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Perpetuities Reform Through Judicial Adoption Of Complete Cy Pres

PERPETUITIES REFORM THROUGH JUDICIAL ADOPTION OF COMPLETE CY PRES

Legislation and judicial decisions have brought about sweeping reforms of the orthodox Rule Against Perpetuities[1] [hereinafter referred to as the Rule] in the United States.[2] Legislative activity directed at perpetuities reform has been considerable,[3] whereas judicial activity has been limited since perpetuities reform has normally been felt to be the burden of the legislature.[4] The traditional approach of the judiciary when presented with a perpetuities problem has been construction to avoid the harsh results of the Rule,[5] but strained construction to save a gift is quite apparent at times.[6] Some courts have, however, assumed the burden of perpetuities reform.[7] The Supreme Court of Hawaii, without benefit of legislation, when presented with the problem of a will establishing a testamentary trust which could not be construed to avoid violation of the Rule, initiated perpetuities reform by applying the doctrine of equitable approximation—cy pres.[8] The court

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[1]Gray's classic statement of the Rule is: "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." J. GRAY, THE RULE AGAINST PERPETUITIES § 201 (4th ed. 1942).

[2]R. LYNN, THE MODERN RULE AGAINST PERPETUITIES 197 (1966).

[3]2 REAL PROP. PRO. & TRUST J. 176 (1967); Reprinted in ABA PERPETUITIES LEGISLATION HANDBOOK (3d ed. 1967).

[4]*E.g.*, Beverlin v. First Nat'l Bank, 151 Kan. 307, 98 P.2d 200 (1940). The court states:

> Nothwithstanding these divergent views, we think the rule in *Leake* v. *Robinson*... having been followed by the courts of England and America for a century has become an integral part of the common law rule, and if a change is to be made it must be made by the legislature.

98 P.2d at 204.

[5]*See* Browder, *Construction, Reformation, and the Rule Against Perpetuities*, 62 MICH. L. REV. 1 (1963); Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638 (1938).

[6]*See* Forman v. Troup, 30 Ga. 496 (1860); Colt v. Industrial Trust Co., 50 R.I. 242, 146 A. 628 (1929); 6 AMERICAN LAW OF PROPERTY § 24.45 (A.J. Casner ed. 1952).

[7]*See In re* Foster's Estate, 190 Kan. 498, 376 P.2d 784 (1962) (excision of part of will which would invalidate gift); Carter v. Berry, 243 Miss. 321, 140 So. 2d 843 (1962) (limited cy pres—reduction of age contingency); Merchants Nat'l Bank v. Curtis, 99 N.H. 225, 97 A.2d 207 (1953) ("wait-and-see"; for explanation of this doctrine see note 14 *infra*.); Edgerly v. Barker, 66 N.H. 434, 31 A. 900 (1891) (limited cy pres—reduction of age contingency).

[8]Cy pres is derived from the French phrase "cy pres comme possible" which means "as near as possible." G. BOGERT, LAW OF TRUSTS § 167 (4th ed. 1963).

Complete cy pres—In the event any interest would otherwise violate the Rule Against Perpetuities, reform the interest, within the limits of the Rule, to approximate most closely the intention of the creator of the interest.

Limited cy pres—Reformation confined to legislatively or judicially specified interests which violate the Rule. An example would be the reduction of an age contingency to bring it within the limits of the Rule. *See* W. SCHWARTZ, FUTURE

held that any interest which would violate the Rule should be reformed within the limits of that rule to approximate most closely the intention of the creator of the interest.[9] This holding apparently puts Hawaii in the unique position of being the only state that has judicially adopted complete cy pres as a perpetuities reform measure.[10]

In *In re Estate of Chun Quan Yee Hop*,[11] the testator died in 1954 and was survived by his wife (who was still living when this decision was handed down), four sons and twelve daughters. The action was filed in 1967 and questions on the validity of his testamentary trust under the Rule were reserved to the Supreme Court for answer and decision. The section of the testator's will in question provided: "This trust shall cease and determine upon the death of my wife, Chun Lai Shee, or thirty (30) years from the date of my death, whichever shall last occur."[12] Upon termination of the trust, the principal and accumulated income was to vest in and be transferred to the beneficiaries. Three-fourths was to go to the survivors of the four sons and the lawful issue of any deceased son. One-fourth was to go to the survivors of the twelve daughters and the lawful issue of any deceased daughter.[13] Since the testator's wife *might have*[14] died within nine years after testator's death, the trust

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INTERESTS AND ESTATE PLANNING §§ 6.37-6.38 (1965); Leach, *Perpetuities: What Legislatures, Courts and Practitioners Can Do About The Follies of the Rule,* 13 U. KAN. L. REV. 351, 359 (1965).

A distinction between the doctrine of equitable approximation and cy pres was drawn in *National Bank of Greece v. Savarika*, 167 Miss. 571, 148 So. 649 (1933). However, as applied in the United States, the two doctrines are generally equated. State *ex rel.* Attorney General v. Van Buren School Dist. No. 42, 191 Ark 1096, 89 S.W.2d 605 (1936); *In re* Succession of Milne, 230 La. 729, 89 So. 2d 281 (1956).

For the principle of operation of the cy pres doctrine see note 18 *infra*.

[9]*In re Estate* of Chun Quan Yee Hop, 469 P.2d 183, 187 (Hawaii 1970).

[10]Other courts have adopted partial perpetuities reform measures. *See In re* Foster's Estate, 190 Kan. 498, 376 P.2d 784 (1962); Carter v. Berry, 243 Miss. 321, 140 So. 2d 843 (1962); Merchant's Nat'l Bank v. Curtis, 99 N.H. 225, 97 A.2d 207 (1953); Edgerly v. Barker, 66 N.H. 434, 31. A.900 (1891)

[11]469 P.2d 183 (Hawaii 1970).

[12]*Id.* at 184.

[13]Considering testator's children only, intestacy would result in equal division among the children. HAWAII REV. STAT. § 532-4(1968). This would work a complete mathematical reversal of testator's plan as to the male and female groups. Three-fourths would go to the female line (12 members) and one-fourth would go to the male line (4 members).

[14]The classic possibilities test for perpetuities is referred to as the Might-Have-Been rule.

> The principle that in judging the validity of an interest under the Rule [Against Perpetuities], you must view possibilities (births, deaths, etc.) as of the creation of the interest (death of the testator, for example) and ignore events as they have actually occurred.

Leach, *Perpetuities: The Nutshell Revisited,* 78 HARV. L. REV. 973, 992 (1965):

estate was not certain to vest within the life of his wife (the specified life in being) or twenty-one years thereafter. The will expressly stated *whichever shall last occur* and thus the trust clearly violated the orthodox Rule Against Perpetuities.[15]

The court considered the judicial origin of the Rule and declined to agree that its hands were tied when faced with this judge-made rule of the common law.[16] In reaching its decision to reform the will by reducing the thirty year period to twenty-one years, the court analyzed the policy of the Rule which was devised to prevent the tying up of property in future estates for an unreasonable period of time. The more important aspects of this policy against tying up property in future estates are the freeing of wealth and the Rule's conducive effect in giving the ultimate recipient complete power of management and disposition over that which is to be his. The most important aspect, however, is the social policy of letting the living, rather than the dead, control the wealth of the world.[17] These aspects of the Rule were not

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see, Jee v. Audley, 1 Cox 324, 29 Eng. Rep. 1186 (Ch. 1787). The reform response to the Might-Have-Been rule is "wait-and-see," an actualities test. In determining whether an interest would violate the Rule under "wait-and-see," the period of perpetuities is measured by actual rather than possible events. R. LYNN, THE MODERN RULE AGAINST PERPETUITIES 10-11 (1966). For example, "wait-and-see" could have been applied to validate the trust in the principal case since testator's wife was still alive when this action was brought more than 12 years after his death which commenced the 30 year period. Thus the trust, viewed from the time of the action, could not vest beyond the life in being and twenty-one years considering what actually occurred.

[15]The Rule restricts the creator of every private trust by requiring him to provide for the *certain* vesting of all contingent interests under or following his trust not later than 21 years after the end of some life or lives in being at the time the trust instrument goes into effect. G. BOGERT, LAW OF TRUSTS § 50 (4th ed. 1963); 1 A. SCOTT, LAW OF TRUSTS § 62.10 (3d ed. 1967).

[16]The court was apparently acting in the spirit of Chief Justice Vanderbilt's dissenting opinion in *Fox v. Snow,* 6 N.J. 12, 76 A.2d 877 (1950). The opinion reads in part: 'To hold, as the majority opinion implies, that the only way to overcome the unfortunate rule of law that plagues us here is by legislation, is to put the common law in a self-imposed strait jacket." 76 A.2d at 882.

[17]469 P.2d 183, 186 (Hawaii 1970); *see* L. SIMES, PUBLIC POLICY AND THE DEAD HAND 58 (1955); Dukeminier, *Perpeutities Revision in California: Perpetual Trust Permitted,* 55 CALIF. L. REV. 678, 691 (1967); *see also* J. MORRIS & W. B. LEACH, THE RULE AGAINST PERPETUITIES, 13-18, 26-30 (2d ed. 1962); Leach, *Perpetuities Legislation: Hail Pennsylvania!,* 108 U. PA. L. REV. 1124, 1133-42 (1960). For discussion of limitations upon testamentary dispositions in the United States see Cahn, *Restraints on Disinheritance,* 85 U. PA. L. REV. 139 (1936); Scott, *Control of Property by the Dead* (pts. 1-2), 65 U. PA. L. REV. 527, 632 (1917); Note, *Protection of the Family Against Disinheritance in American Law,* 14 INT'L & COMP. L.Q. 293 (1965).

found to be inconsistent with the application of the cy pres[18] doctrine to a testamentary trust. No harm would be done to the underlying policies of the Rule, nor to the testator's general intent, by reducing the invalid thirty year term to twenty-one years, thus bringing the trust within the Rule and making it valid in its entirety.[19] The dissenting opinion strongly objected to the reasoning of the majority, stating that the policy of the Rule and the policy of giving effect to the testator's intent because the law abhors intestacy were not compatible in this case. From the dissent's viewpoint, the Rule is a rule of law and not a test to determine intention like a rule of construction. The Rule's object is to defeat intention[20] and is therefore to be remorselessly applied. The dissent questioned why the majority did not directly do away with the Rule in view of their holding in the face of such a clear violation.[21] The majority, however, did not consider their holding to be a complete emasculation of the Rule. On the contrary, the majority emphasized that the Rule has its support in the practical needs of modern times and is of continuing vitality.[22] The majority's decision to reform the trust was also influenced by the ease with which the attorney who drafted the will could have accomplished the exact intentions of the testator without violating the Rule.[23] Authority for the court's judicial adoption of cy pres was found in New Hampshire[24] and Mississippi[25] decisions. Through cy pres, these courts judicially reformed age contingencies that would have invalidated testamentary gifts. Recom-

[18]The doctrine of cy pres operates on the principle that "where there is a general and a particular intent, and the particular one cannot take effct, the words shall be construed to give effect to the general intent." Robinson v. Hardcastle, 2 Durn. & E. 241, 254, 100 Eng. Rep. 131, 138 (K.B. 1788); *see* Carter v. Berry, 243 Miss. 321, 140 So. 2d 843 (1962); Edgerly v. Barker, 66 N.H. 434, 31 A. 900 (1891). This doctrine has normally been confined to charitable trusts. G. BOGERT, LAW OF TRUSTS § 147 (4th ed. 1963).

[19]469 P.2d 183, 185-87 (Hawaii 1970).

[20]A thorough discussion of this controverted aspect of the Rule is beyond the scope of this comment. A comparison of approaches in applying the Rule may be found at 6 AMERICAN LAW OF PROPERTY §§ 24.44-24.46 (A.J. Casner ed. 1952).

[21]469 P.2d 183, 187-88 (Hawaii 1970).

[22]*Id.* at 186.

[23]*Id.* at 186-87.

[24]Edgerly v. Barker, 66 N.H. 434, 31 A. 900 (1891). The opinion by Chief Justice Doe in this case, which reduced a 40 year age contingency to 21, was severely criticized by Professor Gray. *See* J. GRAY, THE RULE AGAINST PERPETUITIES §§ 857-93 (4th ed. 1942). No doubt this had a potent effect in constricting the cy pres doctrine to the confines of New Hampshire for more than half a century. Leach, *Perpeuities: Cy Pres on the March*, 17 VAND. L. REV. 1381, 1384-85 (1964).

[25]Carter v. Berry, 243 Miss. 321, 140 So. 2d 843 (1962).

mendations of perpetuities reform writers[26] and the legislative reform movement[27] were also noted by the court.

The perpetuities reform movement has been a response to the traditional doctrine of striking down an interest which may vest too remotely.[28] This harshness is compounded by the doctrine of *Leake v. Robinson*[29] which invalidates the gifts to all members of a class if one member's gift is invalid.[30] Adding to the disrepute of the orthodox Rule has been some of the fantastic consequences[31] of the classic possibilities test, the "Might-Have-Been" rule.[32] Furthermore, ignoring a testator's obvious intent and striking down his bequest because the drafter of his will was inexpert as to the intricacies of the Rule or transgressed a technical line seems basically unjust.[33]

There are those who caution that the cures offered for perpetuities

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[26]469 P.2d at 187; *see* R. LYNN, THE MODERN RULE AGAINST PERPETUITIES (1966); Browder, *Construction, Reformation, and the Rule Against Perpetuities*, 62 MICH. L. REV. 1 (1963); Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638 (1938); Quarles, *The Cy Pres Doctrine: Its Application to Cases Involving the Rule Against Perpetuities and Trusts for Accumulation*, 21 N.Y.U.L. REV. 384 (1946). For a selected list of articles concerning perpetuities reform see 2 REAL PROP. PRO. & TRUST J. 176, 210 (1967).

[27]469 P.2d at 187; *see* CAL. CIV. CODE § 715.5 (West Supp. 1970); CONN. GEN. STAT. ANN. §§ 45-95, 45-96 (1960); IDAHO CODE ANN. § 55-111 (1957); ILL. ANN. STAT. ch. 30, §§ 191-95 (Smith-Hurd Supp. 1970); KY. REV. STAT. § 381.216 (1969); ME. REV. STAT. ANN. tit. 33, §§ 101-02 (1964); MD. ANN. CODE art. 93, §§ 11-102, 11-103 (1969); MASS. ANN. LAWS ch. 184A, §§ 1-2 (1969); MO. ANN. STAT. § 442.555 (Supp. 1969); N.Y. ESTATES, POWERS & TRUSTS LAW § 9-1.2 (McKinney 1967); N.Y. PERS. PROP. LAW § 11-a(McKinney 1962); OHIO REV. CODE § 2131.08 (Baldwin Supp. 1969); PA. STAT. ANN. tit. 20, §§ 301.4-301.5 (1950); TEX. REV. CIV. STAT. ANN. art. 1291b, §§ 1-4 (Supp. 1969); VT. STAT. ANN. tit. 27, § 501 (1967); WASH. REV CODE §§ 11.98.010-11.98.030 (1965).

[28]2 REAL PROP. PRO. & TRUST J. 176, 180-81 (1967).

[29]2 Mer. 363, 35 Eng. Rep. 979 (Ch. 1817).

[30]6 AMERICAN LAW OF PROPERTY 24.26 (A.J. Casner ed. 1952).

[31]*See* R. LYNN, THE MODERN RULE AGAINST PERPETUITIES 57-88 (1966); Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638 (1938).

[32]Note 14 *supra*.

[33]*See* J. MORRIS & W. B. LEACH, THE RULE AGAINST PERPETUITIES 18, 26, 36 (2d ed., 1962); W. B. LEACH & O. TUDOR, THE RULE AGAINST PERPETUITIES § 24.11 (1957); Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638 (1938); Quarles, *The Cy Pres Doctrine: Its Application to Cases Involving the Rule Against Perpetuities and Trusts for Accumulation*, 21 N.Y.U.L. REV. 384 (1946); Quarles, *The Cy Pres Doctrine with Reference to the Rule Against Perpetuities—An Advocation of its Adoption in all Jurisdictions*, 38 AM. L. REV. 683 (1904); *cf.* Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), *cert. denied*, 368 U.S. 987 (1962). *Lucas* held in part that the rules relating to perpetuities were fraught with such confusion and concealed traps that an attorney violating the rules could not be held negligent as a matter of law. (What recourse do the intended beneficiaries have?) Curiously, this case was cited in the dissenting opinion of the principal case. 469 P.2d 183, 188 (Hawaii 1970).

reform might be worse than the disease.[34] But accepting the need for reform, is complete cy pres[35] the best method? As noted before, the traditional approach of the judiciary when faced with a perpetuities problem is construction. The major question concerning this method is how far it is proper to select one construction on the ground that this renders a gift valid under the Rule in preference to another construction which renders the gift invalid. Professor Gray acknowledged that it is only "human nature for judges . . . to be influenced by the natural desire to construe deeds and wills so as to carry out, as far as possible, the intention of the settlors and testators . . . ."[36] He deemed this natural desire, however, an "irregular action of the judicial mind . . . ."[37] The situation may arise where a construction to render a gift valid reluctantly cannot be given by a court, even though the testator's primary intent may be obvious. The court will state or imply its reason for not substituting its judgment for the testator's in such terms as "We are unable to make a new will for the testator."[38] However, a court in invalidating a gift in a will does in fact "make a new will for the testator."[39] If the public policy of the Rule prohibits the attainment of a testator's specific objectives, there still remains his general dispositive intent. It is on this general intent that the cy pres doctrine operates.[40] Within the limits of the Rule, complete cy pres reforms any interest

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[34]Bordwell, *Perpetuities From the Standpoint of the Draughtsman*, 11 RUTGERS L. REV. 429, 435 (1956); *see* Mechem, *Further Thoughts on the Pennsylvania Perpetuities Legislation*, 107 U. PA. L. REV. 965, 983 (1959); Simes, *Is the Rule Against Perpetuities Doomed? The "Wait-and-See" Doctrine*, 52 MICH. L. REV. 179, 190 (1953), Sparks, *A Decade of Transition in Future Interests*, 45 VA. L. REV. 493, 513-16 (1959).

[35]The application of the cy pres doctrine to the Rule Against Perpetuities was recommended as long ago as 1904 by Quarles, *The Cy-Pres Doctrine with Reference to the Rule Against Perpetuities—An Advocation of its Adoption in all Jurisdictions*, 38 AM. L. REV. 683 (1904), revised and republished as Quarles, *The Cy-Pres Doctrine: Its Application to Cases Involving the Rule Against Perpetuities and Trusts for Accumulation*, 21 N.Y.U.L. REV. 384 (1946).

[36]J. GRAY, THE RULE AGAINST PERPETUITIES § 632 (4th ed. 1942).

[37]*Id.*

[38]One of the objections voiced by the dissent in the principal case was that the majority exercised a power that it did not have, namely, "making a new will for the testator." 469 P.2d 183, 188 (Hawaii 1970).

[39]*E.g.*, Leake v. Robinson, 2 Mer. 363, 35 Eng. Rep. 979 (Ch. 1817); 6 AMERICAN LAW OF PROPERTY §§ 24.43-24.46 (A. J. Casner ed. 1952); J. MORRIS & W. B. LEACH, THE RULE AGAINST PERPETUITIES 244-55 (2d ed. 1962). Two rules of construction have been established to mitigate the harshness of the *Leake rule*. First, where there is a gift of a stated sum to each member of a class, some members may take although the gifts to others fail. *E.g.*, Storrs v. Benbow, 4 De. G.M.&G. 390, 43 Eng. Rep. 153 (Ch. 1853). Second, where the class is itself composed of sub-classes, some groups may take although the gifts to others fail. *E.g.*, Smith's Estate v. Commissioner, 140 F.2d 759 (3d Cir. 1944).

[40]Note 18 *supra*.

which would violate that rule so as to approximate most clearly the creator's intention. Cy pres is more realistic as to its nature and limitations than is strained construction. The alternations necessary for the reformation "of an invalid interest which will most closely approximate the donor's stated objectives will be more evident than in many cases where his stated directions are ambiguous."[41]

A leading authority has stated:

> Once it is perceived how or why an interest offends the Rule, that alteration which would escape the offense tends to suggest itself. In doing so, it presents at the same time the way to preserve the donor's original intention to the fullest extent possible.[42]

Complete cy pres is not a full-circle return to "where-ever [sic] any visible Inconvenience doth appear,"[43] for there are two essential standards for cy pres.[44] First, the result of the reformation must be within the limits of the Rule. Second, the result of the reformation must preserve to the fullest extent possible the intent of the testator within the limits of the Rule.

Attempts at legislative perpetuities reform in the United States have been made for over a century.[45] However, substituting new rules, such as the New York "two lives" rule,[46] has produced unsatisfactory results.[47] A more acceptable reform method has been to retain the com-

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[41]Browder, *Construction, Reformation, and the Rule Against Perpetuities*, 62 MICH. L. REV. 1, 18 (1963).

[42]*Id.* at 31. *See* J. MORRIS & W. B. LEACH, THE RULE AGAINST PERPETUITIES 35 (2d ed. 1962); *But see* LAW REFORM COMMITTEE, FOURTH REPORT, CMND. NO. 18 (1956), an English report which rejected a broad cy pres proposal on the grounds that the impact of a general power of reformation would not be easy to foretell and the jurisdiction would be difficult in its exercise due to inherent complexity and uncertainty. Limited rather than complete cy pres was enacted in England. *See* Perpetuities and Accumulations Act 1964, c. 55.

[43]The Duke of Norfolk's Case, 3 Ch. Cas. 1, 49, 22 Eng. Rep. 931, 960 (1682).

[44]Browder, *Construction, Reformation, and the Rule Against Perpetuities*, 62 MICH. L. REV. 1, 31 (1963).

[45]*See* R. LYNN, THE MODERN RULE AGAINST PERPETUITIES 181 (1966).

[46]The New York "two lives" rule departed from the common law Rule in two significant aspects.

> First, the period was shortened from (multiple) lives in being, plus twenty-one years (a period in gross), to two lives in being, plus a minority. Second, the New York rule invalidated interests which might vest too remotely, as well as those which might suspend the absolute power of alienation beyond two lives in being, plus a minority.

Comment, N.Y. ESTATES, POWERS AND TRUSTS LAW § 9-1.1 at 75 (McKinney Supp. 1970).

[47]R. LYNN, THE MODERN RULE AGAINST PERPETUITIES 181, 190-92 (1966). 2 REAL PROP. PRO. & TRUST J. 176, 181 (1967); *see also* 6 AMERICAN LAW OF PROPERTY §§ 25.1-25.35 (A. J. Casner ed. 1952). A practice commentary discussing New York's

mon law rule and enact legislation to prevent the harsh application of the Rule in specific situations where the possibility of remote vesting is improbable or merely theoretical.[48]

Legislative reform of more general application covering specific situations as well as a wide range of perpetuities violations has been enacted primarily within the past two decades.[49] The most controversial of these reforms has been the "wait-and-see" statute.[50] "Wait-and-see" is an actualities test[51] of validity rather than the possibilities test of the Might-Have-Been rule[52] and permits the court, in passing on the validity of an interest, to consider facts which have occurred after the creation of an interest. The interest is good unless the creator has violated the Rule, *in fact*.[53] One of the major objections to the "wait-and-see" doctrine is the waiting, that is, the deferral of determination of the validity of an interest until events have actually occurred.[54] Postponing a perpetuities problem may appear attractive, but the drawback is that an interested party may not be able to obtain a ruling on the validity of a future interest during the waiting period. Although deferral may be acceptable in some situations,[55] early deter-

abandonment of the "two lives" rule and return to the common law perpetuity period may be found in N.Y. ESTATES, POWERS AND TRUSTS LAW § 9-1.1 (McKinney Supp. 1970).

[48]2 REAL PROP. PRO. & TRUST J. 176, 181, 188-97 (1967).

[49]Statutes cited note 63 and note 75 *infra*.

[50]The law review articles concerned with this controversy are voluminous. The following is by no means all-inclusive. Brégy, *A Defense of Pennsylvania's Statute on Perpetuities*, 23 TEMP. L.Q. 313 (1950); Dukeminier, *Kentucky Perpetuities Law Restated and Reformed*, 49 KY. L.J. 1 (1960); Leach, *Perpetuities Legislation: Hail Pennsylvania!*, 108 U. PA. L. REV. 1124 (1960); Mechem, *Further Thoughts on the Pennsylvania Perpetuities Legislation*, 107 U. PA. L. REV. 965 (1959); Simes, *Is the Rule Against Perpetuities Doomed? The "Wait-and-See" Doctrine*, 52 MICH. L. REV. 179 (1953); Sparks, *A Decade of Transition in Future Interests*, 45 VA. L. REV. 493 (1959); Tudor, *The Impact of Recent Statutory Adoption of the "Wait and See" Principle on the Common Law Rule Against Perpetuities*, 38 B.U.L. REV. 540 (1958).

[51]Note 14 *supra*.

[52]*Id.*

[53]R. LYNN, THE MODERN RULE AGAINST PERPETUITIES 186 (1966); *see* Leach, *Perpetuities: The Nutshell Revisited*, 78 HARV. L. REV. 973, 992 (1965).

[54]R. LYNN, THE MODERN RULE AGAINST PERPETUITIES 183 (1966); 2 REAL PROP. PRO. & TRUST J. 176, 182 (1967); *see generally* Browder, *Construction, Reformation, and the Rule Against Perpetuities*, 62 MICH. L. REV. 1 (1963); Simes, *Is the Rule Against Perpetuities Doomed? The "Wait-and-See" Doctrine*, 52 MICH. L. REV. 179 (1953).

[55]Common situations where courts are prepared to "wait-and-see," even at common law are: Appointment under special powers; gifts in default of appointed; gifts expressed to take effect on two alternative contingencies, one valid and the other too remote (separable alternate contingencies). J. MORRIS & W. B. LEACH, THE RULE AGAINST PERPETUITIES 181-83 (2d ed. 1962); *see also* Lynn, *A Practical Guide to the Rule Against Perpetuities*, 1964 DUKE L.J. 207.

mination may be essential[56] or desirable[57] in others. Another objection to the "wait-and-see" doctrine is the problem of measuring lives. At common law an interest to be valid must vest within lives in being and twenty-one years.[58] This certainty-of-vesting requirement[59] adequately governed the selection of measuring lives. But if you "wait-and-see" in order to allow vesting to occur, the certainty-of-vesting requirement is negated. The question is, "Whose life may be taken as the measure of the period of waiting?"[60] Removal of this objection has been attempted by requiring a "causal relation" of the measuring life,[61] but the central argument supporting "wait-and-see" with its attendant problem of measuring lives is confidence that courts will not push the perpetuities period to its outer limits.[62]

An additional legislative reform has been to combine "wait-and-see" with cy pres.[63] One problem with this is the question of priority in application,[64] but the major objection is the same as that to enacting

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[56]Estate tax problems can make early determination essential. *E.g.*, Second Bank-State St. Trust Co., Ex'r v. Second Bank-State St. Trust Co., Trustee, 335 Mass. 407, 140 N.E.2d 201 (1957); *see* INT. REV. CODE OF 1954 §§ 2033, 2037.

[57]*See* Simes, *Is the Rule Against Perpetuities Doomed? The Wait-and-See Doctrine?*, 52 MICH. L. REV. 179 (1953).

[58]J. GRAY, THE RULE AGAINST PERPETUITIES § 201 (4th ed. 1942).

[59]Note 15 *supra.*

[60]2 REAL PROP. PRO. & TRUST J. 176, 182 (1967); Simes, *Is the Rule Against Perpetuities Doomed? The Wait-and-See Doctrine*, 52 MICH. L. REV. 179, 186-88 (1953); *cf.* R. LYNN, THE MODERN RULE AGAINST PERPETUITIES 184 (1966). *But see* Leach, *Perpetuities Legislation: Hail Pennsylvania!*, 108 U. PA. L. REV. 1124, 1142-47 (1960).

[61]*See* KY. REV. STAT. § 381.216 (1969) which reads in part: "[T]he [perpetuities] period shall not be measured by any lives whose continuance does not have a causal relationship to the vesting or failure of the interest." *See also* 2 REAL PROP. PRO. & TRUST J. 176, 184-85 (1967).

[62]J. MORRIS & W. B. LEACH, THE RULE AGAINST PERPETUITIES 90 (2d ed. 1962); 2 REAL PROP. PRO. & TRUST J. 176, 186 (1967); Browder, *Construction, Reformation, and the Rule Against Perpetuities*, 62 MICH. L. REV. 1, 12 (1963). Limited "wait-and-see" statutes provide for the measuring lives problem. *See* CONN. GEN. STAT. ANN. §§ 45-95, 45-96 (1960); ME. REV. STAT. ANN. tit. 33, §§ 101-02 (1964); MD. ANN. CODE art. 93, §§ 11-102, 11-103 (1969); MASS. ANN. LAWS, ch. 184A, §§ 1-2 (1969).

[63]Legislative enactments combining cy pres and "wait-and-see" include: CONN. GEN. STAT. ANN. §§ 45-95, 45-96 (1960); KY. REV. STAT. § 381.216 (1969); ME. REV. STAT. ANN. tit. 33, §§ 101-02 (1964); MD. ANN. CODE art. 93, §§ 11-102, 11-103 (1969); MASS. ANN. LAWS ch. 184A, §§ 1-2 (1969); OHIO REV. CODE § 2131.08 (Baldwin Supp. 1969); VT. STAT. ANN. tit. 27, § 501 (1967); WASH. REV. CODE §§ 11.98.010-11.98.030 (1959).

[64]R. LYNN, THE MODERN RULE AGAINST PERPETUITIES 39-41 (1966); *see* Browder, *Construction, Reformation, and the Rule Against Perpetuities* 62 MICH. L. REV. 1 (1963). "Wait-and-see" is applied before cy pres since by waiting it will often turn out that the disposition will not need to be reformed. If cy pres reformation is still necessary, the changes required to validate the gift may have become obvious. On the other hand, the benefit of an early resolution of a perpetuity problem through reformation is lost by waiting. 2 REAL PROP. PRO. & TRUST J. 176, 186-87 (1967).

cy pres alone. The objection to cy pres is that it appears to confer on a court unfettered discretion to determine the intent of a testator who is obviously unable to contradict that determination.[65] But courts use discretion in construing dispositive instruments that are ambiguous or incomplete. They employ essentially the same frame of reference that would be used to reform an interest within the limits of the Rule and approximate most closely the intention of the creator, namely, the intention of the creator as revealed by his entire instrument in the light of attending circumstances.[66] There is the risk that a court may abuse such discretion in reforming, but "it is better to suffer such a risk, than to suffer, not the risk, but the continued certain overthrow of too large a proportion of family arrangements which by reformation would be saved."[67] Generally, a "perpetuities question may properly be raised *whenever the validity of a contingent future interest is a relevant factor in decision.*"[68] Cy pres thus offers a major advantage over "wait-and-see" since immediate determination of a perpetuities problem is possible by reformation.[69] "The Rule in 'cy pres' form tells us that a contingent future interest that is prima facie bad *may* be reformed. 'Cy pres' does not tell us *whether* the contingent future interest will be reformed, or *when* it will be reformed, or *how* it will be reformed."[70] Therefore, cy pres reformation cannot be mandatory and would not preclude other methods of validating an interest since its self-limitations are the general intent of the creator and the limits of the Rule. If other methods of validating an interest such as "wait-and-see" or separability of alternate contingencies[71] would best effect the creator's general intent, they could be used. The Supreme Court of Hawaii recognized this in the principal case by not precluding other types of arguments for validating

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[65]2 REAL PROP. PRO. & TRUST J. 176, 186 (1967); Schuyler, *Should the Rule Against Perpetuities Discard Its Vest?*, 56 MICH. L. REV. 683, 718 (1958); Schwartz, *Mr. Justice Kennison and Creative Continuity in Perpetuities Law*, 48 B.U.L. REV. 207, 217-18 (1968). *But cf.* R. LYNN, THE MODERN RULE AGAINST PERPETUITIES 185-86 (1966).

[66]Browder, *Construction, Reformation, and the Rule Against Perpetuities*, 62 MICH. L. REV. 1, 31 (1963); *see* 2 REAL PROP. PRO. & TRUST J. 176, 186 (1967); *cf.* 3 REAL PROP. PRO. & TRUST J. 178 (1968); Fletcher, *A Rule of Discrete Invalidity: Perpetuities Reform Without Waiting*, 20 STAN. L. REV. 459 (1968).

[67]Browder, *Construction, Reformation, and the Rule Against Perpetuities*, 62 MICH. L. REV. 1, 32 (1963); *see* R. LYNN, THE MODERN RULE AGAINST PERPETUITIES 186 (1966).

[68]R. LYNN, THE MODERN RULE AGAINST PERPETUITIES 37 (1966).

[69]R. LYNN, THE MODERN RULE AGAINST PERPETUITIES 36-39 (1966); 2 REAL PROP. PRO. & TRUST J. 176, 186 (1967). *See* Browder, *Construction, Reformation, and the Rule Against Perpetuities*, 62 MICH. L. REV. 1 (1963).

[70]R. LYNN, THE MODERN RULE AGAINST PERPETUITIES 39 (1966).

[71]For an explanation of separable alternate contingencies see note 55 *supra*.