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task with which they are faced is to deter the social drinker from driving and to eliminate the dangers which the intoxicated motorist presents on our public highways, all with a view towards insuring the solidarity of the public welfare. Admittedly, the implied consent statute may properly form the foundation necessary to an attainment of that ideal goal. But legislation without adequate driver education and responsibility will never be effective.\textsuperscript{67} Quite obviously then, the Ohio legislature must not remain satisfied with their new creation, for further study is still needed to produce "a clearer picture of how much sacrifice of which values will be required to assure what degree of safety."\textsuperscript{68}

\textsc{Terence J. Clark}

THE RULE AGAINST PERPETUITIES — STATUTORY REFORM

\textit{Ohio Revised Code Ann. § 2131.08 (Page Supp. 1967).}

The recent amendments to the Ohio perpetuities statute\textsuperscript{1} place Ohio among an increasing number of states that have modified the common law Rule Against Perpetuities in order to eliminate its unrealistic harshness by affording a more rational mechanism to regulate restraints on alienation.\textsuperscript{2} Under the common law rule codified by statute in 1932,\textsuperscript{3} any interest in real or personal property which by any remote possibility might vest, if at all, beyond a life or lives in being at the creation of the interest and 21 years thereafter was void from its inception.\textsuperscript{4} The rule accomplishes its basic purpose of preventing unreasonable restraints on the alienation of property. United States makes stiffer penalties lead only to more difficulty in enforcement. Crampton, \textit{The Drinking Driver: What Legal Controls?}, 12 LAW QUAD. NOTES 8, 10 (Univ. of Mich. 1968).

\textsuperscript{67} This is the conclusion of the 4th International Conference on Alcohol and Traffic Safety. Penner, \textit{Alcohol and Traffic Safety}, 36 MANITOBA BAR NEWS 75-79 (1967). In a conference on traffic safety and the courts at John Carroll University the new statutory scheme was lauded by a majority of the participants. Chief Justice of the Ohio Supreme Court, Kingsley A. Taft, in acknowledging the driver to be the most important factor in highway safety, expressed the opinion that stiffer penalties serve as a deterrent to both the violator and others. Cleveland Common Pleas Judge August Pryatel, however, observed that the new laws were commendable to a point, but they left the human factor untouched: the ignorant must be taught, the careless converted, the reckless punished, and the defiant grounded. The Cleveland Plain Dealer, May 4, 1968, at 13, col. 3.

ability of property by indirectly limiting the time within which future interests must vest. However, application of the rule in its classic form destroyed all future interests which represented only possible violations at the time of their creation without regard to events which happened thereafter, and thus was unnecessarily

1 Ohio Rev. Code Ann. § 2131.08 (Page Supp. 1967) [hereinafter cited as Code] now provides that:

(A) No interest in real or personal property shall be good unless it must vest, if at all, not later than twenty-one years after a life or lives in being at the creation of the interest. . . . It is the intention by the adoption of this section to make effective in Ohio what is generally known as the common law against perpetuities, except as set forth in paragraphs (B) and (C) of this section.

(B) For the purposes of this section, the time of the creation of an interest in real or personal property subject to a power reserved by the grantor to revoke or terminate such interest shall be the time at which such reserved power expires, either by reason of the death of the grantor or by release of the power or otherwise.

(C) Any interest in real or personal property which would violate the rule against perpetuities, under paragraph (A) hereof, shall be reformed, within the limits of the rule, to approximate most closely the intention of the creator of the interest. In determining whether an interest would violate the rule and in reforming an interest the period of perpetuities shall be measured by actual rather than possible events.

(D) Paragraphs (B) and (C) of this section shall be effective with respect to interests in real or personal property created by wills of decedents dying after December 31, 1967, and with respect to interests in real or personal property created by inter vivos instruments executed after December 31, 1967, and with respect to interests in real or personal property created by inter vivos instruments executed on or before December 31, 1967 which by reason of paragraph (B) of this section will be treated as interest in real or personal property which comes into effect through the exercise of a power of appointment shall be regarded as having been created by the instrument exercising the power rather than the instrument which created the power. [Amended wording italicized.]


3 114 Ohio Laws 320 (1932).

harsh in effecting its purpose. Under the new amendments, a violation of the rule is determined not by what events might have happened, but by events that actually transpire.\(^5\)

The new amendments institute what is known as a broad "wait-and-see" policy coupled with broad "cy pres" powers. "Wait-and-see" means that rather than voiding a contingent future interest at its creation because of some hypothetical possibility that it might vest too remotely, the court must wait to see whether as actual events unfold the interest does in fact vest, or become certain to vest, beyond the period allowed. If the event upon which the vesting of a future interest is contingent does in fact occur, or become certain to occur, within 21 years after the death of a relevant life in being at the creation of the interest, the interest is valid. If the interest in question has not yet vested, but there is still a possibility that it may vest in time, decision as to its validity must be postponed until it does in fact vest within the period of the rule or timely vesting becomes certain. However, should it happen that by the operation of actual events it becomes certain that under the terms of the instrument which created the interest, vesting will occur beyond the period of the rule, "cy pres" must be employed by the court whereby the creating instrument will be reformed, within the limits of the rule, to approximate most closely the intention of the creator of the interest.\(^6\) Since in the past the vesting of most future interests voided as violative of the Rule Against Perpetuities was contingent upon an event that in all probability would have occurred within 21 years after the death of a relevant life in being at the creation of the interest, or could easily have been reformed to insure timely vesting, it is apparent that the new statutory reform will save the vast majority of future interests that would have been invalid under the old rule.\(^7\)

The operation of the new reforms can be illustrated by demonstrating how the recent case of Abram v. Wilson\(^8\) would be decided

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\(^{5}\) Paragraph (C) of the new statute provides that "[i]n determining whether an interest would violate the rule and in reforming an interest the period of perpetuities shall be measured by actual rather than possible events." Code § 2131.08(C) (emphasis added). Like the concise statement of the common law rule, this statutory language is deceptively simple. See note 25 infra & accompanying text.

\(^{6}\) Code § 2131.08 (C).

\(^{7}\) The provision of the new statute providing for reformation is mandatory in that it demands that all interests which will violate the rule "shall" be reformed. Thus, the only interests that will fail under the new statute are those which fail by their own terms notwithstanding reformation. See note 14 infra.

\(^{8}\) 8 Ohio Misc. 420, 220 N.E.2d 739 (P. Ct. 1966).
under the new statute. In that case, a testator had bequeathed
the residue of his estate in trust to pay the net income to his
grandnieces and grandnephews until the youngest should reach
age 35, remainder in fee to the beneficiaries. Finding that "grand-
nieces" and "grandnephews" meant those whenever born, the court,
applying the common law rule, held the entire gift void because
of the unlikely possibility that the testator's brother, age 75, might
have another child born after the testator's death who in turn
might produce a grandnephew or grandniece more than 21 years
after the death of the brother and his children alive at the testator's
death. Under "wait-and-see," the validity of the gift to the grand-
nieces and grandnephews might be demonstrated immediately by
showing that the testator's brother at age 75 was incapable of
fathering a child. If this could not be established, the trust
would be continued and decision as to the validity of the gift would
be postponed. If at the brother's death he has in fact produced
no after-born children (the most probable result), the validity of
the gift would be established because all possible members of the
class would have to be born within the lifetimes of nephews and
nieces living at the testator's death. If, however, the testator's
brother should produce another child after the testator's death, no
determination of validity could be made until that after-born child
dies or can be proved incapable of conceiving a child. If the after-

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9 It is apparent that the court construed the gifts to grandnieces and grandnephews
as vested in interest at birth subject to open to let in later-born members of the class
and that only possession was postponed until the youngest member of the class reached
age 35. However, under the "all-or-nothing" rule of class gifts, if the interest of any
member of the class might vest too remotely, the gift is void as to every member of
the class and the entire gift fails. Thus, since the remote possibility existed that a
"grandnephew" or "grandniece" could have been born to an after-born nephew or
niece later than 21 years after the testator's death, the court declared the entire gift
void.

discussion of the problems raised by a possible adoption, see Lynn, Raising the Perpe-
tuities Question: Conception, Adoption, "Wait and See" and Cy Pres, 17 VAND. L. REV.
1391 (1964).

11 It should be noted that the "wait-and-see" approach to the determination of
validity is the antithesis of the approach employed under the old rule. Whereas under
the old statute an interest was void if there was any possibility that it would vest too
remotely, under "wait-and-see," no determination of invalidity can be made if there
is any possibility that the interest will vest in time.

12 Although prospective reformation at this point would be convenient, the word-
ing of the new statute seems to preclude reformation until a violation is certain to
occur. Since at this point the after-born child could die without producing any chil-
dren of his own, it is still possible that "actual events" may vest all interests in time
without reformation. However, should the after-born child survive all nephews and
nieces that were alive at the testator's death, reformation should be granted in order
born child produces a child later than 21 years after the death of the brother and the survivor of the nephews and nieces alive at the testator's death, the gift to grandnephews and grandnieces would be bad under "wait-and-see" alone because by the operation of "actual events" the interest of a member of the donative class has vested beyond the period allowed by the rule. However, the gift would be saved under "cy pres" by reforming the trust to limit the possible beneficiaries to "my grandnephews and grandnieces living at my death and those born within a period measured by the lives of my brother and his children alive at my death and 21 years." Thus, in order to save the gift to the class, the remote member is excluded by reformation. The rationale for excluding the remote beneficiary is that the testator would have preferred the exclusion to the failure of the entire gift which would cause an intestacy with respect to the trust corpus. In other words, "cy pres" is employed to obviate the harsh "all-or-nothing" rule of class gifts. In so doing, the trust is preserved in accordance with the testator's intention and, since no interest does in fact vest later than the period prescribed by the rule, there is no infringement upon the policy against restraints on alienation.

Where vesting is contingent upon the attainment of a certain age beyond 21, a gift may be saved under "cy pres" by simply reducing the age requirement to 21. Also, the new reforms will save gifts which are limited to take effect after a period in gross not specifically related to lives in being. For example, if a testator to allow distribution when the youngest child of nephews and nieces living at the testator's death reaches age 35.

As to whether the grandnephews and grandnieces alive at the testator's death could be measuring lives under the "wait-and-see," see text accompanying note 25 infra. It would appear that if the child of the after-born nephew or niece is born within the lifetime of the grandnephews and grandnieces living at the testator's death, or within 21 years after the death of the survivor of them, his interest might be held valid.

If T devises property "to A for life remainder to A's children who reach 25," the remainder is void under the old rule because after-born children of A might reach 25 later than 21 years after lives in being at T's death. Under "wait-and-see," decision as to the validity of the remainder would be postponed until A's death. If at that time it is discovered that all A's children were born before T's death, or that all are over 4 years old (and hence will reach 25 not later than 21 years after the death of A), the gift is valid and no reformation is necessary. If, however, there are after-born children under 4 years of age, the gift must be reformed to vest the remainder in "such of A's children who reach 21." W. LEACH & O. TUDOR, THE RULE AGAINST PERPETUITIES 229 (1957). See Edgerly v. Barker, 66 N.H. 434, 31 A. 900 (1891) (age contingency reduced from 40 to 21). It should be noted that if none of A's children live to age 21, the gift will fail by its own terms and the property will pass to T's intestate takers. It is therefore evident that "wait-and-see" and "cy pres" do not absolutely insure vesting.
bequeathed certain legacies to his descendants alive at the time his estate should be settled, the legacies are void \textit{ab initio} under the old statute because of the remote possibility that the estate would not be settled within 21 years after the testator's death.\textsuperscript{15} Under the new statute, the legacies would be valid if in fact the estate is settled within 21 years after the testator's death.\textsuperscript{16} If a testamentary trust had been created with absolute discretion in a corporate trustee to select which of a class of beneficiaries should receive income, the interest of each beneficiary was deemed contingent upon the exercise of discretion by the trustee and since the trustee could conceivably make payments in favor of after-born members of the class later than 21 years after the death of the testator, the gift to the entire class of beneficiaries was void under the old statute.\textsuperscript{17} The trust would be valid under the new statute if in fact no potential beneficiaries are born after the testator's death, or the trustee vests the interests of all possible beneficiaries by making payments within the 21 year period after the testator's death.\textsuperscript{18} By making the test for validity depend upon actual rather than possible events, the new reforms have also abolished the absurd results occasioned under the old rule in cases involving the "unborn widow," the "fertile octogenarian," and the "precocious toddler."\textsuperscript{19}

The most difficult problem in applying the new statute will be the selection of appropriate measuring lives. Under the old statute's certainty-of-vesting test, the selection of the appropriate measuring life or lives was no problem, because in order to validate a given interest it was essential that \textit{at the time of creation} one could identify a person, or a reasonably small group of persons, alive at the time of creation within 21 years of whose death the interest was certain to vest. That is, the selection of measuring lives under the old statute was a matter of logical necessity. However, under "wait-and-see," since the validity of the interest is no longer dependent upon a showing that it is certain to vest within the period of

\begin{footnotes}
\item[16] If the estate is not settled until later than 21 years after the testator's death, the gift would probably be held void under the new statute because there are no measuring lives causally related to vesting. \textit{See J. DUKEMINIER, PERPETUITIES LAW IN ACTION} 88 (1962). It also appears that there would be no practical way of reforming the gift to save it from invalidity. \textit{See R. LYNN, supra} note 10, at 75-76.
\item[18] If the trustee should make payments to an after-born beneficiary beyond the period of the rule, there would seem to be no reason why a court should not exclude the remote beneficiary by reformation in order to save the trust.
\end{footnotes}
the rule, but only that it may vest in time, one is no longer compelled at the beginning to identify the appropriate measuring life, but is faced with the new problem of formulating rules whereby the appropriate life may be determined in retrospect. To illustrate the difficulty, suppose that a testator bequeaths $100,000 in trust to pay the income to Case Western Reserve University for 121 years, remainder in fee to his issue then living. The remainder is of course void under the old statute for it cannot be determined as a matter of logical necessity that the remainder interests will vest within 21 years after the death of a life in being at the testator's death. However, the new statute provides that "[i]n determining whether an interest would violate the rule and in reforming an interest the period of perpetuities shall be measured by actual rather than possible events." A literal reading of this provision would validate the remainder if counsel could identify from the birth records some centurian who was alive at the testator's death and who lived for 100 years thereafter. However, the consensus among the writers seems to be that for a person to function as a validating measuring life under "wait-and-see," his life must in some manner causally restrict the time within which vesting may occur for otherwise the policy of the rule will be subverted. Thus, since the life of a random centurian in no way causally restricts the period within which vesting may occur, the remainder in the testator's issue should be held void under the new statute unless it can be brought within the rule by reformation.

20 CODB § 2131.08 (C).

21 See authorities listed in A.B.A. Perpetuity Legislation Handbook, supra note 2, at 210-12. An individual has a "causal relation" to vesting if by the terms of the creating instrument, his life or death somehow restricts the time within which vesting may occur. For example, in a devise to the grandchildren of A, A's children alive at the critical time can be measuring lives since their deaths will define the period within which grandchildren can be born. Also, in a devise to A's children living upon the death of the survivor of B's children, B's children living at the critical time can be measuring lives because their lives have been made relevant to the time of vesting by the express terms of the creating instrument. These examples are not intended to exhaust the infinite variety of situations where a question of the appropriateness of a given life is at issue, rather they are merely illustrative of what is meant by "causal relation." Seemingly, the Kentucky statute solves the problem by expressly limiting the selection of measuring lives to those lives having "a causal relationship to the vesting or failure of the interest." KY. REV. STAT. § 381.216 (1962). However, like Vermont, VT. STAT. ANN. tit. 27, § 501 (1967), the Ohio statute places no express limits on the selection of measuring lives.

For a savings clause designed to obviate any adverse consequences stemming from the ambiguity of the new statute with respect to the selection of measuring lives, see Goldman, Drafting Trust Instruments Revisited, 36 U. CIN. L. REV. 650, 657 (1967).

22 The trust might be reformed by reducing its duration from 121 years to 21 years. However, in reforming an interest within the limits of the rule, the court is
Taking a more realistic example to illustrate the difficulty of selecting measuring lives, suppose a testator bequeaths certain property "to the grandchildren of A who attain 21," and that A and one of A's children (B) survive the testator. Three years later A has another child (C) and then A dies. If C dies without children, the interests of B's children would be valid under the new statute without reformation because all of B's children will come of age no later than 21 years after B's death. However, if C should have children, his life cannot be used as a measuring life because he was not in being at the testator's death, and it could be argued that B's life is not causally related to the vesting of the interests in C's children so that reformation would be necessary to save the interests in B's children by excluding C's children. However, unlike using a random centurian as a validating life, allowing B to function as measuring life for C's children would not seem to occasion any infringement on the policy against restraints on alienation and a court could easily feel justified in not insisting on strict causation. In any event, it is apparent that there are no criteria explicit in the new statute for determining who can be measuring lives in the infinite variety of situations that will arise, and thus the rules that will govern the selection of measuring lives must be developed case-by-case through the process of judicial decision.

Paragraph (B) of the new statute relates to when the period bound to approximate most closely the testator's intention. A court might very well find that such a drastic reduction in the length of the trust might so severely distort the testamentary scheme so as to preclude any reformation.

23 This gift is void under the old statute because A could have another child born after the testator's death whose child (grandchild of A) could reach 21 at a remote time.

24 It has been suggested that B's life does causally restrict the vesting of the interests in the children of C because B's death may close the class of recipients. That is, as long as B remains alive the class will stay open under applicable class-closing rules and thereby prevent vesting. See A.B.A. Perpetuity Legislation Handbook, supra note 2, at 185.

25 It would appear that the choice of the appropriate measuring life in any given situation arising under the new statute will lie somewhere between the extremes of any one of the babies in the world living at the testator's death and that specific life which would validate the interest by applying the old rule with the benefit of hindsight. In terms of policy considerations, both extremes would be untenable for allowing selection of the measuring life from all the babies in the world alive at the time the interest was created would destroy the new statute as an effective regulator of restraints on alienation, and insisting on a strict causal relationship between an acceptable validating life and the vesting of the interest would occasion the exercise of interests by reformation which represent no real infringement upon the basic policy. Since the statute is silent on how measuring lives are to be chosen, the burden is thrust on the judiciary to formulate rules for their selection which will allow the fullest effectuation of the testator's intent, and still preserve the underlying policy against unreasonable restraints on alienation.
of perpetuities begins to run against interests created under an inter vivos transfer wherein the grantor has reserved a power to revoke or terminate the future interests he creates by the transfer. This provision makes it clear that with respect to future interests created under an inter vivos trust wherein the settlor retains an absolute power to revoke the entire trust, the period of perpetuities begins to run when the power to revoke expires which will be the date of the settlor's death unless he has released his power before his death. However, the wording of the provision is ambiguous with respect to its application to interests created under a trust where the settlor merely retains a power to change beneficiaries as opposed to a power to revoke the entire trust. Paragraph (B) provides that "the time of the creation of an interest . . . subject to a power reserved by the grantor to revoke or terminate such interest shall be the time at which such reserved power expires . . . ." Since the words "revoke or terminate" are used in the disjunctive, it would appear that "terminate" was intended to describe a reserved power to end specific interests other than by "revoking" the entire trust. Thus, it could be argued that where a settlor creates an irrevocable trust reserving a power to change beneficiaries, he has reserved the power to "terminate" the interests of named beneficiaries within the meaning of the statute and therefore the period of perpetuities does not begin to run against these interests until the settlor dies. However, since it could be argued that "terminate" is merely synonymous with "revoke" when paragraph (B) is applied to trusts, whether a settlor can postpone the running of the period of perpetuities by merely reserving a power to change beneficiaries will have to await judicial construction.

Paragraph (D) of the new statute is primarily concerned with the effective date of the new amendments. However, the last

26 Code § 2131.08 (B) (emphasis added).
27 The general rule is that the period of perpetuities begins to run against a future interest at the time of its creation. See 6 A.L.P., supra note 4, at § 24.12. Although it appears that no Ohio court has decided the point, other jurisdictions applying the common law rule generally hold that the period of perpetuities does not begin to run against interests created under a revocable inter vivos trust until the settlor's death. See, e.g., Cook v. Horn, 214 Ga. 289, 104 S.E.2d 461 (1958); Ryan v. Ward, 192 Md. 342, 64 A.2d 258 (1949). The policy rationale for this position is that since the settlor can revoke the trust at any time before his death and then sell the property composing the trust corpus, property is not tied up until his death when the power to revoke expires. This policy rationale is not apposite when the trust is irrevocable because the settlor has no power of sale. Yet, in a very real sense, the interests of the beneficiaries under an irrevocable trust where the settlor retains a power to change beneficiaries are not "created" until the settlor's death because until then they are subject to destruction (termination) by the exercise of the settlor's power to substitute other beneficiaries.
sentence concerning interests created in the exercise of power of appointment is extremely ambiguous and will cause litigation. The sentence provides that:

An interest in real or personal property which comes into effect through the exercise of a power of appointment shall be regarded as having been created by the instrument exercising the power rather than the instrument which created the power.28

Because this provision appears in paragraph (D) which concerns the effective date of the provisions in paragraphs (B) and (C), it could be argued that the last sentence of paragraph (D) merely instructs that "wait-and-see" and "cy pres" are to be applied to interests created by powers exercised after the effective date of the statute even though the instrument creating the power became effective before the effective date of the statute.29 However, the broad language of the last sentence seems inconsistent with such a narrow purpose, and the use of such general language indicates that this sentence should be read independently from the rest of the paragraph.30 If the sentence is read literally, it would mean that with respect to all interests created in the exercise of powers, the period of perpetuities will always be measured from the time the power is exercised rather than from the time of creation. Such a construction would greatly expand the interests which the donee of a special or general testamentary power may create and would make possible the creation of a family trust in perpetuity through a succession of powers of appointment.31 Although a literal reading of this provision

28 Code § 2131.08 (D).
29 That the statute in force at the time of exercise controls the validity of the interests created was established in First-Central Trust Co. v. Claflin, 49 Ohio L. Abs. 29, 73 N.E.2d 388 (C.P. 1947), holding that the 1932 perpetuities statute applied to interests created by a power exercised in 1945 even though the instrument creating the power became effective in 1914.
30 Other state statutes expressly making perpetuities reform provisions applicable to interests created by powers exercised after the effective date of the statute do so specifically and in narrow language. Compare VT. STAT. ANN. tit. 27, § 502 (1967), with ME. STAT. ANN. tit. 33, § 106 (1965). In view of the fact that paragraph (C) of the new Ohio statute is obviously copied from the Vermont statute, the inconsistent use by the Ohio legislature of such general language in the last sentence of paragraph (D) would indicate that provision should be read broadly.
31 By way of illustration, assume that a testator bequeaths $100,000 in trust to pay the net income to his son (A) for life, remainder to such of A's issue as A may by will appoint, and that A has no children at the testator's death. Under the 1932 statute, the period of perpetuities with respect to interests which A may create in the exercise of his power begins to run at the testator's death. Cleveland Trust Co. v. McCuade, 106 Ohio App. 237, 142 N.E.2d 249 (1957). If A should exercise his power by appointing a life estate in B (A's child born after the testator's death) with a special testamentary power in B to appoint among his issue, B's power would be invalid under the old statute. However, under the literal reading of the last
would effect a substantial change in past Ohio law which distin-
guishes between presently exercisable general powers and powers
that are only exercisable by will or are otherwise limited, the policy
that such a construction would invoke is not without precedent
in other jurisdictions, and would not unjustifiably infringe upon
the basic policy of preventing unreasonable restraints on aliena-
tion.\footnote{See note 31 supra.}

It must be emphasized that the reform provisions of the new
statute are solely prospective in application,\footnote{The new amendments expressly apply to interests created by: (1) wills effective
after December 31, 1967; (2) inter vivos transfers executed after December 31, 1967;
(3) revocable inter vivos transfers executed on or before December 31, 1967, when the
power to revoke expires (by death or release) after December 31, 1967; (4) powers
of appointment exercised after December 31, 1967.} and that with respect
to future interests created before December 31, 1967, the former
statutes will apply.\footnote{With respect to interests created in real property by instruments becoming
effective between December 17, 1811, and January 1, 1932, validity for perpetuities
purposes is governed by the 1811 statute, \textit{An Act to Restrict the Entailment of Real
Estate}, 10 Ohio Laws 7 (1811), \textit{repealed}, 114 Ohio Laws 475 (1932). See Joseph} However, it is a fundamental tenet of juris-
sentence in paragraph (D), the period of perpetuities would be measured, not from
the testator's death (time of creation of A's power), but from the time of A's exercise,
and since B was a life in being at that time his power would be valid. Hence, B
in the exercise of his power could appoint a life estate in one of his children (C) with
a special testamentary power in C to appoint among his issue. Measured from the time
of B's exercise, C's power would be valid. C could in turn appoint in the same fashion
to one of his children and so forth and so on in perpetuity. However, since each
successive donee would have the option to appoint fee title to the trust corpus to any
member of the appointive class, dead hand control over the disposition of property
is not absolute, and since most trustees have a free hand to sell the property composing
the trust corpus, there would be no real uneconomic restraint on the alienability of
property. In recognition of these realities, Delaware has adopted the position that
the period of perpetuities is to be measured from the time of exercise, \textit{Del. Code
Ann.} tit. 25, § 501 (1953), and the federal estate tax makes special provision for the
taxation of such powers. \textit{Int. Rev. Code of 1954}, § 2041(a)(3). However, in
view of the ambiguous positioning of the provision relating to powers in the new
Ohio statute, whether Ohio has followed Delaware's lead will have to await judicial
construction.

It should be noted that if the last sentence of paragraph (D) of the new statute is
given the recommended literal reading, there will be adverse federal estate tax con-
sequences for the donee of a special testamentary power, who in the exercise thereof,
creates another power of appointment. As a general rule, the value of property with
respect to which a decedent holds and exercises a special power is not included in his
However, by virtue of section 2041(a)(3) of the \textit{Internal Revenue Code of 1954}, if
any decedent "exercises a power of appointment . . . by creating another power of ap-
pointment which under the applicable local law can be validly exercised so as to . . .
suspend the absolute ownership or power of alienation of such property, for a period
ascertainable without regard to the date of the creation of the first power," then the
value of the property is included in the decedent's gross estate when calculating the
federal estate tax. Hence, in the previous example, the $100,000 trust corpus would
be includable in A's gross estate.
prudence that when the legislature modifies a rule of the common law reflecting a significant change in policy, courts should look to that new policy and reason from it by analogy in formulating rules of decision under the common law. 35 Thus, it has been persuasively argued that where the legislature modifies the Rule Against Perpetuities, the courts in deciding cases not expressly covered by the new statute should nonetheless adopt the new policy as a matter of common law. 36 However, since 1811, the Rule Against Perpetuities in Ohio has been governed by statute. 37 Yet, there is strong authority that the 1811 statute applied only to interests in real property and that with respect to interests in personalty created between 1811 and 1932 the common law Rule Against Perpetuities is applicable. 38 Thus, in cases arising after October 24, 1967 (effective date of new amendments) involving interests created under trusts effective before January 1, 1932, a strong argument can be made that a court deciding a perpetuities question should look to the policy of the new statute and adopt the principles of "wait-and-see" and "cy pres" as a matter of common law. 39 Since the 1932 statute expressly states that its intent is to adopt the common law rule, it would appear that a similar argument might

Schonthal Co. v. Village of Sylvania, 60 Ohio App. 407, 21 N.E.2d 1008 (1938) (holding that the 1811 statute applied to interests created in 1900 but not challenged until after the passage of the 1932 statute). With respect to interests created in personal property by instruments effective between 1811 and 1932, there is a conflict as to whether the common law rule applies. See Sager v. Byrer, 24 Ohio N.P. (n.s.) 129 (C.P. 1921), aff'd, 19 Ohio L. Rptr. 713 (Ct. App. 1922) (adopting the view that the common law rule does not apply); Dayton v. Phillips, 11 Ohio Dec. Reprint 680 (Super. Ct. 1892), aff'd sub nom, Phillips v. Herron, 55 Ohio St. 478, 45 N.E. 720 (1896) (holding the common law rule applicable to interests in personal property) (The Ohio Supreme Court did not consider this question on appeal). It would appear the better view is that the common law rule does apply to interests in personal property created between 1811 and 1932. 42 OHIO JUR. 2D Perpetuities § 11 (1960). With respect to interests created in real and personal property by instruments effective between January 1, 1932, and December 31, 1967, the 1932 statute controls.


36 See W. LEACH & O. TUDOR, supra note 14, at 231-36.

37 See note 34 supra.

38 Id.

39 This argument is strengthened by the fact that the Supreme Court of New Hampshire has adopted "cy pres" and "wait-and-see" by judicial decision. See Merchants Nat'l Bank v. Curtis, 98 N.H. 225, 97 A.2d 207 (1953); Edgerly v. Barker, 66 N.H. 434, 31 A. 900 (1891). The possibility that litigation may arise under instruments effective before 1932 should not be dismissed as remote in view of the fact that future interests are often challenged many years after their creation. See Joseph Schonthal Co. v. Village of Sylvania, 60 Ohio App. 407, 21 N.E. 2d 1008 (1938) (executor's interest challenged 38 years after creation).
conceivably be made for the adoption of "wait-and-see" and "cy pres" in deciding perpetuities questions in respect of interests in both real and personal property created by instruments effective after 1932.

It is apparent that the new reform provisions effect a drastic change in the application of the Rule Against Perpetuities and that most contingent future interests void under the old rule will now be saved. However, it should be cautioned that the new reforms do not abrogate the common law rule — they merely modify it. "Wait-and-see" and "cy pres" are employed within the contextual framework of the common law rule. The concepts of vested and contingent interests, of vesting in interest as opposed to possession, and of lives in being plus 21 years remain. The new reforms do not lengthen the period in which a future interest may remain contingent and they do not guarantee vesting. The thrust of the reforms will be to eliminate the drafting pitfalls that caused future interests, otherwise valid, to be cut down by some potential violation, theoretically possible, which in reality would almost never occur. Thus, the reforms effectively preserve the policy of prohibiting uneconomic restraints on the alienability of property while they do away with the unnecessary harshness of the old rule. Although the new statute is not without interpretive difficulties, it should be welcomed as a long-overdue successful effort to interject some semblance of reason into the citadel of irrationality that has plagued property law for centuries.

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40 See notes 24, 27, and 31 supra & accompanying text.