REPORT

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ON

THE RULE AGAINST PERPETUITIES.

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INTRODUCTION

This report is divided into three parts. The first discusses the need for a rule against perpetuities, the second the three main techniques of reform and the third analyses the Ontario Perpetuities Act 1966, which is typical of the Commonwealth statutes based on the wait and see philosophy.

It was originally my intention to include a fourth part on a cy-pres statute. Such statutes are, however, few in number. All of the Commonwealth jurisdictions have espoused wait and see. In the United States the 1967 edition of the Perpetuity Legislation Handbook listed only California, Missouri, and perhaps, (for the statute is obscure) Idaho as having cy-pres legislation. The California and Missouri provisions are set out in Appendix A and there is some discussion of cy-pres at two points in the body of the report (pp. 17 and 61). As Alberta will probably follow in the footsteps of the other Commonwealth jurisdictions this seemed to be an adequate treatment of cy-pres. If by chance it should be adopted as the main technique of reform all of the analysis of the Ontario Act, except sections 5, 6, 7 and 8, would be relevant to it.

Where matters are controversial, I have tried to state both sides of the argument, and then give my own views. I have on occasion essayed some drafting. The result should be regarded more as a general indication of what is needed rather than a finished work. I am only too conscious that good legislative drafting is an art in itself.

I have avoided footnotes throughout. Where specific references were necessary they were added in the text. This should make the report more readable, but I hope I have not incorporated too many ideas of others without adequate acknowledgement. There is on page VII a list of the principal reports, texts and articles used. Of these particular acknowledgement must be made to Morris and Leach, The Rule Against Perpetuities, 2nd ed 1964, and Gosse, Ontario's Perpetuities Legislation, 1967.

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

REPORTS, TEXTS AND ARTICLES

A. REPORTS

Ontario Law Reform Commission, Report No. 1 (1965)

Ontario Law Reform Commission, Report No. 1A (1966)

Law Reform Committee, Fourth Report (The Rule Against Perpetuities) Cmnd. 18

B. TEXTS

Dukeminier, Perpetuities Law in Action (1962)

Fratcher, Perpetuities and Other Restraints (1954)

Gosse, Ontario's Perpetuities Legislation (1967)

Gray, The Rule Against Perpetuities (4th ed. 1942)

Lynn, The Modern Rule Against Perpetuities (1965)

Morris and Leach, The Rule Against Perpetuities (2nd ed, 1962)

Simes and Smith, The Law of Future Interests ss.1201-1439 (2nd ed, 1956)

Simes, Public Policy and The Dead Hand (1955)

C. ARTICLES

ALLEN, Perpetuities: Who are lives in being? 81 L.Q.R. 106 (1965)

BEATSON, Perpetuities Act 1964, Some long needed reforms, 1965 N.Z.L.J. 152, 181

DUKEMINIER, Kentucky Perpetuities Law Restated and Reformed, 49 Ky. L.J. 3 (1960)

JONES, Measuring Lives Under the Pennsylvania Statutory Rule Against Perpetuities, 109 U.Pa.L.Rev.54 (1960)

LANG, A Perpetuities Act for Saskatchewan 40 C. B.R. 294 (1962)

LEACH, Perpetuities in Perspective: Ending the Rule's Reign of Terror, 65 Harv. L. Rev. 721 (1952)

LEACH, Perpetuities: Staying the Slaughter of the Innocents, 68 L.Q. Rev. 35 (1952)

LEACH, Perpetuities Legislation, Massachusetts Style, 67 Harv. L. Rev. 1349 (1954)

LEACH, Perpetuities Reform by Legislation, 70 L.Q. Rev. 478 (1954)

LEACH, Perpetuities Legislation: Hail, Pennsylvania (including Mechem, A Brief Reply to Professor Leach), 108 U. Pa. L. Rev. 1124 (1960)

LEACH, Perpetuities: New Absurdity, Judicial and Statutory Correctives, 73 Harv. L. Rev. 1318 (1960)

LEACH, Perpetuities: Cy Pres On the March, 17 Vand. L. Rev. 1381 (1964)

LYNN, Reforming the Common Law Rule Against Perpetuities, 28 U. Chi. L. Rev. 488 (1961)

LYNN, Raising the Perpetuities Question: Conception, Adoption, "Wait and See" and Cy Pres, 17 Vand. L. Rev. 1391 (1964)

LYNN, Reforming the Rule Against Perpetuities: Choosing the Measuring Lives, 1965 Duke L.J. 720

McKAY, Perpetuities Act 1964 1 New Zealand L. Rev. 484 (1963-1965)

MECHEM, Further Thoughts on the Pennsylvania Perpetuities Legislation, 107 U. Pa. L. Rev. 965 (1959)

MEGARRY, Perpetuities and the Cy-pres Doctrine After 1925, 55 L.Q.R. 422 (1939)

MORRIS & LEACH, Options to Purchase and the Rule Against Perpetuities 18 Conv. (N.S.) 576 (1954)

MORRIS & WADE, Perpetuities Reform at Last, 80 L.Q. Rev. 486 (1964)

PERPETUITY LEGISLATION HANDBOOK 2 Real Property, Probate and Trust Journal 176 (1967)

SCHUYLER, Should the Rule Against Perpetuities Discard its Vest? 56 Mich. L. Rev. 683, 887 (1958)

SIMES, Is the Rule Against Perpetuities Doomed? The "Wait and See" Doctrine, 52 Mich, L. Rev. 179 (1953)

SIMES, Perpetuities in California Since 1951, 18 Hast. L.J. 247 (1967)

WATERBURY, Some Further Thoughts on Perpetuities Reform, 42 Minn. L. Rev. 41 (1957)

LIST OF ABBREVIATIONS

English Report	Law Reform Committee, Fourth Report (The Rule Against Perpetuities) Cmnd. 18
Gray	The Rule Against Perpetuities, 4th ed., 1942
Gosse	Ontario's Perpetuities Legislation, 1967
Morris and Leach	The Rule Against Perpetuities, 2nd ed., 1962
Morris and Leach, First Supplement	First Supplement to Second Edition, 1964
Ontario Report	Ontario Law Reform Commission, Report No. 1 (1965)
Ontario Supplementary Report	Ontario Law Reform Commission, Report, No. 1A (1966)
Perpetuity Legislation Handbook	(1967) 2 Real Property, Probate and Trust Journal 176 (3rd edition of the Handbook)
Simes	Public Policy and the Dead Hand (1955)
The Rule	The Rule Against Perpetuities

PART I

THE NEED FOR A RULE AGAINST PERPETUITIES

There is a general agreement among lawyers that something needs to be done about the rule. In theory what could be done ranges from peripheral tinkering to complete abolition. To assess the continued need for the rule, or the value of any suggested reform, requires an analysis of the policy behind the rule, and of the likelihood of dispositions of property being made which would violate that policy.

The argument in favour of the total abolition of the rule is based upon the policy in favour of freedom of disposition, something which has been a cardinal feature of the common law of property. Though not all his conclusions have been unanimously accepted, the arguments for the need for the rule have been best discussed by Simes in Public Policy and the Dead Hand (1955). Simes does not consider the application of the rule to commercial interests, probably because that did not fall within the general theme of his work. With respect to family interests he considers three, perhaps overlapping, perhaps complementary, reasons why it is said the rule is needed.

First it "is designed to prevent an undue concentration of wealth in the hands of a few", (p. 57). Simes concludes, and Morris and Leach (p. 15) agree with him, that taxation could in itself take care of that problem. Their conclusions are not based on any empirical data. Waterbury has attempted some analysis of the size of American trusts under present day taxation and, from the admittedly incomplete evidence, there is no indication that the creation of large trusts has been seriously impeded. (42 Minnesota L. Rev. 41, 45).

Leach (despite the statement in Morris and Leach and some other comments he has made: see (1952) 65 Harv. L.R. 721, 727) has also recognized that tax law in itself might not control the large family trust:

"...I feel that a rule against perpetuities of approximately the standard length is an adjunct of our system of estate, inheritance and gift taxation, and that if we didn't have one the revenue laws would have to be revised with a lot of unnecessary stress and strain".

With changes looming on the horizon it is difficult to assess the Canadian position. Until recently, if there had been no rule, property could have been tied up for a long time by a judicious use of life estates and special powers or of discretionary trusts and there would have been no grave tax disadvantage. The recent amendments to the federal estate and gift tax law (An Act to amend the Income Tax Act and the Estate Tax Act S.C. 1968-69 C.33), would make that more difficult, as, no doubt, would be the implementation of more of the proposals of the Carter Report. However, the exact impact of the tax law is uncertain, and it is unlikely that legislators are going to keep the rule in mind in passing new tax legislation. While taxes may further some of the ends the rule is supposed to further there is no clear evidence they can act as a substitute for it.

The second argument in support of the rule that Simes considers is that it is designed to ensure productivity (Chap. 11). He concludes that the rule does not do much to

further that end. Most future interests are equitable. Trustees are normally given wide powers of investment and the tendency of modern legislation is to widen statutory powers of investment. The assets of most trusts are stocks and shares and the body issuing the security rather than the trust is the direct generator of productivity. In the case of land the Settled Land Acts are of some help and the power of expropriation is the ultimate weapon if land needed for essential development is tied up in trusts. These arguments are not all convincing. Trust instruments are not all as well, or as widely drawn, as they might be. The Alberta statutory investment powers are narrow and the advent of variation of trusts legislation is unlikely to have any noticeable effect in this context. In any event, however wide his powers, a trustee will of necessity be less speculative than an absolute owner. Leach suggests that the United States is not in need of speculative capital; that may not always be the case and it may not be true in Canada today. A trust will generally restrict consumer spending to income, while it may at times be desirable to have capital available. It is probably true to say that the lack of a rule would not be so grave a threat to productivity as it at a time might have been; it could however damage productivity if too much of the country's wealth was tied up for too long a time and the rule provides a roadblock to those who might succumb to temptation.

The reason for the rule which Simes finally approves is that it is a compromise between total freedom of disposition, which could result in excessive control by the dead hand, and a prohibition on the granting of any thing but absolute interests, which would largely negative freedom

of disposition (p. 59). Even if no other considerations were involved it would be intolerable if a testator long since dead could by a long term trust control the lives of his descendants. Granted no movement to totally restrict freedom of alienation the rule effects the necessary compromise between the living and the dead.

Thus, although not as necessary as it may have been at its inception the rule has still some purpose to serve. Taxation would not necessarily prevent undue accumulation of wealth; the modern trust does not assure maximum opportunity for productivity; and the dead should not control for too long the destiny of the living.

If in theory the rule has some purpose to serve, is it true as a matter of fact that people desire to do what the rule prohibits. The rule assumes that people disposing of property would or might tend to exceed the limits it sets. There is some doubt if that would be the case. Leach states that in Delaware and Wisconsin, where perpetual trusts may be created, there is no indication that settlors are going beyond the limits of the rule (108 University of Pennsylvania L. Rev. 1124, 1140). Lang favours the retention of the rule in Saskatchewan "to guard against the <u>rare</u> case where someone <u>may one day attempt</u> to postpone the vesting of property, for an unduly long period of time" (1962) 40 Can. Bar Rev. 294, 300. So far as reported cases are indicative, a quick check in the Canadian Abridgement showed five perpetuity cases from Alberta, three arising out of private as opposed to commercial transactions,and in none of the three was the rule violated. This may not be a complete exhaustion of the contents of the Abridgement, but it would not indicate the rule as being a major concern of the Alberta lawyer.

It would appear that there would not necessarily be any grave repercussions if the rule was abolished. If in theory the rule has still some purpose to serve, as a matter of fact it is unlikely that people would attempt to maintain excessive control over the future. In effect, if the rule is retained it maybe, as Lang put it, for "the rare case". To abolish it totally would probably not result in very serious consequences, but it is a step no jurisdiction has yet taken.

PART II

METHODS OF REFORM

If there is not to be outright abolition there clearly must be reform. The classic statement of the rule is that of Gray (S.201).

> "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".

There are three main elements in this statement. First, there is the question of vesting. Second, there is the period within which the vesting is to take place. Third, the vesting must, from the date of the creation of the interest, be certain to take place, if at all, within the period. Although by far the heaviest fire of the reformers has been directed at the third of these elements all three have been critized and all three, therefore, require consideration.

A. VESTING IN INTEREST OR POSSESSION?

Schuyler, in an article in volume 56 of the Michigan Law Review at pages 683, 887 is the only modern commentator who has made a sustained attack on the concept of vesting in interest. He argues that it should be replaced by the test of vesting in possession, a suggestion made earlier by Gray (S.972, 974) and, with some hesitation, by Simes (p. 80). He would also reshape the period so that it would be the greater of 80 years or a life in being plus 30 years. To be valid an interest would need, from its creation, to be certain to vest in possession within the period, but some of the more ridiclous consequences of this required certainty would be removed. (See the draft Act 56 Michigan Law Review at pp. 949-951).

The argument against retaining the test of vesting in interest is made on two grounds, first, the difficulty of its application and second, the fact that it does not necessarily further alienability, which is one of the aims of the rule. There is some validity in each of these arguments, but they may be met on a combination of three grounds.

The difficulty of application, which no doubt exists, would in large measure be solved in jurisdictions where wait and see or cy-pres are adopted to deal with the issue of certainty of vesting. Under wait and see, any question about whether an interest is or is not vested in interest would often be answered by effluxion of time; under cy-pres the instrument could be reformed so as to clarify the doubt. Schuyler rejects both wait and see and cy-pres as methods of reform. One or other has, however, been adopted in every jurisdiction where the rule has been amended, and if

they alone or in combination are adopted as a technique of reform, then the difficulties of vesting become much less pronounced.

Schuyler illustrates his argument on alienability with two examples. The first is a spendthrift trust for a testator's children for their lives, followed by vested future interests for his grandchildren, the corpus to be payable on their reaching 60. This would raise no problem in Alberta for, under the rule in Saunders v. Vautier (1841) 4 Beav. 115, the grandchildren could call for their interests on attaining 21. The second example is a gift to A for life, then to his unborn son for life, then, in the one case, a vested fee simple to B, and in the second, a contingent fee simple to B. Whether the remainder to B be vested or contingent it is argued that the property subject to it is equally inalienable. The fact that one interest may be vested in interest does not mean the property is more easily alienable. Under Schuyler's proposed rule both remainders would be bad. If we may generalize from this single example the proposed change would considerably restrict the uses to which the present system of future interests may be put. The balance between free alienability and giving effect to the intent of the testator would be altered against the latter's interest. However, most perpetuity reform accepts the present version of the rule as establishing a reasonable balance, and, if anything, tends towards given greater effect to intent by saving interests which would otherwise be invalid. To the extent that Schuyler's proposal would run against the current trend it should be regarded with some caution.

A third argument against vesting in possession is that on Schuyler's own analysis it cannot be easily applied to some of the most common of future interests. For example, he feels obliged to exempt legal and equitable reversions from the rule. This is not, of course, a strong argument in itself, for few proposals for change can be applied uniformly in all cases, but it carries some weight when considered in conjunction with other things.

As well as being considered on its merits, Schuyler's proposal may be tested by its reception. It was made in 1958. It has not been incorporated into any legislation. The question of vesting was not even discussed in the Ontario report. Leach summarized his reaction to it: "I sympathize with Schuyler's wish to get rid of the vesting concept, but I doubt that it is worth the effort". (108 University of Pennsylvania Law Rev. 1154). I would suggest, therefore, that the concept of vesting need not be altered, particularly if either wait and see or cy-pres are adopted.

B. THE PERIOD - A PERIOD IN GROSS?

The perpetuity period is presently measured by lives in being plus 21 years. As an alternative to this the English Report recommended that an instrument could specify a number of years, not to exceed 80, as the perpetuity period. An assessment of this recommendation requires consideration of the following three points: (i) the need for a period in gross under the present law; (ii) the length of the period; (iii) the use of the period under wait and see. This latter question can be postponed until the wait and see statute is discussed.

In recommending a period in gross the Report hoped to wean draftsmen away from royal lives clauses. These were thought to be bad, not because they prolonged the period, but because a gift could fail because of uncertainty of royal lives, and, particularly where a contingency turned on the death of the survivor of royal lives, because of the expense of keeping track of all the lives. (para. 6).

The Ontario Report rejected the idea of a period in gross. First, it was thought that royal lives clauses are not too common in Canada; they are, however, used and, when they are, have the dangers the English Report noted. Second, the Report thought the 80 year period would be used to prolong the period so as to aid the exotic schemes of grantors and testators, and the law ought not to be made simpler for such people. But if a person is thinking about prolonging the period he can do it now. If the Report had wished to stop that it could have considered direct ways of doing it. If prolongation is to be possible there seems every advantage in making it simple. Moreover in what way would an 80 year period unduly prolong the period; will it not often be roughly the same as the common law period and often shorter than a royal lives period? Third, the Report wanted as few innovations as possible. In the light of the rest of its recommendations that does not seem compelling; it also avoids the merits of the argument.

The period in gross has the advantage of certainty and simplicity. The arguments the Ontario Report marshalled against it are not convincing. Legislation adopting it would seem to be desirable.

If the period in gross is to be adopted the next question is its length. This needs to be considered generally and in relation to particular interests. For now we need only deal with the general question. It seems to involve a choice between 80 and 60 years for these have been the only two periods discussed. England, New Zealand, Victoria and Western Australia have adopted the 80 year period, California the 60. Eighty years would today seem to be a closer approximation to a life in being and 21 years. Well-chosen lives could give a longer period and if one of the purposes of a period in gross is to get away from royal lives clauses it is necessary to allow a reasonably long period. Sixty years is a little short and might be little used if adopted.

The Legislation in England and California may be taken as typical of existing legislation.

1. England - Perpetuities and Accumulations Act, 1964.

S.1.(1) Subject to section 9(2) of this Act and subsection (2) below, where the instrument by which any disposition is made so provides, the perpetuity period applicable to the disposition under the rule against perpetuities, instead of being of any other duration, shall be of a duration equal to such number of years not exceeding eighty as is specified in that behalf in the instrument.

(2) Subsection (1) above shall not have effect where the disposition is made in exercise of a special power of appointment, but where a period is specified under that subsection in the instrument creating such a power the period shall apply in relating to any disposition under the power as it applies in relation to the power itself.

2. California - California Civil Code, s. 715.6

No interest in real or personal property which must vest, if at all, not later than 60 years after the creation of the interest violates Section 715.2 of this Code.

A comparison of these two provisions raises four questions

(1) Under both statutes it is not sufficient merely to say the perpetuity period is, say, 60 years. If that was done in a will where property was left to A for life, remainder to such of his daughters as marry, the remainder would still be bad for it would not be certain that their marriages would take place within 60 years of the testator's death. To save the remainder it would be necessary to add "provided the marriages take place within the perpetuity period herein specified". In this respect there is nothing to choose between the statutes.

(2) It is not clear that the English statute applies where there is a reference in an instrument to a period of years, but it is not expressly stated that this is for the purposes of the rule. T leaves property "to such of A's daughters as marry within 60 years of my death". It has been argued this is not providing for a period within section 1. The California statute would clearly apply for the interest, if it was to be good, must vest within 60 years of the testator's death. In this respect the California statute is the better drafted.

(3) The English Act is also uncertain in its application to a document operative, say, on July 1, 1969, which provides that to be good interests created under it must vest on or before July 1, 1999. It may, on a strict interpretation, be argued that this is not specifying a number of years. New Zealand (Perpetuities Act, 1964, S.6(4)) and Victoria (Perpetuities and Accumulations Act, 1968, S.5(3)) expressly cover this case. The Victoria statute provides:

> If no period of years is specified in an instrument by which a disposition is made as the perpetuity period applicable to the disposition but a date certain is specified in the instrument as the date on which the disposition shall vest the instrument shall, for the purpose of this section, be deemed to specify as the perpetuity period applicable to the disposition a number of years equal to the number of years from the date of the taking effect of the instrument to the specified vesting date.

Once again it is thought the California legislation adequately covers the problem. In the example set out above, the interest, if it is to vest at all, must vest "not later than 60 years after the creation of the interest".

(4) It is standard perpetuity doctrine that the validity of an interest created under a special power is to be decided by "reading back" to the date of the creation of the power. The California statute might raise some doubt as to the continued application of that rule and section 1(2) of the English Act wisely makes the point clear.

Accepting the English policy of requiring some indication in the instrument of a desire to use a period in gross the best statute is one that combines the substantive effects of the California statute and subsection 2 of section 1. Such a statute might read something like this:

> "(1) Subject to subsection (2), no interest in real or personal property which, either according to the express terms of the interest creating it or by necessary implication therefrom, must vest, if at all, not later than 80 years after the creation of the interest violates the rule against perpetuities.
>
> (2) For the purpose only of subsection (1) an interest created under the exercise of a special power shall be deemed to have been created at the date of the creation of the power".

C. REQUIRED CERTAINTY OF VESTING.

If a contingent interest is to be good it must be certain at the date of its creation that, if it is to

vest at all, it will vest within the period. In deciding whether or not this is the case the courts have taken into account not only contingencies which could reasonably materialize, but also improbable and indeed impossible contingencies. Professor Leach has made some of the latter cases notorious; perhaps the best examples are the "fertile octogenerian" cases, decided on the assumption that women clearly past the age of child-bearing could have children. It is clear, therefore, that many of the decisions are indefensible on any ground. To make it worse in many (Leach suggests all) cases the invalidity could have been avoided by careful drafting.

Three solutions have been suggested to these difficulties: particular legislation; cy-pres; and wait and see. These may be used separately or in combination. In the latter case the legislation selects what is thought to be the best solution and then supplements it by using some elements of the other two. Thus, each of these approaches needs to be considered, not only with a view to deciding which should be selected as the basis of any legislation, but also in order to decide how far it might be used in a supplementary fashion.

1. Particular Legislation

Particular legislation may be regarded as handling either one problem or two overlapping problems. First, as has been pointed out, the courts take into account improbable and impossible contingencies in deciding if vesting will take place within the period. Some legislation is aimed at ensuring these contingencies are ignored. Second, there are certain common drafting

errors and legislation can prevent their being fatal. Failing to foresee one of the well-known improbable contingencies might be regarded as drafting error and so all this legislation would really be aimed at curing faulty drafting. Four of the typical improbable events/drafting errors situations are considered below, with an indication of how they may be specifically dealt with.

(a) Examples of Particular Legislation

(1) The Fertile Octogenerian

Suppose a bequest to X for life, then to X's children for their lives, remainder to X's grandchildren. X is a woman, alive, aged 80 at the testator's death. On a strict application of the rule it is considered possible for X to have another child, A, for all the lives in being to die and for A to have a child more than 21 years after their deaths. The remainder to the grandchildren is therefore bad. This can be easily dealt with by a statute which establishes presumptions as to the ages below or after which people cannot have children. England and Ontario have provisions such as this supplementing wait and see, and they will be considered in detail later. (infra p. 29).

(II) Contingencies Related to Administration of Estates

A bequest is made to the children of the testator or their representatives alive at the date of the settling of the testator's estate. The gift is bad because it is considered possible for the administration of the estate not to be completed within the period. A statute could provide for such administrative contingencies. New York has the following legislation:

> 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. New York Real Property Law s. 42-a(4).

(III) Age Contingencies

A bequest is made to A for life, remainder to his children at 25. At A's death he may have a child of 2 who would take more than 21 years after A's death to reach 25; the remainder is, therefore, bad. This can be avoided by legislation providing that where a gift would be invalid because of a contingency related to an age greater than 21 the age specified could be reduced to 21 if the gift would thereby be saved; see, as examples - England; Law of Property Act, 1925, s. 163 (now repealed and replaced by the Perpetuities and Accumulations Act 1964, s. 4); British Columbia: Laws Declaratory Act, R.S.B. 1960, c. 213, s. 2(36). This question is discussed in detail later (Infra p. 52).

(IV) The Unborn Widow

A bequest is made to A for life, remainder to his widow for life, remainder to their children living at the widow's death. A's widow may not be a life in being and may survive him by more than 21 years; the remainder is bad. This situation has been dealt with in a number of ways. Again in England and Ontario the unborn spouse provisions are supplementary to wait and see, and will be considered later. (Infra p. 61).

(b) Particular Legislation As A General Solution

Particular legislation, however, effective in its own sphere, does not go far enough. It deals only with relatively narrow and well-known problems. Simes would be content to leave future difficulties for future particular legislation (p79). Mr. Sheard is of the same opinion (Perpetuities - the New Proposed Act (1966) 14 Chitty's Law Jr. 3, at p. 6). If that were done, dispositions would probably have to be held invalid before legislation was passed. It is better to anticipate and forestall invalidity if that is possible. Moreover most of the particular legislation concerns itself with dispositions under which it is highly improbable, if not impossible, that, as a matter of fact, the event which invalidates the gift would ever materialize. There are, however, cases in which the event could quite easily take place inside or outside the period. This would be so in a devise to A (a bachelor) for life, remainder to such of his children as marry. The marriage of the children outside the period is not highly improbable, yet they may well marry within it. Should not remedial legislation deal with that type of situation?

It is suggested that consideration needs to be given to legislation of a more general nature to cover not only impossible or improbable contingencies, but also the situations where the contingency in question could quite easily take place either inside or outside the period. This cy-pres and wait and see do. Only if they are unsatisfactory should the half-remedy of particular legislation be adopted as the main means of reform.

2. Cy-pres

Cy-pres retains the rule in its common law form, but gives a court the power to redraft a disposition so that it complies with the rule and still effects the testator's primary intention. A standard argument against this doctrine is that the courts should not re-write dispositions. To do so is certainly contrary to the general common law philosophy. However, the supporters of cy-pres can point to certain fields - e.g. the cy-pres aspects of the rule in Whitby v. Mitchell (1890) 44 Ch. D 85 (C.A.), the law of charity, family relief legislation--where the courts do precisely that. The basic common law approach, though perhaps generally wise, is not sacrosanct, and if without violating any other policy, or raising any great practical difficulties, a cy-pres rule could be implemented, the general tendency against re-writing documents need not necessarily prevent it.

It is necessary, therefore, to consider other arguments respecting cy-pres. Three points that have been made against it are not very strong and may be shortly dealt with. First, it is said that it would provoke greater litigation. This is always raised against proposals for change and is suspect on that ground alone. In this particular context it does not seem to carry any greater weight than usual. A doubtful disposition is always going to raise some controversy. The cy-pres doctrine may add the type of case where the rule has been clearly violated and at common law it would have been pointless to litigate; the rule being what it is, the clear case of invalidity is not too common. Leach

has suggested that cy-pres may in fact encourage compromise rather than litigation for it would displace the fatal all or nothing aspect of the present law. Second, there has been some suggestion that cy-pres would encourage poor drafting. It is unlikely a lawyer would knowingly leave a will with a perpetuity problem even if he knew cy-pres would avoid total invalidity. In any event, why, if a lawyer does err, should the beneficiaries suffer? Third, it has been argued that cy-pres runs contrary to the policy in favour of alienability. Often the failure of a gift ensures the earlier vesting of an absolute interest and so aids alienability; cy-pres would prevent this. Nonetheless the more prolonged inalienability, which cy-pres might cause, would still be within the confines of the rule, the accepted compromise between the dead hand and unlimited freedom of alienability for the beneficiaries. Surely there is nothing wrong about operating within these legally recognized limits.

If these arguments are discounted there are two others which are not so easily disposed of. Cy-pres, if applied at the outset, could often result in a document being changed when, in the events that happen, the original contingency actually does occur within the period. The aim of cy-pres is to achieve the primary intent of a testator with the minimum disruption of his detailed dispositions. This would be better achieved by the wait and see doctrine for it involves even less tampering with specific expression of general intent.

Then there is the question of the actual operation of cy-pres. The analogous doctrines on which its supporters rely are not too directly in point. The Whitby v. Mitchell

cy-pres was confined to a particular set of circumstances and in no way resembled a wide-ranging power of reformation. Testator's family relief legislation frustrates rather than achieves intent. The cy-pres of the law of charity is closer, but there the finding of the primary general charitable intent is often a fictional process and, once it is "found", finding a charity of the same kind as the specific one named is an easy process. Cy-pres as applied to the re-drafting of private dispositions could raise many more difficulties. How is a testator's primary intent to be found? One writer has said the courts would be asked to decide what a testator "would have wanted if he had thought about something that he did not think about". (1955) 50 Northwestern University L. Rev. 456, 539. Presumably in some instances it would be better to allow the gift to be declared invalid? If there was to be a re-drafting, how would it be done? A blue-pencil doctrine would be of limited value and could be disastrous. Re-writing could sometimes be easily done. An age beyond 21 can easily be reduced. A gift to the grandchildren of an octogenarian that would be bad may be easily saved by confining the grandchildren to those of children already alive. Things could, however, be more complicated. For example, re-drafting a class gift could raise some difficult questions about who should be excluded from the class so that it may be saved. Another more general approach to re-drafting is to first insert a royal lives clause, and provide that to be good, a gift made in the instrument must vest within that period. In effect this writes a wait and see rule into every document, and raises the question of whether or not a general wait and see statute is not called for. Finally, in any re-drafting would the court be compelled to act as an estate

planner? The difficulties in the way of cy-pres seem to be many.

3. Wait and See

One of the arguments against particular and cy-pres legislation is that it accepts the premise that a decision about the validity of an interest must be made at its creation. Wait and see challenges that premise. Why if an interest might vest within or without the period should not one wait and see when vesting actually takes place? If it occurred within the period that would be the end of the matter. If it did not the gift would be bad, subject to any supplementary provisions. The main argument in favour of wait and see is that it provides the maximum opportunity of giving effect to the testator's intent. The arguments against it may be summarized under three headings. (There is a fourth problem, that of selecting measuring lives for the purpose of wait and see. That has been the cause of much controversy and may be regarded as an important practical obstacle to wait and see legislation. It will be considered in the discussion of the Ontario statute).

First, it is argued that it is an accepted policy of the law to settle questions about ownership of property as expeditiously as possible. That is no doubt desirable, but in fact it is not uniformly done under the present law of perpetuities. Suppose a testator leaves property to A (a bachelor) for life, remainder to A's children at 21. The remainder is valid, but if A has a child aged 2 at his death it would be necessary to wait for 19 years to

see if the interests vests. It is true that here the interest can only vest within the period, while under wait and see there is no guarantee that vesting will be within the period. But both do involve a period of time in which ownership is uncertain. It must also be remembered that a draftsman can, by the use of a royal lives clause, achieve the wait and see effect of statute. Wait and see is thus no stranger to the common law.

From a policy standpoint, although it admittedly delays decision, wait and see may be justified in terms of intent of the testator and probable wishes of the beneficiaries. If they had a choice between early decision on title and the opportunity of waiting to see if a gift was good, generally they would prefer the latter. Simms has argued that it is wrong to allow property to be held up for the period of the rule if there is no guarantee of validity of the gift in the end, (1953) 52 Michigan L. Rev. 179, 190. There is some merit in this, but surely a testator and his beneficiaries would prefer the possibility of the interest being valid to it being held invalid at the outset.

Second, it has been suggested that under wait and see the relationship between trustees and beneficiaries would be uncertain. Could a beneficiary whose interest might be void sue a trustee for breach of trust or could he sue an overpaid fellow beneficiary? Simes has argued he could not , (1953) 52 Michigan L. Rev. 179, 185-186. But this is taking a limited view of judicial initiative, and if it really is a problem it can easily be taken care of by legislation which says that during the waiting period the gift is presumptively valid. (See, e.g. Perpetuities Act S.O. 1966, S4(1); infra p. 35).

Third, it is argued that wait and see encourages inalienability. If it does, it goes no further than any well-drawn trust. It has also been suggested that wait and see results in capital and income being idle, in the sense that, while in a state of investment, it is not available for spending by any beneficiary. Again this may happen at common law. Mr. Sheard borrows from Morris and Leach the extreme example of bequest to the daughters of A who marry, (Perpetuities - the New Proposed Act (1966) 14 Chitty 3 Law Journal 3 at Ch. 5). This gift would be treated in the same way under a wait and see statute as if made at common law, subject to the proviso that marriage must take place within 21 years of A's death. According to Sheard there would be an accumulation for 21 years, then the payment of the income on intestacy and a final distribution of capital postponed perhaps to the end of the period. Capital is "idle" and income is being paid to people not necessarily intended to take any benefit. This, however, arises as much as a result of the existence of future interests as from wait and see. Even before wait and see, many jurisdictions had found it advisable to have advancement and maintenance provisions in order to enable idle capital and income to be used (see for example the English Trustee Act, 1925, sections 32 and 33), and a recommendation to adopt this legislation will be made later (Infra p. 67).

Mr. Sheard, in the article referred to above, also suggests that wait and see could raise considerable difficulty in the payment of taxes. Still considering the example of a bequest to the daughters of A who marry, a reconsideration of the tax position would be needed when the income was released from accumulation after 21 years, and at the end of the perpetuity period. The first would

involve those who would take the released income and the second those who would take on the testator's intestacy, assuming, that is, that no daughter of A married. However, adding something to one's patrimony is generally acceptable even if it means paying some tax that would not otherwise have to be paid. Moreover, this reopening of estates for tax purposes would not apply under death duty legislation, but only under succession duty or equivalent legislation, towards which, however, the Carter report may be propelling us. Finally, it is worth noting that in England the existence of a tax structure as complicated as that in Canada was not discussed as a possible objection to wait and see. Remembering that once again he is arguing from a rather unusual bequest Mr. Sheard's objections are not convincing.

It is suggested, therefore, that wait and see does not entail any totally unpalatable consequences. It comes much closer to achieving the testator's intent than does the present law, without violating any of the policies the rule is supposed to serve. It is, therefore, an acceptable basis for reforming the law, and if need be it can be supplemented by particular legislation and cy-pres.

PART III

WAIT AND SEE - THE ONTARIO ACT

The Acts passed in England (Perpetuities and Accumulations Act, 1964), Western Australia (Law Reform Property, Perpetuities and Succesion Act, 1962), New Zealand (Perpetuities Act, 1964), Ontario (the Perpetuities Act 1966) and Victoria (Perpetuities and Accumulations Act, 1968) are all based on the wait and see philosphy, and,

although there are significant differences in detail, they all follow a common pattern. It is proposed here to analyse the Ontario Act in some detail, referring to the other Acts, particularly the English one, where it seems useful to do so.

The Ontario Act may be divided into three parts:

A. Sections 1, 19 and 20 dealing with interpretation, application and short title respectively.

B. Sections 2-9, dealing mainly, but not exclusively, with wait and see.

C. Sections 10-18, clarifying and amending the law in respect of certain particular interests.

Some additions to and changes in the Ontario Act will be suggested. For ease of reference the following system of numbering will be followed:

1. If a new section is suggested it will be referred to by the number of the existing section that precedes it plus the addition of the letter A. Thus if a section is added between the existing sections 2 and 3 it would be 2A; if two were added they would be 2A and 2B. The same pattern will be followed in respect of sub-sections.

2. If an existing section is substantially re-drafted the re-draft will be referred by the number of the section and the letter X. The same will be done for a re-drafted sub-section.

A. INTERPRETATION, APPLICATION AND TITLE

1. Interpretation (Section 1)

In this Act,

Interpretation

(a) "court" means the Supreme Court;
(b) "in being" means living or en ventre sa mere!
(c) "limitation" includes any provision whereby property or any interest in property, or any right, power or authority over property, is disposed of, created or conferred.

The definition of court could presumably be retained in Alberta. The definition of "in being" is satisfactory. The use of "limitation" is rather archaic. The English Act uses the word "disposition" which has a more modern sound (section 15(2)).

The English Act contains two further definitions not found in Ontario:

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

This is presumably to make it clear that discretionary powers of distribution, often given to trustees, or others, are covered. A court would probably arrive at this conclusion without the provision, but there seems no great harm in having it.

(b) "will" includes codicil.

The same comment applies here; by a normal process of interpretation codicil would be regarded as falling within the term will, but it is probably useful to expressly say this.

2. Application (Section 19)

Application of Act

> Except as provided in subsection 2 of section 12 and in section 18, this Act applies only to instruments that take effect after this Act comes into force, and such intruments include an instrument made in the exercise of a general or special power of appointment after this Act comes into force even though the instrument creating the power took effect before this Act comes into force.

(a) Prospective Operation

The Commonwealth Acts are generally applicable only to instruments coming into effect after the Acts are passed and that is to be expected. The two exceptions referred to in section 19 are administrative powers

(infra p.73), and employee pension trusts (infra p.115). If the device of specifically mentioning retrospective sections is adopted any final draft of an Act needs to be carefully checked to ensure that all the sections to be retrospective are mentioned. It might be safer not to mention specifically any retrospective section, but merely to provide "Except as otherwise expressly provided in this Act ----". This has been done in Western Australia (section 3(1)), New Zealand (section 4(1)) and Victoria (section 3(1)).

Section 19 also deals with interests created in the exercise of general and special powers of appointment. In the case of general powers the section probably states the obvious, for at common law the rule runs from the date of the creation of an interest by the exercise of the power and not from the date of the instrument creating the power. The interests created under the exercise of a special power are read back to the instrument creating the power to determine their validity. If the Act were silent on this point it could be argued that it did not apply where the power was created before, but exercised after the Act was passed and in fact the English Act (section 15(5)) and the Victoria Act (section 3(3)) adopt that rule. Section 19, in common with section 4(2) of the New Zealand Act, takes a contrary, and it is suggested, a better view. Whatever the technical arguments may be, it would be rather pointless to deny to interests created after the Act was in operation the benefits of its provisions.

(b) Should the Act Bind the Crown?

It is not settled whether at common law the rule binds the Crown. The relevant cases, and the views of some of the writers, are summarized in Anger and Honsberger,

The Canadian Law of Real Property, 1959, pp. 417-418, and it would serve no purpose here to illustrate at length the uncertainty of the law. In the Commonwealth Acts there are three different approaches to the issue. The Ontario Act does not refer to the Crown, and therefore pursuant to section 11 of the Interpretation Act, R.S.O. 1960 c.191, does not bind it. The English and Western Australian Acts bind the Crown (see section 15(7) and 3(2) respectively). The New Zealand Act (section 3) and the Victorian Act (section 1(2)) provide that the Act and the rule bind the Crown, except in respect of dispositions made by the Crown.

Of these three approaches the latter is the most desirable. As a matter of general policy it can be argued that the Crown ought to be as much subject to the ordinary law as any private individual. There may, however, be legitimate reasons for the Crown to insert reservations or exceptions in grants made by it. In Alberta this may be a consideration in the oil and gas industry. There seems no reason to exclude grants to the Crown from the operation of the rule. If these arguments are persuasive, then the New Zealand and Victorian provisions, which are in identical terms, serve as useful precedents. The following sub-section could be added to section 19:

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

3. Short Title (Section 20) — Short Title

20. This Act may be cited as The Perpetuities Act, 1966.

This requires no comment, except to say that the date would need changing and that, as a matter of arrangement, it might come more conveniently at the beginning of the Act.

B. WAIT AND SEE

Of the general sections in the Ontario Act there are two which can be dealt with before considering wait and see. They are section 2, which confirms the continued existence of the common law rule, as amended, and section 7 establishing presumptions about parenthood which apply both at common law and under wait and see. In addition if a period in gross is to be adopted it could be added after section 2. Wait and see is enacted in sections 4 and 6. Sections 8 and 9 dealt with age contingencies, class gifts and unborn spouses; a modified cy-pres is applied to the former two, while the unborn spouse is deemed to be a life in being. Section 5 covers some of the issues that may arise during the period of waiting. Although as a matter of convenience any order of treatment has its drawbacks the order in which the sections have just been summarized is probably the best to follow.

1. Continuance of the Common Law Rule (section 2)

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

This is a statement of the obvious and the English Act has no such section. It does not matter too much one way or the other whether the section is included or not.

2. Period in Gross (section 2A) — Period in gross

2A(1) Subject to sub-section (2), no interest in real or personal property which must vest, if at all, not later than 80 years after the creation of the interest violates the rule against perpetuities.

(2) For the purpose only of sub-section (1)

an interest created under the exercise of a special

power shall be deemed to have been created at the date of the creation of the power.

It has been explained earlier that Ontario does not have provision for a period in gross, but that it is desirable to make provision for such a period (Supra pp. 8-12). If it is to be adopted, it could be conveniently inserted after section 2 of the Ontario Acts. The 80 year period in gross has been adopted in all the other Commonwealth Acts.

3. Presumptions as to Parenthood (section 7)

Presumptions and evidence as to future parenthood

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

(a) it shall be presumed,
(i) that a male is able to have a child at the age of fourteen years or over, but not under that age, and
(ii) that a female is able to have a child at the age of twelve years or over, but not under that age or over the age of fifty-five years; but,

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

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

(3) Where a question is decided by treating a person as unable to have a child at a particular time and such person subsequently has a child or children at that time, the court may make such order as it sees fit to protect the right that such child or children would have had in the property concerned as if such question had not been decided and as if such child or children would apart from such decision, have been entitled to a right in the property not in itself invalid by the application of the rule against perpetuities as modified by this Act.

> (4) The possibility that a person may at any time have a child by adoption, legitimation or by means other than by procreating or giving birth to a child shall not be considered in deciding any question that turns on the ability of a person to have a child at some particular time, but, if a person does subsequently have a child or children by such means, then sub-section 3 applies to such child or children.

As was pointed out earlier, in the application of the rule at common law it is assumed men and women of all ages are capable of begetting or bearing children and evidence is not admissible to prove the contrary. Section 7(1)(a) establishes limits outside which it is to be presumed a person cannot have children; note that there is no upper limit for the male! Section 7(1)(b) allows the introduction of evidence to prove the fertility or otherwise of a particular person, so that the presumption in section 7(1)(a) is rebuttable. In many cases the difficulties that this section solves would have been taken care of by wait and see. However, the section does permit the earlier determination of ownership than wait and see would and so is still of value.

The operation of the common law, wait and see and section 7 may be illustrated by the following example:

> T leaves property to A's grandchildren, born before or after T's death. At T's death A, a woman, is 60, all her children are dead and she has 12 grandchildren.

At common law the gift is void. A may have another child X, A and the 12 grandchildren die, and X have a child more than 21 years after their deaths. Under wait and see one would wait to see if A had another child, whose birth was followed by the events set out above. What would probably happen would be that A would die and the 12 grandchildren take, but there might be a period of 20 years or more to wait. Under the Act, section 7(1)(a) would apply and,

unless there was evidence to the contrary, A would be presumed to be incapable of bearing children and the property could be distributed immediately to the 12 grandchildren.

There are a number of comments which need to be made on the drafting of section 7.

(i) It only applies in "procedings: S. 7(1). Although this makes it necessary to go to court to take advantage of the section this is probably desirable. It is unlikely that a lawyer would ever want to take the responsibility of applying the section himself.

(ii) It has been suggested that for the sake of certainty and uniformity the opening words of ss. (2) ought to read "Subject to sub-section 3, where in any proceedings any question is decided". This would be understood in any event, but no harm can be done by adding the phrase.

(iii) Sub-section (2) is, at first glance, a rather odd provision. Even though subsequent events show a certain ruling to have been wrong the ruling is not to be changed. The apparent unreality of the provision is softened by sub-section (3), and sub-section (2) has not been the subject of any comment, adverse or otherwise.

(iv) Sub-section (3) may be narrowly drafted. If a decision of a court is wrong and a person does have a child the court is empowered to act to protect the rights of the child. But other people may also have been affected by the birth. Suppose a bequest to A for life, then to her children for their lives, remainder equally among A's grandchildren, At T's death A has only one child and it is decided that she cannot have any more children. She in fact does have another child. That child's children should now be considered by the court. It may be that this could in fact be

done under sub-section (3) but the corresponding English provision is better for it specifically empowers to the court to act for all interested parties. The section is set out below and it is suggested it should replace the present sub-section (3).

> "(3x) Where any such equestion is decided by treating a person as unable to have a child at a particular time, and he or she does so, the court may make such order as it thinks fit for placing the persons interested in the property comprised in the disposition, so far as may be just, in the position they would have held if the question had not been so decided". (England, Perpetuities and Accumulations Act, 1964, S. 2(2). To the same effect see Victoria, Perpetuities and Accumulations Act, 1968, S.8(2)).

The English Report suggested that when a child was born after a decision that its birth was impossible, any rights which arise as a result of the birth, including the right to trace, ought not to be prejudiced. This recommendation was adopted in Western Australia (section 6(4)) and New Zealand (section 7(4)) but it was not accepted in England, Ontario or Victoria. The English draftsman thought it might be too harsh on other beneficiaries who might have received property quite bona fide to allow tracing against them automatically. It does seem better to leave the matter to the discretion of the court and, with what one could assume will be wary application of section 7 in the first instance, it is unlikely that the problem will arise too often.

(v) Sub-section (4) clarifies something which might well have caused difficulty -- in what way would the possibility of adoption or legitimation affect a presumption or a decision that a person could not have a child? The court is directed to ignore these possibilities. Section 2(4) of the English Act and section 8(4) of the Victorian Act are to the same effect. New Zealand has a substantially similar provision (section 7(5)), but in section 7(6) makes special provision for legitimation.

> 7(6) The foregoing provisions of this section, so far as they would otherwise apply in relation to the possibility that a person will at any future time have a child by legitimation, shall not apply in the case of any person if it is established that the person has had an illegitimate child who has not been adopted by some other person and that the child and both its parents are living, unless the Court is satisfied that there is a high degree of improbability that the child will be legitimated.

Western Australia does not deal with the problem at all.

It may well be that in some cases sub-section (4) goes rather far. A young woman who cannot have a child may have a clear intention of adopting one. Under sub-section (4) this would not even be admissible in evidence. Perhaps this ought to be covered, but it needs to be done so as not to curtail the general effectiveness of the section. One possibility is to provide that once it is decided that a person cannot have a child, it is then also to be presumed that he or she will not have one by adoption, legitimation or other means unless a court is satisfied that there is a high degree of probability that the person in question will have a child in one of these ways. If something is to be done it is better that it should be of general application, rather than just apply to legitimation as does the New Zealand Act.

If sub-section (4) is not in any way qualified one must hope that the good sense of the beneficiaries will ensure that no application is made in a case where the possibility of adoption or legitimation is clear. Sub-section (3) provides the ultimate safety-net.

Taking sub-section (4) as it now stands there are two points to be made about its drafting. First it is not clear what "means other" than natural childbirth, adoption and legitimation are. Presumably the phrase

was added out of excessive caution. Second, in order to tie in with the amended version of sub-section (3) it might be advisable to delete the last five words of sub-section (4), i.e. "to such child or children". The amended sub-section (3) empowers the court to consider all beneficiaries and it would be wrong to restrict it or run the risk of restricting it when the "unexpected" child was adopted or legitmated.

(vi) Mr. Scott-Harston has suggested adding a further sub-section to section 7 to protect a trustee or other fiduciary when he has paid over money pursuant to a decision that a person cannot have a child, but a child is subsequently born. This is perhaps being excessively cautious for the court order itself would probably be regarded as affording adequate protection. There is, however, such a provision in the New Zealand Act (section 7(4)). If a sub-section is to be added it might read something like this:

> (4a)(a) When a court decides that a person is unable to have a child, but such person does subsequently have a child, no executor, trustee, administrator or personal representative shall be personally liable for having delivered or paid over any property under his control if the delivery or payment was made pursuant to the said decision and before he knew of the existence of the said child or of facts from which it might have been reasonably concluded that the person was going to have a child.
>
> (b) For the purposes of this sub-section a reference to a person having a child shall include having a child by adoption, legitimation or any other means.

Finally, it should be noted that in Ontario the section has been applied to other aspects of the law: Trustee Amendment Act 1966. This follows the recommendation of the English Report (para. 14).

4. Possibility of vesting beyond the period (section 3)

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

This would be the inevitable result of wait and see which is introduced by section 4 and the section spells out the obvious. There is no equivalent section in the other Commonwealth Acts.

5. Wait and See (section 4)

> 4. (1) Every contingent interest in real or personal property that is capable of vesting within or beyond the perpetuity period shall be presumptively valid until actual events establish,
>
> (a) that the interest is incapable of vesting within the perpetuity period, in which case the interest, unless validated by the application of sections 8 and 9, shall be treated as void or declared to be void; or
>
> (b) that the interest is incapable of vesting beyond the perpetuity period, in which case the interest shall be treated as valid or declared to be valid.
>
> (2) A limitation conferring a general power of appointment, which but for this section would be void on the ground that it might become exercisable beyond the perpetuity period, shall be presumptively valid until such time, if any, as it becomes established by actual events that the power cannot be exercised within the perpetuity period.
>
> (3) A limitation conferring any power, option or other right, other than a general power of appointment, which apart from this section would have been void on the ground that it might be exercised beyond the perpetuity period, shall be presumptively valid, and shall be declared or treated as void for remoteness only if, and so far as, the right is not fully exercised within the perpetuity period.
>
> Presumption o validity and wait and see doctrine

The general import of this section is clear. An interest which might vest within or without the period is to be treated as valid until it in fact is settled by the passage of time when vesting will or has taken place. Only section 5(2) and (3), dealing with powers, needs special comment.

Sub-sections (2) and (3) merely state the wait and see rule in relation to powers in language more appropriate to them. At common law a general power was valid if it was clear that at its creation it could be exercised within the period, even though it was also possible that it could be exercised outside the period. On the other hand if it was uncertain at the outset whether the power could be exercised within the period it was bad. Thus in the case of bequest to A for life, remainder to his children for their lives, remainder as the survivor of the said children should appoint, the power was bad because the survivor of the children would not necessarily be determined, and so the power not necessarily exercisable, within the period. Under s. 5(2) one would wait to see when the power became exercisable and if it did so within the period it would be good.

Section 5(3) deals with special powers, options or other rights. A special power of appointment is valid at common law only if it is clear at the outset that it can be exercised inside the period and is invalid if it could possibly be exercised outside the period. Under the definition section, discretionary trusts would be treated as powers, generally special. A frequent example of an invalid special power is where trustees, original and substituted, are given the power to appoint to an

unborn person. It is possible for an unborn trustee to appoint to an unborn donee outside the period, and at common law the power is void. Under the sub-section such a power would be valid to the extent that it was actually exercised inside the period.

It is not clear what section 5(3) intends to be covered by "option or other right". Options are specifically covered later in the Act. Other rights could only be interests in property already covered by the general language of sub-section (1). Section 5(3) reproduces section 3(3) of the English Act, and this seems the only reason for the reference to options and other rights. The reference might be best deleted.

6. The measurement of the period (section 6)

Measurement perpetuity period

6.(1) Except as provided in section 9, sub-section 3 of section 13 and sub-section 2 of section 15, the perpetuity period shall be measured in the same way as if this Act had not been passed, but, in measuring that period by including a life in being when the interest was created, no life shall be included other than that of any person whose life, at the time the interest was created, limits or is a relevant factor that limits in some way the period within which the conditions for vesting of the interest may occur.
(2) A life that is a relevant factor in limiting the time for vesting of any part of a gift to a class shall be a relevant life in relation to the entire class.
(3) Where there is no life satisfying the conditions of sub-section 1, the perpetuity period shall be twenty-one years.

The measurement of the period for wait and see gives rises to two major questions, first how are the measuring lives to be identified, and second may a period in gross be used for wait and see?

(a) Identification of lives: the general issue

The identification of the lives by reference to which the waiting is to be done has been the most

controversial question in the actual drafting of wait and see statutes. The statutes enacted so far reveal three different attitudes to that question:

(i) The selection of lives in being is to be on a common law basis and needs no special treatment in a statute. This view prevailed in Western Australia. Section 7 of the Act establishes the wait and see rule. Sub-section 3 provides:

> "Nothing in this section makes any person a life in being for the purpose of ascertaining the perpetuity period unless that person would have been reckoned a life in being for that purpose if this section had not been enacted".

(ii) Some guidance is needed as to lives in being but that can be done by fairly general language. That is true of Ontario (section 6(1)) and also of the legislation in Victoria and Kentucky.

> (a) "Nothing in this section makes any person a life in being for the purposes of ascertaining the perpetuity period unless the life of that person is one expressed or implied as relevant for this purpose by the terms of the disposition and would have been reckoned a life in being for such purpose if this section had not been enacted". (Victoria, Perpetuities and Accumulations Act, 1968, s.6(4)).
>
> (b) 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 so measured by any lives where continuance does not have a casual relationship to the vesting of 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. (Kentucky Revised Statutes 381.216).

(iii) The lives in being need to be precisely defined in the statute. This view is represented by the English Act which will be discussed later. The English technique has been followed in New Zealand (section 8(4)).

In order to choose between these three approaches it is necessary to consider how lives in being are determined at common law. If that is clear then the first approach should suffice; if it is not then either the second or third technique has to be adopted.

Unfortunately the only thing clear about the common law is its lack of clarity. There has in fact been no judicial determination of who is a life in being and that for the simple reason that at common law it generally did not matter. That can be illustrated by this example: A bequest to the first grandchild of A to marry. At the testator's death there are alive A and his wife, a child B, his wife and child B_2, and C, an unmarried child of A. Are A and his wife lives in being? Are B, his wife and C, and if so only for their own children or also for their nephews and nieces? Is B_2 a life in being for his brothers, sisters and cousins? At common law it was not necessary to answer these questions. Whether all or only some of these people were lives in being for all or only some of the potential beneficiaries, the gift was still bad. A could have another child, D, all those alive at the testator's death could die, and D have a child who married more than 21 years after the death of the last to die of the lives in being. Indeed, subject to not making the number of lives uncertain, all these who were resident in Alberta at the testator's

death could be regarded as lives in being and the gift still would fail. The common law operated on the basis of what might come to pass and where a gift failed by reference to one life it generally failed by reference to any life. Consequently, it was never necessary to decide exactly who were lives in being at common law.

As there are no cases on who are lives in being, a court, in interpreting a statute which did not give it any guidance, would presumably turn to the views of commentators. They have propounded three theories, and the question for a draftsman of a wait and see statute is whether one of them is so much more persuasive and more certain of application than the other two that he can safely assume it will be chosen by the courts. If the choice is not clear or the application of the theories is difficult, the draftsman should seek to be more precise.

The first theory is that a person is only a life in being if a gift can be saved by using his life. (Allen, Perpetuities: "Who are Lives in Being?" (1965) 81 L.Q.R. 106). On this hypothesis there would, in the example given above, be no lives in being, and this would be true in all cases where a gift failed at common law. Thus in a statute which said nothing about measuring the period it would be possible to wait only for 21 years. This would unduly restrict the operation of the wait and see legislation.

The second theory is that everyone is a potential life in being. (Simes, "Is the Rule Against Perpetuities Doomed?" (1953) 52 Mich. L. Rev. 179, 186 et seq.) At common law this apparent freedom would be insignificant for if a gift

could not be saved by one life it generally could not be saved by any other. Thus, in our example, the lives most closely connected with the gift not being effective to save it, it would be pointless to search the world for other equally ineffective lives. However, this might be useful under a wait and see statute. A person, wherever found, who was alive at the testator's death and who lived to the appropiate age could save the gift. If this theory were correct it would be open to various objections. If need be, it could prolong the waiting period to 120 years if one found a 100 year old who was born just before the testator's death. It might cause administrative difficulties. Would one wait for 100 years and then search for a saving life, which might not of course be found, or would one have to supply a list of lives in being at the date the testator dies? This theory as to lives in being does not seem to be an ideal hypothesis on which to base a statute designed to reform the law.

The third theory is that every disposition carries within it, either expressly or by implication, its own lives in being (Morris and Wade, "Perpetuities Reform At Last (1964) 80 L.Q.R. 486 495 et seq.) Thus the whole world are not potential lives in being. The fact that the expressed or implied group would not save the gift would not make them any the less lives in being, and they could, therefore, be used for the purpose of wait and see. This would avoid the extremes of the first two theories; it would provide some lives, but not the whole world. The difficulty with it is the uncertainty of application. For example, in the case of a class gift Morris and Wade argue that the life of one potential member of the class is not a life in being

for other members (80 L.Q.R. at p. 503). They also suggest that a settlor is not a life in being unless he is a beneficiary or if there are beneficiaries referred to as his descendants (80 L.Q.R. at p. 503). Thus if A settled property on his children B, C and D, he is a life in being only if he refers to them as his children. In both cases it may be argued that their approach is unduly narrow. In any event it indicates that even if the courts accepted the third theory as the basis for deciding lives in being, there would be room for argument about its application.

It would thus seem desirable for a wait and see statute to be more specific about lives in being. There is in effect no common law on who is a life in being. None of the three theories that have been put forward are a satisfactory basis on which to operate. The first would mean there would never be a life in being; the second that everyone would be a life and many administrative difficulties would arise; the third would probably provide an acceptable and manageable number of lives but there could be much dispute about who is or is not in the group.

(b) The Ontario Act - Section 6

The Ontario, Victorian and Kentucky statutes give general guidance as to the choice of lives. The Ontario and Victorian statutes give rise to two difficulties, one of which is shared by the Kentucky Act.

Section 7 of the Ontario Act says that the period is to be "measured in the same way as if this Act had not been passed". Section 6(4) of the Victorian Act has a substantially similar provision. That appears to force us back to the difficult question of choosing between the three theories just discussed. In fact no great difficulty arises on this score. As we have seen under the

first theory there never would be any lives in being for the purposes of wait and see. If the draftsmen of the statutes had had that in mind it would have been pointless for them to also provide that only lives relevant to vesting should be considered for there would have been no lives to start with. As Gosse has suggested it seems more likely that the Ontario Act accepts the second theory (p. 24 etseq.) However, it was realized that to leave the common law position unqualified would give too wide a group of lives and so the proviso as to the relevant lives was included. If this is so then the third theory would be eliminated. But in fact the second theory, limited as it is in section 6, by relevant lives leads to much the same result as the third theory, based on the express or implied designation of lives in the instrument. Morris and Wade, the proponents of the latter, criticize the English list of lives on the ground that it includes irrelevant lives and excludes relevant lives. Their test of expressor implied reference is that of relevancy to vesting, which is the net result of the Ontario and Victorian Acts.

The difficulty shared by the three statutes is that of determining who lives are in a specific case. When can it be said that a life "limits or is a relevant factor that limits in some way the period within which the conditions for vesting of the interest may occur?" When, under the Kentucky Act, does a life have "a casual relationship to vesting or failure of the interest?"

The Ontario and Victorian Acts deal with one of the problems that would have arisen. Suppose a bequest to the children of A at 25. If at the testator's death A has a child, is he a life in being with respect to after born children. Morris and Wade argue that the child's life

should not be regarded as relevant to the vesting of their interests (80 L.Q.R. at p. 503). The Acts recognized that, using the test of relevancy, the matter could be argued either way, and they therefore provide that a life relevant to the vesting of any part of a class gift shall be relevant for the entire class.

There are still many situations which could be argued either way. Take again the example set out on page 39. It is impossible to say with confidence who are and who are not relevant lives, or whose life bears "a casual relationship" to vesting. The Perpetuity Legislation Handbook provides an illustration of possible difficulty (p.185).

> "Suppose a property is given in trust for A for life, then for A's children for their lives, with contingent gifts over of the corpus of each child's share on his death to the deceased child's heirs. A has four children, two of whom were born before the instrument took effect, two after, But B, one of the children who was living when the instrument took effect, was the last survivor of the children. In one such case the court held that the gifts of corpus to the heirs of the two living children were valid, but the gifts to the heirs of the afterborn children were void. See American Security & Trust Co. v. Cramer 175 F. Supp. 367 (D.D.C. 1959). Under wait and see, would it really be objectionable to use B's life as a measuring life and sustain all interests? Yet it would appear that B's life is relevant or casually related only to that share of the remainder limited after his death".

The Ontario and the Victorian Acts thus pose difficult problems in their application to specific cases. This is owing to the general nature of the provision about relevant lives. If there is a way of making the lives more precise that would be desirable.

(c) The English Act, section 3(4) & (5) (section 6X)

The English statute, which was followed on this point

by the New Zealand Act (section 8), ensures the greatest precision by listing the lives who may be considered in waiting. The severest critics of this technique are Morris and Wade. They do, however, admit that "for most practical purposes the provisions may still prove beneficial and so justify the skill and care with which they have been drawn". (80 L.Q.R. at p. 508) Moreover, one of their major criticisms, that the English list is inappropriate to commercial interests, may be ignored for the Ontario statute deals with such interests specifically, whereas the English one does not. A technique that is precise and for most practical purposes useful is obviously worth considering, and I would recommend its adoption. If it was to be adopted this would mean the replacement of section 6 of the Ontario Act by a section modeled on sub-sections 4 and 5 of section 3 of the English Act, and referred to hereafter as section 6X.

6X(1) Where section 4 applies to a disposiition the perpetuity period shall be:

(a) The period provided for in the instrument creating the disposition; or

(b) If there is no period provided for in the instrument creating the disposition, a period determined by reference to the lives provided for in sub-sections 2 and 3 of this section plus 21 years; or

(c) If there is no period provided for in the instrument creating the disposition and if there are no lives under sub-section 2 of this section, the period shall be 21 years.

(2) Subject to paragraph (e) of sub-section 3 of this section, where any persons falling within sub-section (3)

below are individuals in being and ascertainable at the commencement of the perpetuity period the duration of the period for the purposes of sub-section (1) (b) shall be determined by reference to their lives, but so that the lives of any description falling within paragraph (b) or (c) of sub-section (3) shall be disregarded if the number of persons of that description is such as to render it impracticable to ascertain the date of the death of the survivor.

(3) The persons referred to in sub-section (2) of this section are:

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

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

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

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

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

(iv) where, in the case of a special power of appointment exercisable in favour of one person only, the object of the power is not ascertained at the commencement of the period, any person as to whom some of the conditions of qualifying as the object have been satisfied.

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

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

(d) any person who takes or may take any prior interest in any property disposed of.

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

This section has a rather forbidding look about it, but the following commentary will, it is hoped, show that it is not too obscure.

S.6X (1) (a): The English Act permits waiting only during some period in gross specified in the instrument or during a period determined by reference to the statutory list of lives. If, therefore, an instrument established a perpetuity period by a royal lives clause, it would not be possible to use that for the purpose of wait and see. Although the matter is not one of major importance it is difficult to see why any perpetuity period specified in the instrument could not be used as the waiting period and paragraph (a) makes provision for that.

S.6X (3) (a): It has been pointed out earlier that Morris and Wade object to the use of the settlor as a measuring life on the ground that his life isnot always relevant to vesting (Supra p. 41A). They suggest that if A settles property in his children, B, C, and D, A would be a life in being only if B, C and D were referred to in the settlement as his children. It would seem better to make a general decision one way or the other rather than to rely on such sophistry and accidents of drafting, and there seems no harm in including the settlor.

S.6X (3) (b) (i) and (iii): Again it has been pointed out that Morris and Wade object to one potential member of a class being used as a life in being in order to decide the validity of the interests of the other members (Supra p. 41). The Ontario Act rejected that argument in section 6(2) and section 6X (3) (b) (i) and (iii), in substance corresponds to the present Ontario provision.

S. 6X (3) (b) (ii): One again Morris and Wade object that this permits the use of irrelevant lives (80 L.Q.R. at p. 503). Suppose a bequest to the first child of A to marry. At the testator's death A has one child. Under the statute that child would be a life in being with respect to the interests of his afterborn brothers and sisters. Morris and Wade argue on the grounds of relevancy that this ought not to be so. But this depends on what is relevant, and, in any event, from a practical standpoint there is no grave objection to such a life. It might be said that this would merely extend the period of waiting, but it would still be within the present legally accepted limits.

S. 6X (3) (b) (iv): The corresponding English provision reads:

> "in the case of a special power of appointment exercisable in favour of one person only, that person, or where the object of the power is ascertainable only on certain conditions being satisfied, any person as to whom some of the conditions are satisfied and the remainder may in time be satisfied". (Section 3 (5) (b) (iv)).

Morris and Wade quite correctly point out that if there is one person who is identified as the object of the power then the power is good at common law and there is no need for wait and see (80 L.Q.R. at p. 504). The provision has, therefore, been re-drafted to cover only the case where the object of the power is not identified at the beginning of the period.

S.6X (3) (b) (v): The English equivalent reads:

> "in the case of any power, option or other right, the person on whom the right is conferred". (Section 3 (5) (b) (v)).

"Option or other right" has been deleted. Options are dealt with later in the Ontario Act and "other rights" is so vague that it is better dispensed with.

S.6X (3) (d): The English equivalent reads:

> "any person on the failure or determination of whose prior interest the disposition is limited to take effect". (Section 3 (5) (d)).

Suppose a bequest to A for life, B for life, remainder to the grandchildren of C. Under the English Act A would not be an appropriate life for the remainder, for it does not take effect on the failure or determination of A's interest, but rather of B's interest. It would seem desirable to have all holders of prior interests as lives and this is what the suggested draft tries to do.

S.6X (3) (e): There is no directly corresponding provision in the English Act. Assuming the device of listing lives were adopted, paragraph (e) would deal with the "unborn widow" problem, now dealt with in section 9 of the Ontario Act, and would settle the question of whether section 9 or the age reduction provisions of section 8 are to be applied first. It is necessary, therefore, to explain the effect of sections 8 and 9.

Section 8 provides that if after a period of waiting a gift would still be bad because of an age contingency the age can be reduced so as to comply with the rule. Suppose a gift to A for life, remainder to his children at 25. At A's death he has one child aged 2. The remainder may be rephrased to read 23 so as to bring it within the rule (See further p. 53 infra).

Section 9 provides that where an unborn spouse would cause a gift to fail the spouse shall be treated as a life in being. Suppose a gift to A for life, remainder to his widow for life, remainder to such of his children as are alive at the death of the survivor. The ultimate remainder is bad at common law because A's widow need not be alive at the date the gift is made and may die more than 21 years after A. Under section 9 the widow would be deemed to be a life in being and so the gift would be saved. This is in itself a better solution than the one adopted in England. Section 5 of the English Act provides in effect that the unborn spouse be disregarded and distribution made to those living 21 years after the death of the actual lives in being. That is more destructive of the testator's intent than the Ontario Act, and, although the latter Act could on occasion extend the period, that would probably not happen often and

would not cause any inconvenience. The other Commonwealth jurisdictions adopt basically the same approach as Ontario: see, for example, Victoria, Perpetuities and Accumulations Act, 1968, section 10.

The difficulty raised by the Ontario Act is whether section 8 or 9 is to be applied first. Gosse (p.47) gives the following example:

> T devises on trust for X for life, then on trust for any surviving spouse for life, then on trust for the children alive at the death of the survivor who reach the age of 25. S marries a wife not alive at the testator's death and dies leaving his widow and a child aged 2.

If section 8 is applied the age is immediately reduced to 23; if section 9 is first applied then we can wait and see when the widow dies. In this example, if she lives for two years it will not be necessary to reduce the age at all. The pros and cons of the matter on the language of the Ontario Act are discussed in Gosse (pp. 48-49).

Paragraph (e) of section [8](3) would, it is suggested, solve this problem. In the example just discussed it would be clear that one would first wait and see by reference to the life of the unborn widow before reducing the age. Under paragraph (e) it would not matter whether any spouse of A was or was not alive or ascertainable at T's death. The fact that she was referred in the list of lives specified for the purpose of wait and see should make it clear that one can wait for her life before applying the age reduction section.

If the English device of listing lives is not adopted, but section 6 is retained in its present form, the problem of the application of sections 8 and 9 could still be solved by including paragraph (e) as a subsection of section 6. To fit it into the section 6 the

reference in sub-section (i) thereof to section 9 would need to be deleted and paragraph (e) slightly rephrased, so that it would, as section 6(3a), read as follows:

> 6.(3a) Where a disposition is made in favour of any spouse of a person who is in being and ascertainable at the date of the commencement of the period, or where an interest is created by reference to the death of the spouse of such a person, or by reference to the death of the survivor of them, the said spouse, whether or not he or she was in being or ascertainable at the commencement of the period, shall be deemed to be a relevant life for the purposes of sub-section (1).

This would, of course, mean the deletion of section 9.

(d) Period in gross and wait and see (sections 6(3) or 6X (1) (c)).

Although it favoured allowing a draftsman to insert in an instrument a period in gross, which could then be used for the purpose of wait and see, the English Report recommended against allowing the 80 year period automatically for that purpose. The fear was expressed that that could extend the period of waiting undesirably (para. 9). Section 6X (1) (c) permits waiting for the period stated in the instrument, and in default of that, for a period determined by the statutory lives. Section 6, within its own terms, it substantially the same. This may be giving enough scope to wait and see and it would be embarking on a voyage into the unknown to allow in default of either of these periods a full period of 80 years. The 21 years in section 6(3) and section 6X (1)(c) while not eliminating wait and see, ensures the voyage is not too lengthy.

In favour of the 80 year period it may be argued that if an instrument can easily provide for a period of 80 years, it is inconsistent and indeed unfair not to allow it in the Act. However, presumably the draftsman

has some idea as to the likely consequences of what he does. As we have said, the effect of a period of 80 years in the Act is incalculable.

It is suggested, therefore, that Alberta should follow the Ontario and English examples and allow only a twenty-one year period. This is also the position in Western Australia (Section 5), New Zealand (Section 8(4)(b)) and Victoria (Section 5).

7. Supplementing wait and see (sections 8, 9)

In many cases waiting to see would in itself result in an interest vesting within the period. However, most jurisdictions have recognized that it will not cure all ills. We have already given ample consideration to the Ontario provisions concerning fertility, which supplement both the common law rule and wait and see. But even making allowance for them it is still possible that after a period of waiting an interest, if it is going to vest at all, will vest outside the period. Should something further be done to save such gifts? The Ontario Act, in section 8, has what may be termed limited or particular cy-pres provisions, designed to deal with class gifts and gifts dependent on age contingencies when wait and see has proved ineffective. Section 9, dealing with the unborn widow trap, serves a similar purpose. The New Zealand Act has similar provisions, and in addition has a general cy-pres power operative when wait and see and, where appropriate, particular cy-pres have failed. Many American jurisdictions have simply a general cy-pres power.

The particular cy-pres of the Ontario Act has been adopted in all Commonwealth jurisdictions and prima facie it can be assumed that it ought to be included in statute modelled on the Ontario Act. Whether it should be

supplemented by, or perhaps replaced by, general cy-pres is a more debatable point. It is convenient, therefore, to consider first sections 8 and 9 of the Ontario Act and then the policy behind and the drafting of a general cy-pres power.

(a) Particular cy-pres for age contingencies and class gifts (section 8)

8(1) Where a limitation creates an interest in real or personal property by reference to the attainment by any person or persons of a specified age exceeding twenty-one years and actual events existing at the time the interest was created or at any subsequent time establish,

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

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

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

(2) Where the inclusion of any persons, being potential members of a class or unborn persons who at birth would become members or potential members of the class, prevents sub-section 1 from operating to save a limitation creating remoteness, such persons shall be excluded from the class for all

purposes of the limitation, and the limitation takes effect accordingly.

(3) Where a limitation creates an interest in favour of a class to which sub-section 2 does not apply and actual events at the time of the creation of the interest or at any subsequent time establish that, apart from this sub-section, the inclusion of any persons being potential members of a class or unborn persons who at birth would become members or potential members of the class, would cause the limitation to the class to be void for remoteness, such persons shall be excluded from the class for all purposes of the limitation, and the limitation takes effect accordingly.

(4) For the purposes of this section, a person shall be treated as a member of a class if in his case all the conditions identifying a member of the class are satisfied, and a person shall be treated as a potential member if in his case some only of those conditions are satisfied but there is a possibility that the remainder will in time be satisfied.

(1) Section 8(1)

The operation of sub-section (1) may be considered in the light of the following three examples:

Example 1. A devise to A for life, remainder to his children at 30.

At common law if A has no child aged 30 at the testator's death the gift is void, for there is no certainty that a child of A will reach 30 within 21 years of A's death.

Before the current perpetuity reforms many jurisdictions had legislation which saved such gifts by reducing the age in the gift to 21. One of these was England and the English report recommended that the legislation be retained, and a majority of the committee recommended that it be applied before wait and see. Thus in example 1, the age would have been reduced at the testator's death. A minority of the Committee felt that age reduction should apply after waiting. This would be in accord with the general wait and see tenor of the statute and would do less violence to the intent of the testator (English Report, paras. 26, 27; pp. 34-35). The framers of the English Act not only accepted the minority view, but they also provided that the age should not be reduced to 21 but only so far as necessary to save the gift. (Section 4). This again was aimed at giving maximum effect to intent.

The Ontario Act, wisely it is suggested, follows the English Act. Applying section 8 to example 1, one would wait to see if vesting did or would take place within the period. If at A's death all his children were aged 9 or more the gift would not be changed. If at his death he had a child under 9, say 7, then the age would be reduced to 28 so as to ensure that vesting if it did take place would take place within the period. Even if A had a child over 9 the age would still be reduced so as to encompass the youngest child. The gift being a class gift would be bad if all its members could not take vested interests within the period.

Example 2. A devise to A for life, remainder to his first child to reach 30.

This example needs to be considered in relation to two possible sets of events. First suppose that at the date of A's death he has two children, aged 10 and 6.

Section 8 would not yet apply for, apart from the section, the interest is still capable of vesting within the period---the 10 year old can reach 30 within the next 20 years. Under section 4 it is possible to wait and see if that happens. If he should die before reaching 30 section 8 then applies, for it is now at a subsequent time established that the gift, but for the application of section 8, would be void. The age of 30 may, therefore, be reduced to 27 in order to afford the 6 year old the opportunity of taking within the period. This is the interpretation of the corresponding section of the English Act which has been adopted by Morris and Leach, First Supplement (page 11, illustration 14) and it does not appear to have been challenged.

Second, suppose that at A's death he has two children aged 8 and 6. As neither child can reach 30 within the next 21 years it is clear section 8 must be applied. But is it to reduce the age to 30 or 27? Goose, without discussion, suggests the latter (page 39). Section 8(1) says the specified age is to be reduced to the age (i) that is nearest the age specified and (ii) that would not, apart from section 8, have made the gift void as incapable of vesting within the period. If the remainder had specified 29 it would not have been void as incapable of vesting within the period for the 8 year old could attain that age in 21 years. As 29 is nearer 30 than 27 it would seem the reduction ought first to be made to 29 and only to 27 to accommodate the second child if the first fails to reach 29. This double application of the section seems justified on the ground that it operates at "any subsequent time". It may be objected that section 8 applies where "a limitation creates an interest" and, on a second application, it would be applied where a limitation,

as amended under the section, created an interest. That is a rather strained interpretation and is overshadowed by the other aspects of the section.

It is suggested, therefore, that the interpretation which permits what may be called phased reduction is the correct one, but the matter is probably not clear cut. The section should if possible be clarified, and this not merely to clear up the language as it stands, but to ensure that as a matter of policy the best result is assured. The policy behind the section is to give as full effect as possible to the testator's intent. Phased reduction does that where in the events that happen the elder child reaches the specified or substituted age. If it is 10 and reaches 30 this is exactly what the testator intended; if it is 8, 30 is reduced to 29 and the child reaches 29 that is as close as possible to what was intended. On the other hand if the elder child fails to obtain the specified or substituted age, any further reduction to accommodate the younger child will afford him the opportunity of taking at an age which the elder may have reached but at which he was denied the right to take. A's death occurs in 1970. The child then 10 dies in 1989 aged 29. The specified age would then be reduced to 27 so that the child aged 6 in 1970 could take within the period. If he did reach 27 he would take at an age at which the elder was not permitted to take.

The net result is that if the elder reaches the specified or substituted age this achieves or comes close to achieving what the testator actually intended; if he does not he loses the advantage of being the elder, an advantage the testator either intended, or at least, was not opposed to. One would suppose that in fact the specified or substituted ages will be reached. Where they are not it does represent in substance a greater

departure from the intended relationship between the children and this should be avoided, even if it means at the outset a reduction to encompass the younger child. This would ensure "equal" treatment. It is suggested, therefore, that section 8 ought to make it clear that it applies only once to any one limitation.

It is rather difficult to redraft section 8(1) so that it gives effect to this intent. The following is suggested, though not with too great confidence:

8(1X): Where a limitation creates an interest in real or personal property by reference to the attainment by any person or persons of a specified age exceeding twenty-one years, and, all beneficiaries or potential beneficiaries being in existence, actual events existing at the time the interest was created or at a subsequent time establish,

(a) that the interest, apart from this section and apart from section 4 would be void as not being certain to vest with the period: but

(b) that it would not be void if the specified age had been twenty-one years, the limitation shall be read as if, instead of referring to the age specified, it had reference to the age nearest the age specified that would, if specified, have prevented the interest from being so void.

This amended section 8 can be best explained by considering the situation where A dies leaving 10 and 8 year old children. Under the original section 8(1)(a) it could not be said the interest was void because under section 4 one was entitled to wait and see. If one had simply amended section 8(1)(a) by saying "and also apart from section 4" this would have deprived gifts on age contingencies from the benefit of wait and see from the

outset. One could then have been forced to apply section 8 at the testators death. By requiring all beneficiaries or potential beneficiaries to be in existence before the section applies this postpones, in the example 2, the application of section 8 until A's death. Then apart from sections 8 and 4 the remainder would be void because it was not certain then that the interest would vest: to ensure that it is necessary to reduce the age to the younger child. This takes care of the particular problems of example 2. It may, however, have other ramifications that I have not appreciated, and should be regarded with a critical eye.

Example 3. A devise to the children of A who being sons reach the age of 30 or being daughters reach the age of 25.

This example is taken from Morris and Leach, First Supplement (page 12, illustration 15). They suggest the hypothesis of A, not having had children at the testator's death, dying leaving a son aged 8 and a daughter aged 3. The English draftsman was apparently not certain how the English equivalent of section 8(1) would apply. Would both ages be reduced to 24 or that for the sons to 29 and that for the daughters to 24? The English Act covers that by the following provision and it should be added in Canada, and under the numbering being used would become section 8(1a) "Where in the case of any disposition different ages exceeding twenty-one years are specified in relation to different persons.

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

(b) that sub-section shall operate to reduce each such age so far as is necessary to save the disposition from being void for remoteness" (Perpetuities and Accumulations Act, 1964, s. 4(2)).

(ii) Section 8(3)

Sub-section 3 provides that where the inclusion of certain class members would result in a class gift being totally void, these members may be excluded from the class. Its operation may be illustrated by the following example:

> A devise to A for life, remainder to his children for their lives, remainder to his grandchildren. At T's death A has two children B and C. Two children D and E are born after T's death. A, B and C die and 21 years has elapsed since their deaths.

Under the normal class closing rules (which still operate - see Gosse p. 43) the class of grandchildren will not close until the death of D and E, and so any further grandchildren born to D and E would be included in the class. Their inclusion would, however, make the class void. Sub-section (3) would, therefore, close the class 21 years after the death of A, B and C and exclude any grandchildren subsequently born to D and E.

(iii) Section 8(2)

Sub-section (2) is designed to cover the situation where neither sub-sections (1) nor (3) would save a gift. Its operation can be best illustrated by the following example taken from Morris and Leach, First Supplement, Page 12. The references in square brackets are to the Ontario Act.

"Illustration 17. Gift by will to A for life and then to such of A's children as shall attain twenty-five and the children of such of them as shall die under twenty-five leaving children who attain twenty-five, such children to take the share their parent would have taken.

At T's death, A is alive but has no children, so he is the only life in being. Even if the age is reduced to twenty-one, the gift is still too remote (Pearks v. Moseley (1880) 5 App. Cas. 714), unless saved by s. 3 [s.4]; therefore, s. 4(1) [s.8(1)] does not apply. The grandchildren could be excluded by s.4(4) [s.8(3)]; but that might still leave the gift to the children too remote. Hence, s.4(3) [sub-section 2] provides that if s.3 [s.4] does not save the gift, the grandchildren shall be excluded from the class, and then the vesting age for the children shall be reduced as far as necessary by s.4(1) [s.8(1)]".

(b) The unborn widow (section 9)

This has already been adequately covered, but it needs to be referred to in this context for the sake of completeness. The nature of the unborn widow trap was explained on page 15 . Section 9 of the Ontario attempted to solve the difficulty by treating any unborn widow as a life in being, but left in doubt whether section 8 or section 9 was to be applied first where both were applicable (Page 49). It has been suggested that the easiest way of solving that dilemna is to make the unborn widow one of statutory lives for the purpose of wait and see (Page 49) or if the technique of listing lives is not adopted the problem can still be handled by in effect adding section 9 as a sub-section to section 6 (Page 50).

(c) General cy-pres - supplementing wait and see (section 8A)

The New Zealand statute, as well as having provisions corresponding to sections 8 and 9 of the Ontario Act, confers on the court a general cy-pres power authorizing the reformation of documents if wait and see and particular cy-pres have not operated to save an interest

(Section 10). In the United States Kentucky, Vermont and Washington have general cy-pres following wait and see.

When cy-pres was considered as a primary method of reform it was suggested two arguments militated against its adoption. One was that it could change an instrument when, in the events that happened, vesting would have taken place within the period on the basis of the original instrument. That cannot be used when cy-pres is being applied after a period of wait and see. The second argument was the difficulty of application of the doctrine. That would still apply after wait and see but to a much more limited extent. The testator's intent could still be a matter of some speculation, but the scope of any reformation required would generally be less wide and thus less controversial. The objections to cy-pres as a supplement to wait and see are by no means as strong as to it as a primary remedy, and the general cy-pres could be usefully added to the Ontario Act. It is worth noting that Morris and Leach approve this technique (p. 37).

In enacting a general cy-pres power three matters require consideration: (1) the drafting of the basic provision; (2) the question of retrospective operation; and (3) whether particular cy-pres provisions need to be retained.

The Kentucky Act and a provision modelled on section 10 of the New Zealand Act may be taken as examples of how a cy-pres power could be drafted. If adopted in Ontario it would become section 8A.

(i) 8A "In determining whether an interest would violate 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 casual 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 the rule, to approximate most closely the intention of the creator of the interest". (Kentucky Revised Statutes 381-216).

(ii) 8A(1) Where apart from the provisions of this section, any disposiition would be invalid solely on the ground that it infringes the rule against perpetuities, and where the general intention orginally governing the disposition can be ascertained in accordance with the normal principals of interpretation of instruments and the rules of evidence, the disposition shall, if possible and as far as possible, be reformed so as to give effect to that general intention within the limits of the rule against perpetuities.

8A(2) Sub-section (1) shall not apply where the disposition of the property has been settled by a valid compromise. (Adaptation of New Zealand Act s.10(1)).

For two reasons the second provision is to be preferred to the underlined portion of the Kentucky Statute. The Kentucky Act requires reformation; the New Zealand Act requires it only if it is possible. In most cases the intention of the testator will be better served by reformation. On occasion, however, it might be better to permit property to passing on resulting trust and it is wise to make allowance for that. The provision also gives some direction as to how intention is to be found. In so doing it perhaps states the results the courts would arrive at, but it may be useful to have this expressly stated.

Although the second provision does not require reformation in all cases, it does require it where it is possible. It is possible, however, that the parties interested may be prepared to compromise rather than leaving their fate to judicial redrafting. It would seem desirable that they should be able to do so under normal rules. Standing alone sub-section (1) might leave some doubt whether they could do so and sub-section (2) makes it clear that they can.

The second question is whether or not a general cy-pres power should be retrospective, that is apply to instruments that came into effect before the statute is in force. The Commonwealth statutes are generally prospective in operation. However, the New Zealand Act provides that general cy-pres is to be applied retrospectively. According to an article in the New Zealand Law Journal this followed a recommendation of the New Zealand committee on whose report the Act was based. The recommendation was made to deal with a problem which "stems from the tremendous growth in the formation of trusts and settlements since the last war, and the fact that a number of them have been drafted by some practitioners in the basis of certain precedents prepared many years ago, and these precedents have until recently been accepted without question. However, in recent years some doubts have been raised as to whether these precedents do in fact infringe the rule against perpetuities; and although the matter has not been litigated before the Courts, it is generally considered today that they would be held void". (Beatson, The Perpetuities Act, 1964 (1965) New Zealand Law Jr. at p. 181).

If there is no known reservoir of invalid trusts it is probably advisable to retain the general prospective character of the legislation. If, however, it was thought desirable to make general cy-pres retrospective sections 10 and 11 of the New Zealand Act provide some idea as to how the drafting could be done. They are, it should be observed, rather complicated.

The third question is whether or not section 8 (age contingencies and class gifts) should be retained if a general cy-pres section is added. Under a general cy-pres power a court could do all that section 8 does, and such a power has the advantage of allowing reformation to be modelled to the facts of each case. There would, however, be no certainty as to what exactly a court would or ought to do. As section 8 deals with two of the most common types of invalid gifts it may be desirable to have this specific and certain legislation for them. The arguments are fairly evenly balanced. I would suggest section 8 be retained. This follows the New Zealand Act, and if Ontario and any other Canadian jurisdictions who adopt the Ontario statute do not have general cy-pres, the retention of section 4 would mean some degree of desirable uniformity inside Canada.

8. The position during wait and see.

Section 5 of the Ontario Act covers two questions which could arise during the waiting period. The section reads:

> 5(1) An executor or a trustee of any property or any person interested under, or on the validity of, an interest in such property may at any time apply to the court for declaration as to the validity or invalidity with respect to the rule against perpetuities of an interest in that property, and the court may on such application make an order as to validity or invalidity of an interest based on the facts existing and the events that have occurred at the time of the application and having regard to sections 8 and 9.

> (2) Pending the treatment or declaration of a presumptively valid interest within the meaning of sub-section 1 of section 4 as valid or invalid, the income arising from such interest and not otherwise disposed of shall be treated as income arising from a valid contingent interest, and any uncertainty whether the limitation will ultimately prove to be void for remoteness shall be disregarded.

Sub-section (1) probably states what would have been taken to have been law in any event. Two comments may be made on the section. First, no one is obliged to make an application. This has raised the question of whether or not all interested parties could effect a compromise out of court. No doubt they could, but subject to certain qualifications. Section 7 (the fertility section) applies only in proceedings. An extra judicial compromise which relied on it would be potentially dangerous, for if a child did come into existence it could invoke section 7(3). In a clear case the risk would not be great, but trustees would probably be loath to take it.

Second, the court is not obliged to make an order. This is understandable enough for it may be that on the facts at the time of the application the interest will not clearly vest within or without the period; it would then be necessary to continue waiting.

Sub-section (2) states something which could have been deduced from section 4. but which it is wise to state expressly. If not disposed by the instrument, the income is to be treated according to normal rules of law. In some instances the contingent interest will carry the intermediate income. This is true of a contingent bequest of personalty (subject to certain qualifications) and a contingent residuary gift of mixed realty and personalty. In such cases the income would be accumulated for the period allowed under the accumulation rules and then be held on resulting trust for the settlor or his estate.

Contingent specific bequests, contingent devises and contingent pecuniary legacies do not carry intermediate income and from the outset there would be a resulting trust to the settlor of his estate. (Theobald, Wolh, 12th ed. 1963, p. 550 et seq.)

We have already noted the criticism Sheard has made of this aspect of wait and see. (Supra p. 22). He gives the example of bequest to the daughters of A who marry. At the testator's death A is alive and has one unmarried daughter. In theory one could wait to the end of the period and no daughter would marry. As a result income would have been accumulated for twenty-one years, then distributed on intestacy and there would be a distribution of capital or an intestacy at the end of the period. It was pointed out that this type of situation could arise under the rule as it now stands and that the solution to some of the difficulty would be the enactment of legislation corresponding to sections 31 and 32 of the English Trustee Act 1925. This would mean extending the scope of sections 27 and 28, Trustee Act RSA 1955, Ch. 346.

C. PARTICULAR INTERESTS

Sections 10-18 of the Ontario Act clarify and amend the application of the rule to particular interests. Although, as is only to be expected, the wait and see philosophy colours the changes that are made, in every case some change in the law would be desirable whatever (and whether any) change was made in the basic nature of the rule. The following discussion, although influenced by, is not predicated solely on wait and see.

1. Dependent and independent limitations (section 10)

10 (1) A limitation that, if it stood alone, would be valid under the rule against perpetuities is Saving

not invalidated by reason only that it is preceded by one or more limitations that are invalid under the rule against perpetuities, whether or not such limitation expressly or by implication takes effect after, or is subject to, or is ulterior to and dependent upon, any such invalid limitation.

Acceleration of expectant interests

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

The language of this section differs from the corresponding section of the English Act, which reads:

> "A disposition shall not be treated as void for remoteness by reason only that the interest disposed of is ulterior to and dependent upon an interest under a disposition which is so void, and the vesting of an interest shall not be prevented from being accelerated by the failure of a prior interest by reason only that the failure arises because of remoteness". (section 6).

The common law on dependent limitations is not clear, or, if it is thought to be clear, is difficult of application. If a prior gift contravenes the rule, any subsequent gift which itself contravenes the rule, is of course, also invalid. However, even if it does not itself contravene the rule, the subsequent gift will be invalid if it is dependent on the prior invalid gift. The dependency doctrine has been criticised on two grounds. First it is difficult to apply, and there is agreement all round that decided cases are difficult to reconcile. Second it is doubtful if the rule serves any useful purpose. It is said that the rule is based upon an assumption as to intent. Morris and Leach think the assumption ill founded (p. 179). They consider a residuary gift to A for life, then to A's grandchildren for their lives, and

then to B absolutely. They argue that most testators, if told that the grandchildren could not take, would prefer the gift to go to B rather than on an intestacy. That depends on the circumstances. If A's grandchildren are in fact the testator's great-grandchildren and B is a charity it may be the testator would prefer an intestacy. It is true, however, that in cases not involving perpetuities the question would not be whether the gift to B is good or bad, but merely one of whether, assuming a prior gift to fail, the gift should be accelerated. This would be the issue if in the above example A, the life tenant, disclaimed. If the general rule is that where a prior gift fails, subsequent gifts do not thereby become void, there seems no good reason why that rule should not apply where the invalidity is due to remoteness.

These considerations led the English Report to recommend that where a prior gift contravened the rule a subsequent gift, itself otherwise valid, should not be held invalid because of the dependency rule, but should instead be accelerated (para 33). The English Act implemented this recommendation, except that acceleration is not automatic. The Ontario Report accepted the English recommendation and its draft bill automatically accelerated the subsequent interest (pp. 19 et seq.) However, the Supplementary Report advocated a provision which became sub-section 2 of section 10 (page 5).

Against this general background we turn to a consideration of the Ontario Act. Subsection one provides that a dependent gift shall not be invalid solely because the prior gift contravenes the rule. Section 13(1) of the Western Australian Act is substantially the same. The English Act, and those in New Zealand (section 14) Victorian (section 11), say that the subsequent dependent limitation shall not be void for remoteness because

of a prior gift being so void. This assumes that, because it was dependent, a prior gift contravened the rule. This is not so; the dependent gift could in itself comply with the rule, but fail because it was a dependent gift. If this is a correct view of the common law the Ontario Act is better drafted. Strictly speaking it may be argued that all the English Act does is affirm the common law. Where a subsequent gift complies with the rule, but would be considered as dependent at common law, it would not, under the Act be void for remoteness because it was dependent, but it might still be bad merely because it was dependent and the English Act would not save it. This is, however, the very situation the legislation is designed to cover and the Ontario Act does it.

Subsection 2 of section 10 does not provide for automaticacceleration. As has been said in this it follows the English Act, and this is also the law in New Zealand (section 14) and Victoria (section 11). Only Western Australia provides for automatic acceleration (section 13(2)). According to general principle, acceleration turns in large measure on intent (In re Flowers' Settlement Trusts [1959] 1 W.L.R. 401 (C.A.)) and it seems wise to leave it on that basis.

2. Powers of Appointment (section 11)

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

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

(b) it could, at all times during its currency when that person is of full age and capacity, be exercised by him so as

immediately to transfer to himself the whole of the interest governed by the power without the consent of any other person or compliance with any other condition, not being a formal condition relating only to the mode of exercise of the power.

(2) A power that satisfies the conditions of clauses ~~and~~ a and b of subsection 1 shall, for the purpose of the rule against perpetuities, be treated as a general power.

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

All the Commonwealth Acts have provisions to substantially the same effect. The section adopts and carries to their logical conclusion the rules which the courts had developed to distinguish general and special powers for the purposes of the rule against perpetuities.

Under the section a power is treated as general where the donee is in substance the owner. Under this test a general power par excellence would be one where a single donee could appoint to any person any or all of the property subject to the power at any time and in any manner. If some of these elements are taken away the power may become special.

If there are two or more donees, or a single donee can only act with the consent of another person, the power is special. This is declaratory of existing law: In re Churston's Settled Estates[1954] Ch. 334 (Ch. D).

While the single donee remains a beneficiary the power is general, no matter how small the group of beneficiaries may be. If the single donee is not a beneficiary the power is special no matter how large the group may be. This accords with the substantial ownership test. This is probably declaratory of existing law: Re Penrose [1933] Ch. 793.

A restriction on the amount a single donee could appoint to any one person even where he is a beneficiary, apparently makes the power special under the section. He could not then transfer the whole of the interest to himself. This had not been decided before the Act, but again seems to be in accord with the substantial ownership test.

Normally a restriction as to time will not make an otherwise general power special for the donee could at any time during the currency of the power appoint in his favour ((Section 11 (1) (b)). Some difficulty is caused by a general testamentary power, which is limited as to time in that it can be exercised only at death. At common law such a power is treated as special for the purpose of deciding its validity (Morris and Leach, page 141). This rule is presumably retained by the section for by his will the donee could not appoint in his own favour. To decide the validity of an appointment made under it a general testamentary power is treated as general at common law. This rule is retained by subsection (3). Whether or not this should be so is a matter of great debate (see Morris and Leach, page 147 et seq.). On the one hand it may be argued that property subject to a general testamentary power is in substance inalienable during the life of the donee. The donee cannot appoint to himself and he cannot be said to be to all intents and purposes

the owner. To allow the perpetuity period to run from the date of its exercise could allow inalienability for two successive lives and 21 years, which is surely wrong. On the other hand, at the date of making the appointment the donee can do anything an owner can do; the perpetuity period should, therefore, run from the date of appointment.

The English courts accept the latter analysis, the majority of the American jurisdictions, following Gray, the former. Morris and Leach prefer the former position (p. 149) but recognize that it is not clearly correct, that the English position does not create manifest difficulty and that because of the reliance placed on the rule it would be unwise to change the law. It is doubtful if much has been done in Canada on the basis of the rule. It is true, however, that it has not caused inconvenience and there is no grave objection to it being perpetuated in subsection (3).

A condition as to the manner of appointment, being merely formal, does not under the Act make an otherwise general power special - section 11 (1) (b). This is in accord with the substantial ownership test.

3. Administrative Powers (section 12)

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

(2) Subsection 1 applies for the purpose of enabling a power to be exercised at any time after this Act comes into force, notwithstanding that the power is

conferred by an instrument that took effect before that time.

There is universal agreement that administrative powers ought not be subject to the rule: Radcliffe, Trusts for or Powers of Sale in Relation to the Rule Against Perpetuities (1925) 41 L.Q.R. 52; Leach, Powers of Sale in Trustees and the Rule Against Perpetuities (1934) 47 H.L.R. 948; English Committee Report, para 34; Ontario Report, page 25, para (1); Morris and Leach, page 237 et seq. Only the Western Australian Act fails to exempt such powers from the rule.

As the law now stands such powers are subject to the rule in England, are not in the United States and it would seem that there is no Canadian decision settling the law in this country. The way in which the rule would operate if applied to administrative powers may be illustrated by this simple example. A testator devises property on trust for A for life, remainder to A's widow for life, remainder to A's children. The trustees are give a power of sale. Although all the beneficial interests are good, the trust may last beyond the period of the rule (the widow may not be alive at the testator's death and live more than 21 years after A's death) and thus the power would be exercised outside the period. According to English law it would be bad. Carried to its logical conclusion this application rule could even invalidate an investment clause. It could possibly be raised in the context of oil and gas law to raise doubts about the powers contained in, say, operating agreements.

To apply the rule in such a way serves no purpose. If the beneficial interests are good, administrative powers in trustees are to be encouraged because they

may make property more alienable then it otherwise might be. It would seem that the rule has been applied to administrative power on some analogy to powers of appointment. However, such powers affect beneficial interests, administrative powers do not and the analogy is not sound.

There has been no adverse comment on the drafting of the section. Morris and Leach, First Supplement (page 15) note that the English Act differs from the recommendations of the English Report in three respects. Two of these differences are repeated in section 12. First the section applies not only to trustees but also to other persons. This may be of particular value in the commercial situations where perhaps difficulties could arise. Second, it is partially retrospective. Under subsection (2) it applies to the exercise of a power after the Act is effective, even though the power is contained in instrument that existed before the Act. On the other hand it presumably does not affect such a power if exercised before the Act comes into force.

The Ontario section omits a requirement included in England (section 8), New Zealand (section 16) and Victoria (section 14). The latter Acts require the sale, lease, exchange or other disposition to be for "full consideration". According to Morris and Leach, First Supplement (p.15) this was done to prevent sales to beneficiaries at very low prices being used as a means of creating beneficial interests beyond the period of the rule. This seems a wise precaution, and probably would not be unduly restrictive of the operation of the Act. As the Canadian Act now stands it might be argued that the phrase "otherwise dispose of any property" does cover a power to appoint to a beneficiary. That is, however, probably qualified by the following words of the section "or to do any other act in the administration

(as opposed to the distribution) of any property".

Section 12 is thus acceptable as it stands, subject to there being included after the words "dispose of any property" the words "for full consideration" to ensure the purpose of the section is not violated.

4. Options (section 13)

There is room for debate as to whether options should be subject to the rule at all. The first part of this section will consider the various arguments; the second, assuming the acceptability of the policy behind the Ontario Act, will examine section 13 in some detail.

(a) Should options be subject to the rule?

The Ontario Act deals only with options relating to land. It does not deal with other contractual rights which may create contingent interests in realty and it does not apply at all to personalty. All three of these topics need consideration.

The common law relating to options to purchase land has been the cause of much controversy. It is agreed that the rule applies to property but not to contractual rights. In England options have been treated on both planes. So far as the option is being enforced against the option-giver by either the option holder or someone to whom the benefit of the option has been validly transmitted, the law of contract may be applied and damages awarded, or, if appropriate, specific performance decreed. If the action is against a successor in title of the option-giver the law of contract cannot be relied on, and if the exercise of the option could have resulted in the creation of a property interest outside the perpetuity period the option is void. That does not, however, rule out an action in contract by

someone who can avail himself of the contractual rules. To these general principles there is one important exception--an option to renew a lease is not subject to the rule, although an option to purchase the reversion is.

In Harris v. Minister of National Revenue (1966) 57 D.L.R. 2d 403 the Supreme Court of Canada departed from the English rules. That case decided that if an option can be exercised outside the period it cannot be enforced in contract between the original parties, and ipso facto, it can be assumed, it cannot be enforced between the original option giver and a successor of the option holder. The rule is thus more drastic in its effect in Canada than in England.

There is universal agreement that an option to purchase a reversion in a lease ought not to be subject to the rule. There is a division of opinion as to whether options other than a lessee's option to purchase the reversion - options in gross - should be exempt. It is suggested that a good case may be made that they should be, and, if that is accepted, all that would be needed would be legislation exempting all types of options.

The English Report, whose recommendations were accepted and implemented in section 13(3) of the Ontario Act, concluded that options in gross should be valid for no longer than twenty-one years, and thereafter should be void even as between the original parties (Paras 35-38). Such options, it was argued, discourage development, for the option giver, generally in possession, is inhibited from developing because the option may be exercised against him. It was also thought that if the option lasted too long practical difficulties

would arise in tracing the transmission of the benefit, for, while the burden would need to be registered to be enforceable, that is not true of the benefits.

Having decided that some restriction was needed, the English report turned to the question of how long options should be permitted to exist. It decided, and all are agreed on this, that the traditional period, based as it is on lives in being, has little relevance to commercial transactions. What was obviously required was a period in gross. The Report suggested twenty-one years, saw no grave objection to thirty or fifty, but thought that eighty was too long.

Morris and Leach recognize that a case may be made out for applying the rule, or some variation on it, to options in gross. But the position is not clear cut:

"...in such cases the self-interest of the parties can be relied upon to see that long term options are kept well within the limits of public interest. An owner of land will not be likely to give such an option if development of the land is a real possibility; and if such an option is given, the self interest of the option-holder will lead him to exercise the option and develop the land as soon as such action offers an opportunity for profit". (pp. 224-225). The authors might also have said that the option in gross may in fact be used in assembling land for development, and that it often aids development by ensuring that someone capable of developing is in a position to acquire title when the time for development is ripe. They do point out that in New York there is apparently no restriction on the duration of options and that has not caused any difficulty. It is suggested that the arguments and evidence in favour of subjecting options to the rule is not clear, and if that is so, the general principle

of giving full effect to contractual arrangements ought to prevail. This would in effect mean exempting all options from the rule.

If that general policy is valid, there remains the question of tracing the benefit of the option. The English Report stated this could cause difficulty but did not provide any evidence to support that statement. It is no doubt something which could occur in certain cases, but it is not so demonstrably likely to be a source of widespread difficulty that it ought to determine what the law should be. It may in fact be assuming lengthy options when in practice most will be of short duration.

If all options to purchase are to be exempted from the rule it must then be decided whether all other contractual rights whose exercise could create property rights should also be exempted. It would certainly seem that rights of first refusal should be so treated. The distinction between the option and the right of first refusal is well recognized. An option holder may force a sale on the giver of the option; the holder of a right of first refusal must await a decision of theowner to sell before he can claim his right to have the property offered to him. There is Canadian authority holding that rights of first refusal are subject to the rule: United Fuel Supply Co. v. Volcanic Oil and Gas Co. (1911) 3 O.W.N. 93 (Ont. H. Ct); Re Albany Realty Ltd. and Dufferin-Lawrence Developments Ltd. [1956] O.W.N. 302 (Ont. H. Ct.). The United Fuel case involved the original parties and the court held the right of first refusal void even as between them. No reference was made to the possibility of it being enforced in contract and the Harris case has vindicated that decision.

The argument in favour of exempting rights of first refusal from the operation of the rule are, if anything, stronger than in the case of options. When A grants such

a right to B, A is not compelled to sell and he may in fact develop himself. If he wishes to sell, the typical right of first refusal would require B to match the best offer made to A. A may be in a weaker position if he agreed to sell at some fixed figure, but that would be unlikely to be so if the right was to last for any lengthy period.

As well as options and rights of first refusal it is possible that there are other types of contractual rights which, capable of giving rise to rights in rem, could be held to be subject to the rule. In discussing section 10 of the English Act Morris and Leach (First Supplement p. 17) give an example of a contract to buy land at Dover when the Channel Tunnel is completed. The arguments relating to options would also apply here and it would seem that to be complete a statute should cover all contractual rights which could operate so as to create rights in rem, and make it clear that they are exempt from the rule.

It now remains to be considered whether a statute should also be applicable to personal property. This will be discussed from the standpoint of options to purchase shares, but what is said applies, mutatis mutandis, to other like contractual rights, and other types of personal property.

Recent Canadian authority is divided on whether the rule applies to such options. In 1966 Re Ogilvy decided that it did ((1966) 58 D.L.R. 2d 385 (Ont. H. Ct.)). Two years later Kristall v. Hartigan decided that it did not, but the Ogilvy case was not cited; indeed the court said it had found no case where the rule had been applied to options to purchase personal property ((1968) 2 D.L.R. (3d) 197, 225 et seq. (N.S.S.C.)). Both these cases

involved shares and this is usually the type of personal property over which options may exist. As a matter of construction such an option may be regarded either as a purely personal contract (Borland's Trustee v. Steel Brothers & Co. Ltd. [1901] 1 Ch. 279 (Ch. D.)), or as creating a contingent in rem interest (Re Ogilvy, supra). Only the latter interest can raise perpetuity problems and two conditions must be satisfied before such an interest will arise. First, the option must be enforceable by a decree of specific performance. This excludes most types of personal property; but probably does include shares in a private company. Second the option would need to be enforceable against a third party. It is unclear how far the burden of a covenant will run with personalty. (In theory the same issue could have arisen with respect to realty for, in so far as an option involves a positive act of conveyance, it could have been argued the covenant was positive and the burden would not run even in equity). At most, it would seem that the remedy available against a third party is by way of injunction and even that is not necessarily good law (Lord Strathcona Steamship Co. v. Dominion Coal [1926] A.C. 108 (P.C.); Port Line Ltd. v. Ben Line Steamers Ltd. [1958] 2 Q.B. 146 (Q.B.)). In the case of shares it may be that where the option is in the articles of association the situation may be regarded as sui generis and it would be unfortunate to resort to property concepts.

The law, therefore, is uncertain, and it would be desirable to clarify it. The arguments used with respect to realty apply here. Commercial transactions should not be upset by the application of the rule unless it is fairly clear that there is a potential mischief that needs to be

Application of subs. 1

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

Options to acquire reversionary interests

13.—(1) The rule against perpetuities does not apply to an option to acquire for valuable consideration an interest reversionary on the term of a lease,

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

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

Application of subs. 1

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

Other options

(3) In the case of all other options to acquire for valuable consideration any interest in land, the perpetuity period under the rule against perpetuities is twenty-one years, and any such option that according to its terms is exercisable at a date more than twenty-one years from the date of its creation is void on the expiry of twenty-one years from the date of its creation as between the person by whom it was made and the person to whom or in whose favour it was made and all persons claiming through either or both of them, and no remedy lies for giving effect to it or making restitution for its lack of effect.

Options to renew leases

(4) The rule against perpetuities does not apply nor do the provisions of subsection 3 of this section apply to options to renew a lease.

Easements, profits a prendre, etc.

14. In the case of an easement, *profit à prendre* or other similar interest to which the rule against perpetuities may be applicable, the perpetuity period shall be forty years from the time of the creation of such easement, *profit à prendre* or other similar interest, and the validity or invalidity of such [illegible] *profit à prendre* or other similar interest, so far as [illegible] to the extent that, it fails to acquire the characteristics of a present exercisable right in the servient land within the forty-year period.

Void [illegible]

15. (1) In the case of,

[illegible] the possibility of reverter on the determination of a determinable fee simple, or

(*b*)

in which validated by the application of sections 8 and 9, shall be treated as void or declared to be void; or

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

General power of appointment

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

Special power of appointment, etc.

(3) A limitation conferring any power, option or other right, other than a general power of appointment, which apart from this section would have been void on the ground that it might be exercised beyond the perpetuity period, shall be presumptively valid, and shall be declared or treated as void for remoteness only if, and so far as, the right is not fully exercised within the perpetuity period.

Section 13 has substantially the same effect as the equivalent sections of the other Commonwealth Acts (England, section 9; Western Australia, section 14; New Zealand section 17; Victoria section 15).

Subsections (1) and (2) deal with options to a lessee to purchase the reversion. The English and Ontario Reports, and Morris and Leach (p.225) are all agreed that lease options should not be subject to the rule. The lessee is in possession of the land. To allow him the option should encourage his development of the land which is one of the aims of the rule; to deny him the option may mean he will not develop for the landlord could well reap the benefit of his work.

Subsection (1) is based on this line of reasoning and, as an analogous argument may be made in respect of rights of first refusal, it should be extended to cover them. While a right of first refusal does not give the lessee any right to compel a sale, it does assure him the opportunity of buying should the lessor decide to sell and to that extent provides a protection which encourages development.

Subsection (3) of section 13 deals with options in gross to acquire interests in land. Based on the recommendations of the English Report it provides that such options can last no longer than twenty-one years, and that thereafter they are void even between the original parties. The subsection raises two main issues: (a) is twenty-one years too short a period? and (b) should it be confined to options to acquire interests in land.

As was stated earlier the English Report recommended twenty-one years, could see no great objection to thirty or fifty years, but was opposed to the adoption of an eighty year period, If options in gross are regarded as a serious impediment to alienability it may be that eighty or even a fifty year period is too long. If however, without wishing to exempt them completely, it is accepted that the policy of applying the rule to them is arguable it may not be necessary to curtail the period to the extent this has been done in Ontario. If eighty years is adopted generally I would suggest that consideration be given to adopting it here.

It has also been argued earlier that legislation covering options to purchase realty should also encompass rights of first refusal and other contractual rights, and should apply to both realty and personalty. Section 9(2) of the English Act deals with options relating to land and section 10 deals with these other matters. The section reads:

> Avoidance of contractual and other rights in cases of remoteness
>
> 10. Where a disposition inter vivos would fall to be treated as void for remoteness if the rights and duties thereunder were capable of transmission to persons other than the original parties and had been so transmitted, it shall be treated as void as between the person by whom it was made and the person to whom or in whose favour it was made or any successor of his, and no remedy shall lie in contract or otherwise for giving effect to it or making restitution for its lack of effect.

Morris and Wade say that the intent behind the section is

clear:

> "...if a contract creating proprietary rights capable of binding third parties, such as in option, is not enforced within the perpetuity period, it is to cease to be enforceable even between the original parties". (80 L.Q.R. at p. 524).

They add, and with justification that the section uses "curious language" to give effect to this policy and that it may contain "unexpected traps". It would seem that it is intended to cover the types of interest referred to in the opening sentences of this paragraph. A redrafted subsection 3 may do a better job than section 10.

> 13(3x) "In the case of all other options and all other contractual rights under which an interest in real or personal property may be acquired for valuable consideration, the perpetuity period is eighty years, and where under any such option or contractual right an interest in realty or personalty could arise more than eighty years after the date of the creation of the option or contractual right, the option or contractual right shall be void after the expiration of eighty years from the date of their creation as between the original parties, and, so far as the benefit or burden is transmissible, between them and all parties claiming through them, and no remedy lies for giving effect to it or making restitution for its lack of effect".

This tries to cover the following points raised by Morris and Leach in their discussion of section 10 of the English Act.

(a) The subsection would apply only when an interest in property could arise. That is not made clear in section 10.

(b) After eighty years the option or contractual right would be void between the original parties and, where appropriate, between successors. Thus it would cover contracts respecting chattels where specific performance could be decreed, but in respect to which

no rights would run against third parties. Section 10 attempts to cover this by making or creating an hypothesis about rights and duties running where they do not. The draft hopefully achieves the same result in a simpler way.

5. Easements, Profits and Restrictive Covenants (section 14)

Section 14, set out below, deals with "the case of an easement profit a prendre or other similar interest". Apart from restrictive covenants it is not clear what type of interest would be caught by the phrase "other similar interest", and unfortunately the Ontario Supplementary Report is silent on the point. If the phrase is left in the section it will probably do no great harm. It is, however, difficult to discuss the value of the section in relation to unknown interests. What follows, therefore, is concerned only with easements, profits and restrictive covenants, which, for the sake of convenience, will be referred to as the interests. Section 14 ought to expressly mention restrictive covenants, whether or not the phrase "other similar interest" is retained.

There has been little discussion of the application of the rule to the three interests. They are not dealt with in the English Report or in any of the other Commonwealth legislation. The Ontario Supplementary Report made the recommendation which formed the basis of Section 14. Morris and Leach devote two and a half pages to the topic, stating but not criticizing the law. The best academic discussion is in Battersby, Easements and the Rule Against Perpetuities (1961) 21 Conv. (n.s.) 415. The present discussion falls into three parts:

(a) Should the rule apply?

(b) Section 14

(c) Law of Property Act, 1925, section 162(1)(d) (England)

(a) Should the rule apply?

After some early doubts it is now settled that the rule against perpetuities applies to easements. The leading case is Dunn v. Blackwood Properties Ltd. [1961] Ch. 433. Two plots of land had been conveyed to the plaintiff's predecessors in title, with the right for the grantees their heirs and assigns to use sewers and drains "now passing or hereafter to pass" under a private road owned by the defendant's predecessors in title. Between the date of the conveyance and the date of the subsequent conveyance to the plaintiff two sewers were built. The original easement was expressly conveyed to the plaintiff. In an action by the plaintiff for a declaration that she was entitled to use the existing or any future sewers it was held that the easement was void because the interests were contingent and could vest outside the period (which, in the absence of lives in being, was twenty-one years). The Court also rejected an argument that the interest was saved by section 162(1)(d) of the Law of Property Act 1925.

Although there is no case directly on point it now seems agreed that the rule should also apply to profits and restrictive covenants.

Only Battersby considers whether the rule should apply to these interests at all. (The Ontario Supplementary Report assumes that the rule should apply and merely considers what modification of the common law is needed). There are two main arguments in favour of total exemption. First, the arguments used against the application of the

rule to options can be used. The interests are in general commercial rather than family interests and it is undesirable that commercial agreements should be stricken down unless there is good reason for it. Second, the rule was aimed at excessive restraints on the alienability of land. By this is meant in most cases the alienability of the fee simple. Contingent ancillary interests, and in particular easements, profits and restrictive convenants, while in some degree cluttering the title, do not pose the grave threat to alienability that a restraint on the fee does. There is a possibility that the holder of such a contingent interest, which is in substance of no great value, may try to extort an exorbitant price from someone who wants to clear a title. But the holder of a vested interest may do the same. If this became a problem the solution would be to confer in the Court a power of declaring such interests, vested or contingent, as of no longer any practical significance and, therefore, unenforceable. (cf. Law of Property Act, 1925, s.84 (England)).

These arguments need more specific consideration in relation to oil and gas so far as they are based on the ancillary nature of the interests. An oil and gas lease, if classified as a determinable grant of a profit, or a pipe line easement, are not ancillary, The suggested technique for clearing title would not be appropriate to them, and it may be regarded as undesirable to have such contingent interests perpetuallyagainst a title. However, the analogy to options is close, and if an option to acquire an oil and gas lease or a right of way for a pipe line is not subject to the rule, neither should a contingent grant of a lease or a right of way.

(b) Section 14

> 14. In the case of an easement, profit a prendre or other similar interest to which the rule against perpetuities may be applicable, the perpetuity period shall be forty years from the time of the creation of such easement, profit a prendre or other similar interest, and the validity or invalidity of such [illegible] remoteness is concerned, shall be determined by actual events within such forty-year period, and the easement, profit a prendre or other similar interest is void only for remoteness if, and to the extent that, it fails to acquire the characteristics of a present exercisable right in the servient land within the forty-year period.

If the rule is to continue to be applicable, it clearly needs to be modified. Incorporeal interests would, of course, be subject to the wait and see provisions of the statute. The Ontario Supplementary Report also recommended that it would be wrong to measure the period by reference to lives in being which were inappropriate for commercial transactions. It was suggested, therefore, that a period in gross of forty years be adopted and this was done in section 14.

The reasons for a period in gross are convincing. However, it is recommended that Alberta adopt an 80 rather than a 40 year period. It is recognized in Ontario that 40 years is arbitrary (Leal, Law Society of Upper Canada Lectures, 1966, p.311 fn. 41). The period has apparently some connection with section 2 of the Investigation of Titles Act, R.S.O.C.193 and that, of course, is of no relevance in Alberta. The arguments used in respect of options can be used here to support the contention that

40 years is too short. If incorporeal interests are not clearly a menace to alienability, but are nonetheless to be subject to the rule, they should not be unduly circumscribed. Moreover, while lives in being may generally be irrelevant to incorporeal interests that is not always the case. If an owner of property creates a contingent restrictive covenant in favour of property on which he resides, his life and the minority of his children are not entirely irrelevant. The period in gross should take this into account to some extent and a short period does not.

One further minor change in section 14 is suggested. The section should begin "In the case of a grant, reservation or exception of an easement" rather than merely "In the case of an easement, etc."

If the suggestions made herein are accepted the section will read:

> 14. In the case of a grant, reservation or exception of an easement, profit a prendre, restrictive covenant or other similar interest to which the rule against perpetuities may be applicable, the perpetuity period shall be eighty years from the time of the creation of such easement, profit a prendre, restrictive covenant or other similar interest, and the validity or invalidity of such easement, profit a prendre or other similar interest so far as remoteness is concerned, shall be determined by actual events within such eighty-year period, and the easement, profit a prendre, restrictive covenant or other similar interest is void only for remoteness if, and to the extent that, it fails to acquire the characteristics of a present exercisable right in the servient land within the eighty-year period.

(C) Law of Property Act, 1925, section 162(1)(d) (England)

If section 14 is retained it is worth considering the adoption of section 162(1)(d) of the English Law of Property Act 1925. That provision reads:

> 162. - (1) For removing doubts, it is hereby declared that the rule of law relating to perpetuities does not apply and shall be deemed never to have applied --
>
> (d) To any grant, exception or reservation of any right of entry on, or user of, the surface of land or of any easements, rights or privileges over or under land for the purpose of --
>
> (i) winning, working, inspecting, measuring, converting, manufacturing, carrying away, and disposing of mines and minerals;
>
> (ii) inspecting, grubbing up, felling and carrying away timber and other trees, and the tops and lops thereof;
>
> (iii) executing repairs, alterations, or additions to any adjoining land, or the buildings and erections thereon;
>
> (iv) constructing, laying down, altering, repairing, renewing, cleansing, and maintaining sewers, watercourses, cesspools, gutters, drains, water-pipes, gas-pipes, electric wires or cables or other like works.

This provision has been discussed in only one case, Dunn v. Blackwood Properties Ltd., supra, and, apart from a discussion of the judgment in that case by Battersby, it has not been considered at length by any writer. In the Dunn case Cross J., thought that sub-paragraphs (i) - (iv) were ancillary to an otherwise valid interest. Thus sub-paragraph (iv) assumed a valid right of drainage and merely ensured that say a right to repair sewers would not be held invalid because it was exercisable outside the period. If, however, the right to drainage itself was contingent the sub-paragraph was inapplicable.

Even on this restricted interpretation the provision could, with some modification, be useful. For example, if sub-paragraph (i) was amended so that it clearly included oil and gas, it would ensure that no doubts would

arise about rights of user, ancillary to an oil and gas lease. Again, with an appropriate amendment, sub-paragraph (iv) would protect rights ancillary to oil and gas pipe lines. It is possible that some people might wish to go further and exempt the contingent main interest e.g. the contingent grant of an easement to construct a pipe line. However, if that was thought desirable it might be better to adopt the technique of exempting all easements, profits and covenants from the operation of the rule.

6. Possibilities of reverter and rights of entry (section 15)

(a) The existing law

Although it can at times be rather fine, the distinction between an absolute interest, subject to a right of entry for condition broken, and a determinable interest, is well settled. A conveyance to A and his heirs, subject to the proviso that if he or his successors in title cease to reside permanently on the property the grantor or his heirs may re-enter, is an example of the former type of interest. A conveyance to A and his heirs until he or his successors cease to reside permanently on the property creates a determinable interest, with the grantor retaining a possibility of reverter. These originally were common law interests. They can now exist in law or equity, and, at least in equity, may be created in personalty.

In substance the two types of interest often serve the same purpose, and to the uninitiated the only distinction between them is simply in the language used to create them. Legally, however, they may operate quite differently.

(a) In Ontario before the Perpetuities Act S.O. 1966 C.113 the rule applied to rights of entry, but not possibilities of reverter.

(b) The possibility of reverter may be used to avoid

rules prohibiting restraints on marriage and alienation. In a conveyance to A and his heirs, subject to a proviso against alienation, the proviso is void and A takes an absolute fee. A conveyance to A and his heirs until he or a successor sells the property creates a valid determinable fee (see Re Leach [1912] 2 ch. 422 (Ch. D)).

(c) If a right of entry is void for uncertainty the interest granted then becomes absolute. If the "determining event" in a determinable fee is void for uncertainty it can be argued that the whole interest falls.

(d) When the condition in a right of entry is broken the estate granted continues until the right of entry is exercised. A determinable interest terminates automatically when the determining event happens.

If in fact the purposes are the same, the difference purely one of form, it is wrong that choice of language should result in such disparate legal consequences. A good case can be made for subjecting the two interests to the same rules and this has been done in some jurisdictions. For example, in Kentucky it is provided that words which would have created a determinable fee at common law shall create an interest subject to a right of entry (Kentucky Revised Statutes 381.128 - 381.223). Legislation of that type is well worth considering. However, it has ramifications outside the field of perpetuities and what follows is confined to the latter topic.

The existing law on perpetuity is uncertain and varies considerably from jurisdiction to jurisdiction. As we have seen, in Ontario the rule applied to rights of entry, but not possibilities of reverter. The latest judicial discussion is in Re Tilbury West Public School Board (1966) 55 D.L.R. (2d) 407. In England it is now settled by statute that the rule applies to rights of entry (Law of Property

Act, 1925 s.4 (3)), but the law on common law possibilities of reverter and analogous interests is not so well established (Morris and Leach pp. 211-212). In the United States there is a considerable amount of authority holding both interests outside the rule.

(b) Should the rule apply?

Because of their substantial similarity it seems clear that both interests should be treated alike. The question then is whether they should be subject to or exempt from the rule. The arguments in favour of their exemption are historical and "linguistic". The rule, it has been argued, never applied to common law interests and until the end of the 19th century there was never any doubt that it did not apply to rights of entry and possibilities of reverter. In the case of reverters it may also be argued that they are always vested. The grantor only disposes of a determinable interest, never fully divesting the fee. The reverter, just like the reversion, must therefore be vested. (For the contrary argument see Morris and Leach p.212, fn 70). It is more difficult to make a similar argument with respect to rights of entry for there the grantor does convey an absolute interest, which he or his successors may revest in themselves only on an uncertain future event.

Whatever the intrinsic merits of these arguments they are clearly outweighed by the policy arguments in favour of the application of the rule. These are well marshalled by Morris and Leach (p.213 et seq). Both interests restrict alienability because of a divided title. The use of property may be unduly curtailed because of the condition or determining event may prohibit a use which, with the passage of time, has become desirable. The condition or

determining event may not happen for a considerable period of time, and when they do it may be very difficult to trace the people then entitled to the right of entry or the reverter. If the interests are exempt, but are alienable and devisable, they can be used to avoid the operation of the rule. Thus, if land is conveyed to A and his heirs, but if he or his successors cease to reside permanently thereon to B and his heirs the grant to B is void because the rule is contravened. (It would also be bad at common law for other reasons and technically would need to arise behind a grant to uses to stand any chance of being valid). However, if a right of entry in the grantor is good and alienable he can achieve his purpose by creating, first a right of entry, and then conveying it to B.

These arguments are, it is suggested, convincing. They were accepted by the Ontario and English Reports and form the basis of section 15 of the Ontario Act and section 12 of the English Act. The other Commonwealth Acts, while different in form, in substance achieve the same results (Western Australia, section 15; New Zealand, section 18; Victoria, section 16).

(c) Section 15

15.(1) In the case of,

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

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

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

(2) In the case of a possibility of reverter on the determination of a determinable fee simple, or in the

> case of a possibility of a resulting trust on the determination of any determinable interest in any real or personal property, or in the case of a right of re-entry following on a condition subsequent, or in the case of an equivalent right in personal property, the perpetuity period shall be measured as if the event determining the prior interest were a condition to the vesting of the subsequent interest, and failing any life in being at the time the interests were created that limits or is a relevant factor that limits in some way the period within which that event may take place, the perpetuity period shall be twenty-one years from the time when the interests were created.
>
> (3) Even though some life or lives in being may be relevant in determining the perpetuity period under subsection 2, the perpetuity period for the purposes of this section shall not exceed a period of forty years from the time when the interests were created and shall be the lesser of a period of forty years and a period composed of the relevant life or lives in being and twenty-one years.

The section may be considered under three headings:

(i) the basic effect of section 15

(a) the length of the period

(b) the interests to which it applies

(i) The basic effect of section 15.

Section 15 assumes that rights of entry are subject to the rule. It then provides that reverters and analogous equitable interests shall be treated in the same way. At common law if a right of entry is for any reason void the prior interest becomes absolute. Ex abundante cautela subsection (1) spells that out with respect to reverters; the prior determinable interest becomes absolute. The first part of subsection (2) (i.e. down to "---to the vesting of the subsequent interest") also states what the Courts would probably have decided. According to the Ontario Supplementary Report there was some fear that even under the Act a Court would still accept the argument that a reverter was a vested interest and it was thought desirable that it should be made clear that it was to be treated as contingent.

In Alberta it may not be wise to assume that, as a matter of common law, rights of entry are subject to the rule. It would be necessary, therefore, to redraft sections 1 and 2 of section 15 to make the position clear. This might be done as follows:

15(1X) "In the case of a possibility of reverter on the determination of a determinable fee simple, or in the case of a possibility of a resulting trust on the determination of any determinable interest in real or personal property, or in the case of a right of entry following on a condition subsequent, or in the case of an equivalent right in personal property, the perpetuity period as modified by this Act shall apply as if the event on which the prior interest determines or as a result of which the prior interest could be determined were condition precedents to the vesting of the subsequent interest, and where the aforesaid event could never or does not occur within the period, the subsequent interest shall be treated as void for remoteness and the prior interest shall become an absolute interest".

This redraft

(1) makes it clear that rights of entry, reverters and analogous interests are subject to the rule as modified by the Act.

(2) adopts the technique of stating that the "determining event" shall be regarded as a condition precedent. However, it refers to that event in language appropriate to both rights of entry and reverters. The happening of the event will determine the determinable interest; it merely enables the holders of the right of entry to re-enter if they so desire.

(3) applies the Act as modified, so that wait and see applies. However, in certain cases it may be obvious at the outset that the event could never occur within the period and that is expressly covered.

(ii) The length of the period.

If, as was suggested earlier, the perpetuity period for the purposes of the Act be redefined so as to eliminate the "relevant life" formula, section 15 (2) and 15 (3) need to be changed. The proposed redraft does that by simply stating that the rule, as modified by the Act, shall apply.

However, section 15 (3) also raises the question of whether rights of entry and reverters should be more severely limited than they would be if governed by the standard provisions of the Act. That was first suggested in the Ontario Supplementary Report (pp.9-10). It proposed what was admittedly an arbitrarily chosen period, 40 years, doing this, apparently, because the "opinion has been expressed that the full perpetuity period is too long for what has been described as 'cases of private town planning'". Presumably the Report had in mind the type of case where property is conveyed to a grantee until it ceases to be used for residential purposes, this being an attempt to zone privately. But rights of entry and reverters may also arise in family dispositions and to that extent should be subject to the normal rule. The private planning problem can best be handled by legislation aimed at ensuring the non-enforcement of obsolete private planning restrictions. We have already noted section 84 of the English Law of Property Act 1925 and New York has extensive legislation dealing with rights of entry and reverters (Perpetuities Legislation Handbook pp. 189-190).

In any event the Supplementary Report does not make out a strong case for the limitations contained in subsection 3 and, as Gosse notes, no reason is given for the 40 years (p.58). The other Commonwealth Acts did not apply any special period, and it is suggest that Alberta should follow that example. If that were done all of subsection 2 after the phrase "vesting of the subsequent interest" and all of subsection 3 would be deleted. Section 15x would not need to be changed. If, however, the Ontario precedent is followed section 15X needs amending accordingly.

(3) The interests to which section 15 applies.

The interests to which section 15 applies, or might be considered to apply, may be considered in four groups.

(1) There are first what may be called family dispositions. These are cases where attempts are made to control such things as marriage, social relationship and residence, and there is no doubt the section should apply to them.

Dispositions under which determinable interests have been used to avoid the rules respecting non charitable purposes may be included in the group for the non charitable purpose is often a "family purpose". The classic case is Re Chardon [1928] Ch. 464 where personalty was bequeathed to trustees to pay the income to a cemetery company while a certain tomb was kept in a good state of repairs. If the tomb fell into disrepair the income was to go to the residuary legatee. Under section 15, if the company repaired the tomb during the perpetuity period its interest would become absolute. Section 16 deals with non-charitable purpose trusts and validates them for 21 years, with a resulting trust thereafter to those who, but for the trust, would have been entitled to the corpus. Thus, the Re Chardon technique could ensure the maintenance of the tomb for a longer period than that allowed under section 15, but it has the disadvantage that at the end of the period the interest of the holder of the determinable interest becomes

to benefit the cemetry company to that extent. However, a determinable grant to, say, a member of the family could be utilized so that at the end of the period the absolute interest would vest in that person or his successors. Thus, section 15 could be used to avoid the 21 year limit in section 16, (although that evasion would not be so great if section 15 has the 40 year limit). However, even if the standard statutory period is permitted under the section it is unlikely that its use to avoid the limited period under section 16 would cause any grave problem, and drafting a provision to prevent it would hardly seem worthwhile.

(2) A second group of interests which would be affected by section 15 would be dispositions in favour of charity. Charitable gifts are expressly covered in Western Australia, (section 15(2)); New Zealand, (section 18(2)); and Victoria (section 16(2)), but they no doubt fall within the general language of section 15.

Depending on how they are made, the application of the section to what are essentially charitable gifts is not always clear nor are the possible applications necessarily desirable. Suppose a grant of land is made to X in fee simple so long as the land is used as a public park. At the end of the perpetuity period the interest of X or his successors becomes absolute. Can the property be then used in any way the current owner wishes? If the use as a park is continued, but later becomes impossible, does the absolute interest created by the section exclude a reverter to the donee or the application of the property cy-pres? If the grantee is not an individual but a charity a positive answer to these questions is not quite so startling, but may nonetheless be open to question. Suppose, for example, the grantee is a municipality. At the end of the perpetuity period could it use the land for any municipal purpose it saw fit? Equally if use as a park became

impossible is a reverter or cy-pres ruled out? A grantor who foresaw these possibilities and wished to avoid them could do so by creating a "direct" trust, for example by granting the land to trustees in trust for use as a public park by the citizens of X. This ensures the land either is used for park; or if it is not, will either be applied cy-pres or revert to the settlor. It can never become an absolute interest in the trustees.

If this analysis is correct gifts which are in substance for charitable purposes could be treated quite differently depending on the form which they take. Some attempt should be made to see if a more uniform treatment is not called for. There are really two questions. First, should a gift whose purpose is in substance charitable ever be allowed to become an absolute interest in the grantee? The answer to this must be in the negative, particularly when it is remembered that the grantee could be a private individual. Thus, section 15 should not apply where the determining event is the cessation of a charitable purpose. The second question is what is to be done if the determining event does happen. If one sought to to parallel the law of charity, the property could go to the grantor, or, according to orthodox doctrine, be applied cy-pres if there was a general charitable intention. The search for such an intention is often an elusive, indeed a fictional process. If a charity has gone into operation there is some authority for the view that the property ought to be applied cy-pres if there is no general charitable intent but there was an intention to give out and out. (See Sheridan and Delany, The Cy-pres Doctrine, 1959, at p.96 et seq). It is doubtful if this doctrine has been accepted in Canada (Todd, The Cy-pres Doctrine: A Canadian Approach (1954) 32 C.B.R. 1100). Nonetheless, if the period

of the rule against perpetuities has expired, the claim of the grantor is much less strong and there should be no objection to providing that if, after the expiration of the period, the determining event happens the property shall be automatically applied cy-pres. This means that, as in the case of private gifts the grantor would take if the interest was determined inside the period. After the expiration of the period "charity" would acquire an absolute interest rather than the grantee, who may or may not be a charitable organization. The following subsection gives effect to that recommendation.

> 15(2x) Subsection 1x [Supra p.97] shall not apply where the event, which determines the prior interest, or on which the prior interest could be determined, is the cessation of a charitable purpose, but in such a case if the **cessation** of the charitable purpose takes place after the expiration of the perpetuity period the property shall be treated as if it were the subject of a charitable trust to which the cy-pres doctrine applied.

It should be added that the section, either as it stands in the Ontario Act or as redrafted, does not affect the rule that a gift over from one charity to another is not subject to the rule. The interest of the second charity, not arising in the grantor, is not a right of entry or reverter or analogous thereto. In Western Australia, (section 15(2)); New Zealand (section 18(2)); and Victoria, (section 16(2)) this is, as a matter of caution, expressly stated.

(3) A third type of interest to which section 16 could apply are grants by federal, provincial or muncipal governments. This type of grant and two others, are exempted from the operation for the Kentucky legislation

referred to earlier (the others are charitable gifts, dealt with above, and interests other than freeholds, which will be dealt with below). Under the suggested S.19(2) (supra p. 26) the Act would not apply to any disposition by the Provincial Crown. It is possible that a municipal government could use either a right of entry or reverter in making a grant for say commercial or industrial use. It does not seem desirable that the interest of the grantee should become absolute at the end of the perpetuity period and it might be wise to provide expressly that section 15 does not apply to such grants.

(4) The application of the section to leasehold and incorporeal interests also needs consideration. They, and several other interests, are exempted from the Kentucky legislation by a provision which states that the legislation assimilating reverters to rights of entry and making the prior interest absolute after 30 years, shall not apply to inter alia, "any lease present or future or any easement, right of way, mortgage or trust, or any communication, transmission or transportation lines, or any public highway, right to take minerals, or charge for support during the life of a person or persons, or any restrictive covenant without right of entry or reverter".

The import of all the items on this list is not clear. They can be best discussed if divided into six groups, consideration being given to whether they should be dealt with in section 15.

(i) Public highways and charges for support. I am not sure why they are there at all. It may be that public highways are there to cover a dedication of private land as a highway. This is really a charitable disposition and

these have been dealt with (supra p.100).

(ii) Mortgages. Mortgages are exempt from the rule at common law and need no special mention.

(iii) Trust. No difficulty should arise for section 15 presumably applies only to trusts as far as they are expressly mentioned in it.

(iv) Leases. Section 15 presumably would not apply to leases for rights of entry, reverters and analogous non-common law interests arise only after a fee or absolute interest in personalty. However, there is a danger that a lease for 99 years or until the premises cease to be used as a residence, might conceivably be argued to fall under the section. It clearly should not and an express exception would forestall the argument.

(v) Easements, profits and covenants. Easements and restrictive covenants are expressly mentioned. Rights of way and communication lines, etc., would fall under the general heading of easements. Profits are not referred to, but they should be and the right to take minerals is but one, though no doubt the most important example of them.

Section 15 ought not to apply to these interests for the same reason as was suggested in respect of leases. However, if by chance it was decided the section did apply one result would be that the standard oil and gas lease would be converted into an absolute interest in the lessee at the end of the perpetuity period if it had not earlier determined. This is based on the assumption that the "lease" is really the determinable grant of a profit. Again to guard against such an eventuality these types of interest should be expressly exempted from the section.

(vi) A person wanting to build communication, transmission or transportation lines or to take minerals could

either take an easement or profit, or he could take a fee, determinable on cesser of user or cessation of mining, or an absolute fee with a right of entry in the grantor on either of the two events. It is perhaps at this later situation that the exceptions in the Kentucky statute are aimed. If a grant is made to a pipe line company until such time as gas or oil ceased to be transmitted across the land, it is perhaps not desirable that the company should be able to acquire an absolute interest under section 15. If that is so, an exception covering this type of situation should be made.

7. Non-Charitable Purpose Trusts (section 16)

(a) The existing law

The difficulty with respect to non-charitable purpose trusts is not the rule so far as it operates on the basis of remoteness of vesting, but rather the rule of the law of trusts that in order to be valid a trust must be capable of enforcement. (It will be assumed that the non-charitable purpose is certain and that we are not to be side-tracked by the non-delegation of testamentary power red herring). A trust can be enforced either by ascertained human beneficiaries (I.R.C. v. Broadway Cottages [1955] Ch. 20 (C.A.)) or by the Attorney-General on behalf of charity. A non-charitable purpose is not susceptible of direct enforcement by anyone and is invalid. This is now settled, at least in England: Re Endacott [1960] Ch. 232 (C.A.).

To the general rule there are certain exceptions, which may be grouped under four headings. Morris and Leach (p. 310) also consider trusts for the benefit of unincorporated associations as being within the list of exceptions, but admit that this is rather doubtful. The cases in this field are difficult, indeed impossible to reconcile, but the most recent important decision, Leahy v. Attorney-General

for New South Wales [1959] A.C. 457 (P.C. Aust.) analyses the issues in traditional trust terms with no indication that gifts to unincorporated associations should be treated in any exceptional way. The four exceptional groups are:

1. Trusts for the maintenance of monuments and graves.
2. Trusts for the saying of masses. Such a trust was held to be charitable in Re Caus [1934] Ch. 162, but the emphasis on the element of public benefit in charity may have thrown some doubt on that: see Gilmour v. Coats [1949] A.C. 426. In Ontario trusts for masses have been held not to be charitable (Re Zeagman (1916) 37 Ont. L.R. 536), but more recent Canadian authority holds them charitable (Re Hallisy [1932] 4 D.L.R. 516; Re Samson (1966) 59 D.L.R. 2d 132, at 138). The law is not settled, but so far as it may be decided they are not charitable it seems accepted that such trusts fall within the list of exceptions.
3. Trusts for specific animals.
4. Miscellaneous cases. The best known is Re Thompson [1934] Ch. 342 (the promotion of fox hunting).

To the extent that they are valid these exceptional trusts cannot last beyond the perpetuity period. Obviously this has nothing to do with remoteness of vesting as such. However, such trusts if allowed perpetual duration would tie up capital "too long without any direct benefit to living persons" (Morris and Leach 326). The policy being enforced is the same as that behind the rule, and the period of the rule has been borrowed as a convenient limit to put on the duration of these trusts.

Whether or not the present law is satisfactory has been the subject of a barrage of discussion totally disproportionate to the importance of the problem (See authorities cited Morris and Leach p. 307, FN. 1). Any change in the law raises two questions: (i) should non-charitable trusts be permitted? and (ii) if they are, what limitations should they be subjected to?

Some trusts may, of course, be void for uncertainty (Re Astor's Settlement [1942] Ch. 534); others may be void as against public policy (Brown v. Burdett (1882) 21 Ch. D. 66)). Assuming there are no difficulties on these grounds, the normal doctrine of freedom of disposition would suggest non-charitable purposes trust ought to be recognized. The fact that some people would think some of the purposes served rather vain or useless is not in itself a reason for not giving effect to that general principle. On the other hand, it is true that if allowed to last perpetually, such trusts would take property out of commerce and benefit no living individual. Two compromises are possible. One is that only small amounts of money should be permitted to be applied to such trusts. Although the English Report did not discuss the general question of non-charitable purpose trusts, regarding it as being outside its terms of reference, it did recommend that perpetual trusts for the maintenance of graves and tombs should be allowed, with £1000 as the maximum trust corpus (para. 25). The Ontario Report, following the weight of academic opinion and the Restatement, recommended that such trusts should be treated as creating powers of appointment, valid so far as they were exercised within twenty one years from the date of their creation (pages 40-41).

It is difficult to make any clear choice between these two possibilities. In many cases the former might be more acceptable to the individual testator who would prefer a

perpetual trust of a limited amount to a trust of any amount but limited as to duration. One difficulty with this is that of enforcement. After a time those who would be entitled on the non application of the funds and who would be expected to watch the trustees would become difficult to trace, and, as there is no element of public benefit, the burden of enforcement should not be placed on the Attorney-General. A trust of limited duration avoids that difficulty and it permits a testator to apply as much as he wants to his purpose during the permitted period. It is certainly acceptable as a general solution to the issue; perhaps it might be supplemented by legislation allowing perpetual trusts of limited amounts for certain purposes e.g. graves and tombs as suggested by the English Report.

Of the Commonwealth jurisdictions, England and Western Australia did nothing about non-charitable purpose trusts. The English Act expressly preserves the existing law (section 15 (4)). New Zealand and Victoria have legislation which at first glance is simpler than that in Ontario, but it does not do a good job. Something will be said about this after section 16 has been considered.

(b) Section 16

Specific non-charitable trusts

16. (1) A trust for a specific non-charitable purpose that creates no enforceable equitable interest in a specific person shall be construed as a power to appoint the income or the capital, as the case may be, and, unless the trust is created for an illegal purpose or a purpose contrary to public policy, the trust is valid so long as and to the extent that it is exercised either by the original trustee or his successor, within a period of twenty-one years, notwithstanding that the limitation creating the trust manifested an intention, either expressly or by implication, that the trust should or might continue for a period in excess of that period, but, in the case of such a trust that is expressed to be of perpetual duration, the court may declare the limitation to be void if the court is if opinion that by so doing the result would more closely approximate the intention of the creator of the trust than the period of validity provided by this section.

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

(i) The trusts covered

The section covers trusts "for a specific non-charitable purpose that create no enforceable equitable interests in a specific person" provided the purpose is not illegal or contrary to public policy. Two matters arise out of this.

First, there may well be difficulties about the interpretation of "specific non-charitable purpose". Suppose three trusts, one for "benevolent purposes", the second "for fox hunting" and the third for the maintenance of the testator's tomb. Presumably the first is not within the section and the third is. The second is more specific than the first but less so than the third. It may well be argued that it is too general to be encompassed under the term specific purpose. Would it then be possible to fall back on the common law, or is section 16 now to be regarded as containing all the law as non-charitable purposes? It would be difficult to define specific in any way which would avoid uncertainty and the importance of the non-charitable question is not so great as to make such an exercise worthwhile. The continued authority of the existing exceptional cases could be taken care of by a clause clarifying the matter one way or other. It might be useful to wipe the slate clean and provide that the section is all embracing.

Mr. Scott-Harston, in the discussions in the British Columbia Special Committee on Perpetuities, raised a more

important issue: could section 16 be construed as applying to discretionary trusts in favour of individuals? In the light of the acknowledged purpose of the section this is unlikely, but a discretionary trust could be described as "a specific non-charitable trust that creates no enforceable interest on a specific person". Mr. Scott-Harston suggested the following clause so that the issue would be covered:

> 16(2a) Nothing in this section shall be deemed to apply to any discretionary power to transfer a beneficial interest in property to any person or persons without the furnishing of valuable consideration.

(ii) The duration of the trusts.

The section limits the trusts to a maximum period of 21 years, notwithstanding any attempt to provide for a longer duration. The Ontario Report originally contemplated a full perpetuity period, but in the Supplementary Report was impressed by "strong representations" that that was too long and reduced the period to 21 years (page 10). Any period is difficult to justify in absolute terms. For example, it might be thought that allowing only 21 years for the maintenance of graves is rather short. The New Zealand and Victorian Acts allow the standard perpetuity period, although it should be noted the Acts may be confined to the four anamolous groups of cases (Infra p. 111). However, any period beyond 21 years must be arbitrarily chosen. Perhaps a period of 40 or 50 years, while meeting the point about a full perpetuity period, would not be too excessive.

Under the latter part of subsection (i) the court is given the power of declaring a perpetual trust void if it is of the opinion that this would be closer to the intention of the creator of the trust than allowing it to operate for 21 years. It might be better if this covered not merely trusts "expressed to be of perpetual duration", but trusts "expressed to last for any period longer than the twenty one years (or any substituted period) permitted under this section".

(iii) The ultimate disposition of the corpus.

Subsection 2 provides that on the termination of the trust the unexpended income or capital shall go to the persons "who would have been entitled to the property comprised in the trust if the trust had been invalid from the time of its creation". That provision may be a little difficult to apply. Suppose a will creates a non-charitable purpose trust to last 30 years, provides that at the end of that period the property is to be divided between Y's children then alive and make Z the residuary legatee. At the end of 21 years who becomes entitled to the income or capital? If the trust had been invalid at its creation would the interest of Y's children have been accelerated or, because it is children alive at the end of 30 years, would the income have gone to the residuary legatee until that the end of the 30 year period. Presumably this is a matter of applying the doctrine of acceleration and the law could not be made any better by trying to be more specific in subsection 2.

(C) New Zealand and Victoria

The New Zealand and Victorian provisions are identical.

Rule against inalienability

20.(1) Except as provided in subsection (2) of this section, nothing in this Act shall affect the operation of the rule of law rendering non-charitable purpose trusts void for remoteness in cases where the trust property may be applied for the purposes of the trusts after the end of the perpetuity period.

(2) If any such trust is not otherwise void, the provisions of section 8 of this Act shall apply to it, and the property subject to the trust may be applied for the purposes of the trust during the perpetuity period, but not thereafter.

(New Zealand, section 20 (1) and (2); Victoria, section 18).

This section is poorly drafted. There is no common law rule providing that non-charitable trusts are void for remoteness if the property may be applied outside the period. There is a general rule saying such trusts are absolutely void because they are unenforceable. The four exceptional groups of trusts are void if they can operate outside the period. Technically this has nothing to do with remoteness (p.106), but it may be to these that the section applies. If that is so the only effect of the section is to apply the wait and see provisions to the four exceptional cases. It may be that the section was intended to cover all non-charitable purpose trusts, but it does not clearly do so. It certainly does not provide Alberta with any useful precedent.

8. The rule in Whitby v. Mitchell (section 17)

Under the rule in Whitbyv. Mitchell (1890) 44 Ch. D. 85 (C.A.) a gift to the issue of an unborn person, following a gift to that unborn person, is void. Thus if realty is conveyed to A for life, remainder to his first (unborn) son for life, remainder in fee to that son's first son the remainder in fee is void. The rule applies only to legal and equitable remainders in realty.

The origin of the rule is obscure (Morris and Leach pp. 258-259). If it existed before the modern rule against perpetuities its purpose probably was to prevent a series of life estates on the same family, creating more or less an unbarrable entail. However, in the vast majority of cases where the rule would now apply, the rule against perpetuities would also invalidate the gift. This would be true in the example in the preceding paragraph. The remainder in fee in that example would be saved from the perpetuity rule by adding that A's grandson must be born within 21 years of A's death. If this was done the remainder would be still void under the rule in Whitby v. Mitchell. As the rule against perpetuities is the major rule controlling future

interests it seems better that Whitby v. Mitchell, of obscure origin and operating in narrow compass, should not be retained to strike down interests which are otherwise valid. This argument is even stronger under a wait and see statute for where Whitby v. Mitchell applied it would strike an interest down ab initio without giving wait and see a chance to operate. In abolishing the rule in Whitby v. Mitchell, Alberta would not only be following Ontario, but would also be following the examples of England (Law of Property Act; 1925, s. 161) and British Columbia (Laws Declaratory Act R.S.B.C. 1960 C. 213 s. 2 (36) (a)) who abolished the rule long before any thought was given to comprehensive perpetuity legislation.

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

Rule in Whitby v. Mitchell abolished

This section is taken substantially from s.161 of the English Law of Property Act 1925. It is in fact expressed in rather wider language than need be. That may be illustrated by two examples:

1. A conveyance to A for life, remainder to his first (unborn) son for life, remainder to that son's first son in fee simple.

This is exactly the case envisaged by the rule and falls within the language of section 17.

2. A conveyance to A for life, remainder to his first (unborn) son for life, remainder to B's (a bachelor) first grandson in fee.

This conveyance is within section 17 for it contains after a life interest to an unborn person an interest limited in favour of "the unborn child or other issue of an unborn person".

Under the rule the issue in question had to be the issue of the unborn person who took the prior life interest, and conveyance 2 would not have violated the rule. The section is, therefore, drafted more widely than need be. However, it does not seem that that could be the source of any embarrassment and it is hardly worth changing the section, particularly in view of the fact that the Alberta legislation would then be different from other jurisdictions.

There is one other relevant matter not dealt with in the section. This is the cy-pres doctrine. Under it, in the case of a will containing devises violating the rule, a court could, either by a benevolent construction or by a process of reformation, vest in the unborn life tenant an estate which would carry out as far as possible the testator's intention. Thus in a devise to A for life, remainder to A's first (unborn) son for life, remainder to A's son's first and other sons in tail a court would vest in A's son a fee tail. However, if the ultimate remainder had been in fee simple the doctrine would not have applied for the creation of fee simple in the son could have resulted a wider range of people benefiting than the testator intended. Equally if the remainder in tail had been only to the first son of A's first son, the latter would not have taken a fee tail for under it his sons other than first could have benefitted, something not intended by the testator.

It is not settled whether the cypres doctrine has survived the abolition of the rule. There have been no cases on the point. Megarry has argued that as cy-pres operated not only to avoid the operation of Whitby v. Mitchell, but also the rule against perpetuities, it should still apply for the purposes of the latter rule (55 L.Q.R. 422). Morris and Leach point out the majority view is against the continued operation of the doctrine, and this is supported by judicial

dislike of the doctrine even before Whitby v. Mitchell was abolished (Morris and Leach p. 265). In England the argument also involves consideration of sections of the Law of property Act 1925 which, of course, are not relevant in Alberta. However, in Alberta the legislation providing that language appropriate to create a fee tail shall now create a fee simple is much in point. (Transfer and Descent of Land Act R.S.A. 1955 C. 342 S.10). It may be argued that as the cy-pres doctrine operated to create a fee tail, which would now be treated as fee simple, the doctrine can no longer apply for the one thing it did not admit of was the creation of a fee simple.

It would probably be wise to settle the controversy about the cy-pres doctrine one way or the other. This would best be done by adding a subsection to section 17 abolishing it. This would be in accord with the majority view in England. It is a result to which the Transfer and Descent of Land Act, supra, could lead Alberta courts in any event. It would guard against any anomolous treatment being accorded to those interests to which Whitby v. Mitchell once applied, and would leave all future interests to stand or fall within the terms of the new statute.

9. Employee-Benefit Trusts (section 18)

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

Rules as to perpetuities not applicable to employee benefit trusts

All the Commonwealth jurisdictions exempt employee superannuation plans, or, (a slightly wider concept) employee-benefit trusts, from the operation of the rule. The sole issue in drafting any legislation in Alberta is just how wide any such provision ought to be. There are three matters that require consideration.

(a) The rules of law affected

Section 19 deals only with perpetuities. Section 3 of the Accumulations Act R.S.O. 1960 C.4, as amended by S.2 of the Accumulations Act 1966, also exempts employee-benefit trusts from the rules restricting accumulations. In British Columbia the Laws Declaratory Act R.S.B.C. 1960 C.213, S.2 (37) (d) includes restraints on alienation and double possibilities (Whitby v. Mitchell. supra p.112) as well as perpetuities and accumulations. Legislation should deal with all four areas. In Alberta the Pension Benefits Act 1966, sections 16(1)(b) and section 18 already covers restraints on alienation . In a perpetuity statute it would be useful to have a comprehensive section covering perpetuities, accumulations, alienation and double possibilities.

(b) The trusts covered

Section 19 applies to "a plan, trust or fund". This is open to a wide interpretation, but there is every advantage in this as the aim of the section is to avoid the rules of law in question destroying employee-benefit arrangements. The range of purposes covers more than superannuation; to which some of the other legislation is restricted - see for example Victoria (section 17) and Western Australia (section 19). Again, however, it is desirable that the section be as extensive as possible.

There is one respect in which the section is narrower than the equivalent provisions in Western Australia and Victoria. These statutes cover:

19. (1) The rule against perpetuities does not apply and shall be deemed never to have applied to-- Superannuation funds, etc.

(b) a trust or fund established for the purpose of making provision by way of superannuation for persons (not being employees) engaged in any lawful profession, trade, occupation or calling or the widows, widowers, children, grandchildren, parents or dependants of any of those persons or for any persons duly selected or niminated for that purpose pursuant to the provisions of the trust of fund.

(Western Australia, section 19(1)(b); Victoria, section 17(1)(b).

This would cover trusts of professional bodies, or perhaps,of trade unions where there is not the element of employment involved. If there is the possibility that such trusts may exist in Alberta it would be desirable that they should also be exempted. In doing that the legislation should not be restricted solely to trusts or plans to provide superannuation benefits.

One further question is whether trusts should be registered or be recognized by the taxing authorities in order to obtain the benefit of the exemption. In England special registration is required under the Superannuation and other Trust Funds (Validation) Act 1927, section 1. In New Zealand the trust must be a superannuation fund within the meaning of the Land and Income Tax Act 1954, or deductions in respect of payments to it allowed under the section 128 of that Act. These are complications which are to be avoided if possible. In Ontario the exemption of such trusts and funds from the rule against perpetuities has been in effect since 1954 and there is apparently no movement for any restraint. It is suggested, therefore, that funds should not need to be registered or recognized for tax purposes in order to fall within section 19.

(c) Retrospective operation

Section 19 is retrospective in operation and it is desirable that it should be.

10. Accumulations - (The Accumulations Act, R.S.O. 1960 c.4, amended the Accumulations Amendment Act, 1966).

(a) Application of the ordinary law

There are two possible ways of dealing with accumulations. The first is to subject them to the Accumulations Act 1800 (Thellusson's Act), as modified in England and Ontario. This allows a shorter period than would be allowed at common law. The second is to apply to them the common law rule, as modified by any new perpetuity legislation. This has been done in Western Australia (section 17), New Zealand (section 21) and Victoria (section 19). In the United States most of the jurisdictions which adopted special legislation have reverted to the common law rule (Morris and Leach p. 269). Of the Canadian provinces Prince Edward Island permits an accumulation for lives in being and 60 years, a period much longer than under the ordinary rule (Perpetuities Act, R.S.P.E.I. 1951 c. 108).

There is thus ample precedent for dispensing with special legislation. Is it wise to do so? The English Report, while recognizing that accumulations today are not likely to be "a serious or insurmountable evil", saw "no substantial argument why the periods [allowed under Thellusson's Act] should be extended" (para. 55). It, therefore, confined itself to suggesting amendments to the existing law. The Ontario Report did not consider the possibility of any major change in the law (pp. 42-44). On the other hand Simes (Chap. IV) and Morris and Leach (pp. 303-306) argue that special legislation should be repealed and accumulations left to the ordinary rule.

Again, the issue is one of balancing the interest of the living, the dead and the general economic interest in free alienability. If the rule is accepted as the standard compromise, why is something different needed for

accumulations? It is possible that accumulations are worse than a series of future interests, because they deprive everyone of the benefit of the property, whereas in the case of a series of successive interests the holders of the present estates are given some immediate benefit. However, there is no evidence, in the jurisdictions where there are no special restrictions, of excessive and undesirable accumulations. Thellusson's Act was panic legislation, and the experience since it was passed, including what happened to Thellusson's will, has not shown that it satisfied any great need. If by chance a long accumulation was directed statutory powers of maintenance and advancement, and, in the case of wills, the Family Relief Act R.S.A. 1955 c.109 would alleviate many of the ill effects. There is no evidence that accumulations need to be more tightly restricted than they would be under the ordinary rule.

Another reason against special legislation is the difficulty it always gives rise to. Simes, speaking of the American position, states that the "moment you have a separate rule for accumulations with a shorter permissible period, the volume of litigation on the subject increases enormously". (p. 100) Morris and Leach point out that there has been, on the average, one case a year in England on Thellusson's Act since it was passed, that the cases abound "with fine distinctions", and yet there are "still unsettled questions which seem bound to produce some complicated litigation" (p. 304). In New Zealand it appears that the complexity and uncertainty created by Thellusson's Act was a major factor in its repeal ([1965] New Zealand Law Journal at p, 185; (1963-1965) 1 New Zealand Universities Law Review at p. 532).

If it is decided to subject accumulations to the common law rule as modified by the Act, section 17 of the Western Australian Act provides a useful precedent. Subsections (2) and (3) have been substantially reproduced in New Zealand (section 21(1) and (2)) and Victoria (section 19(1) and (2)).

> 17. (1) The Act of the Parliament of Great Britain, 39 and 40 Geo. 3, c. 98 (known as the Accumulations Act 1800), ceases to apply in the State.
>
> (2) Where property is settled or disposed of in such manner that the income thereof may or shall be accumulated wholly or in part, the power or direction to accumulate that income is valid if the disposition of the accumulated income is, or may be, valid and not otherwise.
>
> (3) Nothing in this section affects the right of any persons or persons to terminate an accumulation that is for his or their benefit or any jurisdiction or power of the Court to maintain or advance out of accumulations or any powers of a trustee under Part V of the Trustees Act, 1962.
>
> (4) For the avoidance of doubt, it is hereby declared that this section has effect only as provided by section three of this Act.

The basic subsection is subsection (2), and it should obviously be in any corresponding legislation adopted in Alberta. It allows an accumulation if the ultimate disposition of the accumulation is or may be good. Thus if property were settled on trust for A (a bachelor) for life, remainder to such of his daughters as married, with a direction for an accumulation between A's death and the marriages, an accumulation would be possible for the 21 years after A's death. This would not be possible in England or Ontario. It should be noted that the subsection covers not only directions but also powers to accumulate.

Subsection (3) has been included as a precautionary measure. In Alberta the reference to the Trustee Act would be to sections 27 and 28 of the Alberta Trustee Act R.S.A.

1955 C.3/6. There should also be included a reference to powers of maintenance or advancement expressly created by the instrument directing or empowering the accumulation. This has been done in New Zealand (section 17(2)) and Victoria (section 19(2)). In England the rules on presumptions as to parenthood have also been applied to any question as to the right to terminate an accumulation (section 14). Under the common law the possibility of another beneficiary being born would prevent the existing beneficiaries terminating an accumulation. The "fertile octogenarian" reasoning has been applied to the decision whether a child could be born. The presumptions as to parenthood are as much needed in respect of accumulations as perpetuities and section 14 of the English Act should be adopted.

Subsection (4) confirms the prospective operation of the section. This would have followed from section 3 of the Western Australian Act in any event, but the matter has been made explicit for the avoidance of doubt. It may be wise to include a similar provision in any Alberta legislation.

The adoption of subsection (1) in Alberta would cause some difficulty. It assumes that Thellusson's Act is in force in Western Australia. There is some doubt whether that Act is in force in Alberta (Re Burns (1961) 25 D.L.R. 2d 427, at 440 (Alt. App. Div.)) Any provision which declared any rule was to cease to operate in Alberta would have to first state what the Alberta law was. This might be an academic exercise for there are probably few documents that have raised accumulation issues. If there are any, it could raise difficulties with respect to estates administered or being administered on an assumption of the law different from that established (and then abolished) under the Act. Presumably a further provision would be needed to protect

trustees and beneficiaries in respect of things done or rights acquired on this different assumption. All of this seems a pointless exercise and it would probably be wiser to leave the pre-statute Alberta law in its present uncertain state.

(b) The Ontario Act

If it is decided to make special provision for accumulations, the Ontario Act should be adopted. It is substantially the same as the legislation in England. It is true that Morris and Leach are critical of the English law, particularly of its lack of certainty on several points (p.304). However, the Ontario Report, speaking of the amendments in the English legislation, thought it wiser to accept them as they stand "if for no other reason than that we could avail ourselves of the extremely able decisions of the Chancery Courts in England on the statute without the necessity of cavilling over the details in language". This is good general counsel.

The Ontario Act, as amended, reads:

1. (1) No disposition of any real or person property shall direct the income thereof to be wholly or partially accumulated for any longer than one of the following terms:
   1. The life of the grantor.
   2. Twenty-one years from the date of making an inter vivos disposition.
   3. The duration of the minority or respective minorities of any person or persons living or en ventre sa mere at the date of making an inter vivos disposition.
   4. Twenty-one years from the death of the grantor, settlor or testator.
   5. The duration of the minority or respective minorities of any person or persons living or en ventre sa mere at the death of the grantor, settlor or testator.
   6. The duration of the minority or respective minorities of any person or persons, who under the instrument directing the accumulations, would, for the time being, if of full age, be entitled to the income directed to be accumulated.

(1a) The restrictions imposed by subsection 1 apply in relation to a power to accumulate income whether or not there is a duty to exercise that power, and such restrictions also apply whether or not the power to accumulate extends to income produced by the investment of income previously accumulated.

(1b) The restrictions imposed by subsection 1 apply to every disposition of real or personal property, whether heretofore or hereafter made.

(a) (2) Nothing in subsection 1 affects,

(a) the validity of any act done; or

(b) any right acquired or obligation incurred, under The Accumulations Act before this Act came into force.

(b) (2) No accumulation for the purchase of land shall be directed for any longer period than that mentioned in subsection 1.

(3) Where an accumulation is directed contrary to this Act, such direction is null and void, and the rents, issues, profits and produce of the property so directed to be accumulated shall, so long as they are directed to be accumulated contrary to this Act, go to and be received by such person as would have been entitled thereto if such accumulation had not been so directed. R.S.O. 1950, c. 4, s. 1.

2. Nothing in this Act extends to any provision for payment of debts of a grantor, settlor, devisor or other person, or to any provision for raising portions for a child of a grantor, settlor or devisor, or for a child of a person taking an interest under any such conveyance, settlement or devise, or to any direction touching the produce of timber or wood upon any lands or tenements, but all such provisions and directions may be made and given as if this Act had not been passed. R.S.O. 1950, c.4, s.2.

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

There appears to have been some error in incorporating the 1966 amendments into section 1. Subsection 2 (marked above with an (a)) was added in 1966. Subsection 2 (marked with a (b)) was already in the Act and does not appear to be affected by the 1966 Act, which merely states in section 1

that it is repealing subsection (1) of section 1 of the main Act. However, as well as restructuring subsection 1 of section 1 the 1966 amendment also added subsection (2) on retroactivity. It will be here referred to as subsection (2)(a) and the existing subsection on accumulations for the purchase of land as subsection (2)(b).

There is in Morris and Leach an extensive analysis of the English legislation as it existed before it was amended in 1964. (pp. 270-303). Most of what they say would be applicable to the Ontario Act before the 1966 amendments and there is no point in trying to summarize their analysis here. What follows is a statement of the effects of the 1966 amendments and an indication of the points that would need to be watched in adopting the Ontario legislation.

Of the 6 periods in section 1(1), two, the second and third, are new. The English Report took the view that if 21 years or minorities are allowed from the date of the death of the grantor, settlor or testator, they ought also to be allowed from the date of the making of the disposition (para. 56). The recommendation was accepted in the Ontario Report (pp. 42-43).

Subsection (1a) of section 1 clarifies two points which could have caused trouble. It makes it clear that the Act applies to powers to accumulate. That was decided in Re Robb deceased [1953] Ch. 459, but the English Report (para. 60) and the Ontario Report (p. 43) thought it wise to make the rule explicit. The subsection also makes the Act applicable to accumulations at simple interest. That was not clearly settled on the earlier law. The English Report said that simple interest accumulations mitigated but did not avoid the mischief at which the statute was aimed, and recommended that they should be expressly covered (para. 60). This recommendation was also adopted by the Ontario Report (p.43).

Section 3, which was added by the 1966 Act in Ontario, has already been discussed (supra p. 116).

There are two points which need to be particularly noted in enacting legislation in Alberta. Subsection 1(2)(b), which is concerned with accumulations for the purchase of land, refers to the period mentioned in subsection 1. Presumably, therefore, any one of the six periods may be used. However, the English law on this type of accumulation allows only period number 6 and no other (Law of Property Act 1925, S. 166(1)). This special restriction on accumulations to purchase land was enacted in the Accumulations Act 1892 "presumably in order to check a particulary loathsome manifestation of posthumous vanity". (Morris and Leach p.272). When Ontario adopted the 1892 Act it did not confine such accumulations to the one period. This may have been due to a mistake or have been deliberate. Ontario does not appear to have suffered greatly by allowing any one of the periods and, if in fact there was a mistake in the adaptation of the 1892 Act, it is not important whether it is now corrected or not.

Section 1(1b) raises the question of whether any legislation passed in Alberta ought to be retrospective. For the reasons discussed in connection with legislation applying the ordinary rule to accumulations, it is suggested it should not. It should be noted that in Ontario it is easy to protect rights required or acts done under the previous law, for, by contrast with Alberta, the previous law was settled. It is recommended, therefore, that section 1(1)(b) and (2) ought not to be included in any Alberta legislation.

APPENDIX A

The following texts of the California and Missouri cy-pres statutes are taken from the Perpetuity Legislation Handbook.

(a) California Civil Code S.715.5

> No interest in real or personal property is either void or voidable as in violation of Section 715.2 of this code [enactment of common-law rule] if and to the extent that it can be reformed or construed within the limits of that section to give effect to the general intent of the creator of the interest whenever that general intent can be ascertained. This section shall be liberally construed and applied to validate such interest to the fullest extent consistent with such ascertained intent.

(b) Missouri Statutes Annoted S.442.555

> 2. When any limitation or provision violates or policy corollary thereto and reformation would more closely approximate the primary purpose or scheme of the grantor, settlor or testator than total invalidity of the limitations or provision, upon the timely filing of a petition in a court of competent jurisdiction, by any party in interest, all parties in interest having been served by process, the limitation or provisions shall be reformed, if possible, to the extent necessary to avoid violation of the rule or policy and, as so reformed, shall be valid and effective. When such a petition is filed in a probate court the matter shall be transferred to the circuit court.
>
> 3. This section shall not apply to any limitation or provision as to which the period of the rule against perpetuities has begun to run prior to the first day of November in the year in which this section becomes effective. Laws 1965, S.B. No. 318, s.1.