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FUTURE INTERESTS—RULE AGAINST PERPETUITIES—ACTUAL RATHER THAN POSSIBLE FACTS AS DETERMINING CERTAINTY OF VESTING—*T* died testate, leaving a life estate to her children *A* and *B*, with the remainder to granddaughter *C*. The will further provided that if other body heirs of *A* and *B* survived their deaths, then such heirs should share equally with *C*; and if all the grandchildren should die without leaving heirs of their body, then the property was to pass to *T*'s brothers and sisters or their representatives. *A* and *B* survived but *T* died without further issue. Later *C* also died without issue. *X* held conveyances deeding to him the interests of the estates of *A*, *B*, *C*, and *T*. Suit was brought to determine the rights in the land as between *X* and the representatives of *T*'s brothers and sisters. The trial court transferred the case without ruling. The state supreme court *held*, the gift did not violate the rule against perpetuities. The perpetuities issue can be determined on the basis of the facts which actually occur, rather than on the basis of those which may happen viewed as of the death of the testator. Alternatively, where there are two contingencies one of which is bound to happen within the period of the rule and the other of which may not, the first may be considered valid. *Merchants National Bank v. Curtis*, (N.H. 1953) 97 A. (2d) 207.

New Hampshire's supreme court is the second¹ to demonstrate a willingness to deviate from the time-honored rigid application of the rule against perpetuities. The traditional view is that the interest, considered in the light of the facts existing at the time of the testator's death,² must vest, if at all, within the period³ of the rule against perpetuities, or else the contingency is void.⁴ If there is any possible combination of events which could take place that would prevent such vesting, the contingency is invalid.⁵ What may occur rather than what does occur is put forth as the common test.⁶ It is only in recent years that a tendency to deviate from this view has become apparent. In 1947 Pennsylvania enacted a major statutory revision⁷ of the rule against perpetuities, which in effect produces the same result as was achieved in the principal case by judicial interpretation. The statute provides: "Upon the expiration of the period allowed by

¹ The first was the Supreme Judicial Court of Massachusetts in *Sears v. Coolidge*, (Mass. 1952) 108 N.E. (2d) 563.

² SIMES, FUTURE INTERESTS 374 (1951); GRAY, THE RULE AGAINST PERPETUITIES, 4th ed., §231 (1942); *Rhode Island Hospital Trust Co. v. Granger*, 51 R.I. 401, 155 A. 358 (1931).

³ The period extends twenty-one years after some life in being at the creation of the interest. SIMES, FUTURE INTERESTS 367 (1951); GRAY, THE RULE AGAINST PERPETUITIES, 4th ed., §201 (1942); *Industrial Trust Co. v. Flynn*, 74 R.I. 396, 60 A. (2d) 851 (1948).

⁴ SIMES, FUTURE INTERESTS 367 (1951); *Goffe v. Goffe*, 37 R.I. 542, 94 A. 2 (1915).

⁵ GRAY, THE RULE AGAINST PERPETUITIES, 4th ed., §214 (1942); Leach, "Perpetuities in a Nutshell," 51 HARV. L. REV. 638 (1938); *Equitable Trust Co. v. McComb*, 19 Del. Ch. 387, 168 A. 203 (1933).

⁶ GRAY, THE RULE AGAINST PERPETUITIES, 4th ed., §214 (1942); *Equitable Trust Co. v. McComb*, note 5 supra; *Tiehen v. Hebenstreit*, 152 Neb. 753, 42 N.W. (2d) 802 (1950).

⁷ Pa. Laws (1947) No. 39, §§4, 5; Pa. Stat. Ann. (Purdon, 1950) tit. 20, §§301.4, 301.5.

the common law rule against perpetuities as measured by actual rather than possible events any interest not then vested . . . shall be void."⁸ This act has been attacked because it requires a long waiting period to determine whether the vesting will take place⁹ and during this time the ownership of the property is unascertainable.¹⁰ But the statute has not been without its supporters, one of the most notable being the recent multi-volume treatise, *American Law of Property*.¹¹ The authors assert that the Pennsylvania statute is sound in concept and deserves to be widely copied. They declare that the only rationale for the generally accepted rule is unrealistic in actual practice. The basis of this rationale is that the various persons involved should know from the outset which interests are valid and which are invalid, and that such knowledge cannot exist when validity depends on events to happen in the future. However, it is contended that even under the common law rule this uncertainty exists because courts refuse to pass on the validity of a remainder until after the life estate is terminated. Since validity will not be determined anyway until after the uncertain events have taken place, it is argued that the courts should allow the testator's intent¹² to control by taking into consideration whether or not the events do in fact take place within the period of the rule. In the past, other means have been used in some cases to escape the effect of the rule against perpetuities. Where the courts have been able to find an ambiguity in an instrument, they have shown a remarkable tendency to adopt the construction which makes an interest valid rather than void.¹³ This is done in spite of the often repeated statement that the rule against perpetuities is a rule of substantive law, not a rule of construction.¹⁴ The principal case goes much farther and presents the question of whether the courts will directly and intentionally change the rule against perpetuities. Articles written on the subject have shown a direct conflict of opinion among scholars in the field.¹⁵ Although it is far too early to predict the result, the possible developments are worthy of the close attention of any lawyer who ever draws a will.

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⁸ Pa. Stat. Ann. (Purdon, 1950) tit. 20, §301.4(b).

⁹ 48 MICH. L. REV. 1158 at 1166-1170 (1950).

¹⁰ Phipps, "The Pennsylvania Experiment in Perpetuities," 23 TEMPLE L.Q. 20 (1949).

¹¹ 6 AMERICAN LAW OF PROPERTY §24.21 (1952); also see Bregy, "A Defense of Pennsylvania's Statutes on Perpetuities," 23 TEMPLE L.Q. 313 (1950).

¹² New Hampshire has been a leader in giving effect to the testator's intent rather than rigidly applying the rule against perpetuities. See, e.g., *Wentworth v. Wentworth*, 77 N.H. 400, 92 A. 733 (1914). Gray in his treatise devotes fifteen pages to attacking this tendency. GRAY, *THE RULE AGAINST PERPETUITIES*, 4th ed., 752-766 (1942).

¹³ SIMES, *FUTURE INTERESTS* 399-400 (1951); *Industrial Trust Co. v. Flynn*, note 3 supra; *Colt v. Industrial Trust Co.*, 50 R.I. 242, 146 A. 857 (1929).

¹⁴ SIMES, *FUTURE INTERESTS* 398 (1951); *Industrial Trust Co. v. Flynn*, note 3 supra; *Prichard v. Prichard*, 91 W.Va. 398, 113 S.E. 256 (1922).

¹⁵ *Pro*: 6 AMERICAN LAW OF REAL PROPERTY §24.21 (1952); Newhall, "Doctrine of the 'Second Look,'" 92 TRUSTS AND ESTATES 13 (1953). *Pro and con*: "Reform of Rule against Perpetuities," 92 TRUSTS AND ESTATES 768 (1953) (Professors Leach and Simes and Messrs. Newhall and Looker participating in a panel discussion); also published in A.B.A. PROCEEDINGS OF PROBATE AND TRUST LAW DIVISIONS 83 (1953). See also Simes, "Is the Rule against Perpetuities Doomed? The 'Wait and See' Doctrine," supra p. 179.