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Illinois v. The Rule against Perpetuities, 3 J. Marshall J. of Prac. & Proc. 386 (1970)

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ILLINOIS v. THE RULE AGAINST PERPETUITIES

A long list might be formed of the demonstrable blunders with regard to its questions made by eminent men, blunders which they themselves have been sometimes the first to acknowledge; and there are few lawyers of any practice in drawing wills and settlements who have not at some time either fallen into the net which the Rule spreads for the unwary, or at least shuddered to think how narrowly they have escaped it.¹

THE COMMON LAW RULE AGAINST PERPETUITIES

From its inception, the Rule has provoked havoc to innumerable testamentary dispositions. Much has been suggested and many attempts have been made to alleviate some of the disastrous results of the Rule. It is the purpose of this comment to discuss one such attempt: the recently enacted Illinois Statute Concerning Perpetuities.

History of the Rule

The reasons for the Rule Against Perpetuities are somewhat obscure as are most of the property principles found in Anglo-American common law. No necessity for restrictions upon the creation of future interests existed prior to the Statute of Uses and Wills since future interests as such were rarely used. Terms for years to begin in the future and shifting or springing executory interests were not recognized.² As a result of the above mentioned statutes, recognition was given to these interests. But problems soon arose. Executory interests were held to be indestructible,³ the vesting of which could possibly be postponed indefinitely. For example, testator may devise a tract of land to A and his heirs so long as the northwest corner not be used for commercial purposes, but if said corner is used for such puposes, then to B and his heirs. It is theoretically possible without restrictions or perpetuities, for the land to stay in A's family for a millennium and then go to the heirs of B as a result of the corner plot being used for commercial purpose. The astronomical proportions of transferring the property to B's heirs after such a lapse of time, understandably aroused the displeasure of the common law courts. Finally, the *Duke of Norfolk's Case*⁴ afforded a measure for the period within which future interests were to vest, thereby establishing a time element to determine the validity of an interest.

The Rule was a safeguard against the taking of property

¹ J. GRAY, *THE RULE AGAINST PERPETUITIES* at xi (4th ed. 1942).

² H. CAREY & D. SCHUYLER, *ILLINOIS LAW OF FUTURE INTERESTS* §476 (1941).

³ *Pells v. Brown*, 79 Eng. Rep. 504 (1620).

⁴ *Duke of Norfolk's Case*, 22 Eng. Rep. 931 (1682).

out of commerce. It was hoped that the Rule would thereby insure that property would not be rendered inalienable, thereby affecting subsequent holders by limiting the free transferability of the property. The disposition of property made by the present generation would not, it was hoped, affect the desires of future generations.⁵ But the evolutionary process has taken its toll. The intended panacea has become, as will be shown, a legal disaster.

Classical Definition

Prior to its recent statutory form, the Rule Against Perpetuities had been adopted by the Illinois courts,⁶ using Professor Gray's definition of the Rule as the standard.⁷ This classic definition states that, "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."⁸ A corollary of the above is that, "If by any possibility the interest does not vest within this time, it comes within the Rule, and the estate attempted to be created must fail."⁹

In his work on perpetuities, Gray states that it is "a well established simple and clear Rule" and "it has grown to fit the ordinary dealings of the community."¹⁰ At first glance, it would seem Gray's initial description of the Rule is correct. However, it is well to keep in mind that Gray wrote over 800 pages on this "simple and clear Rule."¹¹

THE NECESSITY FOR CHANGING THE COMMON LAW RULE

Victims of the Rule

The draftsman bears the initial responsibility of currently determining the effect of the Rule on the dispositions he is formulating. Normally, only the most experienced practitioner is able to escape the hazards that have become inherent in the Rule. This is not to say that the average practitioner is in-

⁵ For brief treatments of the Rule, see L. SIMES, *HANDBOOK OF THE LAW OF FUTURE INTERESTS* ch. 23 (2d ed. 1966); Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638 (1938). For more extended treatments see J. GRAY, *THE RULE AGAINST PERPETUITIES* (4th ed. 1942); RESTATEMENT OF PROPERTY §§370-403 (1944); L. SIMES & A. SMITH, *THE LAW OF FUTURE INTERESTS* ch. 39 (2d ed. 1956); 5 R. POWELL, *THE LAW OF REAL PROPERTY*, chs. 71-73 (1968).

⁶ *Continental Ill. Nat'l Bank v. Llewellyn*, 67 Ill. App. 2d 171, 214 N.E.2d 471 (1966).

⁷ *Corwin v. Rheims*, 390 Ill. 205, 61 N.E.2d 40 (1945); *Wechter v. Chicago Title & Trust Co.*, 385 Ill. 111, 52 N.E.2d 157 (1944); *McKibben v. Pioneer Trust & Sav. Bank*, 365 Ill. 369, 6 N.E.2d 619 (1937); *Keefer v. McCloy*, 344 Ill. 454, 176 N.E. 743 (1931); *Aldendifer v. Wylie*, 306 Ill. 426, 138 N.E. 143 (1923).

⁸ J. GRAY, *THE RULE AGAINST PERPETUITIES* §201 (4th ed. 1942).

⁹ *Chicago Title & Trust Co. v. Schellaberger*, 399 Ill. 320, 333, 77 N.E.2d 675, 683 (1948).

¹⁰ J. GRAY, *THE RULE AGAINST PERPETUITIES* §870 (4th ed. 1942).

¹¹ *Id.*

capable of avoiding the perpetuities problem, since the technicalities of the Rule that do trap the less experienced draftsman may be avoided. It may be that a slight change in the wording of the instrument is sufficient to prevent an unfavorable application of the Rule. Consider, for example, the often recurring situation of a gift of property to A for his life, then to such of A's children as attain the age of twenty-five. By simply cutting the age contingency so that the gift to A's children becomes dependent upon reaching the age of twenty-one, the gift no longer violates the Rule. This, however, offers no consolation to the unwary draftsman who does not possess the skills, derived through experience, that the Rule demands.

The ultimate victims are the legatees and devisees, who as a result of the draftsman's inadvertence, innocently fail to receive the property which testator had intended them to receive. In such a situation, the damage with regard to the draftsman is not limited to his professional pride. If his workmanship results in a violation of the Rule, he may become liable to an intended beneficiary for the amount lost by the beneficiary as a result of the violation.¹²

CRITICISMS OF THE RULE

The Rule has been the brunt of much criticism with legal scholars and practitioners alike demanding reform. The principal criticisms are primarily directed at the Rule's more absurd and inequitable results. Although these results do not frequently occur, they are not so rare that they may be delegated to a position of unimportance.

In the main, the criticisms revolve around the following problem areas:

1. The Rule is applied according to standard perpetuities doctrine at the instrument's inception, so that the validity of the interest must be determined prospectively in the light of then existing factors. The Rule requires that at the time of the dates of the instrument it must be certain that the interest will vest within the period of the Rule. Facts that actually have occurred since the instrument's creation are deemed irrelevant so that contingent future interests may be void even though the probability of the interest not vesting within the prescribed period is remote. It may, in fact, be impossible for the interest not to vest in time due to factors that have risen shortly after the date

¹² *Lucas v. Hamm*, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821, (1961). In this case the California Supreme Court held the defendant-attorney not liable for malpractice since errors made in matters involving the Rule were not uncommon among skilled and capable attorneys. This, however, avoids the problem and it is entirely possible that other courts, as did the trial and appellate courts in the instant case, may find liability.

of the instrument. Nevertheless, under the common law rule, the interest must be adjudicated void.

Examples of the above, involving perhaps the most highly criticized aberrations of the Rule, may be categorized into three general situations:

The first is the problem of an interest that is contingent upon the probate of a will or some other administrative contingency which typically takes the form of testator devising certain property to his descendants or to his executor in trust for the benefit of said descendants, who are living at the time of the probate of his will.¹³ In such a situation the gift will therefore not vest in the devisee until the probate of the will occurs. Courts are not unaware that the probability of the interest not vesting in time is extremely remote. This awareness was expressed by the Illinois Supreme Court in a case involving a probate contingency where it stated that:

It is clear from the language of the will itself: whatever interest the executor took under it could not vest in him until the probate of the will, and while this event would, in the ordinary and usual course of events, probably occur within a few months, or at most a few years, after the death of testatrix, yet it cannot be said that it is a condition that must inevitably happen within twenty-one years from the death of testatrix.¹⁴

The existence of a bare possibility of the contingent interest remotely vesting is sufficient to violate the Rule.¹⁵ This possibility becomes virtually non-existent when the contingency invokes, as in the example above, the full period of the Rule, namely, lives in being plus twenty-one years. It therefore becomes evident that although the high probability of the interest being valid is acknowledged, the courts have been conspicuously powerless to alleviate the inequitable, arbitrary nature of the Rule.

The second situation involving contingent future interest is the case of what has become known as the "unborn widow". This construction results in the invalidity of future interests which normally would not have violated the Rule.¹⁶

The "unborn widow" doctrine is invoked normally where testator gives a life estate to a third person, then a life estate to that person's widow and upon her death a remainder to her children.

¹³ In this example and those that remain, it is to be assumed (unless the contrary is stated) that the gift is by testamentary disposition.

¹⁴ *Johnson v. Preston*, 226 Ill. 447, 457, 80 N.E. 1001, 1004 (1907). Here the contingency involved a provision that devised to testatrix's executor a certain tract of land, to have and to hold for the term of 25 years from and after the probate of the will in trust for certain of her grandchildren.

¹⁵ *Id.*

¹⁶ *Lynn, Reforming the Common Law Rule Against Perpetuities*, 28 U. CHI. L. REV. 488 (1961). See also *Leach, Perpetuities in a Nutshell*, 51 HARV. L. REV. 638, 644 (1938).

Such a widow may be a woman born after the death of the testatrix and may live more than twenty-one years, (after her husband's death) so that the limitation to take effect after her death is void because the contingency on which it depends may not occur within the time prescribed by the rule. The improbability of its occurrence after the prescribed time is immaterial.¹⁷

Thus the gift over to the children is void. The remarkable fact is that an actual case of the "unborn widow" has yet to be documented.¹⁸ But the courts have continued to invalidate these gifts on the premise that it might possibly happen and therefore the gift must be declared void. The appalling result of this construction has justly earned the contempt and ridicule of the legal community.

The third problem area concerns the presumption of the fertile octogenarian. The theory is that there is a conclusive presumption of fertility, that is to say that a person, no matter what age, is presumed to be capable of reproducing. Under the theory, a woman of ninety is capable of bearing children and a boy of five has the capacity of becoming a father, in spite of the fact that medical evidence has shown conclusively that there are, indeed, limits to man's sexual endurance.

Since *See v. Audley*,¹⁹ where it was held that a woman of seventy was conclusively presumed to be capable of bearing children, these fertile octogenarian cases have destroyed sensible wills and trusts. It is not to be assumed that the theory has become impotent due to the modern presence of well documented medical evidence. As recently as 1949, an English court ruled that it was conclusively presumed that a widow of sixty-seven could have a child and that this child could in turn have a child before the age of five.²⁰

In the future this theory may create even greater problems. Under modern scientific methods of artificial insemination, babies may be born years after the death of their father.²¹ The possibilities of this legal dilemma alone should be sufficient to warrant statutory change in the Rule.

2. The second major criticism of the Rule centers on the problem of a violating contingency being adjudicated as totally void, although parts of it may be valid. In instances where the violating clause is void due to a minor technicality, the contingency will not be rewritten so as to make it valid, although its

¹⁷ *Easton v. Hall*, 323 Ill. 397, 408, 154 N.E. 216, 219-20 (1926).

¹⁸ Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721, 731 (1952).

¹⁹ 29 Eng. Rep. 1186 (1787).

²⁰ *Re Gaites Will Trusts*, 1 All E.R. 459 (1949).

²¹ For an interesting discussion of this problem of the "child en ventre sa frigidiaire" see Leach, *Perpetuities in the Atomic Age: The Sperm Bank and the Fertile Decedent*, 48 A.B.A.J. 942 (1962).

alteration would have no significant effect on testator's intention.

Perhaps the most familiar and often recurring case of the above is that of age contingencies which are most often found in gifts to classes.

The common law governing age contingencies, as pertaining to class gifts, was announced in 1817, in *Leake v. Robinson*²² and has remained relatively unchanged in jurisdictions that apply the common law Rule Against Perpetuities, including Illinois.²³ In that case, property was given to the grandson of testator for his life, with a remainder to such of his children as should attain the age of twenty-five, followed by a gift over to his brothers and sisters who should attain the age of twenty-five on the condition that testator's grandson should either die without issue or have no issue who attain that age. The grandson died without issue leaving eight brothers and sisters surviving him, three of whom were born after testator's death. The English court held that the gift to the brothers and sisters was contingent upon the donees reaching the age of twenty-five and that this class of donees included all of the brothers and sisters of the grandson. Since the gift, according to the court, was not confined to the brothers and sisters living at testator's death, the fact that one of the grandchildren born after testator's death and therefore not a life in being, might not reach the age of twenty-five within the time limits set by the Rule, necessitates the failure of the entire gift.

Under the rule of *Leake v. Robinson*, every class gift, therefore, fails if it is limited to take effect on members of the class attaining an age that is in excess of twenty-one years, unless the class is restricted to those members who are in esse when the gift is made.²⁴

The most typical example of an age contingency that violates the Rule is the frequent gift of a life estate to A, remainder to such of his children as reach the age of twenty-five. This gift under the common law rule, as interpreted in *Leake v. Robinson*, is totally void, since A may have a child who was not alive at testator's death and was less than four years old at A's death. It is irrelevant if all of A's children, at the time of his

²² 35 Eng. Rep. 979 (1817).

²³ *Thomas v. Pullman Trust & Sav. Bank*, 371 Ill. 577, 21 N.E.2d 897 (1939); *Howe v. Hodge*, 152 Ill. 252, 38 N.E. 1083 (1894). See also *McKibben v. Pioneer Trust & Sav. Bank*, 365 Ill. 369, 6 N.E.2d 619 (1937), which decision the court attempts to explain in the *Thomas* case.

²⁴ *Aldendifer v. Wylie*, 306 Ill. 426, 138 N.E. 143 (1923); *Moroney v. Haas*, 277 Ill. 467, 115 N.E. 648 (1917); *Dime Sav. & Trust Co. v. Watson*, 254 Ill. 419, 98 N.E. 777 (1912); *Pitzel v. Schneider*, 216 Ill. 87, 74 N.E. 779 (1905); *Schuknecht v. Schultz*, 212 Ill. 43, 72 N.E. 37 (1904); *Eldred v. Meek*, 183 Ill. 26, 55 N.E. 536 (1899); *Lawrence v. Smith*, 163 Ill. 149, 45 N.E. 259 (1896).

death, are actually over the age of four. The mere possibility at the time of the devise, that a child born to A may be less than four, is sufficient to negate the gift.

A suggested solution to the above situation is the "second look" doctrine,²⁵ which aims at the determination of the validity of a contingent interest on the basis of events that actually happen. Under this doctrine, the validity of the interest would be determined on the basis of facts existing at the termination of the life estates or lives in being. Thus it is hoped that facts occurring within the lives in being will result in validating the gift. The "second look" doctrine would be effective in saving the gift of the example above, where all the children of A are over four at his death. But if a child of A, born after testator's death, is less than four at the death of A, "second look" will not save the gift.

"Second look" is a variant of the "wait and see" principle which states that an interest is not invalidated at the time of its creation; the court must wait and see whether the interest in fact vests within the period of the Rule, before the occurrence of the invalidating condition. The court therefore waits until actual events happen that validate the gift or until it becomes apparent that the interest cannot vest in time. In effect, then, there is a substitution, under this principle, of actual events for possibilities in determining the validity of interests.²⁶

This approach does overcome to a degree the criticism that possibilities at the time of the interest's creation, which do not actually take place, should not destroy what would otherwise have been a valid gift. But there is one rather significant drawback to the principle: the determination of the validity of all limitations may possibly be delayed until the expiration of substantially all of the period allowed under the rule. Consider, for example, the situation where a trustee has been distributing out of the trust to certain beneficiaries for a considerable length of time. Ultimately, it is determined, using "wait and see" that the trust is void for remoteness. The result may very well be that the trustee has been distributing funds to the wrong people. It would be little consolation to the surcharged trustee that the "wait and see" principle avoided one of the inequities of the Rule Against Perpetuities.

3. The next major criticism deals with the possibilities of

²⁵ *Sears v. Coolidge* 329 Mass. 340, 108 N.E.2d 563 (1952); *Minot v. Paine*, 230 Mass. 514, 120 N.E. 167 (1918); 6 AMERICAN LAW OF PROPERTY §§24.35 (A. J. Casner ed. 1952). Statutes that have in some degree enacted the doctrine are: MASS. ANN. LAWS ch. 184A, §1 (1954); CONN. GEN. STAT. §§45-95 (Rev. 1958); ME. REV. STAT. ANN. tit. 33, §101 (1964).

²⁶ This principle has been adopted by Pennsylvania. PA. STAT. ANN. tit. 20, §301.4 (1947).

reverter and rights of re-entry for breach of condition. These two interests are said to be exceptions to the Rule, although their result may be as objectionable as those contingent interests that are held within the Rule. Although the statutory limitations on the period of these interests, that have been enacted in a number of states, notably Illinois,²⁷ have taken some of the sting out of their result, their continuing existence as exceptions are inconsistent and illogical. This may be illustrated in the following examples: testator devised to X school, land in fee simple, so long as said land is used for a playground. Testator's heirs have a possibility of reverter, which is regarded as vested and therefore not subject to the Rule. But if testator had devised this land to X school in fee simple and added that if the land ceased to be used as a playground, then to Y in fee, Y's executory interest being subject to the Rule, would be void for remoteness, since it is possible for Y's interest not to vest within a life in being plus twenty-one years. Objectively, there is no logical reason why the possibility of reverter of the heirs is valid and the executory interest in Y is void. They both defeat the avowed purpose of the Rule since they equally tend to tie up property by hindering the property's alienability.

4. The fourth criticism deals with the concept of vesting under the Rule. As shown in situations involving possibilities of reverter and rights of re-entry, some vested interests may tie up property as long as contingent ones. In limiting the Rule to contingent interests, the very purpose of a modern Rule Against Perpetuities is frustrated. As a result, the control of descendants' estates is possible from the grave by the use of vested interests. Their result would be severely limited if said interests were held within the Rule as are contingent ones. The conclusion that the exemption of vested interests from the Rule should be eliminated seems both persuasive and reasonable.

To avoid this problem of vesting, it has been argued that the common law rule as such should be abolished and a rule against remoteness of possession be enacted. The period of the Rule would remain the same; the only basic difference between the two forms would be that the question would not be one of whether the interest will or will not vest within the prescribed period but would become one of possession within the period. Vested interests would come under the same scrutiny as contingent interests, since the validity would be determined in the light of their coming into possession and not their vesting in time. With such an alteration, the free marketability of title,

²⁷ ILL. REV. STAT. ch. 30, §37e (1969) which limits the length of possibilities of reverter and right of re-entry to forty years from the date of their creation.

one of the main purposes of the common law rule, could be more jealously and effectively guarded.

It is obvious that the common law Rule Against Perpetuities demands reform making statutory modification essential to bring the Rule out of its medieval concepts.

ILLINOIS STATUTE CONCERNING PERPETUITIES

The Illinois General Assembly enacted, in September of 1969, a "Statute Concerning Perpetuities."²⁸ This was the first time in the State's history that the Illinois legislature had directly addressed itself to the Rule Against Perpetuities. It was obviously their intention to modify the common law rule so that the inequitable results that had, prior to the statute, run rampant through property law, be erased for present and future generations. Their success can only be determined by the passage of time, but the prospects, as will be shown, are, at best, mixed.

Sections 191 and 193²⁹ respectively, deal with title and the definitions of some of the terms used. Section 192, in stating the purpose of the statute, makes it clear that this Act merely modifies the common law rule and that the common law rule "shall remain in full force and effect."³⁰ It is therefore evident from the onset that the problems involved with the concept of vesting are not changed by the statute.

In Section 194(a),³¹ the Act codifies the situations where the Rule is not to be applied. It encompasses leases to commence in the future, options and powers of a trustee with relation to distribution and allocation of income and principal.

It is important to note that Section 194(a)(1)³² in effect states that the statute applies only to situations where there has been a violation of the Rule. In other words, where no violation exists, the modifications enacted may not alter terms of a gift, even if the change would have provided for a more equitable result. At a minimum this means that the courts and practitioners must still grapple with the workings of the Rule, since one must understand a principle before determining whether or not it has been violated. Fully understanding the Rule Against Perpetuities remains, therefore, an almost impossible prerequisite in applying the statute. This section also lends greater significance to a court's determination in extremely complex cases, of whether there has been a violation, since an application of the

²⁸ ILL. REV. STAT. ch. 30, §§191-96 (1969).

²⁹ *Id.* §§191, 193.

³⁰ *Id.* §192.

³¹ *Id.* §194(a).

³² *Id.* §194(a)(1).

statute in such a situation may result in the complete alteration of the gift's direction and of testator's intention.

Illinois' "solutions" to the criticisms of the Rule are, in the main, enacted in Section 194(c),³³ beginning with a declaration of the presumption "that the interest was intended to be valid,"³⁴ which is to be used in the determination of whether an interest violates the Rule.

Under the common law interpretation, in looking at the gifts created by the instrument, one had to first make the determination of whether the slightest possibility existed that a gift violated the Rule. Therefore, under the common law, the possibilities were to be approached with pessimism and were not considered in terms of optimism. This attitude has resulted in the all too frequent declaration of invalidity of perfectly reasonable and sensible gifts. The statute's presumption of an intention, on the part of the testator to create valid gifts, offers a new approach to the determination of an interest's validity. Instead of searching for unlikely possibilities, the approach is initiated from a more optimistic point. The precise location of this point, however, is unclear. The section does not elaborate on the extent of the presumption and will ultimately therefore depend upon court interpretation. If one assumes that testator had no intention of violating the Rule, that he in fact intended the gift to be valid, it is reasonable to adopt the construction of the gift that would avoid invalidity. The remote possibilities would not be considered since testator had intended the valid construction. This is not to say that the existence of a distinct and probable possibility of the interest being remote, will not be considered. In such a case, the presumption of validity would be overcome, but remote possibilities would not effect the existence of a valid construction. If this valid construction could reasonably be adopted, what would normally have been adjudicated remote due to unlikely possibilities, could be declared valid. Whether the courts will effect such an interpretation is, at this point, mere conjecture, but if it were adopted, the mortality rate of gifts caught in the Rule's technical web, would probably be significantly diminished.

The presumption could go further than "wait and see" and, if it did, it would provide a solution to the problems of the doctrine. A court would not have to wait to discover whether the interest would vest in time. If the construction is reasonable and the possibilities of the interest being remote are unlikely, the gift could be given immediate validity. Whether the

³³ *Id.* §194(c).

³⁴ *Id.* §194(c) (1) (A).

gift actually does vest remotely is irrelevant. The tables would be turned, since under the common law rule the fact that it became obvious by subsequent occurrences, that the interest would indeed vest within the period of the Rule, had no materiality to the interest being held void. Under the proposed interpretation, reason would be the cornerstone of the Rule, thereby alleviating the courts from the necessity of using strained constructions in saving gifts from the Rule.

Section 194(c) (1) (B)³⁵ deals with the interests that are conditioned on the probate of a will and other administrative contingencies. As previously discussed, the courts have acknowledged the extremely high probability that the interest would vest within the period of the Rule, but have not lent validity to such a contingency. Whatever interpretation is given to the general presumption of validity, the legislature has expressly stated in this section that an administrative "contingency must occur, if at all, within the period of the rule against perpetuities. . . ."³⁶ Ordinarily, under the common law rule, a devise to certain individuals, who are alive at the time of the probate of testator's will, would be regarded as void since it was felt that there was a possibility that the interest would vest remotely. With the presumption afforded by the section, such a devise would be valid.

However, the section does present a problem due to its lack of defining an administrative contingency. If, for example, testator devised to A in trust certain realty, for the benefit of his descendants living when the mortgage on said realty is paid in full, the mortgage, in a situation where it is quite high, may, according to its terms, take upwards of eighty years or longer to discharge. There exists a high probability that this administrative contingency will not vest within the allowed period but would, nevertheless, be regarded as valid under the statute. Thus, testator could accomplish what the Rule is specifically set up to prevent: the taking of property out of commerce and rendering it inalienable.

The problem of the "unborn widow" is effectively solved by Section 194(c) (1) (C).³⁷ As previously discussed, ultimate gifts conditioned upon the survival of a life tenant's widow were regarded as invalid under the common law rule, since the widow may not have been born at the time of testator's death and therefore was not a life in being.

Under the statute, a presumption arises,
[w]here the instrument creates an interest in the "widow," "wid-

³⁵ *Id.* §194(c) (1) (B).

³⁶ *Id.*

³⁷ *Id.* §194(c) (1) (C).

ower," or "spouse" of another person, that the maker of the instrument intended to refer to a person who was living at the date that the period of the rule against perpetuities commences to run.³⁸ Thus, if the life tenant was married at the date of testator's death, his wife at that time was meant to be the receiver of the donor's generosity. If she predeceased him, or if he was not married at the time, the gift conditioned on surviving the widow would become vested in possession at the death of the life tenant, since no widow existed for the purpose of the section to take her life interest. Therefore, whether the widow is unborn or not, the gift over is valid. As a result of this section, the unreasonable result of the "unborn widow" doctrine under the common law rule will no longer plague reasonable testamentary dispositions.

Section 194(c) (2)³⁹ aims to cut gifts down to size, instead of invalidating them, where the violation of the Rule Against Perpetuities is the result of an age contingency. Under the common law as discussed earlier, the gift to A for life, remainder to such of his children as reach the age of twenty-five, the gift to said children was totally void since a child of A may be less than four at A's death resulting in the children's interest vesting later than the prescribed period. This section would come into operation here by reducing the age limitation to twenty-one for all the children and would thereby validate the entire gift. Thus,

[w]here any interest . . . would be invalid because it is made to depend upon any person attaining or failing to attain an age in excess of 21 years, the age specified shall be reduced to 21 years as to every person to whom the age contingency applies.⁴⁰

Although this section will relieve problems arising from ordinary, simple dispositions as the one above, it is not to be considered as a panacea for all the ills of age contingencies under the Rule. Consider the example of a gift to A for his life, remainder to such of his children as attain the age of twenty-five, but if no child attains twenty-five, then to X. A has one child, who was born after testator, but dies at the age of nineteen, ten years after the death of A. Under common law the interest of X would be invalid because it is contingent upon a person failing to attain an age that is in excess of twenty-one years, which may occur beyond the period of the Rule.

Applying Section 194(c) (2)⁴¹ to the example, the age contingency must be reduced to twenty-one which would make the interest of the child divestable since the divesting clause of the gift

³⁸ *Id.*

³⁹ *Id.* §194(c) (2).

⁴⁰ *Id.*

⁴¹ *Id.*

over to X becomes valid when the age is cut back to twenty-one. The property would therefore go to X. But if the child dies at twenty-two, the gift over to X, though valid, would not divest the child's interest. In such a situation, testator's intention would be completely defeated since he did not intend the child to receive the property unless he attained the age of twenty-five, which he did not do. Further, testator intended that if the child did not reach the prescribed age, X was to take it, but that is impossible since the reduced age limitation has been attained. Under common law, the gift to the child would have been divestable at whatever the age required. The result of the statute in validating the divesting clause may be that neither X nor the child will receive the property as testator intended.

The fertile octogenarian construction is found in Section 194(c)(3).⁴² The presumption here is that "no person shall be deemed capable of having a child until he has attained the age of 13 years,"⁴³ and that, "any person who has attained the age of 65 years shall be deemed incapable of having a child. . . ."⁴⁴ The section's effect is to diminish but not eradicate the legal absurdity that any person is capable of having children. Medical authorities and surveys agree that a woman of fifty-five may reasonably be presumed to be incapable of bearing children.⁴⁵ Although the statute does provide that "evidence shall be admissible as to the incapacity of having a child by a living person who has attained the age of 65 years,"⁴⁶ the legislature displayed a conspicuous lack of appreciation of the available evidence. Setting the minimum age of thirteen and the maximum at sixty-five is a step, but it fails to enact a law which reflects the best medical evidence to date.

It is to be noted that the statute expressly applies to adopted children. Since Illinois puts an adopted child on a parity with a child of the blood, it is to the statute's credit that it states that "the possibility of having a child or more remote descendant by adoption shall be disregarded."⁴⁷ This presumption is not unrealistic since it is common knowledge that most social agencies discourage adoption by parents over the age of thirty or thirty-five. Thus the not too frequent problem of a grandparent adopting a grandchild is totally eliminated.

⁴² *Id.* §194(c)(3).

⁴³ *Id.* §194(c)(3)(A).

⁴⁴ *Id.* §194(c)(3)(B).

⁴⁵ See LAW REFORM COMMITTEE, FOURTH REPORT, CMD. No. 18 (1956). See also *City Bank Farmers' Trust Co. v. United States*, 74 F.2d 692, 693 (2d Cir. 1935) where the court quoted statistics of the U. S. Department of Commerce which showed that among the 20,389,873 births in the United States between the years 1923 and 1932 none were to a woman over 55.

⁴⁶ ILL. REV. STAT. ch. 30 §194(c)(3)(C) (1969).

⁴⁷ *Id.* §194(c)(3)(D).

Perhaps the most significant, if not the most novel, feature of the Act is the section dealing with trusts.⁴⁸ This section, in effect, creates an automatic savings clause in any trust the terms of which violate the Rule. This means that the trust must terminate, irrespective of its violating terms, within a life in being plus twenty-one years. Therefore, a trust containing a limitation that is in violation of the Rule,

[S]hall terminate at the expiration of a period of (A) 21 years after the death of the last to die of all the beneficiaries of the instrument who were living at the date when the period of the rule against perpetuities commenced to run or (B) 21 years after that date if no beneficiary of the instrument was then living, unless events occur which cause an earlier termination in accordance with the terms of the instrument and then the principal shall be distributed as provided by the instrument.⁴⁹

The extent of the benefit derived from this section can only be determined by the passage of time, but it may be said that this automatic savings clause will enable many more beneficiaries to reap the rewards of a trust than before the statute's enactment. At least, the unwary settlor and the innocent beneficiary will cease being, to an extent, the victims of the Rule due to an oversight or lack of knowledge on the part of the draftsman.

This is not to say that savings clauses, that have heretofore been written into the trust instrument, are insignificant and unnecessary or that the draftsman need not use utmost care in avoiding a violation of the Rule. Since "[t]his section applies only when a trust would violate the rule against perpetuities as modified by Section 4 and does not apply to any trust which would have been valid apart from this Act,"⁵⁰ a carefully drawn instrument taking cognizance of the Rule, with an effective well formulated savings clause, would not be subject to the section's arbitrary plan for distribution at the trust's termination.

One of the distribution provisions of the statute,⁵¹ provides, as will be shown, a very interesting and perhaps unintentional result. The section's effect is to abolish, to a limited extent, the doctrine of capture. "Capture is an equitable remedy based upon the implied intent of the donee when the attempted exercise of a power of appointment is ineffective or incomplete."⁵² It

⁴⁸ *Id.* §195.

⁴⁹ *Id.* §195(a).

⁵⁰ *Id.* §195(d)(3)(e).

⁵¹ *Id.* §195(b).

⁵² Jones, *Consequences of an Ineffective Appointment-Capture*, 18 ALA. L. REV. 229 (1965). The designation of the doctrine as "capture" was made in *Old Colony Trust Co. v. Allen*, 307 Mass. 40, 43, 29 N.E.2d 310, 312 (1940), where the court stated "If a manifestation by the donee of an intent to capture the appointive property from the original settlement is a valid exercise of the power even though the actual appointment fails" (emphasis added).

occurs when, as a result of being given a general testamentary power of appointment, the donee assumes the control of the appointive property. This property is treated due to the donee's general power as his own, since he has the ability to appoint it to his own estate if he so chooses. According to the doctrine, the donee's intention is shown when there is an attempted exercise of the power that is ineffective or incomplete, so that it is the donee's intent, by the exercise of the power, that it will not result in the property going to the takers in default of appointment, as provided by the donor's creating instrument, but will remain as part of and therefore pass through donee's estate.

Prior to the statute's enactment, capture in Illinois was applied only to a limited extent; *i.e.*, where the donee had mingled or blended the appointive property with his own. The leading Illinois case applying capture to a blending situation is *Bradford v. Andrew*.⁵³ The donee in that case blended property that was subject to the general power of appointment with property owned by her by placing it all in her residuary estate which expressly included the subject matter of the power of appointment. As one of the appointees predeceased the donee, the question of the proper disposition of the appointive property arose. The court found that, in blending the appointive property with her own, testatrix showed the intention that the property was to go to her estate rather than the takers in default upon the contingency that the appointment be ineffective.

In *Northern Trust Co. v. Porter*,⁵⁴ the court made it clear that capture would apply only to situations that involved blending. It felt that if the exercise of the power of appointment was made in a separate and distinct clause of the will and was not mingled with the donee's own property there was no blending and therefore no capture. The appointive property would then pass to the takers in default provided for by donor's creating instrument.

Under the standard doctrine of capture, the donee's heirs would take the appointive property whether or not there was blending where there was an ineffective exercise of a general power of appointment. The basis for the standard doctrine is that most donees, if they bother to exercise a general power at all, would rather have it pass to their own estates than to the appointees who may be strangers to them. Illinois courts, not willing to accept this reasoning completely, applied capture in cases where the donee's intent could be more easily ascertained and thereby limited the doctrine's application to situations in-

⁵³ 308 Ill. 458, 139 N.E. 922 (1923).

⁵⁴ 368 Ill. 256, 13 N.E.2d 487 (1938).

volving blending. When blending did occur the courts showed no hesitancy in allowing the property to pass to the heirs of the donee rather than the beneficiaries in default. Capture was, at least to a limited extent, the law in Illinois prior to the enactment of the statute.

Section 5(b) of the statute states that if a trust which terminates by operation of the statute "was created by the exercise of a power of appointment . . . the principal shall be distributed to the person who would have received it if the power had not been exercised."⁵⁵ The result would seem to be that if the donee violates the Rule in exercising his general power of appointment in the form of a trust, the takers in default would receive the property. This would occur despite the fact that the appointive property had been blended with that of the donee's. Not only is capture avoided by the statute at the trust's termination by saving a trust which would otherwise be regarded as an ineffective exercise of donee's power of appointment, capture is prevented from being applied at its customary point when the exercise of the power is determined to have violated the Rule.

Thus, in a case where the donee has exercised his general power by creating a trust that violates the Rule, the statute would apply and upon the trust's termination, the remaining property would be distributed to the takers in default of appointment as provided in donor's creating instrument. Even the mingling of the appointive property with that of the donee's does not, under the statute, invoke capture. The donee's heirs will not take under any circumstances. Clearly, to the extent that a trust is created by an exercise of a power of appointment, the doctrine of capture has been abolished by this section of the statute.

CONCLUSION

A fair reading of the cases involving the Rule does not reasonably affirm Gray's observation regarding the simplicity and clarity of the Rule.⁵⁶ The problems found in situations such as the "unborn widow",⁵⁷ probate contingencies,⁵⁸ age contingencies⁵⁹ and the fertile octogenarian construction⁶⁰ simply do not support such an observation. Statutory modification was needed. The "solutions" proposed and enacted by the Illinois legislature for the above problems,⁶¹ although they evidence a certain lack of ambition in their cautious modifications, may, to

⁵⁵ ILL. REV. STAT. ch. 30, §195(b) (1969).

⁵⁶ See text at note 10 *supra*.

⁵⁷ See text at notes 18, 37 *supra*.

⁵⁸ See text at notes 13, 36 *supra*.

⁵⁹ See text at notes 22, 39 *supra*.

⁶⁰ See text at notes 19, 42 *supra*.

⁶¹ See text at note 33 *supra*.

a degree, alleviate these problems. But at this stage, it is virtually impossible to predict with a high degree of certainty the end result of this statute on perpetuity law. Cases involving many of the problems that have been discussed are not common place on court dockets. They arise sporadically and few invoke the full range of the technical complexities that characterize the Rule. It is therefore quite probable that it may take many years before the various sections discussed are interpreted by the courts. Whatever the interpretation, the statute is certain to remedy many of the most common violations of the Rule in situations involving rather simple and obvious dispositions. But the Act does not shed much light in solving problems arising from complex and borderline limitations, and it may, in fact, only confuse the issues involved in an already confusing field of law.

Problems arising from the concept of vesting have been completely ignored.⁶² The enactment of a new statute is the most propitious time for correcting previously existing evils. Certainly the common law Rule Against Perpetuities demanded extensive revision, yet only the most conspicuous aberrations of the Rule are dealt with by the statute. This act has solved some of the traditional problems but not without creating new ones, such as the one discussed regarding capture.⁶³ Many questions are still unanswered. Only time will provide the answer as to which direction the scales will tip.

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⁶² See text following note 27 *supra*.

⁶³ See text at note 55 *supra*.