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## AN ATTACK ON THE "TWENTY-ONE YEAR RULE"

By S. RAYMOND DUNN\*

The rule against perpetuities has been defined by Gray in one sentence:

"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."<sup>1</sup>

The rule has been criticized in the following language:

"It was all very well to consider that manhood had been attained by a tough-fibred youth of *twenty-one* when the chief duties of a man were to wield a sword, wear a tin suit, collect feudal dues from the tenantry and torture gold out of the usurers, but it hardly follows that a Junior in college is competent to handle investment problems in a world of Coolidge booms, Hoover depressions, Roosevelt recessions and a planned economy."<sup>2</sup>

The mind of the average person of twenty-one is not focused upon the studies which are essential to the sound management of investments. Inflation, deflation, current ratios, price-earnings ratios, convertibility features of bonds, debentures and preferred stock, seasonal and cyclical fluctuations, long-term growth trends are not within the range of interests of the average youth of twenty-one, whose tastes are often more likely to run to rock-and-roll.

Persons under twenty-five customarily pay higher premiums for automobile liability insurance, and this supplies actuarial proof, if proof be needed, of a certain recklessness. As a rule, a higher degree of discretion is required in portfolio and real estate management than in the driving of an automobile.

Even a few generations ago, persons aged twenty-one, having attained physical maturity, were able to cope adequately with most of the problems of life, e.g., making a clearing in the forest, building a log cabin, planting seed. But it is a far cry from seed to sinking funds. The ever

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<sup>1</sup> GRAY, *THE RULE AGAINST PERPETUITIES* (4th Ed., 1942) 191. Italics added.

<sup>2</sup> Leach, *The Rule against Perpetuities and Gifts to Classes*, 51 Harv. L. Rev. 1329, 1332 (1938). Italics added.

increasing complexities of present-day living require an increased maturity.

It appears that the twenty-one year period stems from the period during which an estate tail could be made unbarrable.<sup>3</sup>

The language of Lord Brougham, in *Cole v. Sewell*,<sup>4</sup> regarding the origin of the twenty-one year rule, is quite interesting and illuminating:

“And as I had often heard ventilated the notion that there could be no such thing as a term in gross, at all, of twenty-one years, I put the question expressly to the learned Judges . . . namely, can there, without the least regard being had to the fact out of which the rule arose (for that is the origin of the rule), without the least regard being had to the fact of the heir of A, the life or last of the lives in being, not being able to cut off or to bar the remainder, by suffering a recovery or levying a fine, till he is twenty-one, — without any regard to that, but supposing there to be no question of the heir at all; supposing there to be no question of levying a fine or suffering a recovery, or barring the remainder over at all, can by law the life or lives in being have the addition of a term in gross of twenty-one years? The Judges held that that is now the law, whatever may have been its origin. *It most clearly arises from a mistake.* The law never meant to give a further term of twenty-one years, much less any period of gestation. The law never meant to say that there shall be twenty-one years added to the life or lives in being, and that within those limits you may entail the estate, but what the law meant to say was this: until the heir of the last of the lives in being attains twenty-one, by law a recovery cannot be suffered, and consequently the discontinuance of the estate cannot be effected, *and for that reason, says the law, you shall have the twenty-one years added, because that is the fact and not the law, namely, that till a person reached the age of twenty-one, he could not cut off the entail.*”

We are not concerned with the concept of the term in gross, as such. Assuming, however, as we must inevitably assume, that the term in gross has been firmly established

<sup>3</sup> SIMES, FUTURE INTERESTS (1951) 365; *Stephens v. Stephens*, Cas. T. Talb. 228, 25 Eng. Rep. 751 (1736); *Cole v. Sewell*, 2 H. L. Cas. 186, 233, 9 Eng. Rep. 1062 (1848).

<sup>4</sup> *Ibid.*, 232-233, 1080-81. Italics added.

in the law, why should the term in gross necessarily be one of twenty-one years?

The following conclusions spring from Lord Brougham's language: The twenty-one year term arose *out of a fact* and not the law. The fact was *then* the inability of a person under the age of twenty-one to cut off the entail. The equivalent fact is *now* the attainment of the age at which the average, prudent man is able to manage investments intelligently. Factual ability is the substance. Age twenty-one is the mere form. And that form is now out-of-date.

It is, indeed, the common experience of trust companies and of estate planners generally to find that one of the major concerns of clients is to have the estate protected against dissipation or destruction through final distribution at too early an age.

Consequently, in situations where the rule against perpetuities is not involved (*e.g.* in cases relating to trusts for the testator's own children), it is customary to have distributions at such ages as twenty-five, thirty or thirty-five.

Why then should the fundamental estate plan or scheme have to run the risk of being defeated by premature distribution to grandchildren?

Clearly, the result is the same in either case: the testator's intent is defeated, by payments into juvenile hands, whether those hands be those of children or of grandchildren.

Moreover, since the matter is one of fact (fact which the law should faithfully reflect) it is pertinent to consider, in addition to the practical facts of investments, estate management and actuarial figures, other facts which are equally pertinent and compelling — medical facts, vital statistics.

In the middle ages, the average life span was approximately forty years. At present, the average life span is approximately sixty-five. Consequently, the twenty-one year term was more than half of the average medieval life span. On the other hand, a term as long as thirty years would be less than half of the present life span. This vital ratio is one of the facts which the law should reflect.

The contemporary (and rapidly increasing) life span offers far greater life potentialities. A longer preparatory period (factually a net gain, as we have seen) is the concomitant. If we are to reap the benefits of the potentialities, we must have a realistic regard for the preparatory period.

Fortunately, the courts, in dealing with the rule against perpetuities, have often retained and displayed quite a bit

of the appropriate regard for facts, even to the extent of modifying the rule, in order to conform to the facts.

For example, in *Safe Deposit & Trust Company v. Sheehan*,<sup>5</sup> the Court of Appeals stated:

"The rule against perpetuities is judge made law. In its modern form it was first announced in the *Duke of Norfolk's Case*, 3 Ch. Cas. 27, which marked a definite stage in a long struggle between the great landowners of England who sought the power to so tie up their land that no future owner 'would have complete power of alienation,' and the courts, which sought to preserve freedom of alienation as a principle of the common law, a struggle which raged intermittently from a very early period of the common law until comparatively modern times. *Holdsworth, History of English Law*, vol. 7, p. 195 *et seq.* But as the dangers inherent in the recognition of a power to withdraw property from commerce for remote and indefinite periods lessened, so the attitude of the courts to the right of donors to impose restraints upon alienation in order to protect objects of the donor's solicitude or interest changed, and greater weight was given to the donor's intention, so long as the execution of that intention involved no real danger of a perpetuity. So, while formerly the test was the period for which the estate might endure beyond a life or lives in being and twenty-one years (with an allowance for the period of gestation, when necessary), the test now universally recognized is whether it will vest within that period. *Id.*, 216, *Miller, Construction of Wills*, sec. 314 *et seq.*; *Tiffany on Real Property*, sec. 179."

A similarly factual study and analysis of the twenty-one year term in its present-day setting would be appropriate.

This judicial tendency to look behind mere forms, at the facts behind the forms, has appeared quite frequently, in many types of situations.

For example, facts which exist as of the time of the creation of the instrument may aid in sustaining a limitation. Thus, assume a devise "to such children of B as attain the age of thirty years." This would ordinarily violate the rule (because B could outlive the testator and subsequently have a posthumous child, or a child born near the close of B's life, and such child's attainment of the age of thirty

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<sup>5</sup> 169 Md. 93, 103-104, 179 A. 536 (1935).

years would be beyond the permitted period). But, now, let us suppose, also, that B died before the testator. Under such facts, the devise is good, because, at the testator's death, we know that the interest will vest, if it vests at all, in children of B alive at that time.<sup>6</sup>

Facts regarding a power to revoke an *inter vivos* trust instrument have also been considered and utilized by the court to sustain what otherwise would have been an invalid limitation. Because of such power, the settlor could revoke and sell the property just as certainly as if he were the absolute owner; therefore, the property was not taken out of commerce.<sup>7</sup>

An extensive exception to the general doctrine of the rule against perpetuities has been carved out, on the basis of factual circumstances, by the Court of Appeals in *Hollander v. Central Metal Co.*<sup>8</sup>

As part of the general rule, options are void if for a longer period than twenty-one years.<sup>9</sup> Nevertheless, options to redeem (as well as to renew) ground rent leases were held, in the *Hollander* case, to be outside of the rule, because of the facts concerning real estate market conditions in Baltimore and vicinity.

The Court stated:<sup>10</sup>

“Again, in the case of *Myers v. Silljacks*, 58 Md. 319, speaking of leases of this character, Judge Alvey said: ‘We all know that estates dependent upon leases like the one before us are exceedingly common in this State, and particularly so in the City of Baltimore. Both the reversionary freehold and the leasehold estates are the subject of daily transfers and assignments, and they constitute a considerable portion of the substantial wealth of the people. While the one estate is subject exclusively to the law that governs real property, the other is mainly controlled by the law that governs personalty; . . . Both estates alike are the subjects of mortgage and judgment liens, and are constantly being

<sup>6</sup> *Simes, op. cit., supra*, n. 3, 374, citing *Equitable Trust Co. v. McComb*, 19 Del. Ch. 387, 168 A. 203 (1933); *Safe Deposit and Tr. Co. v. Sheehan, ibid.*; *Bradford v. Griffin*, 40 S. C. 468, 19 S. E. 76 (1894); *Whitby v. Von Luedecke*, 1 Ch. 783 (1906); *Southern v. Wollaston*, 16 Beav. 276, 51 Eng. Rep. 785 (1852).

<sup>7</sup> *Mfgs. Co. v. von Hamm-Young Co.*, 34 Hawaii 288 (1937).

<sup>8</sup> 109 Md. 131, 71 A. 442 (1908).

<sup>9</sup> *Brown v. Mathis*, 201 Ga. 740, 41 S. E. 2d 137 (1947); *Eastman Marble Co. v. Vermont Marble Co.*, 236 Mass. 138, 128 N. E. 177 (1920); *West Virginia-Pittsburgh Coal Co. v. Strong*, 129 W. Va. 832, 42 S. E. 2d 46 (1947).

<sup>10</sup> *Supra*, n. 8, 160-161.

sold and transferred in the enforcement of such charges. It is of the utmost importance, therefore, that the tenure be maintained with entire certainty; that the true relation of the parties to the property be at all times fully recognized, so that their exact rights may be known and enforced, and that third parties may know how to deal with respect to those rights'. And again, in the case of *Worthington v. Lee, supra*,<sup>11</sup> the Court said, that the above cases fully state the reasons why *this Court 'has applied a more liberal doctrine to these cases than that applied in the English Courts; and it has done so with special reference to the peculiar nature and condition of the local titles that exist in the City of Baltimore'*. Without detracting from the great weight and respect to which the authorities cited by appellants are justly entitled,<sup>12</sup> we must adhere to the previous decisions of this Court, and hold that the lease in question did not place the property *extra commercium*, and that the rights of the parties under the covenants therein are 'not open to any of the objections against perpetuities'."

It is, perhaps, relevant to observe that the nature and condition of the investment market throughout Maryland, and the United States generally, are as deserving of consideration as the nature and condition of the local titles and real estate market in the City of Baltimore.

It is submitted that the twenty-one year term, rooted in what is essentially a transatlantic and medieval system of estates in fee tail, is now inappropriate and unrealistic in present-day Maryland, as well as the United States generally.

Here in Maryland, it was provided by statute, very shortly after the Revolution, in 1782, that estates tail could be barred by deed.<sup>13</sup> In 1786, another statute provided that they would also descend in fee simple. By the construction placed upon these statutes, estates tail general were converted into estates in fee simple, and it was held that a tenant in tail general had all the rights and powers of a tenant in fee simple, including the power to devise.<sup>14</sup> Finally, in 1916, we got around to ending estates tail

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<sup>11</sup> 61 Md. 530 (1884). Italics added.

<sup>12</sup> They include GRAY, *THE RULE AGAINST PERPETUITIES* (2d Ed.) §§230A, 275, 275A, cited in Appellants Brief, p. 11, and §230b quoted by the Court of Appeals at p. 158.

<sup>13</sup> Md. Code (1951) Art. 21, §30.

<sup>14</sup> VENABLE, *REAL PROPERTY* (1892) 16.

special.<sup>15</sup> Yet, the fee tail's little brother, the equally quaint and medieval twenty-one year rule, we still have with us!

Would it not appear that it is high time for the twenty-one year rule to go the way of the fine and the common recovery?

However, as soon as we approach the problem, we run into the danger of being caught in a vicious circle.

Let us consider, for example, the following, somewhat typical, "twenty-one year provision", quoted by the Maryland Court of Appeals in a recent decision:<sup>16</sup>

"(c) *From and after twenty-one years after the death of the last surviving descendant of Mary Elizabeth Devries living at the time of my death, or upon the youngest living grandchild of Mary Elizabeth Devries attaining the age of twenty-one years, whichever event shall first occur, I hereby give the trust estate as then constituted, including accrued interest not matured, unto the children of Mary Elizabeth Devries then living.*"

Certainly, no lawyer would deliberately prepare a will or an *inter vivos* deed of trust, and substitute therein, say, twenty-five or thirty years, in lieu of the deeply-rooted twenty-one, thereby jeopardizing his client's estate plan, solely for the purpose of providing the raw materials for a test case, which might take place within a century following "the creation of the interest".

The rule against perpetuities is already frightening enough to many lawyers, and there are enough dangers of subtle nature — such as the Fertile Octogenarian and the Unborn Widow<sup>17</sup> — without running such obvious and unnecessary risks.

On the other hand, it is altogether unlikely that any appellate court would volunteer to recommend, or even to suggest, that a term in gross for any period in excess of

<sup>15</sup> Md. Code (1951) Art. 46, §1.

<sup>16</sup> *Marty v. First Nat'l. Bk. of Balto.*, 209 Md. 210, 214-215, 120 A. 2d 841 (1956). Italics added. Many a will has been criticized as inartificial, but even a casual reading of the Tormey will makes it apparent that in concept and execution, it is highly artificial. Its language requires the inference that the testator dealt with the possibility in law that a sister might have a child after his death who in turn might have a child after the death of the sister, and that such a grandchild of the sister might not become *twenty-one until more than twenty-one years* after the death of the last descendant of that sister, who was living at the testator's death. If such an eventuality occurred, the rule against perpetuities would have been violated absent the cut-off clause. MILLER, *CONSTRUCTION OF WILLS* (1927), 936, n. 12; GRAY, *THE RULE AGAINST PERPETUITIES* (4th Ed. 1942), §110.1, *ibid.*, at 218.

<sup>17</sup> *Perkins v. Iglehart*, 183 Md. 520, 39 A. 2d 672 (1944).



twenty-one years (in addition to the life or lives in being — plus, of course, the possible period or periods of gestation) be provided for in some subsequently drafted instrument. Such is not the practice of appellate courts, and, moreover, a statement of this nature would, almost certainly, be considered as mere *dictum* and would not be relied upon by draftsmen.

In short, the vicious circle (which applies to individual gifts at least) may be described as follows: Where there is no provision for a period in gross for more than twenty-one years, there is nothing for a court to pass upon; and it is practically inconceivable that a court would or could say anything by way of *dictum*, strong enough to “encourage” the drafting of such an instrument.

Does this mean that it is almost impossible to return to the original, practical, factual purpose of the twenty-one year requirement? (We say “almost impossible” because of the slight possibility that a case involving an inexpertly drafted instrument would provide an opportunity for a direct ruling, even with reference to an individual gift.)

Not necessarily! The law is not so inelastic. The law offers a range of interesting possibilities and opportunities.

There exists the possibility that a court might pass favorably upon Professor Leach’s recommendation<sup>18</sup> that *Leake v. Robinson*<sup>19</sup> be declared analytically unsound. Professor Leach suggested a three-pronged attack upon *Leake v. Robinson*; but the same result might possibly be accomplished by changing the period itself in a case involving a class gift.

Other possibilities are afforded by statutes concerning perpetuities, and also the closely related rule against accumulations (to which latter rule the arguments advanced in this article are equally applicable).

Every amendment of the contemplated nature would be helpful toward making bench, bar, estate planners, trustees and the public increasingly “twenty-five year conscious”

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<sup>18</sup> Leach, *The Rule Against Perpetuities and Gifts to Classes*, 51 Harv. L. Rev. 1329, 1352 (1938).

<sup>19</sup> 1 Mer. 363, 35 Eng. Rep. 979 (1817), holding that if there is any possibility that a class gift will not vest in any possible member of the class within the period of the rule, the entire gift is void. Cf. *Vickery v. Maryland Trust Co.*, 188 Md. 178, 185, 52 A. 2d 100 (1947).

“Gray states (§370, p. 392): ‘A devise to the testator’s grandchildren as a class is good if the vesting is not postponed to a time after they become of age, for they must all become of age within 21 years after the death of their parents (the testator’s children), and the parents must all have been born (or begotten) in the testator’s lifetime. What is true of a devise to grandchildren of the testator is true also of a devise to grandchildren of a person who has died before the testator.’”

or "thirty-year conscious", instead of "twenty-one year conscious".

Organizations, such as the Trust Division of the American Banking Association, the Corporation Fiduciary Association and the various estate planning councils would, it is believed, be serving the general public interest, as well as the interests of their members and members' customers and clients, by the urging of appropriate action.

Statutes concerning perpetuities may be classified under three heads:<sup>20</sup>

- (1) statutes which present a general rule, distinct from the common law rule, but with the same general objective;
- (2) statutes and constitutional provisions, merely declaratory of the common law; and
- (3) statutes which recognize the common law rule, but which modify or supplement it in one or more particulars.

Most important of the first group are the New York statutes<sup>21</sup> restricting the suspension of the power of alienation to a period of two lives, with the addition, in certain cases, of a minority, which statutes have been adopted, in whole or in part, by a number of other states.

As an example of the second group, an Iowa statute<sup>22</sup> provides:

"Every disposition of property is void which suspends the absolute power of controlling the same, for a longer period than during the lives of persons then in being, *and twenty-one years thereafter.*"

Of particular interest is the statutory law of Wisconsin,<sup>23</sup> which provides for *a period of lives in being plus thirty years.*

With reference to accumulations, statutes, such as those of New York,<sup>24</sup> limit accumulations to the minority of the

<sup>20</sup> SIMES, *FUTURE INTERESTS* (1951) 412.

<sup>21</sup> REAL PROPERTY LAW, §42, adopted in 1909; PERSONAL PROPERTY LAW, §11.

<sup>22</sup> IOWA CODE (1950) §558.68.

<sup>23</sup> WIS. STAT. (1955) §§230.14, 230.15 and 230.23. §230.15 says:

"Limit of suspension. The absolute power of alienation shall not be suspended by any limitation or condition whatever for a longer period than during the continuance of a life or lives in being at the creation of the estates and thirty years thereafter. . . ."

<sup>24</sup> REAL PROPERTY LAW, §§61, 61a, 62 and 63; PERSONAL PROPERTY LAW, §§16, 17 and 17a.

beneficiary, subject to various exceptions. Other states have statutes providing for a period of accumulations which is the same as that for the suspension of the power of alienation.<sup>25</sup>

In any event, the period of the "financial minority", "investment minority" — call it what you will — could appropriately be extended to twenty-five or thirty years.

Following the passage of several statutory amendments with reference to the period of accumulations, as well as the rule against perpetuities itself, in statutory jurisdictions, statutory enactments — changing the period from twenty-one to twenty-five or thirty years — would be facilitated even in "common law" jurisdictions.

In closing, we may appropriately recall the well-known statement of the very creator of the rule against perpetuities, Lord Nottingham, when he was asked where he would stop if he did not stop at a life in being as the maximum period: "I will stop whenever inconvenience doth appear".

For the many reasons considered, the term of twenty-one years after some life in being is no longer one of convenience, but one of inconvenience. The *rationale* of the rule, as expressed by Lord Nottingham himself, requires an additional term of twenty-five or thirty years, after some life in being. (Clearly, for example, "inconvenience" means the same thing for children as for grandchildren.)

Furthermore, because of the lengthening of the average life span, the continuation of the twenty-one year term constitutes not a maintenance of the originally contemplated scheme of estate planning, but rather a departure from the original scheme. From the standpoint of physiology, as well as investments, the age of thirty is today's schematic equivalent of age twenty-one centuries ago.

In the language of *Safe Deposit & Trust Company v. Sheehan*,<sup>26</sup> the attitude of the courts to the right of donors to impose restraints upon alienation should change once again (change in form, that is, not in essence, for essentially it would be a restoration and reinvigoration of the true rule) in order to protect the objects of the donor's solicitude or interest, and greater weight should once again be given to the donor's intention, so long as the execution of that intention involves no real danger of a perpetuity.

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<sup>25</sup> MONT. REV. CODE (1947) §§67-411-413, 67-416.

<sup>26</sup> 169 Md. 93, 179 A. 536 (1935).