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THE "WAIT AND SEE" DOCTRINE

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FEW rules of the common law have shown such amazing vitality as the rule against perpetuities. Emerging in the *Duke of Norfolk's Case*[1] in 1682, as a rule to restrict unbarrable entails in land, it is now applied, not only to interests in land, legal and equitable, but also to personal estate, tangible and intangible, including beneficial interests in trusts. It is regarded as a part of the common law of nearly every English speaking country, except a few of the United States where statutory substitutes have been provided. Since 1930, statutory substitutes have been abolished and there has been a return to the common law rule by legislative enactment in six states.[2]

In spite of this pronounced legislative trend, it is possible to detect the stirrings of a counter current. The rule has recently been personified as "an elderly female clothed in the dress of a bygone period who obtrudes her personality into current affairs with bursts of indecorous energy," and who "must learn to sit by the fire and confine her activity to a few words of wise advice from time to time."[3] Moreover, since the decision in the case of *Brown v. Independent Baptist Church of Woburn*,[4] in 1950, the distinction between executory devises and

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[1] 3 Ch. Cas. 1, 22 Eng. Rep. 931.

[2] Ala. Gen. Acts (1931) No. 684; Cal. Stat. (1951) c. 1463; 114 Ohio Laws (1931) p. 470; Indiana Laws (1945) c. 216; Mich. Public Acts (1949) No. 38; Wyoming Laws (1949) c. 92.

[3] Leach, "Perpetuities in Perspective: Ending the Rule's Reign of Terror," 65 HARV. L. REV. 721 at 725 and 727 (1952).

[4] 325 Mass. 645, 91 N.E. (2d) 922. This case involved a devise of land to a church "to be holden and enjoyed by them so long as they shall continue as a church;" and if the church be dissolved then the land was to go to certain named persons. A later clause in the will devised the residue of the estate to the same named persons. The court determined that the first devise to the named persons was an executory interest, void under the rule against perpetuities; but this left a possibility of reverter in the testatrix's estate, which was validly devised by the residuary clause. Of course, under orthodox doctrines, the residuary clause created a void executory interest as well as the prior gift over. For it was created by the same instrument by which the determinable fee was created. The testatrix did not

possibilities of reverter would seem to have become so completely obliterated in Massachusetts as to permit the exact equivalent of a legal executory interest to be created in any living person who might be selected, without being subjected to the restrictive operation of the rule against perpetuities.

I

THE "WAIT AND SEE" DOCTRINE

The most serious aspect of this counter trend, however, remains to be described. To use the apt phrase of its chief proponent, it is the "wait and see" doctrine. It means that the validity of contingent future interests under the rule against perpetuities is to be determined as of the time when the contingency occurs.

Before entering upon a discussion of that doctrine, a brief statement of the existing common law rule[5] on this matter should be made. First, let us recall Gray's shorthand statement of the rule, which is as follows: "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."[6] In applying this rule, the validity of a future interest is, with one exception, determined by considering the facts as they exist at the time the period of the rule begins to run, this time commonly being the delivery of the deed or the death of the testator. The one exception arises when an appointment under a general power to appoint by will only, or under a special power, is involved. In those cases, though the period is counted from the creation of the power, the validity of the appointment is determined by a consideration of facts as they exist at the time when the power is exercised.[7]

first create a determinable fee and then devise it, for she did not die twice. See 2 PROPERTY RESTATEMENT §§154 and 158 (1936). Since, unfortunately, the possibility of reverter is not subject to the rule against perpetuities, this decision permits a testator, by placing a gift in the residuary clause, to make it a possibility of reverter and thus exempt it from the rule against perpetuities.

It is true, in any jurisdiction in which possibilities of reverter are alienable, a person can create a determinable fee by one conveyance and assign the possibility of reverter, which he thereby reserves to himself, in a later conveyance. That is because one can make two conveyances, taking effect at different times, and he, therefore, can first create a possibility of reverter and later assign it. This is bad enough, but the recent Massachusetts decision extends the evil to testamentary transactions.

[5] By the existing common law rule is meant the rule in jurisdictions other than Massachusetts and New Hampshire. The law of these states is later discussed.

[6] GRAY, RULE AGAINST PERPETUITIES, 4th ed., 191 (1942).

[7] See, for example, Warren's Estate, 320 Pa. 112, 182 A. 396 (1936).

A. *Sources of the Doctrine*

Early in 1952, Professor W. Barton Leach, of the Harvard Law School, published two substantially identical articles, one in the *Harvard Law Review*[8] and one in the *Law Quarterly Review*,[9] in which he advocated legislation modifying the common law rule against perpetuities so that the validity of a contingent interest would be determined in the light of events existing when the contingency occurred. "Whatever reason may be adduced through either ancient authority or present contrivance," he says, "I am certain that the better reason is opposed to the current doctrine. By hypothesis the interests in question are all contingent. . . . Why should we not 'wait and see' to determine whether the contingency happens within the period of the Rule?"[10]

Later in 1952, when the *American Law of Property* came off the press, similar views were expressed in Part XXIV, written by Professor Leach and Mr. Owen Tudor, of the Boston bar. These views are indicated by the following excerpt:[11] "The reason, if any, for the rule that, in case of a *devise* or *bequest*, the courts will not 'wait and see' whether events actually turn out in such a way as to cause all interests to vest within the period of perpetuities is this: As soon as an interest is created its validity should be capable of ascertainment. The present writers do not consider this an adequate reason—by hypothesis the remainder is contingent, so all the parties must 'wait and see' which way the contingencies happen; why is there any inconvenience in requiring them to 'wait and see' whether the contingencies happen within the period of the Rule?"

A few months after the publication of the *American Law of Property*, the Supreme Judicial Court of Massachusetts handed down its decision in the case of *Sears v. Coolidge*.[12] The facts were substantially as follows: The settlor of an inter vivos trust had reserved to himself a power to amend and declare new uses in any manner except

[8] "Perpetuities in Perspective: Ending the Rule's Reign of Terror," 65 HARV. L. REV. 721 (1952).

[9] "Perpetuities: Staying the Slaughter of the Innocents," 68 L.Q. REV. 35 (1952).

[10] 65 HARV. L. REV. 721 at 730 (1952). Similar language appears in 68 L.Q. REV. 35 at 44 (1952). In each article legislative changes in the rule are suggested for consideration, the first of which is "a provision that the rule will be applied to any interest on the basis of events which have actually occurred at the termination of the preceding interests, not on the basis of events which might have occurred but did not." 65 HARV. L. REV. 721 at 747 (1952).

[11] 6 AMERICAN LAW OF PROPERTY 102 (1952). While the passage quoted purports to state the view of "the writers," note 7, page 102, and note 4a, page 104, indicate that Mr. Tudor does not entirely agree with Professor Leach's "wait and see" doctrine.

[12] 108 N.E. (2d) 563 (1952).

for his own benefit. This power is treated, for purposes of the case, as a special power of appointment. Subject to the power, and qualified by an alternative contingency which did not occur, the corpus of the trust was to be distributed to the settlor's issue living at the time of distribution, which was fixed at the time when the settlor's youngest grandchild living at his death should attain the age of fifty. The youngest grandchild who attained the age of fifty was in being when the trust was created, and no grandchildren were born after the trust was set up. The power was not exercised. The court held that the provision for distribution was valid under the rule against perpetuities. Citing the *American Law of Property*,[13] from which quotation has herein been made, the court reasoned that, since the facts existing when a special power of appointment is exercised may be considered in determining the validity of the appointment, it should also be possible, in determining the validity of a gift in default, to consider facts existing when the donee dies and the power is unexercised.

This, of course, is a long way from accepting the "wait and see" doctrine in its entirety, and would seem merely to extend the doctrine to a gift in default of appointment. Moreover, the case could have been decided on a perfectly orthodox ground which the court referred to but did not rely on. At the time the trust was created, the settlor was eighty-one years old and a widower. His only children then living were two daughters, one aged fifty-nine years and the other fifty-five years. It could fairly, therefore, be assumed that, when the settlor referred to "the attainment of fifty by the youngest surviving grandchild of mine who was living at my death," he meant "youngest grandchild of those living when the trust was set up," because he did not anticipate that he would have any more grandchildren.[14]

In *Merchants Nat. Bank v. Curtis*,[15] the New Hampshire Supreme Court passed upon the validity of a gift over in a testamentary trust limited to vest "if my granddaughter M.M.C. or other grandchildren shall survive both my children and shall have and leave no heirs of her or their body." M.M.C. was the only granddaughter which the testatrix had. She died without leaving any surviving issue. The court held the gift over valid under the rule. First, the court gave the perfectly orthodox reason that there were really two alternative contingencies, namely, the death of M.M.C. without surviving issue, and the

[13] The court cited 6 AMERICAN LAW OF PROPERTY §24.36 (1952), which is concerned with the single question whether, in determining the validity of a gift in default, facts existing when the donee died may be considered.

[14] 4 PROPERTY RESTATEMENT §377, comment c (1944).

[15] 97 A. (2d) 207 (1953).

death of unborn grandchildren without surviving issue. The first was clearly valid in its inception under the rule, since M.M.C. was the life in being. Since this is the contingency which occurred, the gift over was good.[16] But the court went on to say that the condition might be construed as a single contingency, in which case the facts could be considered as of the time when the testatrix's children died. The *American Law of Property* and Professor Leach's *Harvard Law Review* article, which have already been referred to, were cited with approval, the court observing: "When a decision is made at a time when the events have happened, the court should not be compelled to consider only what might have been and completely ignore what was."

In addition to these two cases we have one statute which definitely lays down the "wait and see" doctrine. In 1947, as a part of its new Estates Act, the Pennsylvania legislature enacted the following provision:[17]

> "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."

Apparently it was not realized how revolutionary this piece of legislation is. The comment in the report of the Joint State Government Commission, in which the statute is presented to the legislature, states, "This subsection is intended to disturb the common law rule as little as possible. . . ."[18] A justification for the new provision is that, according to Pennsylvania law, it appears that the courts will not construe a will for the purpose of determining the validity of contingent equitable interests in a trust until after the death of the life tenant.[19] To date the Pennsylvania courts have not construed this statute.

Thus we have in support of the existence of a "wait and see" doctrine two cases, each of which could be decided on other and perfectly orthodox grounds, and an uninterpreted statute.[19a] Evidently we cannot

[16] 4 PROPERTY RESTATEMENT §376 (1944).

[17] 1 Pennsylvania Laws (1947) No. 39, §4(b).

[18] Report of the Joint State Government Commission of the General Assembly of Pennsylvania Relating to the Following Decedents' Estates Laws: Intestate Act of 1947; Wills Act of 1947; Estates Act of 1947; Principal and Income Act of 1947, p. 72 (1947).

[19] See Quigley's Estate, 329 Pa. 281, 198 A. 85 (1938), cited to this effect in the Report referred to in note 18 supra. In general on declaratory judgments in Pennsylvania, see the monograph on that subject by Professor Levin, published in Purdon's Pennsylvania Statutes Annotated (1953), immediately preceding title 12, §731. Of course, what the Pennsylvania legislature did was to perpetuate a bad rule as to the time when the validity of a future interest can be determined.

[19a] See *Addendum*, infra p. 194.—Ed.

be sure that the doctrine is in force anywhere except in Pennsylvania, and we still do not know precisely what it means there. But before this innovation spreads further, it may be well to consider what it means and where it is likely to lead us.

B. *The Case against the "Wait and See" Doctrine*

It is my belief that the "wait and see" doctrine, in the unqualified form presented in the Pennsylvania statute and elsewhere,[20] is undesirable and unworkable; and that its adoption means that the rule against perpetuities is doomed.

1. *Since a contingent future interest exists when the creating instrument takes effect, its validity should be determined as of that time.* Protagonists of the "wait and see" doctrine appear to find something startling about determining the validity of an interest in accordance with facts existing when it is created. It would seem that to consider validity as of the time when interests arise is a completely normal process which runs all through our legal system. The validity of a devise on a condition in restraint of marriage is not determined when the devisee marries. Suppose, for example, a testator devises his estate to his two-year-old daughter on a condition subsequent that she never marry. We do not wait until she is old enough to be legally capable of marriage before determining whether the condition is illegal. We determine it at the death of the testator. Contracts are determined to be against public policy when they are executed, not when one of the parties does something against public policy.

A good deal has been said, both in prose and poetry, about the validity of limitations under the rule against perpetuities being determined on the basis of what "might have been." It is submitted that all

[20] For comments on the Pennsylvania statute, see the following: Bregy, "A Defense of Pennsylvania's Statutes on Perpetuities," 23 TEMPLE L.Q. 313 (1950); Phipps, "The Pennsylvania Experiment in Perpetuities," 23 TEMPLE L.Q. 20 (1949); notes, 60 HARV. L. REV. 1174 (1947); 23 N.Y. UNIV. L.Q. 511 (1948); 97 UNIV. PA. L. REV. 263 (1948); 26 TEMPLE L.Q. 148 (1952).

In general, on the "wait and see" doctrine, in addition to the Leach articles cited, notes 8 and 9 supra, see the following: 6 AMERICAN LAW OF PROPERTY 40, 99-106 (1952); Newhall, "Doctrine of the 'Second Look'," 92 TRUSTS AND ESTATES 13 (1953); "Reform of the Rule Against Perpetuities," Panel Discussion by Looker, Leach, Simes and Newhall, 92 TRUSTS AND ESTATES 768 (1953), same in A.B.A. PROCEEDINGS, PROBATE AND TRUST LAW DIVISIONS 83 (1953).

It should be pointed out that, in the panel discussion last cited, Professor Leach merely advocated determining the facts as they exist at the termination of the life estate in applying the rule against perpetuities. Since, however, he did not indicate any retraction from the position taken in earlier writings, it is to be assumed that his proposal made at the A.B.A. meeting represented what he believed a legislature might be willing to enact.

the rule against perpetuities does is to look at facts as they are when the testator dies or when the deed is delivered. In a number of jurisdictions interested parties may be able to have the validity of future interests determined immediately upon the inception of the instrument.[21] Ideally, in such jurisdictions, the suit to determine the validity of the future interest would be brought at the moment of the inception of the interest. If that were true, then the decision would never be made on the basis of facts which "might have been." But since in practice there will be a period of time between the inception of the instrument and the filing of the suit, it sometimes could happen that there would be a decision on the basis of facts which had not and could not occur. However, no one, whether he favors the "wait and see" doctrine or not, would contend that the facts should be determined as of the time suit is filed, since that would give the plaintiff an opportunity, by careful timing, to determine the validity of the future interest.

It is true, in some jurisdictions, when a trust involves an equitable life estate with future interests following it, the courts refuse to determine the validity of the future interests until the life estate ends. But that rule has nothing to do with the rule against perpetuities and is inconsistent with the modern trend of enlightened jurisprudence. Certainly the existence of a bad rule such as that should not cause us to change the rule against perpetuities.

There was a time when a person in whose favor a contingent future interest was limited was thought of as having little more than a bare expectance like the *spes successionis* of the heir apparent. He had no remedies to protect his interest before it vested; he could not assign it; for practical purposes it did not exist until it vested. But today, if modern trends in the law of future interests mean anything, they mean that future interests are existing interests and can be owned just as certainly as possessory fees simple in land.[22]

The practical effect of the "wait and see" doctrine in this respect may be illustrated by the following case. *A* transfers securities to *T* on trust to pay the income to *B* for his life, and to hold until *B* has a son who has attained the age of fifty years, and then to transfer the corpus to such son; in default of any such son, then to transfer the corpus to *C*. *B* is alive and has a son, *D*, twenty-one years of age, who is in excellent health. *T*, the trustee, is attempting to embezzle the trust

[21] See 2 ANDERSON, DECLARATORY JUDGMENTS, 2d ed., §576 (1951).

[22] See 2 PROPERTY RESTATEMENT §153 (1936), where a future interest is described as a "segment of ownership."

estate in collusion with *B*. Under existing legal doctrines, the limitations both to the son of *B* and to *C* are void under the rule against perpetuities. There would be a resulting trust in favor of *A*, who would be able to proceed against the trustee. But suppose we apply the "wait and see" doctrine. It would seem that neither *C* nor *D* could proceed against *T*.[23] For when each brings his suit, the court will say: We cannot do anything for you, for your interest may be void *ab initio* under the rule against perpetuities; we must "wait and see." Nor is it clear that *A* can sue on any theory of resulting trust. For at the present time, *D*'s interest may be valid, or *C*'s interest may be valid. While technically it is possible to say that there is a resulting trust even if that be true, the interest of *A* would be so slight and ephemeral that equity might well refuse any remedy.

If a contingent future interest exists for any purpose at the inception of the creating instrument, its validity should be determined as of that time. The reason why we consider the validity of an appointment in the light of facts existing when it is made is that the future interest is then created.[24] But to say that the validity of a future interest, involving a right to present protection and a present power to alienate, cannot now be determined, involves both a logical and a practical anomaly.

2. *This doctrine leaves us without any satisfactory method of determining who are the lives in being.*[25] How do we determine the lives in being under the existing rule? The answer is, we may use any life as the measure, provided we can say, at the time the instrument takes effect, that, no matter what happens, the contingent interest will not vest later than twenty-one years after the termination of that life. As Professor Leach has said: "The measuring lives need not be mentioned in the instrument, need not be holders of previous estates and need not be connected in any way with the property or the persons designated to take it."[26]

[23] It may be argued that it is better to deny an action to *C* and *D* than to hold their interests void, as would be done under the common law rule. In answer it may be said that it is better to give a resulting interest to the settlor than to allow the trustee to embezzle the fund.

[24] It might also be said that the gift in default is not effectually created until it is certain that the power will not be exercised and that the non-exercise of the power is a kind of appointment to the taker in default. This would justify the result in Sears v. Coolidge, (Mass. 1952) 108 N.E. (2d) 563.

[25] This argument applies only if the facts are considered as of the time when the future interest vests. If any point of time prior to the happening of the contingency, such as the termination of a present life estate, or the exercise of a special power of appointment is selected, there is no difficulty in determining who are the lives in being.

[26] Leach, "Perpetuities in a Nutshell," 51 HARV. L. REV. 638 at 641 (1938).

Suppose a testator devises his estate on trust to distribute to such of his lineal descendants as are alive twenty-two years after his death. If we look at this as of the testator's death, there is no life in being that can be used as the measure and the interest is void. For no matter whom we select, it is possible that the person may die within less than a year after the testator's death. On the other hand, if we apply the "wait and see" doctrine, we can use the life of any person who was alive at the testator's death and who lived for at least one year thereafter. The fact that there will likely be millions of people who come within that description should not invalidate the provisions. It is true, there is a rule to the effect that the measuring lives must not be so numerous that evidence of their deaths is likely to be unreasonably difficult to obtain.[27] But that refers to cases where the interest is to vest on the death of the last survivor of several persons, such as a bequest to the last survivor of all persons whose names appear in the New York City telephone directory. In the case of a bequest to vest twenty-two years after the testator's death, we need find only one life under the "wait and see" doctrine, and that will probably be quite easy.

Perhaps it may be queried: Then why is not the "wait and see" doctrine desirable for that very reason? My answer is, if you can apply it in that case you can also apply it in a case where there is a devise to such of the testator's lineal descendants as are alive 120 years after the testator's death. If a person can be found who was alive when the testator died and who lived more than ninety-nine years after the time of the testator's death, the limitation would be good. One can imagine, in such a case, remote lineal descendants patiently awaiting the termination of the 120 year period, not knowing after all this time whether the limitation is good or bad. And finally, at the end of the 120th year, the attorney for the descendants advertises for evidence concerning any person who died twenty years ago and who was at least one hundred years old at the time of his death. Doubtless the attorney will eventually find such a person. For in every year there must be at least a few persons who die at the age of one hundred. But what a fantastic way to determine the validity of a future interest!

A still more difficult case to solve, if the "wait and see" doctrine is to be applied, is the following: *A* devises Blackacre "to the *B* Church in fee simple; but if the land should ever cease to be used for church purposes, then to *C* in fee simple." How long do we wait to see whether that contingent future interest violates the rule against per-

[27] 4 PROPERTY RESTATEMENT §374 and comment *l* to that section (1944).

petuities? Do we wait 120 years? or 130 years? Or must the church actually cease to do business before we can decide whether the executory interest is void?

3. *The "wait and see" doctrine is a long step in the direction of inalienability of property.* First, it seems clear, from the discussion which has preceded, that if the lives are selected at the end rather than at the beginning, longer lives will likely be chosen. The draftsman who selects twelve healthy babies at the inception of the future interest for the measuring lives may find that they all die within six months. But if he could select the lives when the contingency happens, he could never fail to find long ones. On this matter, hindsight is inevitably better than foresight.

Moreover, the fact that the future interest is not determined to be either good or bad until the contingency happens means that in many instances property would be inalienable for quite a long time in cases where, by the application of the common law rule, it would not be rendered inalienable even for a day. This objection is particularly serious in cases involving legal titles to land. While, of course, the vast majority of future interests about which litigation arises are equitable interests in trusts, an examination of the reports shows that problems involving contingent legal interests in land are not negligible.

It may also be pointed out that the proponents of the "wait and see" doctrine appear to be thinking solely in terms of problems involved in family trusts, and not from the standpoint of a land title attorney. I venture to assert that, if the "wait and see" doctrine were presented to any of the leading land title organizations of this country, its repudiation would be practically unanimous.

Consider again the fact situation already referred to. *A* devises Blackacre "to the *B* Church in fee simple; but if the land should ever cease to be used for church purposes, then to *C* in fee simple." At common law the executory interest limited to *C* is void, and *B* church at once has a fee simple absolute. According to the "wait and see" doctrine, we would have to wait until the condition happens before knowing whether the title of the church is good. Suppose after 125 years, the church ceases to function, and after diligent search, no measuring life can be found. Then the court decides that the church had a good title all the time. We have thus tied up the title for 125 years where it would not have been tied up at all at common law; and we have done so without carrying out the testator's wishes one whit more than the common law.

Not only does the "wait and see" doctrine increase inalienability

by postponing a decision when *future* interests are involved; it can also postpone a decision when *present* interests are involved. There is a doctrine which has aptly been termed the doctrine of infectious invalidity.[28] It is to the effect that, even though an interest devised may be perfectly valid in itself, if it is so closely connected with a future interest which fails under the rule against perpetuities that the testator would have preferred to die intestate rather than to have the future interest alone held invalid, then the present as well as the future interest fails.

Suppose a testator has an estate of $300,000 and has three principal objects of his bounty, his children *A*, *B* and *C*, who are his only heirs. He bequeaths $100,000 to *A*. He bequeaths $100,000 to a trustee on trust to pay the income to *B* for life, and to transfer the corpus after his death to such of his children as attain the age of thirty years. He, also, makes the same sort of bequest of $100,000 on trust to pay the income to *C* for his life, and to transfer the corpus after his death to such of his children as attain the age of thirty years. Under the common law rule, the remainder interests limited to *B*'s children and to *C*'s children would be void. It is entirely possible, also, under the doctrine of infectious invalidity, a court might hold the life estates in *B* and *C* and the bequest to *A* void.[29] This is because the testator intended a substantially equal distribution among his children, and this would be more nearly secured by holding that he died intestate as to all his estate. Under the "wait and see" doctrine, however, no question of invalidity could be determined until *B* and *C* die. Thus we would be in the absurd position of saying that the validity of the life estates could not be determined until the life estates had expired, and that the validity of the present absolute bequest of $100,000 could not be determined until the same time.

I realize that it may be argued that in none of the cases I have put is the property tied up more than lives in being and twenty-one years under the "wait and see" doctrine, and that the present law permits a tying up for that period of time. But, there is no principle in the law that it is good public policy to tie up property for lives in being and twenty-one years. It is not good public policy to tie up property even for a day. But it is good public policy to allow people to do what they wish with their own property. The law strikes a rough balance be-

[28] 6 AMERICAN LAW OF PROPERTY §§24.48 to 24.52 (1952); 4 PROPERTY RESTATEMENT §402 (1944).

[29] See In re Richards' Estate, 283 Mich. 485, 278 N.W. 657 (1938); Millikin National Bank of Decatur v. Wilson, 343 Ill. 55, 174 N.E. 857 (1931).

tween these two conflicting policies, and the rule against perpetuities is the result. By the "wait and see" doctrine the balance is pushed farther in the direction of inalienability. Moreover, to tie up property for the period of the rule, and then eventually to prohibit a testator from doing what he wishes with his own property after all, would seem to be backed by no public policy whatsoever.

C. *Conclusions*

If the "wait and see" doctrine is generally adopted, in my opinion the common law rule against perpetuities, in anything like the form in which we know it, will cease to exist. If the doctrine is accepted in an unqulified form, the rule will have little restrictive effect. Property will be tied up more frequently and for longer periods.

On the other hand, if the doctrine is adopted at all, I think it more likely that its operation will be restricted and a new method of determining lives in being will slowly be evolved. Thus, an attempt may be made to limit the lives in being to those named or implied in the creating instrument. That, however, would seem to be a vague and unsatisfactory solution. As Lord Chief Baron Macdonald said in *Thellusson v. Woodford*,[30] the first great case in which it was determined that the lives in being need not be persons who take under the creating instrument, "The length of time will not be greater or less . . . whether the lives are those of persons immediately connected with, or immediately leading to that person in whom the property is first to vest: *terms to which it is difficult to annex any precise meaning.*" (Italics are the author's.) If the courts do work out a new method of ascertaining the lives in being, it may mean years of uncertainty and costly litigation; and when the law is settled, it will not be the rule against perpetuities.

II

PUBLIC POLICY BACK OF THE RULE AGAINST PERPETUITIES[31]

Doubtless there are those who feel that, even if my dire predictions prove true and the rule against perpetuities vanishes, it will be no great loss. It can be contended that the policy of the rule is to prevent inalienability of specific property, and that this policy is rarely violated by future interests which are created today. For most future interests are

[30] 11 Ves. 112 at 137, 32 Eng. Rep. 1030 at 1040 (1805).

[31] For a discussion of the rationale of the rule against perpetuities, see 4 PROPERTY RESTATEMENT 2129 (1944).

equitable interests in trusts, and the trustee has a power to alienate the subject matter of the trust. Or if the contingent interest in question is a legal interest in a specific thing, such legislation as the Pennsylvania Price Act[32] permits a sale of an absolute interest in property and the establishment of a trust in the proceeds. As one proponent of the "wait and see" doctrine has put it, "In a sense, the period of the rule as it was originally understood has been shortened to zero."[33]

It is true, the rule against perpetuities was developed primarily to further the alienability of specific land. The early English cases dealing with the rule practically all involve contingent legal interests in particular pieces of real estate. There can be little doubt that sound public policy is violated by rendering specific tangible things inalienable. It means that property is less productive, and the national income decreases. The possessory owner may not wish to make a specific piece of property productive because he lacks the capacity for that sort of thing, or because he has nothing to invest in its development. Or it may be that the existence of a remote future interest means that the possessory owner does not wish to invest in the development of the property because his ownership may terminate on an uncertain event. But he cannot sell it to a person who is willing and able to make the property productive, because the existence of the future interest makes it unmarketable.

If, however, an equitable interest in a trust is involved, the trustee is almost certain to have a power to invest and reinvest. Indeed it is his duty to make the trust property productive. Hence, the existence of remote future interests in trusts does not, as a rule, make property less productive or reduce national income. It is believed, however, that there are other grounds for restricting the tying up of property in a fund.

First, it is good public policy to allow each person to dispose of his property as he pleases. This policy extends not only to the present generation but to future generations. If we are to permit the present generation to tie up all existing capital for an indefinitely long period of time, then future generations will have nothing to dispose of by will except what they have saved from their own income; and the property which each generation enjoys will already have been disposed of by ancestors long dead. The rule against perpetuities would appear to strike a balance between the unlimited disposition of property by

[32] See Pa. Stat. Ann. (Cum. Supp. 1952) tit. 20, §1561.

[33] Bregy, "A Defense of Pennsylvania's Statute on Perpetuities," 23 TEMPLE L.Q. 313 at 323 (1950). Mr. Bregy, however, does not contend that there should be no restriction today on the beneficial interests in private trusts. See his note 21 on the page above cited.

the members of the present generation and its unlimited disposition by members of future generations.

Second, by prohibiting too remote future interests in trusts, economic stagnation is avoided. When we say that a trustee has power to invest and reinvest, we do not mean that he can do anything he likes with the trust fund. Indeed, his power to dispose of it is extremely limited. He cannot give it away; he cannot invest it in new and untried enterprises. He cannot make a speculative investment in unimproved real estate. As a trustee, he is pretty much limited to investing in first mortgages and in seasoned stocks and bonds. Yet if society is to advance, somebody must take risks by putting capital in new enterprises. Somebody must invest in the development of industrial uses of atomic energy. Somebody must put capital into jet propelled transportation. If all the world's savings are tied up in trusts which restrict the use of funds to the conservative pattern set by a by-gone era, who will finance the Columbus of a new industrial age?

Furthermore, to meet the changing and unforeseeable economic conditions of each generation, there should be some free flow of property between capital investments and consumers' goods. If all accumulated capital is frozen in perpetual private trusts, the demands of any given moment cannot release it for consumption. If depression strikes, so that beneficiaries of trusts need to invade corpus, or if inflation becomes rampant, so that the amount of trust income determined by a dead hand becomes inadequate, the beneficiary cannot use the capital of the trust.

Other policies back of the rule, which are applicable to future interests in a fund, have been suggested. It is said that the rule prevents undue concentration of wealth. On the other hand, it has been suggested that, if there is any law of survival of the economic fittest, a restriction on the tying up of trust property is necessary to make it work.

Judicial opinion has always favored the application of the rule against perpetuities to beneficial interests in trusts. Indeed, it never seems to have been doubted that a power in a trustee to invest and reinvest does not take the beneficial interests of the trust out of the rule.[34] Even when statutes prohibiting the suspension of the absolute power of alienation are involved, the same conclusion has been reached,[35] though a literal interpretation of such statutes might lead to the opposite conclusion.

[34] See 4 PROPERTY RESTATEMENT §370, comment *p* (1944).

[35] In some states, statutes were enacted expressly providing that the power of a trustee to change the form of the subject matter did not prevent the illegal suspension of the power

III

WHAT SHOULD BE DONE ABOUT IT?

It must be conceded that much of the discussion so far has been negative. While I do not approve of the "wait and see" doctrine, I recognize that the evils which Professor Leach has so dramatically portrayed in his article do exist. Just what should be done about them, I am not sure.

It may be desirable to proceed with legislation of a very specific character, to take care of each particular situation which has perennially caused trouble—the "unborn widow" case, the "fertile octogenerian" case, the administrative contingency. I also approve of Professor Leach's suggestion that we provide for a *cy pres* doctrine, applicable to private trusts, which will permit the court to remold them when future interests are invalid under the rule.

If these reforms are thought to be insufficient, and it is felt that the common law rule against perpetuities is too deeply encrusted with the ashes of a dead feudalism, then I suggest that a new restrictive rule be considered with an entirely new approach. What I have to say in this regard should in no sense be treated as a proposed solution. More study of all its implications should be made before it can be determined whether it is a feasible substitute for the rule. I am merely suggesting that its possibilities should be investigated before we decide to adopt the "wait and see" doctrine.

The real difficulty which the rule against perpetuities seeks to eliminate is the inalienability of present interests, not future interests. Vested as well as contingent interests may tie up property. The only present interests which are freely marketable are absolute interests in land, chattels and intangibles, terms of years in land, and the reversions and remainders subject to such terms. Property held in trust, determinable and other qualified fees simple, life estates, as well as all legal and equitable estates subject to executory interests, are unmarketable, and may be said to be practically inalienable. I would, of course, place no limit on the duration of fees simple absolute and terms of years. But I would consider prohibiting the creation of a defeasible interest or a trust estate which might continue to be such for longer than a fixed period of time, determined as of the inception of the interest. The period might be lives in being and twenty-one years, or if some other

of alienation. In New York and Michigan this result was reached without the aid of a statute. On the other hand, in Minnesota and Wisconsin it was held that the power of alienation was not suspended when a power to change the form of the trust res existed. As to these cases and statutes, see 4 PROPERTY RESTATEMENT 2655 and 2734 (1944).

period be thought more desirable, that could be the basis of the rule. If an instrument provides for the objectionable kind of limitation, neither the present interest nor the future interest following it would necessarily be void. As to a determinable fee, fee simple subject to a condition subsequent or to an executory interest, the fee simple would become absolute, if and when the event named in the special limitation, condition or executory limitation had not happened by the end of the limiting period, say twenty-one years. As to trusts, they would be terminated at the end of the period, if the provisions for their termination had not already taken effect. Gifts over would have to be rewritten in the light of the earlier termination of possessory interests. Rules for this purpose could, no doubt, be developed. And in cases not within the rules, a sort of *cy pres* doctrine for private trusts, such as has already been referred to, could be employed.

I realize that to modify the provision for the termination of an interest as stated in the terms of the creating instrument is bound to cause difficulty. But the problem is much the same as that which has been encountered for over a century in applying the English Thellusson Act[36] and its American counterparts. Moreover, legislation has already been enacted in some states permitting possibilities of reverter and rights of entry for a limited period of time, and invalidating provisions for a longer period of time, only as to the excess.[37]

Finally, legislative reform in this area of the law should proceed only after thorough study and careful deliberation. There are times when it is better to "bear those ills we have than fly to others that we know not of." The path of American legal history is strewed with the remains of unsuccessful substitutes for the rule against perpetuities. Let us not throw off the restraining yoke of the rule before an adequate substitute is found.

[36] 39 and 40 Geo. III, c. 98 (1800). This was an act which restricted the duration of accumulations. As to American counterparts of that act, see 4 PROPERTY RESTATEMENT c. 36 (1944).

[37] As to such statutes, see SIMES, HANDBOOK OF FUTURE INTERESTS 415 (1951); Fla. Stat. Ann. (1952 Supp.) §689.18; Rhode Island Acts (1953), House Bill 838, amending General Laws of Rhode Island (1938), c. 435.

Addendum: After this article was in page proof, the writer was advised that a bill was introduced into the Massachusetts legislature on December 3, 1953, the first section of which is as follows:

"In applying the Rule against Perpetuities to an interest in real or personal property limited to take effect after one or more valid life estates, facts existing at the termination of such life estate or estates shall be considered in determining the validity of the interest."