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Future Interests-Rule Against Perpetuities--Cy Pres Applied to Modify an Interest Violating the Rules

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FUTURE INTERESTS—RULE AGAINST PERPETUITIES—CY PRES APPLIED TO MODIFY AN INTEREST VIOLATING THE RULE—Testator's will created a trust for his grandchildren which was to terminate "when my youngest grandchild (whether now living or hereafter born) shall become twenty-five years of age." As it would be possible for the youngest grandchild to become twenty-five beyond the period permitted by the Rule Against Perpetuities,¹ the chancellor held the class gift invalid. The state supreme court reversed,² and ruled that since the trust allowed payment of income to the beneficiary as needed, the interests vested upon the death of the testator.³ On suggestion of error, *held*, overruled, judgment modified and corrected. The interests may be modified through application of the equitable doctrine of cy pres to avoid the effect of the Rule Against Perpetuities; as such, the trust will terminate when the youngest grandchild reaches the age of twenty-one. *Carter v. Berry*, 140 So. 2d 843 (Miss. 1962).

At common law the interests of each and every member of a class must vest within the period permitted by the Rule Against Perpetuities, or else the entire class gift will fail.⁴ The leading case embodying this principle, *Leake v. Robinson*,⁵ has been followed in every American jurisdiction to rule on the issue,⁶ although the doctrine itself has been subject

¹ "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." GRAY, *THE RULE AGAINST PERPETUITIES* 191 (4th ed. 1942).

² *Carter v. Berry*, 136 So. 2d 871 (Miss. 1962).

³ It has generally been held that in trusts in which the income is payable to the beneficiary, the interest is presently vested even though distribution is to occur at some future date. See, e.g., *Hill v. Birmingham*, 131 Conn. 174, 38 A.2d 604 (1944); *Jackson v. Langley*, 234 N.C. 243, 66 S.E.2d 899 (1951). The court in the principal case adhered to this line of reasoning at first, but the "desirability of meeting the issue head-on" persuaded the court to treat the interests as contingent. Principal case at 850.

⁴ GRAY, *op. cit. supra* note 1, § 374; 4 RESTATEMENT, PROPERTY § 371 (1944); SIMES & SMITH, *FUTURE INTERESTS* § 1265 (2d ed. 1956).

⁵ 2 Meriv. 363, 35 Eng. Rep. 979 (Ch. 1817).

⁶ E.g., *Taylor v. Crosson*, 11 Del. Ch. 145, 98 Atl. 375 (1916); *Thomas v. Pullman Trust & Sav. Bank*, 371 Ill. 577, 21 N.E.2d 897 (1939); *Kates v. Walker*, 82 N.J.L. 157, 82 Atl. 301 (1912); *Parker v. Parker*, 252 N.C. 399, 113 S.E.2d 899 (1960).

to substantial criticism.⁷ The rationale offered in justification of the all-or-nothing rule, as it is called, is that to hold one part of a class gift void, but another part valid, is to produce a result the testator never intended.⁸ Often, however, as seen in the principal case in which, by the terms of the will, the children of the testator were expressly excluded, the testator's intent would be practically ignored by allowing that portion of the estate to pass by intestacy rather than to be sustained in part.⁹ In an attempt to avoid such stringent consequences of the Rule Against Perpetuities, there has been considerable legislative activity in recent years.¹⁰ Some states¹¹ have enacted statutes which embody a "wait and see" doctrine, whereby the duration of a contingency is measured by actual rather than possible events. Under such a statute, a bequest which is contingent upon settlement of the estate or the payment of a debt would be valid rather than fail as a violation of the Rule,¹² since the event is of a nature likely to occur within a relatively short period. Another provision, which is often seen linked to a "wait and see" statute, is one which *automatically* reduces the age to twenty-one years when the interest is contingent upon the beneficiary reaching an age in excess of twenty-one.¹³ This type of statutory provision is designed to correct the specific problem encountered in the principal case. A third of the recent statutory developments gives the courts a blanket cy pres¹⁴ power, enabling them, as was done in the

⁷ Leach, *The Rule Against Perpetuities and Gifts to Classes*, 51 HARV. L. REV. 1329 (1938); Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721 (1952).

⁸ *Ryan v. Ward*, 192 Md. 342, 355, 64 A.2d 258, 264 (1949); 4 RESTATEMENT, PROPERTY § 371, comment a (1944).

⁹ Testator already had made provisions for his two daughters, as was stated in his will. By prior arrangements one had received \$31,292 in cash plus substantial stock, and the other \$50,000 in cash and substantial stock.

¹⁰ For a short summary of recent trends in perpetuities legislation, see 5 POWELL, REAL PROPERTY ch. 75A (1962).

¹¹ KY. REV. STAT. § 381.216 (1960); MD. ANN. CODE art. 16, § 197A (Supp. 1962); PA. STAT. ANN. tit. 20, § 301.4 (1950); VT. STAT. ANN. tit. 27, § 501 (1959); WASH. REV. CODE §§ 11.98.010-050 (Supp. 1961). The following "wait and see" statutes are applied only to interests following life estates: CONN. GEN. STAT. REV. § 45-95 (1959); ME. REV. STAT. ANN. ch. 160, § 27 (Supp. 1962); MASS. ANN. LAWS ch. 184A, § 1 (1955). See generally Leach, *Perpetuities Legislation, Massachusetts Style*, 67 HARV. L. REV. 1349 (1954); Simes, *Is the Rule Against Perpetuities Doomed?: The "Wait and See" Doctrine*, 52 MICH. L. REV. 179 (1953). For an application of this doctrine without benefit of statute, see *Merchant's Nat'l Bank v. Curtis*, 98 N.H. 225, 97 A.2d 207 (1953).

¹² For the general common-law treatment of interests contingent upon such events, see 6 AMERICAN LAW OF PROPERTY § 24.23 (Casner ed. 1952).

¹³ CONN. GEN. STAT. REV. §§ 45-95 to 100 (1959); ME. REV. STAT. ANN. ch. 160, §§ 27-33 (Supp. 1962); MD. ANN. CODE art. 16, § 197a (Supp. 1962); MASS. ANN. LAWS ch. 184A, §§ 1-6 (1955); N.Y. REAL PROP. LAW § 42-B. In addition to the provision concerning a mandatory reduction in age, New York has also enacted a provision containing rules of construction to approximate testator's intent. N.Y. REAL PROP. LAW § 42-C. Professor Leach has said that if New York would pass a cy pres statute, every other state would fall in line within a five-year period. Leach, *Perpetuities Legislation: Hail Pennsylvania*, 108 U. PA. L. REV. 1124, 1149 n.65 (1960).

¹⁴ "Cy pres means 'as nearly as may be.' The doctrine is a simple rule of judicial construction, designed to aid the court to ascertain and carry out, as nearly as may be,

principal case, to modify an invalid bequest to approximate most closely the thwarted intent of the testator.¹⁵ In the absence of such a statute, the application of this equitable doctrine, which has been traditionally limited to charitable trusts,¹⁶ is almost entirely without precedent. The only previous authority to be found is an early New Hampshire decision,¹⁷ in which an invalid trust for the testator's grandchildren, which was to vest when the youngest reached forty, was modified *cy pres* so that it terminated when the youngest reached twenty-one. This doctrine is still extant in that jurisdiction, although at the time the decision did not escape entirely without criticism.¹⁸

That there is a need for some degree of reform of the Rule Against Perpetuities, so that it may meet the needs of modern times, no one seriously disputes.¹⁹ Yet, judicial powers of correction being somewhat limited, it is generally felt that this burden must be borne by the legislatures.²⁰ While this may be conceded in the abstract, a court presented with a validity question similar to that presented in the principal case might very well apply the same *cy pres* doctrine to avoid harsh results;²¹ for the apparent success of *cy pres* in those states in which it has been adopted confirms its usefulness as a potential cure. New Hampshire is of special interest, since its extension of *cy pres* beyond the area of charitable trusts was without the benefit of legislation. Yet, this jurisdiction now enjoys a workable doctrine as effective as that adopted by statute in other states. Moreover, the New Hampshire rule and its equivalent adopted in the principal case maintain a possible advantage over mandatory age-reduction

the intention of the donor of a gift to provide for the future." *BALLENTINE, LAW DICTIONARY* 324 (2d ed. 1948).

¹⁵ IDAHO CODE ANN. § 55-111 (1957) (applicable to trusts only); KY. REV. STAT. §§ 381.215-.223 (1962); VT. STAT. ANN. tit. 27, §§ 501-03 (1959); WASH. REV. CODE §§ 11.98-.010-.050 (Supp. 1961).

¹⁶ See 2A BOGERT, TRUSTS AND TRUSTEES § 431 (1953); 4 SCOTT, TRUSTS § 399 (2d ed. 1956). See generally 2A BOGERT, *op. cit. supra* §§ 431-41; 4 SCOTT, *op. cit. supra* §§ 395-401.

¹⁷ *Edgerly v. Barker*, 66 N.H. 434, 31 Atl. 900 (1891).

¹⁸ GRAY, *op. cit. supra* note 1, app. G. But see Leach, *supra* note 13, at 1130. Many eminent writers in the field, however, have expressed approval of this doctrine, some advocating statutory adoption. Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721 (1952); 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); Simes, *The Policy Against Perpetuities*, 103 U. PA. L. REV. 707, 733 (1955); Simes, *Reform of the Rule Against Perpetuities, Qualified Endorsement*, 92 TRUSTS & ESTATES 770 (1953).

¹⁹ Leach, *Perpetuities: New Absurdity, Judicial and Statutory Correctives*, 73 HARV. L. REV. 1318 (1960); Lynn, *Reforming the Common Law Rule Against Perpetuities*, 28 U. CHI. L. REV. 488 (1961); Schuyler, *Should the Rule Against Perpetuities Discard Its Vest?*, 56 MICH. L. REV. 887 (1958); Waterbury, *Some Further Thoughts on Perpetuities Reform*, 42 MINN. L. REV. 41 (1957).

²⁰ LEACH & TUDOR, *THE RULE AGAINST PERPETUITIES* app. 6 (1957).

²¹ But see *Beverlin v. First Nat'l Bank*, 151 Kan. 307, 312, 98 P.2d 200, 204 (1940), where the court said, "Notwithstanding these divergent views, we think the rule in *Leake v. Robinson* . . . having been followed by the Courts of England and America for a century, has become an integral part of the common-law rule, and if a change is to be made it must be made by the legislature."

statutes, since the discretionary power left in the courts enables them to dispose of the rare, but nevertheless conceivable situation in which total invalidity would have been preferred by the testator. The objection has been raised,²² however, that such broad discretion vests a court with the arbitrary power to determine the intent of an individual who is unable to contradict that determination. While this may be true, such discretionary power is exercised by courts in many instances, such as in the admission of a will to probate in which the necessary testamentary intent is not entirely clear,²³ or in the interpretation of statutes which require determination of legislative intent to establish their meaning.²⁴ Thus, notwithstanding this objection, the equitable doctrine of cy pres can be profitably employed in adapting the Rule Against Perpetuities to contemporary requirements.

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²² See Newhall, *Reform of the Rule Against Perpetuities, Practitioner's View*, 92 TRUSTS & ESTATES 773 (1953).

²³ E.g., *In re Saragavak's Estate*, 35 Cal. 2d 93, 216 P.2d 850 (1950).

²⁴ E.g., *Rogers v. Wagstaff*, 120 Utah 136, 232 P.2d 766 (1951).