mercantile Trust Co.*, 335 S.W.2d 167 (Mo. 1960), involved such a provision and an ambiguous saving clause similar to that suggested in the text. The court resolved the ambiguity in favor of the validity of the dispositions as modified by the saving clause.

nation of the trust, which is stated to be "upon the death of all my children and the issue of my children."<sup>14</sup> The testator has four children, some of whom have children. Here the necessary alteration suggests itself: restrict the duration of the trust to the death of all the issue of the testator living at the time of his death (or twenty-one years thereafter). Why should not such a modification be made whenever it is called for? Why wait to see whether vesting will occur in due time when it is extremely improbable that it will, and when the potential benefit of waiting can be built into the instrument as so reformed?

What should happen if at the time a suit is brought it appears that the interest in question has already vested or is certain to vest within the limits of the Rule? Is some language like that in the Vermont and Kentucky statutes about the consideration of actual events necessary here? If those statutes were construed merely to preclude reformation in such a case, I would rest content with them as written. I do not believe, however, that such language is necessary. Consider again the case mentioned above where property is left by will in trust for the testator's son for life, and then for the son's children, with the direction to distribute shares of the principal to the children as each attains thirty, with alternative provisions in case of death under thirty.<sup>15</sup> Suppose no attack is made upon these provisions until the son's death, at which time it appears that all of his children were living at the testator's death. In invoking the reformation principle, the same analysis would be made as indicated above which would there result in the framing of an appropriate saving clause. But having addressed the problem in the same way, the court might as a practical matter choose not to pursue what would then have become but a verbal exercise, refrain from issuing any formal mandate of reformation, and simply declare the remainders valid. In this case, as in any other case which wait-and-see would save, the principal objective of that doctrine, that is, the saving of interests which in fact vest in due time, can be accomplished without any enforced period of waiting, and without any statutory prescription of actual events, but as an integral part of the reformation process.

Why, then, does not reformation do the whole necessary job? Why interpose a preliminary requirement of waiting? As far as

<sup>14</sup> See *Large v. National City Bank*, 170 N.E.2d 309 (Ohio P. Ct., 1960). See text accompanying note 60 *infra*.

<sup>15</sup> See note 13 *supra* and accompanying text.



I know, no reasons have been given. It may be assumed, however, that the answer would be to this effect: since we cannot know in advance whether actual events will cause an interest to vest in due time, the special virtue of a Vermont-type statute is that it does not authorize the alteration of a donor's scheme until it becomes certain that such reformation is necessary.

If this answer means that an enforced period of waiting is required to prevent the unnecessary frustration of a donor's objectives, such a requirement is illusory. To take account of events which have happened is no different in result from taking account in advance of the fact that such events might happen. As indicated above, and as will further appear from the cases considered below, it is perfectly feasible by reformation to incorporate a donor's original directions in such a manner as to preserve them substantially intact in the event that vesting duly occurs within the limits of those directions. This kind of amendment would alter the course of devolution declared by the donor only where such alteration would be necessary after a period of waiting had ended.

It would seem, therefore, that the only possible gain from a required period of waiting is the inducement to interested parties to desist from litigation until, hopefully, the occurrence of actual events has eliminated the need for litigation. It is reasonable to infer that the duty of a court to reform an invalid instrument will discourage litigation by disgruntled heirs at law who otherwise might stand to profit from the defeat of at least a part of a dispositive scheme. But whether the presence of a wait-and-see ingredient will also deter anxious beneficiaries or fiduciaries is more doubtful. To assume that it will is to assume that parties can establish for themselves not only the presence and true basis for invalidity, but the circumstances under which the invalid element can be absolved by the passage of time. In the absence of a study of the kinds of circumstances under which perpetuities cases arise, the assumption may be ventured that there is a significant relation between questions of validity and the presence of ambiguity. Where a question of validity is dependent on the proper construction of an instrument, the construction problem is likely to be the presence of a requirement of survival for existing beneficiaries or the inclusion under a class designation of after-born beneficiaries. Where questions of this sort exist, or where interested parties under an ambiguous instrument cannot be certain just what sort of actual events they should wait for, or whether there is any reason to wait, considerable incentive exists to seek

an early construction. Even where the desired effect is gained, and interested parties restrain themselves until questions of validity can no longer be postponed, is there any assurance that such parties will be any more content at that time than at an earlier time to accept without construction or official mandate the terms of an instrument as written? This is not to speak of those cases where, after a period of waiting, reformation still would be required. If at least one lawsuit will be necessary in any event, there has been no gain from waiting. In any case where early litigation has in fact occurred, the most distressing and wasteful consequence of enforced waiting, at least to the parties involved, is the inability to obtain from a court what would appear to be a simple and final resolution of the issue in question. And where such a case turns out to be one of those which waiting does not save, the parties, having been brought to trial and frustrated, must then be subjected to still another trial. Implicit in the wait-and-see principle, moreover, at least under statutes like those in Vermont and Kentucky, is uncertainty as to the measure or length of the period of waiting, as well as uncertainty as to whether a period of waiting will be required at all.<sup>16</sup> These questions must be resolved by judicial interpretation, and will thus become in themselves an inducement to litigation.

No mention has been made of all the objections which were initially marshalled against the wait-and-see doctrine when it was proposed separately from reformation.<sup>17</sup> There is no need here to go over all that ground again, nor the question whether these objections would be outweighed by the virtues of the doctrine where it must serve alone as the instrument of perpetuities reform. But to the extent that any of these criticisms has value, it applies here as well where wait-and-see is a condition precedent to reformation.

One of the basic criticisms, however, must be mentioned again here, for it may occur to someone to raise the same sort of question about the scope of the reformation principle. The objection was made that no standard was provided for defining the period of waiting or the selection of measuring lives when the validity of an interest is to be determined as of a time other than the creation of the interest. The source of this difficulty has been said to be

<sup>16</sup> See note 5 *supra*.

<sup>17</sup> See, e.g., Mechem, *Further Thoughts on the Pennsylvania Perpetuities Legislation*, 107 U. PA. L. REV. 965 (1959); Simes, *Is the Rule Against Perpetuities Doomed? The "Wait-and-See" Doctrine*, 52 MICH. L. REV. 179 (1953).

that the so-called period of the Rule Against Perpetuities is not an "ascertainable span of time," but "a projection of possibilities made as of the effective date of the instrument in question."<sup>18</sup> Perhaps another way to put the same idea is to note the elementary features of the process of applying the common-law Rule. It should be noted first that the term "measuring lives" is elusive and ambiguous. One invariable requirement is that such lives be lives in being at the creation of an interest. Beyond this, the term can be used to refer to those persons selected for the purpose of testing whether the interest in question is certain to vest within some life or lives and twenty-one years thereafter. Unless the donor has specified measuring lives in his instrument, this is an amorphous class which theoretically can include anyone, although in the process of selection we do not waste time testing with lives which are not in some way involved in the scheme of disposition. In the course of selecting, testing, and rejecting measuring lives of this sort, we may exhaust the possibilities without finding anyone who supplies the link between the postponement of vesting of an interest and the required certainty of vesting. The process then ends with a judgment that the interest is too remote. But if in this process some one or more persons are found who do meet the test, then of course we know that the interest is valid. At this point the term "measuring lives" acquires another meaning. It may refer to those persons whose existence insures timely vesting. There is no way of recognizing such persons from afar, nor must they possess any identifiable qualifications other than that of passing muster when the roll is called. This variable meaning of "measuring lives" causes no embarrassment, for it is inherent in the certainty-of-vesting test, the traditional application of which requires no further clarification.

It is the essence of the wait-and-see doctrine, however, that the certainty-of-vesting test must be rejected. We must wait for some period of time in order to take account at the end of that time of actual rather than possible events. What is the period? This is a basic ambiguity of the Pennsylvania statute,<sup>19</sup> which re-

<sup>18</sup> Jones, *Measuring Lives Under the Pennsylvania Statutory Rule Against Perpetuities*, 109 U. PA. L. REV. 54, 55 (1960).

<sup>19</sup> PA. STAT. ANN. tit. 20, § 301.4(b) (1950). "Void interest—exceptions. Upon the expiration of the period allowed by the common law rule against perpetuities as measured by actual rather than possible events any interest not then vested and any interest in members of a class the membership of which is then subject to increase shall be void . . . ." This language adds to the ambiguity of the term "measuring lives," for it refers to the perpetuities period as though it were measured, not by lives at all,

quires waiting until the end of the period allowed by the common-law Rule as measured by actual events. So also it seems with the Vermont and Kentucky statutes, which do not expressly prescribe, but may be said to imply, a period of waiting. But as previously stated, the common-law Rule prescribes no period of time in any terms which are meaningful apart from the required certainty of vesting. It could be said that you wait until it becomes certain upon the happening of relevant events that the interest in question has or has not vested, or is or is not certain to vest in due time. Thus the period of waiting could be left indefinite and unspecified. But this would still leave the question whether vesting had occurred or would occur in due time. Within what period of time must an interest vest? This brings us back again to the problem of selecting measuring lives. It will not do to say that you use the same lives which you would use at common law. If you use the first meaning of measuring lives mentioned above, this includes any one; but this will not suffice, for you can select any one only for the purpose of putting him to the certainty-of-vesting test, which is here rejected. If you refer to the second meaning, that is, those persons who pass the certainty-of-vesting test, this will not do either, for once that test is passed, there is no need to wait and see.

What other standard can be used? You can look to those persons who have survived the common-law test in a variety of actual cases and see if they have some other characteristic in common, and if such can be found, impose it as a requirement. In any case, some kind of requirement can be conceived under which the wait-and-see principle will save some interests which otherwise would be void, and at the same time prevent the subversion of the policy of the common-law Rule Against Perpetuities. In the absence of some such specific requirement, you are left to choose among that innumerable class of persons whose only common feature is that they were all living when the instrument took effect. It was this possibility which initially provoked the question of *when* the selection of measuring lives would be allowed. Must the selection be made as of the effective date of the instrument, or can it be made at some future time and take account of events which have meanwhile occurred? In other words, can you wait until the death of all or most of those persons who might be thought

but by events. The same sort of expression is used in the Vermont and Kentucky statutes. See notes 3 and 4 *supra*.

of as measuring lives and then cast about for other persons, strangers to the testator and his scheme of disposition, who happened to be living at the testator's death? Could you wait ninety years after the testator's death and perform such a rite? If you could, obviously vesting could be postponed in particular cases well beyond anything that would be possible under the common-law Rule. No wait-and-see proponent I can recall has been willing to countenance this. It has been passed off as a *reductio ad absurdum* which no court would allow.

We seem reduced, therefore, either to stating some new qualification for official measuring lives or leaving the class of potential measuring lives indefinite and variable, but confining the selection so as to make them identifiable as of the effective date of the instrument. The first alternative appears to be the only practicable one. It is essentially the solution offered both by the Massachusetts-type statutes and the Kentucky statute. The former deals with the problem by confining wait-and-see to cases in which future interests are expressly limited to take effect after one or more life estates in, or lives of, persons in being when the period of the Rule begins to run, and determining validity as of the termination of such lives.<sup>20</sup> The Kentucky statute purports to restrict measuring lives to those which have a causal relation to the vesting or failure of an interest.<sup>21</sup> This restriction of course is not free from ambiguity. In his commentary on this statute, Professor Dukeminier offers a list of alternative qualifications which would satisfy the statutory requirement and cover most of the cases.<sup>22</sup> His commentary goes further and undertakes to specify the period of waiting which would be permissible under the statute, although the statute is silent on this point. The period of waiting is tied to the selection of measuring lives. When an interest is limited to take effect after one or more lives in being, its validity will be determined at the end of such lives. Thus the express standard of the Massachusetts-type statute is to be imported by construction.

<sup>20</sup> MASS. ANN. LAWS ch. 184A, § 1 (1955). "Basis of Determining Validity of Interest; 'Life Estate.' In applying the rule against perpetuities to an interest in real or personal property limited to take effect at or after the termination of one or more life estates in, or lives of, persons in being when the period of said rule commences to run, the validity of the interest shall be determined on the basis of facts existing at the termination of such one or more life estates or lives. In this section an interest which must terminate not later than the death of one or more persons is a 'life estate' even though it may terminate at an earlier time."

<sup>21</sup> See note 4 *supra*.

<sup>22</sup> DUKEMINIER, *op. cit. supra* note 5, at 81.

But where the vesting of an interest is not causally related to any lives in being, the period of waiting is twenty-one years. These alternatives do not exhaust the possibilities, but presumably where vesting is causally related to some life in being, you wait until the end of such a life, even though the interest in question is not limited to take effect at the termination of such a life. Professor Dukeminier believes that these explanatory principles will cover most cases, but that, in cases which they do not fit, the courts will have to work out other interpretive rules. The reason for not including such principles in the statute itself, he says, is to avoid a statutory scheme too complex to be practicable. Under statutes like those in Pennsylvania and Vermont,<sup>23</sup> the courts are left to work out all these matters as best they can.

If this reiteration of old questions has been tedious, my purpose is to come finally to the question of how reformation fares in respect to the selection of measuring lives. It is obvious that it avoids the necessity for defining some period of waiting, for it is the special virtue of reformation, when not tied to wait-and-see, that you are not required to wait, but are allowed to seek a timely resolution of a perpetuities problem. Neither does the question relate to the initial judgment on the validity of an interest as written, for the traditional standards of validity would still apply. The question relates to the framing of a substitute or saving provision which is valid. Even this will pose no problem if a judgment is called for when an instrument takes effect, or shortly thereafter. But suppose a considerable period of time has elapsed since the instrument has taken effect. Will courts be free in framing such a provision to use actual events as a basis for sifting out those lives which have ended and substituting others in the manner which has been the source for criticism of the wait-and-see doctrine?

By the terms of an enabling statute, reformation will be confined to the limits of the common-law Rule. It should be clear at least that a court cannot declare a reformed scheme as though the testator were revived and writing it anew. A reformed interest must be treated as if it were in the instrument as written, and it must satisfy the certainty-of-vesting test, applied as of the effective date of the instrument.

Suppose a testator limited ultimate interests to vest on the death of all the children of his son, and at the time of suit all of

<sup>23</sup> See notes 3 and 19 *supra*.

the son's children had died except one, who was not living at the testator's death. Could the court so reform as to provide for ultimate distribution not later than twenty-one years after the death of *A* or *B* or *C*, all of whom were living at the testator's death and are still living? Would this subvert the policy of the common-law Rule? It is at least arguable that it would. But to avoid abstruse inquiries into the relation between the mechanics and the policy of the Rule, note may be taken of what seems to me to be a sensible limitation on the power to reform. To require that a court reform within the limits of the Rule seems to me to require that the process be wholly tied to the effective date of the instrument. In other words, it seems to be implicit that a court would be required to place itself in the position of a draftsman who was asked, immediately prior to the testator's death, to effectuate his scheme within the limits of the Rule. Not only would the validity of the reformed disposition have to be judged as of the effective date of the instrument, but it would have to meet the further requirement of approximating the testator's intention as closely as possible, and this judgment would also have to be made as of the effective date of the instrument. By this test the kind of reformation mentioned above would have to be rejected. No draftsman who sought to preserve the testator's objectives within the limits of the Rule would conceive of doing it that way, for the possible early death of *A* or *B* or *C* would bring the testator's scheme of disposition to an abrupt and untimely end and thus thwart his stated objectives. Therefore, without having to frame a specific rule concerning the selection of measuring lives for reformation purposes, a court would be driven to do what competent draftsmen always do, that is, to consider only those lives which were suggested by the instrument as originally written and were related in some way, as beneficiaries or otherwise, to the testator's scheme of disposition. In this view the most obvious way to reform in the present instance would be to provide for ultimate distribution or vesting not later than twenty-one years after the death of all of the son's children and grandchildren who were living at the testator's death.<sup>24</sup>

<sup>24</sup> For those who may still not be satisfied that a court in reformation would respect these implicit limitations on its authority to reform, the only way to tie the hands of a court more specifically would be to declare a new definition of permissible measuring lives for reformation purposes, in the manner provided in the Massachusetts and Kentucky statutes for wait-and-see purposes. As an alternative to either of these, the following could be added as an additional sentence in the reformation statute proposed at the beginning of this article:

It is my conclusion that, for all cases not specifically provided for by statute, a simply stated authority to deal *cy pres* with perpetuities violations, unencumbered by any sort of obligation to postpone judgment, will meet all the objections which have led to the demand for perpetuities reform, and that it will do so without any real danger of subverting the policy of the common-law Rule or of distorting its essential features. But those who may be satisfied that a *cy pres* authority, if properly defined, will not subvert the Rule Against Perpetuities, may still not be satisfied as to the enlarged authority of courts to deal with the solemn records of donative intention. Before proceeding to examine further the possible operation of the *cy pres* principle in actual cases, it seems in order first to address this question: Just how new or startling or dangerous is this business of entrusting courts with discretion to tamper with a man's will?

### *In Defense of Reformation*

In endorsing the proposal that courts "reform" instruments which violate the Rule Against Perpetuities, I am aware that this amounts to asking courts to engage in a salvage operation which offers no value to the draftsman save the small comfort of knowing that his work will not prove all in vain, no matter how badly his job has been done. Certainly there is no thought of encouraging careless drafting. There may be some startling implications in the thought of some whimsical draftsman's choosing to outline a dispositive scheme in general terms, leaving a court to work out the details in the light of future events.<sup>25</sup> To those who would regard such a development with alarm, it need only be said that such a development is not at all to be expected, and is in any case

"An interest shall be reformed so that it must vest, if at all, either within twenty-one years after the life of some beneficiary, or the ancestor of a beneficiary, under the instrument creating the interest who was living when the instrument took effect, or within twenty-one years after the effective date of the instrument."

This seems preferable to the Massachusetts restriction, which may be too limited in scope for reformation purposes, and to the Kentucky statute, which requires further specific definition. This alternative, however, may be subject to the objection that it could be construed to permit the selection as a measuring life of a stranger to the interest in question, to whom the donor may have chosen to give some insignificant legacy. It probably would not occur to a court that this sort of thing was permissible if this particular language did not seem to suggest it. The trouble with any of the possible alternatives in this connection is the assumption that they are necessary, which amounts to assuming the danger of an unconscionable manipulation of measuring lives. The general *cy pres* provision, without express delineation of its scope, still seems preferable to me.

<sup>25</sup> Compare *Fitchie v. Brown*, 211 U.S. 321 (1908).



overborne by the current need to provide relief against the damage done by unskilled drafting. At any rate, we may proceed on the assumption that the case for perpetuities relief, which has been greatly elaborated by the proponents of wait-and-see, has been proved, and not labor the point further.

Despite the characterization of reformation as a salvage operation, its ultimate rationale is not equitable relief for those who find themselves in trouble because of a failure in drafting. Reformation invokes the principle of *cy pres*, or approximation. This implies that the criterion for its application is donative intention and that the principle proposed is no more nor less than a principle of construction. It can also be asserted that, while the principle may superficially seem to enlarge the traditional confines of construction, in fact it does not do so, or that if it does, current constructional patterns provide patent analogies which render the extension justified and workable.

Most simply, "construction" means to interpret what is written. But it also implies that what is written needs interpretation, that is, it is in some respect incomplete or unclear. And so construction implies in some respects a tampering with the written word, which rarely is confined to the presentation of a synonym or definition. This much, presumably, everyone will concede. Courts, however, usually place themselves between a search for the true dispositive intention revealed by written words, on the one hand, and the making of an instrument for a donor, on the other hand. Realistically, the tenet that a court will not make a will for a testator cannot be regarded as more than a superficial symbol of a worthy admonition that sound policy requires some humility in a court which seeks to find a dispositive purpose lest, in due regard for the inherent weaknesses of human thought and feeling, a court should substitute its judgment for that of a testator as to the proper disposition of his estate. This admonition in fact forces attention all the more upon the quest for the true testamentary intention and upon all the traditional methods for discovering it. The precept against making a will for a testator has never been thought to preclude inferences of donative intention, where other signs fail, from assumptions about what the normal or average testator would have intended in the circumstances. Still less does it preclude that freedom in the treatment of specific dispositive language which is implicit in any process of finding meaning from verbal symbols.

It is not necessary to resort to modern findings in semantics to appreciate that there are few plain and invariable meanings even of traditional and ordinary dispositive words or phrases. If this fact has not been well understood by draftsmen, courts have always been faced with the inevitable consequences, which leave them with an impressive degree of discretion in coping with the problem of pervasive ambiguity in dispositive instruments. Examples need not be cited in respect to such matters as the existence and extent of conditions of survivorship, the designation of interests as contingent or defeasible, and the meaning of such terms as "issue" and "heirs." One can think of a half-dozen questions which are presented and left unanswered by a gift to someone's "issue,"<sup>26</sup> which is a very common word indeed in current dispositive practice. In all such construction problems a choice must be made among a varying number of possible alternatives, and the criterion for selection is ultimately the testator's plan or scheme of disposition as reflected by the whole instrument in the light of its factual setting. To this, rightly or wrongly, the various specific rules of construction are subject.

We have by now been made quite conscious of the inexorable consequences of the certainty-of-vesting requirement in perpetuities law. But we should not lose sight of instances when courts strain to construe dispositions so as to avoid the Rule, adopting constructions which otherwise would be rejected or not even thought of except in vindication of a "constructional preference for validity." Surely the most notable experience of this sort is to be found in the constructional complex which was erected in New York to escape the deadly "two-lives" rule.<sup>27</sup> This feature of current perpetuities law is not cited to make light of the need for further relief from the inexorable strictures of the Rule, although in fact all the famous booby traps of invalidity could be avoided by enlightened construction. Emphasis here is rather upon the proposition that what we inaptly call "reformation" calls for no different frame of reference, or no greater liberality in the pursuit of donative intention, than that to which the courts have long been accustomed in the traditional processes of construction.

Courts are reluctant to declare in general terms the full extent and implications of their power to construe. This reticence may

<sup>26</sup> See, e.g., 5 AMERICAN LAW OF PROPERTY §§ 21.13, 21.24, 22.36, 22.56-63 (Casner ed. 1952).

<sup>27</sup> See 6 AMERICAN LAW OF PROPERTY §§ 25.21-25.31 (Casner ed. 1952); 5 POWELL, REAL PROPERTY ¶¶ 802, 803 (1962).

produce a psychological obstacle to the acceptance of a so-called power to reform, even when it amounts to no more than what is commonly done in the name of construction. One does occasionally find a frank avowal of the real nature of the construction process:

"The power of this Court to effectuate the manifest intent of a testator by inserting omitted words, by altering the collocation of sentences, or even by reading his will directly contrary to its primary signification is well established. This power, when necessary, is exercised to prevent the intention of the testator from being defeated by a mistaken use of language. The question presented is simply this: Will the Court execute the clear intent of the testator not fully or clearly expressed in a will, or will it by a strict technical adherence to the form of words and their literal meaning suffer the intention of the testator to be defeated?"<sup>28</sup>

It will be seen that this description of construction does more than recognize the inherent variability in the meaning of specific language; it countenances the wider freedom to insert language which is found to have been intended but not expressed. It has long been established that specific language may be stricken from a will according to the same standard operating in reverse. There is, in fact, a difference between resolving ambiguities in otherwise complete dispositions, and filling dispositive gaps. But the point should not be labored. The choice between varying meanings of specific language is often dictated by the choice of that meaning which in fact prevents a gap from appearing. In any case, the ultimate standard for both processes is exactly the same, and the courts, in their liberal use of the construction process, have implied a confidence in their ability to discover the true dispositive intention in a particular case. This confidence, in turn, is the key to a successful application of a *cy pres* doctrine in perpetuities cases. It is my firm belief that such confidence would find greater justification in reformation cases than elsewhere, that the alteration of an invalid interest which will most closely approximate the donor's stated objectives will be more evident than in many cases where his stated directions are ambiguous.

There is no want of precedent for extending the construction

<sup>28</sup> *Bottomley v. Bottomley*, 134 N.J. Eq. 279, 291, 35 A.2d 475, 481-82 (1944), quoted with approval in *Fidelity Union Trust Co. v. Robert*, 36 N.J. 561, 566, 178 A.2d 185, 188 (1962). See a similar statement in *Second Bank-State St. Trust Co. v. Wasserman*, 337 Mass. 195, 200, 148 N.E.2d 666, 669 (1958).

process as far as suggested by the New Jersey court quoted above. The most forceful example for the present purposes is the practice approved by a number of courts in dealing with dispositions which are patently incomplete. It goes to the extent of implying limitations of future interests on the basis of a discovered scheme of disposition, for which there is not even a fragment of language specifically declaring the dispositive intention.<sup>29</sup> Is this construction or reformation? Or has such a question, in the light of the inherent nature of language as a vehicle of meaning and the judicial practice in dealing with dispositive language, become deceptive and unfair? Is there a significant difference between filling a gap which the draftsman left and filling one created by the invalidity of a particular dispositive provision? Reformation in perpetuities cases may prove less drastic than in the type of case last mentioned, for, as indicated above, it will often consist of nothing more than the insertion of a saving clause inadvertently omitted. In a large proportion of such cases the insertion of such a clause will not alter in any respect the expressed course of distribution on the facts which in due course develop, but will serve merely to insulate the dispositive scheme against the infection preserved in the dogma about unlikely possibilities.

The doctrine of "infectious invalidity" is not without significance in this regard. When the invalidity of an interest causes other interests to fail because of an inference that the testator's intention would be better served thereby, the result technically is not reformation. But in such cases a court is actually deciding upon alternative courses of devolution which are declared either in the instrument or in the intestate law. The most significant fact in the process of selection is that a court has nothing more specific to go on than the donor's scheme of disposition as revealed by his instrument in the light of the surrounding circumstances. This is the same kind of process which would be followed if the court's authority were enlarged by the duty to reform. The only difference is that the selection process in reformation would not be limited to those alternatives provided by the intestate law. Although the possible alternatives in reformation are undefined, the duty to

<sup>29</sup> See, e.g., *Hilton v. Kinsey*, 185 F.2d 885 (D.C. Cir. 1950); *Brock v. Hall*, 33 Cal. 2d 885, 206 P.2d 360 (1949); *Boston Safe Deposit & Trust Co. v. Coffin*, 152 Mass. 95, 25 N.E. 30 (1890); *City Bank Farmers Trust Co. v. Hentz*, 107 N.J. Eq. 283, 152 Atl. 331 (1930); *First Nat'l Bank & Trust Co. v. Palmer*, 261 N.Y. 13, 184 N.E. 477 (1933); *Buist v. Williams*, 88 S.C. 252, 70 S.E. 817 (1911); 2 POWELL, REAL PROPERTY ¶ 325 (1950); cf. *Warner v. Warner*, 237 F.2d 561 (D.C. Cir. 1956).

choose that one which most closely approximates the donor's intention serves in fact to confine the choice as much as under infectious invalidity. But since the possible alternatives in reformation are not predetermined, the prospect of finding that one which best preserves the donor's intention is correspondingly improved. In this view, infectious invalidity is nothing other than a restricted form of cy pres construction.

The established practice of dealing cy pres with charitable trusts which fail constitutes a precedent which should apply a fortiori to perpetuities problems. When a gift to charity fails, resort is had to a general inference of a charitable purpose, which is vindicated by substituting for the gift which failed a gift to some other charity of a like nature.<sup>30</sup> Where a disposition fails for violation of perpetuities law, the insertion of a saving clause, as we have seen, may not alter the dispositive scheme at all on the facts which develop. Where it does alter the specific devolution of interests, it does so within the limited framework of a dispositive scheme which, unlike the charitable gift cases, will at least confine the disposition to persons who are indicated as the objects of the donor's bounty.

There has been a break-through of these pressures into perpetuities cases without the benefit of legislation. As early as 1891, in *Edgerly v. Barker*,<sup>31</sup> a limitation contingent upon the youngest of the testator's grandchildren attaining the age of forty was modified so as to limit the remainder upon the youngest attaining the age of twenty-one. It now seems remarkable that the monumental opinion of the New Hampshire court stood virtually isolated for three-quarters of a century. The elaborate argument delineating the essence of the cy pres principle comes down to a simple proposition which does not sound strange when put in general terms: "Where there is a general and a particular intent, and the particular one cannot take effect, the words shall be so construed as to give effect to the general intent."<sup>32</sup> In elaborating this principle, the court in *Edgerly v. Barker* said that it is in pursuance of the testator's

"implied intent to divide according to common reason, throw out what is against law, and let the rest stand. This legal intent, correctly inferred as a fact, is a part of the will, not

<sup>30</sup> 4 SCOTT, TRUSTS §§ 399-399.5 (1956).

<sup>31</sup> 66 N.H. 434, 31 Atl. 900 (1891).

<sup>32</sup> *Id.* at 467, 31 Atl. at 912.

less operative or less important than it would be if set forth in express terms in the writing. A refusal to execute it would be *an alteration of the will*, and a violation of common-law principle and statutory right.”<sup>33</sup>

In this case the general intent was that the testator’s grandchildren should have the property; the specific intent, that they should have it when the youngest attained the age of forty. If the particular intent cannot be given effect, the only justifiable reason for not giving the property to them at all would be the inference of intention that if the whole could not take effect, the whole should be void. Rejecting any such inference, the court said,

“The revocation of that devise, leaving the remainder to descend as intestate property, would thwart the purpose of his conditional appropriation of \$30,000 . . . deprive the grandchildren of the protection which the testator considered indispensable, and defeat the main objects of the will. It would be little less erratic than a causeless revocation of the whole instrument. An intended intestacy as to the remainder can be inferred from nothing but mental disorder, of which there is no evidence.”<sup>34</sup>

To the objection that a court cannot put the question as to what the testator would have done had he known the applicable law and do this for him, it was answered:

“The law determines not what will he would have made if he had known that the last nineteen of the forty years were too remote, but what will he did make in ignorance of this flaw in his appointment of time. His intent that the grandchildren shall not have the remainder till the youngest arrives at the age of forty years is modified by his intent that they shall have it, and that the will shall take effect as far as possible.”<sup>35</sup>

The crux of the matter, then, is the presence of a dominant and general intention, and the obvious inference of such an intention arising from the fact that a donor chose to give property to certain people. This is the basis for any statutory direction to approximate such an intention as closely as possible, that is, that the donor’s paramount purpose is evident from the instrument. If the frustration of such an intention can be prevented by reduc-

<sup>33</sup> *Id.* at 473, 31 Atl. at 915. (Emphasis added.)

<sup>34</sup> *Id.* at 474-75, 31 Atl. at 916.

<sup>35</sup> *Id.* at 475, 31 Atl. at 916.

ing an age-contingency from forty years to twenty-one, is there not even more justification for preventing such frustration, whenever possible, by a saving provision which merely qualifies the scope of his stated directions, but leaves them otherwise as written?

The analysis of the cy pres principle in *Edgerly v. Barker* calls to mind an analogy in the law of powers of appointment. When a special power to appoint to a restricted class of persons is invalidly exercised, or even when it is not exercised at all, and there is no express gift in default of appointment, a dominant purpose is declared to benefit that class, which is vindicated by the implication of a gift to the class as a whole.<sup>36</sup> At least where such a result is founded on a theory of an implied gift in default of appointment, such an explanation is nothing less than the cy pres principle as defined in *Edgerly v. Barker*.

If the use of cy pres for perpetuities problems is regarded as a novel or startling proposal, it is relevant to refer to a quotation by the court in *Edgerly v. Barker*,<sup>37</sup> taken from an early edition of *Jarman on Wills*:<sup>38</sup>

"The most striking illustration . . . of the anxiety of the courts to prevent the total disappointment of the testator's intention by the operation of the rule against perpetuities, is afforded by the doctrine of *cy pres* or approximation (as it is called). This doctrine applies where lands are limited to an unborn person for life, with remainder to his first and other sons successively in tail, in which case, as such limitations are clearly incapable of taking effect in the manner intended . . . the doctrine in question gives to the parent the estate tail that was designed for the issue; which estate tail (unless barred by the parent or his issue, being tenant in tail for the time being) will comprise, in its devolution by descent, all the persons intended to have been made tenants in tail by purchase. The intention that the testator's bounty shall flow to the issue, is considered as the main and paramount design, to which the mere mode of their taking is subordinate, and the latter is therefore sacrificed."

That this proposition, and other similar uses of the estate tail to effectuate an intention invalidly expressed, was accepted in Eng-

<sup>36</sup> 5 AMERICAN LAW OF PROPERTY § 23.63 (Casner ed. 1952); see RESTATEMENT, PROPERTY § 367 (1940).

<sup>37</sup> 66 N.H. 434, 466, 31 Atl. 900, 912 (1891).

<sup>38</sup> The latest edition in which this language has been preserved unabridged is 1 JARMAN, WILLS 261-62 (7th ed. 1930).

land has been recognized and explained in some detail by Gray.<sup>39</sup> He cites also a few early American cases to the same effect. With the virtual disappearance of the estate tail in this country, this particular device gained no real foothold here. Apparently this use of cy pres was kept by the English courts within rather restrictive bounds, and it of course constitutes no basis for asserting that cy pres construction is an integral part of modern perpetuities law generally. But even this limited use of the doctrine, emerging as early as the Eighteenth Century, has its lesson for anyone who would regard the modern proposal as an unprecedented or shocking innovation.

At long last the force of the argument of the court in *Edgerly v. Barker* has made its mark elsewhere. In *Carter v. Berry*<sup>40</sup> the Mississippi Supreme Court recently applied the rule of *Edgerly v. Barker* to a similar type of disposition, with language which unqualifiedly endorsed the cy pres principle as defined by the New Hampshire court. Moreover, most of the American statutes on accumulations,<sup>41</sup> as well as the English Thellusson Act,<sup>42</sup> provide that a provision for excessive accumulation in point of time shall be valid for the permissible period, which of course is another example of a limited application of the cy pres principle. The same result was reached without benefit of statute by the Kentucky court in purporting to apply New Hampshire law to a will of a testator who had died domiciled in that state.<sup>43</sup>

In addition to Kentucky and Vermont, Washington has enacted a statute which accepts cy pres for perpetuities purposes, although limited to dispositions in trust,<sup>44</sup> and Idaho has a trust section which may be said to have the same effect.<sup>45</sup> The limited

<sup>39</sup> See GRAY, *THE RULE AGAINST PERPETUITIES* §§ 643-70 (4th ed. 1942). See also Bordwell, *Alienability and Perpetuities V*, 25 IOWA L. REV. 1, 18 (1939); Sweet, *The Rule in Whitby vs. Mitchell*, 12 COLUM. L. REV. 199 (1912).

<sup>40</sup> 140 So. 2d 843, *modifying and correcting* 243 Miss. 321, 136 So. 2d 871 (1962); see 61 MICH. L. REV. 609 (1963).

<sup>41</sup> See SIMES & SMITH, *FUTURE INTERESTS* § 1468 (2d ed. 1956); *RESTATEMENT, PROPERTY* § 447 (1944) and Special Notes (Supp. 1948).

<sup>42</sup> Law of Property Act, 1925, 15 Geo. 5, c. 20, § 164.

<sup>43</sup> *Hussey v. Sargent*, 116 Ky. 53, 75 S.W. 211 (1903).

<sup>44</sup> WASH. REV. CODE § 11.98.030 (1959). "If, at the expiration of any period in which an instrument creating a trust or any provision thereof is not to be rendered invalid by the rule against perpetuities, any of the trust assets have not by the terms of the trust instrument become distributable or vested, then such assets shall be then distributed as the superior court having jurisdiction shall direct, giving effect to the general intent of the creator of the trust."

<sup>45</sup> IDAHO CODE ANN. § 55-111 (1957). "Suspension of power of alienation.—The absolute power of alienation of real property cannot be suspended by any limitation or condition whatever, for a longer period than during the continuance of the lives



cy pres rule applicable to age contingencies has been enacted in England and in Connecticut, Maine, Maryland, Massachusetts, and New York.<sup>46</sup>

### *Reformation Applied*

It may be profitable to present a selection of cases in which perpetuities violations were present, for the purpose of suggesting ways in which the respective dispositive schemes might have been salvaged by reformation. Within the allowable space, this presentation must be suggestive, not exhaustive, of the types of cases which may be expected to arise, and, on the limited basis of the facts appearing in the reports of appellate decisions, of possible alternative forms of reformation in any type of case. A substantial number of the perpetuities violations which have appeared within the past five years are included. Where alternative patterns of reformation appear in respect to the cases presented, they are mentioned. If these cases are representative, the presence of, or the choice between, alternatives presents no real problem.

*American Security and Trust Co. v. Cramer*<sup>47</sup> is mentioned first because of an interesting feature which puts to a test the practicability of selecting measuring lives both under wait-and-see and reformation. A testamentary trust was established for the benefit of the testator's wife for life, then for his daughter Hannah for life. At her death the income was to go to the children of Hannah "then living or the issue of such of them as may then be dead leaving issue surviving" Hannah, and "upon the death of each the share of the one so dying shall go absolutely to the persons who shall then be her or his heirs at law according to the laws of descent now in force in said District of Columbia." Two children of Hannah were living at the testator's death, and two more were born thereafter. At the time of the suit, two of the four had died,

of the persons in being at the creation of the limitation or condition, and 25 years thereafter; there shall be no rule against perpetuities applicable to real or personal property, nor any rule prohibiting the placing of restraints on the alienation of personal property; no trust heretofore or hereafter created, either testamentary or inter vivos, shall be declared void, but shall be so construed as to eliminate parts violating the above provisions, and in such a way that the testators [sic] or trustors [sic] wishes are carried out to the greatest extent permitted by this act; that there shall be no presumption that a person is capable of having children at any stage of adult life."

<sup>46</sup> Law of Property Act, 1925, 15 Geo. 5, c. 20, § 163; CONN. GEN. STAT. REV. § 45-96 (1958); ME. REV. STAT. ch. 160, § 28 (Supp. 1961); MD. ANN. CODE art. 16, § 197A(b) (Supp. 1962); MASS. ANN. LAWS ch. 184A, § 2 (1955); N.Y. REAL PROP. LAW § 42-b; N.Y. PERS. PROP. LAW § 11-a.

<sup>47</sup> 175 F. Supp. 367 (D.C. Cir. 1959).

and another died while the suit was pending. Mary, one of the children who was living at the testator's death, survived. In prior litigation over the same will the interests of the children were held valid, with a ruling on the ultimate interests reserved. In still another prior suit, the interest of the heirs of a deceased child, Hugh, was held valid, for Hugh was also living at the testator's death. In the instant suit, the interest of Mary's heirs was declared valid (in express recognition of the desirability of such a ruling despite the continuance of Mary's life interest), but the gifts to the heirs of the after-born children of Hannah were held void. Under the authority of *Cattlin v. Brown*,<sup>48</sup> the "sub-class" doctrine of class gifts was applied to justify the separation of the good remainders from the bad.

How would this case fare under the wait-and-see doctrine? At the time of the suit it was evident that all remainders would vest not later than the death of Hannah's daughter, Mary, who was a life in being at the testator's death. Could her life be taken as a measuring life for all the remainder interests? The Massachusetts-type statute does not seem applicable.<sup>49</sup> In Pennsylvania<sup>50</sup> and Vermont<sup>51</sup> no answer could be confidently given until the relevant statutes were construed. The Kentucky statute<sup>52</sup> does not seem to help, for Mary's life does not seem to have a causal relationship to the vesting or failure to vest of any interest other than that given to her own heirs. If I understand Professor Dukeminier's elaboration of this requirement,<sup>53</sup> this case does not meet the specific tests which he states for determining the causal relationship. Unless under the Kentucky statute a different standard may be used for reformation, Mary's life could not be used for that purpose. No difficulty is perceived, however, in applying cy pres in the absence of such a restriction. A saving clause could simply provide that the heirs of all the children of Hannah should be ascertained and the remainder vest in them no later than twenty-one years after the death of the last survivor of such of Hannah's chil-

<sup>48</sup> 11 Hare 372, 68 Eng. Rep. 1319 (Ch. 1853).

<sup>49</sup> See note 20 *supra*.

<sup>50</sup> See note 19 *supra*.

<sup>51</sup> See note 3 *supra*.

<sup>52</sup> See note 4 *supra*.

<sup>53</sup> DUKEMINIER, *op. cit. supra* note 5, at 81: "In practically all cases the measuring lives will be one or more of the following as fits the particular facts: (a) the preceding life tenant, (b) the taker(s) of the interest, (c) a parent of the takers of the interest, (d) a person designated as a measuring life in the instrument, and (e) some other person whose actions or death can expressly or by implication cause the interest to vest or fail."

dren as were living at the testator's death. The insertion of such a provision would allow the testator's stated plan of devolution, under the facts which had developed, to be carried out without change. In other words, the saving clause would serve to connect the life of Mary with the time of ultimate vesting and thereby insulate the plan against invalidity.<sup>54</sup> Would this operation exceed the proper authority of a court in respect to the selection of measuring lives for reformation purposes? I believe it would not, for the suggested saving provision might very properly be regarded as the sort of provision which the draftsman of this will ought to have inserted at the beginning. This is not a case of gaining knowledge by hindsight and using such knowledge to extend the period of the Rule. This case also serves to demonstrate the advantages of timely reformation and the wasteful consequences of deferring judgment when reformation is possible. Here it took three lawsuits before the final conclusion was reached that a major part of the testator's scheme must fail. With reformation available, one timely lawsuit could have settled the matter and would have left the testator's objectives room to work themselves out under the facts as they developed, without any impairment whatever.

Two recent cases involve a type of problem one might expect to be common;<sup>55</sup> at least the evident testamentary objective must be very commonly sought. In one of these cases a will provided for the sale of property to establish a fund "from which my grandchildren are to receive an education as high as their abilities may acquire."<sup>56</sup> If this did not mean that the grandchildren were entitled to certain shares of the fund on birth to be administered so as to provide for their education, but left a discretion as to the sums which were payable for the education of each grandchild, which the court declared was the proper construction, the gift would be void if it extended to after-born grandchildren. This the court also held, since the discretion might not be exercised within twenty-one years after any available life or lives in being. This

<sup>54</sup> In fact, if the question of reformation arose at the time of this suit, the court, upon proper analysis, as previously indicated (page 7 *supra*) might choose to dispense with a formal amendment of the will and simply declare the will valid. An amendment of a will would need to be recorded only for future reference and application. Here it would have served its purpose upon conception.

<sup>55</sup> *Parker v. Parker*, 252 N.C. 399, 113 S.E.2d 899 (1960); *Burruss v. Baldwin*, 199 Va. 883, 103 S.E.2d 249 (1958); *cf. Clarke v. Clarke*, 253 N.C. 156, 116 S.E.2d 449 (1960).

<sup>56</sup> *Burruss v. Baldwin*, *supra* note 55, at 885. In *Parker v. Parker*, *supra* note 55, at 401, the trust was to terminate by distribution of the principal when the youngest grandchild reached the age of twenty-eight.

admirable arrangement, including the discretionary element, it might be argued, is supported by sufficient policy to justify excepting it from the Rule Against Perpetuities where limited so that ultimate distribution is required upon the end of the period needed for educational purposes. At any rate, such an objective ought not to fail altogether, as it did in the two cases in question. A saving provision could be inserted limiting the stated directions so as to end twenty-one years after the death of all the testator's children and grandchildren who were living at the testator's death, and directing the trustee to distribute to or hold for each grandchild then living a sum estimated as necessary to complete that child's education. If, as in the two cases cited, there were several grandchildren living at the testator's death, the chances would be great that the saving provision would never need to be invoked. In one of the two cases no disposition was provided for funds not needed for the educational purposes.<sup>57</sup> In such a case, upon reformation, such funds presumably would be disposed of as intestate property. In the other case cited, alternative dispositions of surplus funds were provided.<sup>58</sup> In that case, the saving provision would also operate to limit the time of such distribution to the amended period indicated.

The "unborn widow" problem appeared in one recent case.<sup>59</sup> A trust was created for the benefit of the testator's wife and his son's family. The will further provided, "Upon the death of my wife and the death of my son, Thomas . . . and the death or remarriage of his widow, if any survive him, I desire that my estate be distributed equally, share and share alike, among the children of my son. . . ." There were alternative provisions in case any of the son's children should not be living at the time of distribution. The court held that the remainders to the son's children were vested and valid, that the limitations over on the death of those children of the son who were living at the testator's death were valid, but the limitations over on the death of those who were after born were invalid, with the result that the remainders in the latter children became indefeasible. It could have been a simple matter to save the entire plan, either by construing the gift to the widow as intended to apply to the son's then living wife, or by adding to the words "if any survive him" the words "who was

<sup>57</sup> *Burruss v. Baldwin*, *supra* note 55.

<sup>58</sup> *Parker v. Parker*, 252 N.C. 399, 113 S.E.2d 899 (1910).

<sup>59</sup> *Lanier v. Lanier*, 218 Ga. 137, 126 S.E.2d 776 (1962).

living at my death." Or, as an alternative, the language could be left as written but subject to the proviso that if at Thomas' death he should be survived by a widow who was unborn at the testator's death, distribution should be made twenty-one years after Thomas' death.

Two recent Ohio cases, one of which has previously been referred to, established trusts for the children and issue of the testator. In *Large v. National City Bank*<sup>60</sup> provision was made for shares of income of a trust estate for each of the testator's children, with remainders in the income to the issue of each and cross-remainders in the absence of issue to the survivors of the children or their issue. The will further provided: "This trust shall cease and determine upon the death of all of my children and all of the issue of my children." At that time distribution was to be made to the lineal descendants of the children per capita, or if there were none, to the testator's heirs at law. The entire trust was held void. In *Gwinner v. Schoeny*<sup>61</sup> gifts of 200 dollars a month from income and/or principal were made to each of the testator's children for life, such payments to continue in each child's issue per stirpes after his death. The will further provided, "The payments out of said trust fund shall begin as of the first day of the month following my death and shall continue until said trust fund has been depleted." The court, in declaring a perpetuities violation, undertook to preserve as much of the testator's scheme as did not violate the Rule, and held that only the life interests of the testator's children could be so sustained.

By way of reformation, the provision of the *Large* trust quoted above could be amended simply by the addition at the end of that statement of the words "living at my death." Similarly, the quoted provision of the *Gwinner* trust could be amended by adding the proviso that the trust should end not later than the death of all the testator's issue who were living at his death, with a direction that all remaining principal be then distributed to the issue of the testator per stirpes then living.

*Colorado Nat'l Bank v. McCabe*<sup>62</sup> is another example of a striking disregard of the requirements of the Rule, as well as an illustration of the rather obvious devices which can vindicate the

<sup>60</sup> 170 N.E.2d 309 (Ohio P. Ct. 1960).

<sup>61</sup> 111 Ohio App. 177, 179, 171 N.E.2d 728, 729 (1960).

<sup>62</sup> 143 Colo. 21, 353 P.2d 385 (1960).

stated objectives within the limits of the Rule. In that case the residuary estate was left in trust for four named persons, one of whom was the testator's cousin and sole heir, and two of whom were the cousin's children. The income was to be used for the support and education of these persons, with cross-remainders in the income on the death of any of them. It was directed that the trust continue for twenty-five years after the testator's death, at which time ambiguous alternative provisions for distribution of the corpus to the named beneficiaries or their issue, all of which were found to be contingent, were to take effect. The interests in the corpus and the income of the survivors of the named persons were held valid, but the other alternative dispositions were held void. The simplest and most obvious way to reform the instrument would have been to substitute twenty-one years for twenty-five years as the period of the trust. A better alternative would have been to leave the period as stated in the will, but couple it with the period of twenty-one years after the death of all the named persons, distribution to be made when the first of these two periods should end. In all probability the valid saving period would prove to be the longer of the two.

In *New England Trust Co. v. Sanger*<sup>63</sup> an irrevocable inter vivos trust, which was not subject to amendment, provided for the testator's brother for life. On his death income was to be paid in the trustee's discretion to the then surviving children of the brother, the issue of any deceased child to take its parent's share. On the death of the last surviving child the principal and any accumulated income was to be paid to the issue of the children per stirpes. Perceiving later that this disposition might violate the Rule Against Perpetuities, the settlor adopted the ingenious expedient of executing a further instrument inter vivos, which provided that if any provision of the first instrument should be held invalid and on account thereof any income or principal should revert to the settlor or his estate, the same should be held in trust for the children of the brother "now living" and to their issue by right of representation until the death of the last survivor of said children and thereupon to pay over the principal to the then living issue of such children. Two children of the brother were living when the first instrument took effect. Another was born after the first but before the second instrument. The former two

<sup>63</sup> 337 Mass. 342, 149 N.E.2d 598 (1958).

died after the execution of the second instrument, one of them with issue surviving, and the death of the second of these two led to this suit. At that time the after-born child of the brother was still living and had three minor children.

The court did indeed find a perpetuities violation in the first instrument, which included all interests subsequent to the life interests of the children. To allow the subsequent remainders then to fall within the compass of the second instrument would produce a distortion in the settlor's scheme, the court said. Consequently, the court undertook to resolve the doubt created by its prior decisions in respect to infectious invalidity and applied that doctrine to the article of the first instrument which disposed of the estate after the brother's death, so that all interests subsequent to the brother's failed, and the property became subject to the terms of the second instrument. In this way, the court believed, the donative scheme was substantially preserved. It was argued that this arrangement also was void because it turned on a finding that the first instrument was invalid, which might not have taken place within the period of the Rule. The court rejected this argument by finding that the first instrument must be regarded as void *ab initio* and that consequently the settlor remained free from the time of the first instrument to dispose of the property not validly disposed of by that instrument. You will note that the settlor did not say in his second instrument that all property not validly disposed of by the first instrument should be disposed of by the terms of the second. He made his second round of gifts contingent on a decision as to the invalidity of the first. There is no reason to quarrel with this result, but was it not reformation of a sort? It was at least a constructional preference for validity.

It will be noted that the settlor in this case, when he executed his second inter vivos trust instrument, could start the perpetuities period running anew in respect to all property covered by that instrument. Suppose his first instrument had been a will unmodified at his death. No comparable resolution of his difficulties, therefore, would have been possible by way of reformation. But a saving clause could have been provided which called for the distribution of principal and accumulated income no later than twenty-one years after the death of all of the children of the brother who were living when the instrument took effect, distribution to be made per stirpes to the issue of the brother then living.

*Conclusion*

The gist of the concern which may be felt about enacting a blanket cy pres doctrine for perpetuities violations is probably not the fact that under such a doctrine the language of a written instrument will be altered. Rather, it probably centers on the fact that such an alteration is authorized without specification of the limits of the alteration. Two general standards for reformation are indispensable: (1) the result must be confined within the limits of the Rule Against Perpetuities, and (2) the result must preserve the intention of the donor to the fullest extent possible within those limits. I suppose there is less concern about breaching or subverting the traditional requirements of the Rule than about the possible substitution of a court's judgment for that of the donor on the proper disposition of his estate. If this concern reflects a fear that the stated restrictions will prove inadequate guides to a court which faces the task of reformation, it has been my thesis herein that the process of reformation is essentially a process of construction which invokes the same frame of reference to which the courts have always resorted when dealing with ambiguous or incomplete dispositive instruments, that is, the intention of the donor as revealed by his entire instrument in the light of attending circumstances. It has also been the burden of my argument that there are special and intrinsic guidelines for the kind of construction which passes under the name of reformation. The survey of cases presented above may show that the way to reform an invalid scheme within the limits of the Rule is usually rather obvious. It emerges from the same kind of analysis which courts have always made in finding violations of the Rule. Once it is perceived how or why an interest offends the Rule, that alteration which would escape the offense tends to suggest itself. In doing so, it presents at the same time the way to preserve the donor's original intention to the fullest extent possible. It is a further significant fact in this connection that reformation often will consist not in the alteration of specific directions, but in the insertion of a saving provision which leaves the donor's original directions verbally intact and qualifies their applicability in such a manner that timely vesting is assured.

Must we also face the danger that if reformation is authorized, courts will be induced to disregard the stated limitations of that process? Where, for example, there is an end-limitation to the issue of *A* which violates the Rule, is there a real danger that a



court would feel free, for one reason or another, to substitute a gift to *B*, for whom the donor may have made no provision? The danger either of a deliberate disregard of applicable law or of ignorance and ineptitude in its application is perhaps greater in the administration of the intricacies of the Rule Against Perpetuities than elsewhere in the law. We have lived with such a risk for a long time; the only certain way to eliminate it is to abolish the Rule. If this sort of risk becomes greater when the door of reformation is opened—which I do not believe will be the case, but which I cannot disprove—I am driven ultimately to the position that, in the balance of values, it is better to suffer such a risk than to suffer, not the risk, but the continued certain overthrow of too large a proportion of family arrangements, which by reformation would be saved.