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REPORT

ON

THE RULES AGAINST ACCUMULATIONS AND PERPETUITIES

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I. INTRODUCTION

In August, 1975, the Honourable Howard Pawley, Q.C., then Attorney-General of Manitoba, referred to the Law Reform Commission the subject of the Rules against Perpetuities and Accumulations. These rules place restraints on the extent to which the absolute ownership of property may be prevented from falling into any one person's hands until a certain period of time has elapsed. The Rule against Accumulations, as its name implies, restricts the period for which income from a fund may accumulate. The rule is set forth in legislation, passed in England one hundred and eighty-two years ago: the *Accumulations Act* (also known as *Thellusson's Act*) 1800.[1] There are two rules against perpetuities: The Rule in *Whitby v. Mitchell*[2] and the modern rule against perpetuities. They have their origin deep within the history of the common law. All three rules were received by Manitoba as the Law of England on July 15, 1870.

The Commission commenced its study by retaining a law student in 1977 for the purpose of undertaking some preliminary research but, as no priority was attached to the reference, attention was given to other matters of higher precedence. In the fall of 1979, the Commission resumed its study of the rules. It became clear to us not long after this resumption, that there were two central questions for our consideration, (1) should these rules be abolished or simply improved upon?, and (2) if the latter, how can one best achieve the improvement?

The Commission expressed the view that there was a need for some further discussion on both these questions. Letters were sent to several practising lawyers in the province soliciting their comments on these issues. Though few in number, many responses contained well-considered and thoughtful analyses on certain aspects of these questions. In particular, some gave

attention to the treatment of trusts under the Canadian *Income Tax Act* and considered whether this Act alone provided sufficient inducement in Manitoba to bring about the absolute ownership of property. The Commission also received the considered view of the Legislative Counsel of Manitoba, Mr. R.H. Tallin. At a meeting in November, 1979, Mr. Tallin presented a paper to the Commission which supported the abolition of the modern rule against perpetuities. This paper, along with the correspondence received from practising lawyers, convinced the Commission that the initial question as to whether these rules should be abolished was worthy of further consideration.

In December, 1980, the Commission had the good fortune to engage the services of Dr. D.W.M. Waters, M.A., B.C.L.(Oxon.), Ph.D.(London) of Lincoln's Inn, Barrister-at-Law to assist us in our studies. Dr. Waters is the distinguished author of a definitive work entitled the *Law of Trusts in Canada** and is a professor at the Faculty of Law, University of Victoria. Dr. Waters prepared a position paper which set forth the options for reform for the Commission's consideration. After close consultation with the Commission, Dr. Waters produced the contents of this final Report. The Commission gratefully acknowledges his significant contribution.

The structure of this Report is as follows. In Chapter II, the Commission considers the Rule against Accumulations, the younger of the rules in restraint of alienation. A discussion on the Rules against Perpetuities is then set forth in Chapter III. There, the Commission outlines both rules but discusses in greater detail the origin and nature of

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*The Carswell Company Ltd., Toronto, 1974.

the modern rule and sets forth the arguments in favour of its abolition and those against. The recommendations for the reform of the rules against accumulations and perpetuities are found at the conclusion of Chapters II and III respectively.

All of the Commission's recommendations are set out in Chapter IV and two draft bills to implement them are found in Appendices B and C. In Appendix A, the options for reform to improve the modern rules against perpetuities are outlined. Given our recommendations concerning the necessity of the rule, this discussion became superfluous. The purpose of its inclusion is educational.

II. THE RULE AGAINST ACCUMULATIONS

A. The Nature and History of the Rule

Though the younger of the two rules with which we are here concerned, we deal with it first because the issues raised are more localized, and can be dealt with more rapidly. The accumulation of income within trusts is familiar when interests are vested in minors; it is a sensible saving device for young people, and in any event they cannot give a binding receipt. Maintenance and support are normally permitted by the settlor or testator at the discretion of the trustees, and the remaining income, if any, is accumulated and ultimately capitalized. Accumulations are also familiar within discretionary trusts, and again this may be a wise manner in which to provide for and among a class of persons, such as children or grandchildren. The trustees are usually empowered to choose which of the members of the class shall receive income arising, how much and on what occasions. Surplus or undistributed income in the year is again capitalized.

The rule is not concerned in principle with these trusts providing for the living;[3] it is concerned with the person who seeks to set aside a fund, have it accumulate for a great many years, and then at the end of the period when the fund is a fortune have it pass to a fortunate beneficiary. The setting up of such a scheme would be expected to be done by will, and the fortunate beneficiary would be a lineal heir of the testator. The heir, being unborn at the time, is completely unknown to the testator, who cannot of course even know that there will be a lineal heir at the appropriate time. This was the scheme which Peter Thellusson set up by his will and which in 1799 was upheld by the Court of Chancery,[4] its

decision being upheld by the House of Lords six years later.[5] The Chancery decision so frightened Parliament at Westminster that vast fortunes would now be built up, the owners of which would have commensurate power, that they passed the *Accumulations Act* in 1800 to prevent any future occurrences of this.

Prior to the Act, the income of a fund could be accumulated for the length of the perpetuity period (then a life in being), because only at the end of that period had there to be a vested beneficiary of it. This was what Peter Thellusson did. The Act considerably reduced the permitted period, however, introducing in its place four periods of time, one of which the grantor or testator might choose. Those periods effectively were the lifetime of the grantor or settlor, 21 years from the death of the grantor or testator, and the minorities of persons living at the testator's death, or the minorities of persons entitled to the accumulated sum on coming of age. Since the lifetime of the grantor or settlor, and 21 years from the death of the grantor or testator, have no relationship to any particular set of usual trust provisions, they have proved to be both arbitrary and productive of a vast amount of otherwise avoidable litigation. A very familiar problem arises when a husband gives an annuity to his widow, and requires excess income to be accumulated and added to capital during her survivorship. The whole capital sum is to be divided among his children on her death. There is only one period which is relevant to his needs, namely, the 21 years. But what happens if his widow survives him by more than 21 years? No excess income can now be accumulated, but who is entitled to it as it arises? This can give rise to the most complex litigation in search of 'the testator's intent'.[6]

The Act can cause other problems. Suppose a parent wishes to set up an *inter vivos* trust for his or her child, with discretionary power to accumulate income, to be called upon when

necessary. Assume further that the child is mentally handicapped, it being the intention to provide for the child's needs for his or her lifetime. Should such an *inter vivos* trust be established, the Act would apply to allow the direction to accumulate for only the parent's lifetime, or worse, the minority of the child. At the parent's death (which would normally amount to the longer accumulation period) the future income would fall into the residue of the estate. In short, the parent's intention to provide a discretionary trust for the duration of the child's lifetime could not be accomplished, although such a trust would be, under the circumstances, entirely reasonable.

The plight of *inter vivos* trusts[7] was thought particularly severe in 1964 when the *Perpetuities and Accumulations Act*, 1964, c. 55 was passed in England. In 1925 Parliament at Westminster had repealed and replaced in more modern language the four *Accumulations Act* periods,[8] and in 1964 two further periods were added. These were 21 years from the taking effect of an *inter vivos* trust, and the minority of any person or the minorities of persons alive at that date. This was the alleviation to the limitations of the 1800 Act which Ontario also adopted in 1966.[9]

However, while it is an alleviation, it does not supply an answer to the needs of the *inter vivos* trust for the handicapped child we earlier mentioned, nor does it solve the excess accumulations problem. To other jurisdictions it appeared that the answer was more far-reaching. In the State of Western Australia in 1962, [10] in New Zealand in 1964,[11] and in the State of Victoria, Australia, in 1968, [12] the 1800 Act periods were statutorily abolished, and each jurisdiction reverted to the old common law rule that an accumulation was in order provided there is a vesting of the accumulated fund within the perpetuity period. It was this policy which

Alberta adopted in 1972,[13] and British Columbia in 1975.[14]

The 1800 Act and the case precedents in Canada are extremely well set out and analyzed in the Alberta Institute of Law Research and Reform's Report No. 6,[15] which led to the statutory adoption of the abandonment of the 1800 Act in that province, and we need do no more here than express our concurrence with most of the reasons for the abandonment which are so well set out there. The Act of 1800 is hard to apply and productive of litigation, and it so often defeats the donor's intentions.

B. The Recommendations of the Commission

As the Institute's Report mentions one of Western Australia's reasons for abandoning the 1800 Act was that taxation will prevent accumulations of the magnitude feared when the Act was passed. This seems to us of particular significance; such is the pattern of income taxation, including capital gains taxation, in Canada[16] that such an accumulation trust today would yield a tax haul to the Crown of enormous proportions. We also cannot believe that even an eccentric would choose an accumulation trust in today's conditions for the attempted purpose of building a fortune for an unknown heir sometime in the remote future. In an era of corporate enterprise, diversification, and take-over acquisitions leading to multi-national corporate activity, the accumulation trust wears more the appearance of the age of the horse and buggy. We certainly cannot envisage this trust as creating a social or economic problem, requiring preventative legislation, in the Manitoba of the late twentieth century.

Later in this Report, we recommend the abolition of the rule against perpetuities. Thus, we cannot advance a further argument for the repeal of the Act that the Alberta Institute cites: that the accumulation of income would still be controlled by the perpetuity rule. However, we have concluded that the arguments for the repeal of the 1800 Act are sufficiently cogent, even without this concluding argument. Our final thought is that were the problem of accumulations ever to raise its head again, the legislature would surely wish to have a statutory device attuned to the exact nature of the problem. We cannot bring ourselves to see the perpetuity vesting period of lives in being plus twenty-one years as the control device which a Manitoba Legislature of the future would adopt were it starting afresh in today's sophisticated financial world with its totally different conditions.

The Commission therefore recommends:

1. *That the Act of the Parliament of Great Britain, 39 & 40 Geo. III, Chapter 98 (known as the Accumulations Act, 1800) cease to apply in this province.*

III. THE RULES AGAINST PERPETUITIES

A. The Nature of the Rules

1. The modern rule against perpetuities.

The so-called modern rule against perpetuities is concerned with remoteness of vesting in interest. That is to say, it is concerned to ensure that if a person alienates property (normally his own) to or in favour of others who are to enjoy that property in succession, the person or persons who are to take any successive interest must be ascertained, and any qualifications he or they are to have must be possessed, within a certain period of time of the taking effect of the instrument alienating the transferor's property. Once the beneficiary or class of beneficiaries is known, and any required qualification has been met, that person or those persons are ready to take their interest in possession as soon as the property becomes available for their possession. It is the moment of the readiness to take with which the rule is concerned. It must occur within the legally defined period of time. In other words, as conveyancers say, the beneficiary must be 'vested in interest' within that period of time. When he actually receives income or capital, whatever it is to which he is entitled, he is said to be 'vested in possession', but with this vesting the rule has no concern whatsoever.

The modern rule against perpetuities is as follows:

> No interest which does not vest when the instrument of creation takes effect, is valid unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.

This period chosen by the common lawyers really chose itself, so to speak. Common law property interests were essentially based on the length of lives; the lawyers recognized periods of years only during the fifteenth century when the loan for a period of time secured on land developed into what we now know as leasehold interests. Consequently in the mid-seventeenth century when the perpetuity period of the modern rule was first formulated it naturally looked to the time-honoured life, and took the form that all contingent interests must vest, if they are ever to vest, within the time of the lives in existence when the instrument takes effect. Subsequently, since a child or minor could not deal with his property interests anyway, the period of minority (then 21 years) was added to lives in existence (or lives in being).

The modern rule against perpetuities does not permit waiting to see whether property will be vested within the perpetuity period. Consequently, the rule looks to the state of affairs as of the date an instrument comes into effect; it does not assume the validity of an instrument until it becomes clear it cannot vest within the permitted period. Consequently, even if a possible future event is highly unlikely, or even physically impossible (like the possibility of a woman of 70 bearing a child) the rule will apply to invalidate an interest unless it undeniably must vest within the permitted period. This strict application arose from the old common lawyers' dislike of uncertain titles, which dated back to abeyance of seisin.

2. The Rule in *Whitby v. Mitchell*.

The reference to the "modern" rule against perpetuities is explained by the fact that Sir Edward Coke had earlier in that century fashioned a rule against double possibilities.

This rule, known today as the Rule in *Whitby v. Mitchell*,[18] or the old rule against perpetuities, laid down that there could not be a gift to an unborn person who was to be the offspring of a person unknown at the time of the instrument taking effect, and himself the beneficiary of a preceding estate. The new or 'modern' rule on the other hand embraced all kinds of estates which might vest in the future, and therefore it claims to eclipse the old rule.

The Rule in *Whitby v. Mitchell* is a relic of a past age when the concept of a perpetuity rule was still forming. Those jurisdictions which have statutorily amended the 'modern' rule have abolished the old rule.[19] We would also recommend its abolition. The Commission recommends:

2. *That the rule in Whitby v. Mitchell be abolished.*

B. The Interests to Which the Modern Rule Applies

The modern rule applies to all immediate and successive interests, whether created behind a trust as equitable interests, behind a use as executory interests, or at common law as contingent interests (using the word 'contingency' there in its original form as descriptive of common law future interests). Indeed, this was the feat which the conception of the rule achieved. Previously there had been separate ways of dealing with different types of future interests, but the late sixteenth century and the early seventeenth century saw such a rapid emergence of new conveyancing forms of future interests that a general response was necessary. The *Duke of Norfolk's Case* was that response.

It is most unlikely today that a professional would create either executory interests (the shifting and springing executed use estates) or common law limited and remainder

estates (the contingent remainder interests which had their own destruction rules) in the wills and estate planning deeds that he draws. Indeed, if truth were known, it is probably the case that only a handful of lawyers throughout Canada know how to draw such instruments. Mr. Wolfe Goodman, Q.C., of Toronto, once wrote a compelling article on the advantage which might exist in using these estates which are unknown to the Act,[20] but our enquiries suggest that many lawyers are concerned with the hazards and unpredictabilities which they see in employing them. It is ironic, but more than likely, that, if these very significant estates of the past are met at all today, it is because a testator with his home-drawn will has stumbled into them, or a draftsman has made an error.

Today's immediate and successive estates are created behind a trust, and are therefore uniformly equitable. As a consequence it is equitable estates which are either vested or contingent, and hardly any Canadian practitioner would have used those descriptive terms in relation to any other kind of estate. The estates which will be found today in use are life estates, leasehold (or terms of years) estates, and fee simple (or absolute) estates in remainder. For instance, on trust to A for 5 years, then to B for life, remainder to C absolutely. The estate *pur autre vie* ('to X for the life of Y') is seldom found today, it would seem, largely because it assumes relationships and dependencies which no longer exist in contemporary families.

The rule is very much concerned with conditions, both precedent and subsequent. A condition precedent is one which must be satisfied before an estate vests in interest ('provided he is qualified as a medical doctor'); a condition subsequent is one which prematurely terminates an already

vested estate (as in the old form, 'to my son, George, and his heirs, but if the property is ever used for commercial purposes then to my son, Frederick, and his heirs'). The rule is concerned that an estate subject to a condition precedent shall vest in interest within the permitted period, and that a vested estate shall not be terminated by the occurrence of a condition subsequent after the close of the period, whereby the person with the right to the 'gift over' would then be entitled to claim an interest in the property in question.

Due to the long separation between the legal and equitable jurisdictions in England down to the late nineteenth century, the law strict in its controls on future interests because of the influence of the earlier mediaeval history of seisin (or title), and equity much more lax because it is unconcerned with seisin and its estates in any event are a later phenomenon, different positions existed in the case law. A condition subsequent imposed on a fee simple reserves to the grantor of the fee a right of re-entry upon breach, even if the condition is breached outside the permitted perpetuity period; and because the grantor retains that right when he makes his original grant, he is vested with the right (or power) of re-entry from the beginning. Nevertheless, because the exercise of the right following upon breach terminates or cuts short the estate in fee simple subject to the condition, the courts have taken the view that the power should not be exercisable later than the perpetuity period. If it could be so exercised, seen from the date of the grant, the condition itself is struck out, the fee simple thus enlarged to its natural size, and the right of re-entry, nowadays by statutory intervention a transferable property right in many jurisdictions, is destroyed.[21] After the *Statute of Uses* in 1535, executory 'gifts over' became possible at law, and Courts of Equity recognized the validity of similar 'gifts over' behind a trust. Conditions subsequent which would let in either of these types of 'gifts over' were also made subject to the seventeenth century perpetuity rule.

It is important to notice that this rigorous control of the condition subsequent upon a fee simple was not extended to conditions subsequent upon a leasehold estate. The lessor is vested from the beginning with his right to act if the condition is broken, but that factor, as we have just seen, could have been ignored. The crucial point, however, is that the lessor retains the fee simple, and his right to act upon breached conditions was, and continues to be, seen as an attribute of his contractual position and his fee simple estate. The rule against perpetuities has never therefore applied to lessor and lessee relationships, even if the lease is for a very long period like 999 years. For the same reason lessors may impose restraints on alienation by lessees of their leasehold interests, to which neither the perpetuity rule nor the usual restraint doctrines of the common law apply. It was restraint upon the fee simple holder which particularly concerned the old common lawyers.

So far as determinable fees simple (or conditional fees) were concerned, the common law took the view that, while there could only be a reverter after such a grant (and the reverter is a mere possibility because the determining event may never occur), the perpetuity rule being a remoteness of vesting rule, there was nothing to which it could attach. The determining event ('so long as the Grantee uses the land so granted for school purposes') is not an event which cuts short a fee simple, as a falling tree may terminate the journey of a car, and as a condition subsequent acts; it is an event which is built into the estate and merely brings that estate to a natural end. The analogy of such a termination is perhaps a car which runs out of gas. Once nineteenth century statutes in some jurisdictions made the possibility of reverter, like the right of re-entry after

condition broken, a freely transferable interest, it is clear that an extraordinary situation had come about. While future interests which were contingent remainders, conditions subsequent with the attendant right of re-entry, executory interests, and equitable interests were otherwise subject to the rule, determinable fees at law as in equity were in England not so subject and therefore the reverter could always take effect, whenever the event in question occurred. That state of the case law, rarely invoked as it is, constitutes the law in Manitoba.[22]

Evidently the conveyancer who knows his art can pick his way through this complex area, and obtain just what his client wishes. However, the inexperienced will not notice what supreme importance attaches to language, and will subject the client's instrument to future construction litigation. Is the interest vested or contingent?[13] Is it subject to a condition precedent or a condition subsequent? Is the terminating event of the fee simple cast in the language of a condition subsequent or of a determinable fee? While these questions can and do occur in contexts other than the perpetuity rule, there is no doubt that perpetuity problems considerably enhance their importance.

As we have seen, the rule applies not only where an interest is given to a single individual, but where it is given to a class of persons (ie., two or more). This is not a case of another *interest* to which the rule applies, but it intimately affects the use of future estates in family provision trusts. The rule in its case law form stipulates that the class gift is entirely valid, or it is totally void. For instance, if a grandmother leaves her residue to be divided equally ". . . between all my

grandchildren on their attaining 25", it is possible that a grandchild born after the testatrix's death will attain 25 more than 21 years after the death of the survivor of the grandmother's children. Therefore, the entire gift is void. The gift is even more vulnerable to failure if grandmother's brother makes the gift to the grandchildren, and grandmother survives her brother. If children and grandchildren are joined in the same class gift, and the gift cannot be severed, the lack of total validity attaching to the gift to the grandchildren will bring down the entire gift, and again, as totally void. From the middle of the nineteenth century the courts developed a number of construction rules for saving class gifts, such as severance and the construction of class gifts as a series of individual gifts, and perhaps the most celebrated avoidance device was the employment of the construction rule in *Andrews v. Partington*[23] to find an assumed intent by the testator or settlor that the class of beneficiaries should close within the perpetuity period. If this construction is possible, some of those persons who would have qualified as members of the class are excluded, but their exclusion saves the gift for those who qualified within the permitted period. The construction rule is applied to all class gifts, whether the interests in question are immediate or successive, and therefore, though it is very arbitrary in operation, it has saved many a gift for those who themselves qualified, but who would have had nothing under the 'all or none' doctrine.

A power of appointment is the authority to select who shall be the beneficiary or beneficiaries of another's property. The donor of the power will be either a testator or a settlor, and he may confer a general power

or a special power upon the donee. A general power is the power to select (or appoint) anyone, including one's self though the donee of the power, and the special (or fiduciary) power is the power to appoint among an enumerated list, or a class, of persons. There has to be a perpetuity control upon powers. The donor may confer the power upon a member of a generation so much after his own that the power is not exercised until some very remote time. And as for the donee of the power, he has the authority to select a person as the recipient of the property who again might be very remote in generation from his own. The law will obviously be concerned with both these possibilities.

Consequently the courts have applied the rule, and required that the donee of a power, whether it is general or special, must be a person who within the perpetuity period is ascertained, qualified, and under the terms of the instrument of creation empowered to exercise it. This establishes the validity of the general power. It does not matter that it could be exercised after the period, because a general power is tantamount to ownership (the donee may appoint himself). In the case of a special power, however, the power must not only be exercisable, but be solely exercisable, within the perpetuity period. This establishes the validity of the special power.

So far as the appointments made in exercise of either power are concerned, the perpetuity rule applies to each interest created, but there are different times from which the period begins to run. The period begins to run from the date of the instrument of appointment in the case of a general power, since this power is tantamount to ownership. But the position is different with a special power; the period begins to run from the date the instrument

creating the power took effect. This is because the special power of appointment fills a gap in the dispositions of the instrument of creation, and must be seen as part of that instrument. Many an appointment under a special power has been rendered invalid by this early commencement date of the running of the perpetuity period. The draftsman had overlooked the fact.

The rule also has some odd side effects in the way in which it applies. A successive estate which follows a previous estate that is void for perpetuity reasons will itself be void, if it carries language which expressly makes it subject to the same contingency as brought down the previous estate. However, it will not so fail if the language used does not refer to the same contingency, but merely expresses the intention that the successive interest shall follow after the previous (invalid) interest. Again, much turns on the competence of the conveyancer, and the language he chooses to employ, but the judicial decisions applying the rule in this way are surely justifiable. If express language repeats a contingency which invalidated the prior interest ('but, if [the unborn person] shall not have a child, to A and his heirs'), the successive interest is tainted by the reiteration of the invalid contingency. If the gift had been left to follow after ('and then to A and his heirs'), it would clearly and obviously be distinct from the previous interest.

It is often said, though erroneously, that the perpetuity rule does not apply to gifts to charitable trusts or corporations. This is far from the truth. An immediate contingent gift to charity is void when the contingency could occur beyond the perpetuity period, a gift over to

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p. 19 - lines 6-8 should read:

"there is a gift over to charity from a prior gift to charity will the remote contingency of the gift over not invalidate that gift over. The reason for this preservation is that"

p. 19 - line 21 the word "perpetuity" was partially blanked out.

charity is void if the prior gift is to a person or non-charity and the gift over is contingent upon an event which might occur at too remote a time, and, even if the prior gift is charitable, it will not save a non-charitable gift over dependent on the same remote contingency. Only if there is a gift over to charity from a charity will the remote contingency of the gift ate that gift over. The reason for this preserv at the courts regard the property in question as dedicated to charity when the prior gift takes effect, and as never losing that characteristic though there may at some time be a change in the identity of the particular charity which is to benefit.

The rule has also been applied to administrative obligations imposed upon trustees, and administrative powers conferred upon them. In principle, the rule is not concerned with duration, and therefore does not affect how long any such obligation or power may last. But, if such an obligation or power is only to arise in the future on the occurrence of an event which may be beyond the per ity period, the rule does apply. For instance, a house is left on trust for the children of a living person, "but, if at any time a majority of the children then living decide they no longer wish the house retained, my trustees are to hold it on trust for sale and conversion," etc. The rule invalidates the trust for sale, because the children are not themselves lives in being, and the decision to retain the house no longer might be taken more than twenty-one years after the parent's death.

The rule has a random application to matters other than family trusts and wills. Being a property rule,

it does not generally apply to contracts, but it has been applied to options to purchase land. Such an option contract is conceived as specifically enforceable, thus giving the option-holder a would-be equitable interest in the land, an interest which is contingent upon the holder's decision to exercise the option. The key is therefore the specific enforceability of a contract that confers upon one party the option to purchase property. Whatever the nature of the property, if specific performance is available, the rule should apply. All options to purchase realty interests, such as the option given to a tenant to purchase the reversion, are clearly included, because specific performance is obtainable, and in time it may come to include as well other special property interests. Options to renew leases, however, are not within the rule, though the option be dependent on a remote contingency. Why this is so is a matter for debate; it may merely be that the common lawyers avoided applying the rule to leases.

The rule does not apply to provisos for redemption in a mortgage, however long the period of amortization, and there is some doubt as to whether, and if so to what extent, it applies to easements and other *iura in re aliena*. If the right over another's land is to arise in the future and on an occasion which may be beyond the perpetuity period, however, the rule has certainly been held to apply. This in turn has lead to an effort by other courts to construe such clauses as creating easements which are to arise immediately, because in this way the rule is avoided altogether.

The test to determine whether the rule might apply to the transaction or instrument to hand is to ask whether

a property interest of any kind is in question, either being in existence or to come into existence, and, if so, whether any person will or may become entitled to that property interest at a point in time which is beyond a life in being plus twenty-one years. If the property interest is commercial or arises in a commercial transaction, like contract or a real estate deal, and the test yields a positive answer, it is wise to check the commentaries on the perpetuity rule to see whether the courts of the jurisdiction have actually applied the rule to the particular property interest, or have found reasons for not doing so. If the courts have been silent, an advice and directions application may be necessary.

Finally, though the rule is properly concerned with remoteness of vesting, and not with duration, it has been, and continues to be, applied to control duration. Under the case law a gift to a non-charitable unincorporated association or for a non-charitable purpose may last for twenty-one years, but no longer. Such a gift is not to a person or a class of persons, therefore there is no express or implied life in being, and consequently the law applies that when there is no life in being the perpetuity period is twenty-one years. Here that period is given a limit of duration function, and determines how long the non-charitable purpose may last before the law requires that the funds revert to the settlor or testator.

C. The Purpose of the Modern Rule

1983 will make the three hundredth anniversary of the House of Lords decision which launched the modern rule against perpetuities,[24] and it would not be surprising that

over such a span of time the purpose or purposes of the rule would change, or become less obvious, or even be forgotten. Nor is that proposition as preposterous as it might seem. Once the rule is adopted by the courts, the very inductive growth of the common law through *stare decisis* ensures that a rule's existence becomes indelible. Attention is focussed on its operation and how property dispositions and transactions are to be affected by it. The conveyancer has no reason for considering why the rule should be, or should be as it is; his task is to know the rule so well that he can reduce to the smallest possible dimension its effects on his client's wishes. The judge also is rarely likely to be concerned with the policy behind such a rule as this;his task is to determine if, and how, it applies to the issue before him, given the precedents brought to his notice, and the emphasis on technique and logical deduction which, he finds, characterizes those precedents. Not until two hundred years after its commencement did any legislature become interested in its existence, and then the only concern was to remove some obvious excesses or contemporary inconveniences of a rule, which was by then luxuriant in growth, complex to an extreme, and hallowed by time. Few in the legislatures understood it, there was a vague sense that on the whole something like it was probably necessary, and lawyers who worked with it would naturally think in terms of a 'tune up' as all that was required.

A number of factors have been put forward to explain why the rule exists - not only in the seventeenth century beginning, but today - and they include apprehension of the accumulation of property in a few hands, that property subject to limited interests over a good many years will be

unproductive, and that people with wealth will make dispositions of their property aimed only and capriciously at depriving future generations of the same amount of control that the original disposer had had. Fear of the damage to society which the eccentric may cause is another description of this last factor. However, most commentators appear to agree, in whatever way they phrase them, that the rule has two central purposes. The first is to bring about the availability of land, and possibly some forms of personalty, within regular and sufficiently frequent periods of time. The second is to strike a fair balance between the desires of present absolute owners to regulate beyond their own mortality the enjoyment of their property in the years to come, and the wishes of those living tomorrow to have the same, or at least effective, control over the enjoyment of property which they have inherited. It is the second of these two purposes which has probably the widest acceptance in terms of why we have, and need, the rule today, though both are forcefully argued to be relevant to today's scene.

However, neither of these explanations - indeed, none of the above explanations - explains why the rule should be concerned with remoteness of vesting rather than duration. By duration is meant the prohibition on property being made inalienable for longer than a certain period of time. Indeed, there is evidence from the case law that the judges themselves found a duration rule potentially more embracive of the extent of control which they sought. When the gift was not to lives (eg. 'to my trustees for the advancement of the local newspaper industry, so long as two newspapers exist in my home town, XYZ, Manitoba'), which are the measure of any one human's enjoyment and also definitive in length of time, the courts turned to a duration control.

As we have seen, purpose trusts were those handled on a different basis. Vesting was not the only concern with these trusts; purposes do not die, and therefore the judges limited the duration of purposes by borrowing the vesting period from the modern rule against perpetuities. Since there are unlikely to be any lives in being associated with a purpose trust, the period became twenty-one years, as it does when applied to a trust for persons and there are no lives in being which can be adopted. The arbitrary nature of this solution, and the fact that a rule against perpetual duration was thus in force, were masked by the policy decision of the judges to exempt charitable purpose trusts from that rule. Those trusts were by far the most important of purpose trusts, both in social significance and in volume. But this does not answer the question as to why a much simpler control of perpetuities, namely a maximum period of duration before an absolute owner must once again exist, was not adopted in 1683 for all purposes.

The explanation for a remoteness of vesting rule would seem to lie in the fact that from mediaeval times lawyers had reasoned, and conceived controls, in terms of vesting. The constant struggle from the eleventh century between landowners anxious to 'tie up' their land and so keep it in the future family, and the future family members themselves anxious to break those ties and give themselves the same absolute control the ancestor had had, was conducted on a series of legal battlefields. At first the scene was the entailed estate, but by 1613 in *Mary Portington's Case*[25] the family members finally prevailed and the entailed estate was barrable whatever the landowners' response. However, even earlier, perhaps sensing defeat with the entail, landowners had shifted the scene to contingent remainders. Gradually, in response, the courts developed a series of

destruction rules, and these, based on abeyance of seisin and the ethereal conceptual existence of that which may never exist in fact, substantially reduced the reliability of the contingent remainder for the landowner's purpose. Vesting was essential if the remainder was to survive for any effective period of time after its creation. A preceding legal life estate and a preceding legal term of years were both employed by landowners in an attempt to 'tie up' their land by way of contingent remainders to a series of unborn fathers and unborn son limitations, and in the rule against double possibilities (now known as the rule in *Whitby v. Mitchell*) in the early 1600s and *Sanders v. Cornish* in 1630,[26] the unborn lives were struck down. Vesting delayed by such devices would not be permitted.

Then the tide of events turned very much against the family members. Executory interests, creatures of the *Statute of Uses*, were held in 1620 not to be subject to destruction by the contingent remainder rules, and the new equitable estates (the estates behind a trust, the concept accepted by the courts as valid in 1634)[27] were totally uncontrolled. Trusts to preserve contingent remainders became popular with landowners, as if to revenge an old defeat. In 1595[28] and 1671[29] family members were victorious in obtaining the ruling that executory interests, whether contained in *inter vivos* or testamentary instruments, were to be construed as contingent remainders, and so destroyed, if that were possible. But any conveyancer worth his salt made sure his executory interests could not be construed as remainders; he ensured that they could only 'shift' and 'spring'. So that by 1683 lawyers on behalf of family members were seeking a successor to the rule against double possibilities which, working inevitably with the familiar

vesting concepts, would achieve the same result, but be applicable not only to common law legal estates, but also to executory interests and equitable estates. The answer, when it came, was vesting within a life in being. The rule was simple but it worked, and the courts, though developing it beyond anything the House of Lords could then have foreseen, would later find no reason to jettison anything that worked. The landowner thereafter could only 'tie up' his land with legal or equitable contingent remainders so long as there survived lives in being at the time of the settlements creation.

Undoubtedly, the purpose of the rule at this time was to prevent land from being 'tied up' indefinitely, and in England this continued to be its essential purpose down to 1877 when the *Settled Estates Act* enabled tenants for life to acquire from the courts the power to sell. In 1882 the *Settled Land Act* itself gave this power, among other management powers, to all life tenants of family estates, and the great day of the English family estates, carried on since Sir Orlando Bridgeman's time in the seventeenth century by his device of successive 'strict settlements', was almost at an end. Nevertheless, the demise of the 'strict settlement' was too early for it to have any impact in Canada,save for some hardly applicable local legislation in Nova Scotia, Ontario and British Columbia which appears never to have been very much invoked. Manitoba, coming into being in 1870, avoided all this history, though it acquired the vesting rule against perpetuities.

However, part of the development of the rule involved its extension to trusts for sale. Why it made this leap from settlements and trusts of land to trusts of funds, whose assets are constantly changing in the process

of investment, seems never to have been fully explained. One supposes that, by the eighteenth century when these "traders' trusts" were first introduced, the courts' vision was so locked into remoteness of vesting that such trusts naturally came into question with their successive estates. The move to regulate these trusts with the perpetuity rule marked a significant shift in legal thinking. It was no longer the taking of land, or indeed of any other property, including stocks and bonds, out of commerce that was the concern. Remoteness of vesting *per se* was the concern. And from this occurrence has come the purpose which is nowadays discerned as the essential object of the rule, namely, to strike a balance between donors who wish to spell out how future generations shall enjoy the donor's wealth, and those future generations of donees who wish to decide for themselves. Some authors have characterized this idea as controlling 'the grasp of the dead hand', 'ruling from the grave', and as a recognition that 'property is for the living'.

However, the object of balancing interests does not explain why, pursuing the theme of remoteness of vesting, the courts have carried the modern rule against perpetuities into the areas of contract, of easements and rights over another's land, and of administrative trusts and powers. Nor does it explain, if these extensions are in accordance with recognizable purpose or principle, why options to renew leases may be exercised at any time, while options to purchase the reversion may not. Far from striking a balance between opposing interests, if that is the rationale, the grantor of an option to purchase which he knows the grantee will exercise or surrender within a short period of time is given a considerable advantage. Property prices rise unexpectedly, the grantor did not protect himself with

a price adjustment provision, and to prevent the grantee acquiring his gain through taking up the option, the grantor has the option struck out of the contract for violation of the perpetuity rule. As Morris and Leach, *The Rule Against Perpetuities*,[30] point out, making options to purchase the reversion subject to the rule can have results which are directly contrary to what the authors see as one object of the rule, namely,the proper utilization of land.

D. Is that Rule Necessary Today?

(1) The practitioner's view

It is an odd fact that among a gathering of practitioners mention of the rule against perpetuities always evokes smiles. It seems that the rule is associated in many lawyers' minds with the academic world; it is a rule which is no doubt educationally of value, but surely something of limited real significance for the busy practitioner. Lawyers who attend wills and trusts section meetings, and those who specialize in estate planning and administration of estates, seem often to hold views which are not very different. Essentially they make the comment that the likelihood of their today drawing trusts where *vesting* ("of all things - I thought you meant trust termination") will not occur within the span of all the possible lives in being, plus twenty-one years, is about as likely as the abolition of taxation.[31] "If I had one hundred problems", said one practitioner, thereby parodying a one-time comment of a well-known political leader, "the rule against perpetuities would be the one hundred and first".

The average testator, we are assured, is interested in his spouse, if she survives him, his children, and his grandchildren. Many a testator will have children by more than one marriage, which will add to his concern for them all, and he may also have financial responsibilities to a separated or divorced spouse that will continue beyond his own death. The period of survivorship of the wife (or husband) will usually be succeeded by a division of capital among children, grandchildren representing deceased parents, and trusts will be contemplated during the minority of grandchildren. Powers of appointment, other than the power of encroachment, are more rarely found in Canadian wills than has been the practice in England, but the beneficiaries of them are likely to be children and grandchildren. In other words, the burden of comments made to us is effectively this - that the rule against perpetuities was conceived with the plethora of future interests in mind that were available to the draftsman up until this century, but only a handful of which survive in practice, and that it was the complex large family settlements of English history, unknown in Canada, that were essentially the stuff of perpetuity problems. Being asked for their views, practitioners questioned for the purpose of our research fell broadly into two classes: first, those who thought the rule irrelevant to modern life and legal practice, and would abolish it, and, secondly, those who agreed as to its apparent irrelevance, but would not abolish it in case it might prove useful in the future in controlling some form of perpetuity which society cannot now discern. Members of both classes often confessed that without research they had only a rough idea of the details of the rule; very few volunteered that they knew the rule well.

Whether or not these opinions are valid, and the

speakers sufficiently well-informed to pass any opinion, are matters which need not be discussed here. The point we wish to make is that, though aware of the rule's existence, very few of those interviewed considered the rule of any practical significance today in their practices. On the other hand, the *Income Tax Act* (Canada) was taken seriously; all clearly had a good working idea of its provisions affecting trusts and estates, including complex sections and subsections.

(2) The view of the authors and the reform agencies

We therefore turned with considerable interest to the authors and the law reform reports for their responses as to whether the rule is any longer necessary. What would the authors and the reform bodies make of this type of opinion, a reaction which appears to be fairly typical across Canada of the practitioner's attitude. The older authors, such as Gray and Simes, give the purposes of the rule, as we have previously seen them, and let that suffice, as one might expect, since the need of a rule was not an issue in their day. But when one turns to the contemporary writers and to the law reform reports, it is surprising to find only lightly sketched contentions and arguments which suggest an implicit assumption that the rule should be, or will be, retained. To illustrate why we came to this opinion we will examine the two best known works in the Commonwealth countries on the subject of perpetuity.

After a close and critical discussion of the grounds which have been put forward to explain and justify the rule's existence, including the reflection that, even if the rule did not exist, it is likely that the modern trust would be terminated well within the present perpetuity period, Dr. J.H.C. Morris and Professor Barton Leach in

England in 1962 had this to say in *The Rule Against Perpetuities*:[32]

> Still, the present authors conclude that on the whole the Rule does more good than harm, though the policy considerations underlying it are much weaker than they were 300 or 100 years ago. The English Law Reform Committee in 1956 regarded the necessity for placing some time limit on the vesting of future interests as "beyond argument".

There they leave the matter. How the rule does more 'good than harm' does not appear to be explained, and we were not able to discover why it was thought such good necessitates the retention of such a complex body of law, to which the Law Reform Committee in England[33] then proposed (later the 1964 Act) to add several pages of amending legislation. From such eminent scholars this part of their work is to us puzzling. We can only surmise that the nature of documents drafted in England continues to make the case there self-evident.

The late Professor R.H. Maudsley, another eminent English scholar, in his recent book, *The Modern Law of Perpetuities*,[34] demonstrates that the perpetuity rule does not secure the alienability of property or of beneficial interests. Nevertheless, he continues:

> . . . those who argue for [the rule's] abolition would, I suggest, think again, if it became the practice to set up trusts for great-great-grandchildren, or more remote issue. . . . Most people, I would expect, would think that the law should not allow a settlor or testator to make such a gift. But why? And how to separate the gifts which you would allow from those which you would not? There is no *a priori* answer. It is a matter of judgment and degree.

He goes on to explain that the judgment and degree would determine how the law will balance the wishes of the disposing generation, and the wishes of the beneficiary generations to come. It is the maintenance of that balance - "I accept that there should be some way of limiting the control by the dead of property in the hands of the living"[35] - which in Professor Maudsley's view makes the rule necessary. However, given the instance of an undesirable trust which he chooses in order to illustrate his case, it is difficult to see what force could attach in Manitoba to the author's argument. The law of the province should always be responding to real problems, not fanciful ones, whether it is the making of new law or the abolition of old law that is in question. Is there any real likelihood in Manitoba that such an unprecedented practice as the author warns us against would ever occur? In the setting of this province such a warning is reminiscent of the apprehension of future vast fortunes and consequent power that followed Peter Thellusson's will, and led to the *Accumulations Act*, 1800. As we have noted, two western Canadian jurisdictions have now recognized the long-acknowledged invalidity of that original apprehension.[36] And if a few eccentric, wealthy people in Manitoba chose to draw such wills, is that enough to prove the necessity of such a complicated control device as the modern rule against perpetuities? Would it really matter what a few eccentrics do, if assets in the trust portfolio are regularly being sold and others purchased in the course of investment? These were the questions that we found we were asking. It may not be the function of the tax laws to prevent perpetuities, but there is little doubt that the chief beneficiary of such an eccentric's accumulation trust would be the

revenue authorities, whatever tax changes the future may bring. Indeed, Professor Maudsley concedes this in his accompanying remarks.

> The real issue, as we see it, is whether there is any balance which needs to be held. If what is objectionable on the part of the disposing generation - "the dead" - is something which only the eccentric would ever do, there really is not a social problem, and therefore any call for legal intervention. Prior to 1914 settlements and trusts might still be created whose object was to keep fortunes in the large Victorian family over as many generations as possible, but in Manitoba, if they were ever with us, those days have long since gone. In these days of the nuclear family, and the frequent need for property distribution, including property held in trust, on the breakdown of marriage within that nuclear family, is there any type of disposition by "the dead" with which lawyers today are familiar, and which is so objectionable that it constitutes a necessity for the law's intervention? Professor Maudsley appears to give us no evidence of any such disposition, and we have not been able to think of one which we could seriously put forward. Perhaps again it is the English scene with which Professor Maudsley was essentially concerned.[37]

The first question - is the rule necessary? - in fact contains two questions: (1) is a rule of any kind necessary in present-day Manitoba, and, if so, (2) does the rule against remoteness of vesting constitute the most effective and simplest control that the law can devise?

It is with these questions in mind that one turns to the report of the law reform commissions, and here we

meet with the contentions that lead one to conclude that these bodies saw themselves as concerned with the *reform* of the remoteness of vesting rule. Certainly Dr. Morris had been advocating this for many years in England, and in Professor Barton Leach he had an enthusiastic ally in the U.S.A. It would therefore have been perfectly natural for the Law Reform Committee in 1956 in England to see the issue in these terms. Certainly they gave short shrift to the idea of abolition. As we have seen from the remarks of Dr. Morris and Prof. Leach, the Committee merely said they considered it "to be beyond argument" that there was a need for some limit on future vesting. In 1965 the Ontario Law Reform Commission may have taken its lead from this remark, for the Commission reproduced it in their report,[38] and added that "there is a general acceptance" that a rule is necessary to strike the balance, of which we have spoken here. They concluded their remarks on abolition with these words:[39]

> Nowhere is there any considerable body of opinion that would wish to abolish the rule [against perpetuities] entirely, and accordingly, we can see no reason for recommending its abolition. Indeed, there seems to be general satisfaction with the rule apart from the manner in which it applies and apart from a few instances in which for obvious reasons it should not apply.

When the Alberta Institute of Law Research and Reform issued its *Report on the Rule against Perpetuities* in 1971,[40] the Institute members at the commencement of their report said that "property is for those who are living",[41] and adopted Professor Simes's view that "the Rule against Perpetuities strikes a fair balance".[42] Though such laws might deter, they did not regard the tax laws as "a complete substitute for the Rule",[43] and they were "not

prepared to go this far"[44] as to recommend the abolition of the rule to commercial transactions. At this point they moved to their discussion concerning the reform of the rule.

In British Columbia no report was issued. A committee of the Wills and Trusts Section of the Canadian Bar Association (British Columbia Branch) took the English, Ontario and Alberta Acts, and worked on these as the basis for their own recommended legislation. Their recommendations were essentially contained in the *Perpetuity Act* enacted in 1975 and proclaimed four years later.[45]

E. The Arguments in Favour of Abolition

We turn first to the character of Canadian property dispositions within the family. While the statutory corporation is commonly used, possibly preferred, in many estate planning situations today, it seems clear that the corporate device cannot be used to 'tie up' shares in unborn persons. There is no reason why trustees should not be registered shareholders, holding on trust for unborn lives, but this merely means the trust has to be used if that kind of asset recipient is intended. Infants can own shares, but in practice such shares are likely to be held in trust, so that the trustees can vote the shares. However, in view of the shortcomings of the corporation as an instrument for securing perpetuity, it is significant that Canadian practitioners use the corporation and the trust together without being concerned with perpetuity problems. We are told that this is because, as we have said, Canadians wish to provide for spouse, children, and grandchildren. *Inter vivos* trusts are almost always tax-saving in purpose, and are therefore moving assets between generations whose members

are either alive at the time of the trust's creation, or will be born well within the perpetuity period. Vesting tends to occur in these trusts either at once or on the dropping of an immediate life tenancy. So far as testamentary trusts are concerned, children of the testator are lives in being, so that this moves the end of the perpetuity period even further off into the future. It is less frequent that testators wish vesting in *interest* (ie. as opposed to possession) of grandchildren to be delayed beyond the twenty-first birthday. But, if they do, it is at this point that the practitioner has to watch in a 'no-reform' province, such as Manitoba, that he does not trip over the perpetuity rule. Class gifts are vulnerable, as we have seen. Though, here again, for tax reasons individual trusts for grandchildren are often preferred, and with increasing longevity among Canadians, their children's families are normally complete when grandfather or grandmother makes his or her last will.

Some practitioners in the estates departments of larger law firms report that there is a marked move in wills to outright, immediate dispositions. As long as Canada had estate tax or succession duty legislation which did not levy tax or duty on the death of income beneficiaries, there was an advantage in creating surviving-spouse-for-life-remainder-to-children trusts, if the estate assets were likely to appreciate in value during the surviving spouse's lifetime. The estate would be valued for tax or duty purposes at the testator's death. However, now that there is no longer such death taxation (ie. aside from capital gains tax), the incentive for many testators to create successive interest trusts has gone.[46] Moreover, today's wives often do not see why they should not have

absolute ownership of assets passing under the husband's will, even if their mothers were prepared to tolerate life estates and trustee powers of encroachment. As for *inter vivos* trusts, these are principally employed in Canada for the purposes of tax reduction, and involve moving assets from adults in high tax brackets to children or grandchildren in lower tax brackets. They are also used to provide sustained maintenance during their lives for mentally or physically handicapped persons. Common law estates are very rare, because the layman drawing his own will tends to employ the stationers' form where a space for the appointment of "Executor and Trustee" is provided. Moreover, because the layman almost invariably has the living in mind as his testamentary donees, he does not create perpetuity objections.

It is against this background that any consideration of the rule against perpetuities in Manitoba has to be undertaken, and it seems clear from the evidence that delayed vesting in interest beyond a period of something like eighty years from the instrument of creation taking effect would be very much the exceptional situation in the province today. This, of course, could suggest that the legislature need do nothing. There is not a problem, however lacking the existing law may be. However, the present case law rule, as it operates in Manitoba, has an obverse significance; it is a trap to the unwary whose dispositive intent would not even have offended our forefathers. To retain such a rule which can do gratuitous injury, is indefensible, and yet to respond by recommending that repairing legislation, or a new statutory rule based on vesting, be adopted would be wrong. It impliedly asserts not only that, because of gifts to the remote unborn, perpetuity continues as a real social or

economic danger in the province, but that the remoteness of vesting rule is the most appropriate response the Manitoba legislature can make for the needs of the present day. Abolitionists would say there is no evidence of a continuing perpetuity danger, or even if there were, there is no evidence that the remoteness of vesting rule is the most desirable response.

It is conceivable that a farmer or businessman, who has built up his enterprise himself, and wishes it to be kept in the family into the remote future, may attempt to create a perpetuity by a continuous succession of life estates to the eldest son of each future generation. It is also conceivable that the land investor, whether resident or non-resident in the province, may desire to 'land bank' with the intention of taking a considerably enhanced profit at a much later date. But abolitionists question whether it is not in reality the tax advantages, given or withheld by the federal government, which would govern his decisions, and thus control the farmer or businessman who wishes to keep his enterprise in the family.

As to non-resident land investors it is questioned whether indefinite retention would be sought by way of successive interests in the living and the unborn, and whether in any event, if this problem of indefinite retention were to occur, it would not be the better approach for the legislature to enact legislation exactly attuned to the nature of the problem, as it is found to be.

Indeed, even if a rule were to be considered necessary, it is said to be indisputable that the rule should be as simple as possible. Its task would be to catch the instances of eccentricity, and to be seen clearly

to be doing nothing else. For this purpose, to retain in Manitoba the complex rule against remoteness of vesting, whether in amended or completely new statutory form, is a curiously heavy-handed solution. The acid test is said to be this: if no rule existed controlling the perpetual withholding of absolute title, and a rule were needed, would we today recommend to the legislature a rule which controls by way of limiting the remoteness of vesting? If a rule were needed, it is argued that a duration rule would be far preferable. For instance,'no trust or other creation of successive interests shall endure longer than 100 years. On the expiration of that period, should termination not have occurred earlier, the person or class of persons then in possession, whatever their interest in the property, become absolute owners, and all other subsequent interests are extinguished. This provision is subject to the instrument providing for any other mode of termination at the close of the period.'

Unnecessary complexity in the law is indefensible, whether it be case law or statute, and it is argued that that should be a prime axiom. It has been written of the *Perpetuity Act*, R.S.B.C. 1979, c. 321:

> The Act has not made any simpler a technical and complex area of law. However, it has removed the traps which abounded in the common law, and into which even the most careful draftsman could fall. Indeed, perhaps the great virtue of the Act is that a draftsman need not even know of its provisions, and it still will provide a safety net to save inexpertly drafted dispositions which would have been automatically invalid at common law.[47]

While one can appreciate an approval for the final disappearance of those traps, if there were a simple alternative to produce the same result, the above comment, though not intended in that manner, can be seen as an indictment of the method chosen. Should not a lawyer at least know, and be able to advise his clients, how the law may ultimately amend the client's dispositions, so as to fit them within the perpetuity period? Had the client known what would happen, he might well have wished to make different dispositions. This, it is said, is certainly the experience of the profession.

Family property dispositions aside, abolitionists point to the inappropriateness of applying a life in being, plus twenty-one years, duration rule to other situations. First, as to non-charitable purpose trusts, it is argued that there is no conceivable reason why, there being no life in being, it should be twenty-one years. Moreover, no duration period governs non-charitable corporations, and it is underlined that Canadians prefer to incorporate their purpose activities, whether charitable or otherwise.

The abolition of the rule against perpetuities would likewise leave the validity of options to purchase to the law of contract. That a period of life in being plus twenty-one years should be applied to commercial interests subject to the rule is thought to be doubly absurd. First, that period was conceived for family settlements, being roughly the lives of the next generation (the children), and the minority of the generation after that one (the grandchildren). It is totally irrelevant to the needs involved with any other kind of interest. Secondly, to make an option to purchase subject to an 80 to 100 year

vesting rule is to invite the statute's inclusion in the humour column of the financial and business pages. That anyone would grant such an option today is, we are told, unimaginable. Two years is normally regarded as a lengthy period. That commercial interests should be subject to any perpetuity rule is misconceived for yet another reason; contracting parties are at arm's length, and strike a bargain. The rule against remoteness of vesting can innocently produce as much unfairness as the *Statute of Frauds*, a subject which we have previously reported on.[48] If there are problems with options to purchase, as there may well be with long leases (though they are *not* subject to the rule), the appropriate response is through legislation which precisely pinpoints the problem and focuses the solution. Governments in the centuries prior to the present left many problems for solution by the courts, and the courts responded in the best way they could. That state of affairs is also long since gone, and with it the need for present society necessarily to perpetuate the law and the techniques of those years.

Indeed, abolitionists would say, the rule against perpetuities is essentially yesterday's device for solving yesterday's problems. Faced with a Parliament and government which was likely to do nothing, the courts fashioned the rule in the seventeenth century to deal with a real contemporary problem. Thereafter, "like Topsy, it just *growed*" to become as it is today, and to reach even outside settlements and trusts. Technical and complex though it became, and is, it may very well in times past have prevented overlarge conglomerations of landed wealth, and concentrated the benefactor's attention upon the needs of the living rather than upon his own familial pride and the remote unborn. But its day, certainly in this

province, is done. Legislators no longer look to the courts for solutions to domestic issues. *"The Dower Act"* C.C.S.M. c. D100, *"The Testator's Family Maintenance Act"* C.C.S.M. c. T50, *"The Devolution of Estates Act"* C.C.S.M. c. D70 and *"The Marital Property Act"* C.C.S.M. c. M45 are all evidence of this. Indeed, the fact that the legislature of Manitoba has not already legislated, or been asked to legislate, on the 'tying up' of property in successive interest settlements suggests it is not a current policy issue.

It seems clear that the remoteness of vesting rule should not be applied to contractual options to purchase, to easements and other rights over another's land, and to trustee's administrative obligations and powers. Morris and Leach have themselves cogently argued that this is so.[49] However, abolitionists would go further than Dr. Morris and Prof.Leach in that they would not just restrict the rule's application, as these two authorities have advocated; they would abolish it, even so far as it applies to family trusts and settlements. On this fundamental issue, Morris and Leach are their adversaries.

One of the primary arguments they advance in favour of the rule's retention, in the context of family settlements and trusts, is that the rule strikes a balance between the conflicting wishes of the disposing generation and that of the beneficiaries. This reason is offered by the Alberta Institute as a primary justification for the rule's retention.[50]

The abolitionist would reply that the balancing argument is no longer valid, certainly so far as the trust is concerned, and in any event the time has come for all successive interests to be capable of creation by one method only. That method would obviously be the trust. With the trust, the abolitionist continues, it has always been the case under

the rule in *Saunders v. Vautier*[51] that, whatever the provisions of the trust, if all the beneficiaries, both in possession and contingently entitled, are adult under provincial law, capacitated, and ascertained, they can get together and demand the trust property from the trustees. The trustees must comply; they are then given a release by all the beneficiaries, and the trust is terminated. Prior to 1958, however, the problem was that in so many family settlements and trusts not all the beneficiaries were ascertained (e.g., "those of my children and grandchildren who qualify as medical doctors"). There were also likely to be infants and minors, and possibly unborn beneficiaries (e.g. "on trust for Lucy's children". Lucy is 25 years old when the testator dies). It was the fact that these trusts could not be terminated, or their terms varied, by those beneficiaries who were themselves adult and capacitated which led to the passing of the *Variation of Trusts Act* in England in 1958.[52] Within a few years that legislation was copied throughout common law Canada, in some Australian states[53] and in New Zealand. It appears as section 61 of *"The Trustee Act"* C.C.S.M. c. T160 of Manitoba.

The effect of this section is that to a very large extent trusts in favour of persons in succession now remain in effect only with the willingness of the adult and capacitated beneficiaries that they do so. The court is empowered to consent to any arrangement put before it varying or revoking the trust, and it consents on behalf of those who cannot consent for themselves - the unascertained, the infants, and the unborn. It cannot be said without qualification that only with the consent of the adult and capacitated does a trust today remain in effect, because the court has an overall discretion whether to

give its consent and a duty to ensure that the persons on behalf of whom it consents receive 'benefit' from the proposed arrangement. Nevertheless, in practice throughout the Commonwealth countries which have this legislation (the states of the United States do not) the courts have been consistently prepared to terminate without any doctrinaire objection, providing only a good case is shown. Usually it is tax saving, but a whole variety of reasons appear in the reported cases. Our attention is drawn to the fact that there is no reason why the adult and capacitated beneficiaries should not be able to persuade the court that each beneficiary, whether in possession or contingently entitled, with a sum of capital in his pocket proportionate to his interest is a more beneficial arrangement than successive limited interests extending into the remote future. The capital shares of the infants and the unborn would be placed in new trusts for them till they attain majority, and the adults would have ready cash, or stocks and bonds absolutely owned which they can sell or employ as security. People have mortgages to keep up, school fees to pay, bank and credit card loans at onerous interest rates, and family businesses with shrinking profit margins or needing the infusion of capital. On such a business may hang the financial well-being of the family. Did the settlor or testator foresee all these trials which beset the present generation? Possibly he did, and he wanted his wealth to be the family's support over two or three generations if all else failed. Equally possibly, he did not; he simply thought a trust with successive interests was a good provision, in view of the fact that he had a significantly large estate to pass on. He had not considered all the problems his successors now face.

Of course, on the other hand, he might have had a small estate, and he was ill-advised to create a trust for successive generations, or when he made his last will his estate was significant, but it was whittled away by inflation and nursing home charges before he died. All these are proper considerations for the court.

The point the abolitionist is making is that it is not the testator who controls the future, but the judge who decides today (when that future has come) whether a sufficient case has been made out for an arrangement which would revoke the trust. And, it is underlined, this legislation already exists; it has been on the Manitoba statute book for over seventeen years.[54] Such a jurisdiction would have been unthinkable before 1945, and it was only because of the effects of high post-War taxes and the ravages of inflation on trust funds that it came - from the backbenches of Parliament at Westminster - in 1958. But it came, and it changed the world of trust law within a decade.

It is therefore especially puzzling to the abolitionist that Professor Maudsley, writing in 1979, did not discuss the significance of this Act, because he well knew the impact the Act had had and continues to have. Perhaps, it is said, he did not connect the perpetuity rule and the Act as those who argue the abolitionist position have done, and he associated revocations under the Act with different ends in view. However, it was put to us, the judicial discretion exists, and there is nothing in the Act (or section 61 in Manitoba) which in any way limits that discretion.

The real task for the Commission, it is said, is to ensure that section 61 is adequately worded so that every possible type of trust beneficiary can either give a capacitated consent to a proposed arrangement under that section, or that the interests of that beneficiary fall within the power of the court to consent on behalf of beneficiaries who cannot consent for themselves. And, it is emphasized, this is not needed because of remote trust limitations that may come before the courts. It is a question of whether section 61 is sufficiently all-embracive on this matter for the purposes then conceived when it was originally enacted.

F. The Arguments Against Abolition

We have also carefully considered the arguments of those who concede that the present case law rule against perpetuities stands in need of reform, but who see the appropriate response as either the retention of the rule together with reforming legislation on the lines of that which has been adopted in other Canadian jurisdictions, or the abolition of the case law rule and the adoption in its place of a completely statutory rule against perpetuities. Such a statutory rule would be based, as now, on the vesting of interests.

Proponents of this approach (whichever of the options they support) lay emphasis on the fact that the vesting rule against perpetuities has a long and deep-rooted history in the common law system everywhere. For three hundred years it has prevented successions extending over an unacceptable period of time, and has been successful

whatever the nature of the successive estate, legal or equitable. The fact that it is so seldom an issue in practice does not necessarily mean it performs no useful role in modern society. So little may be heard of it because it is effectively performing its task, namely, deterring settlors and testators from 'tying up' property for that unacceptable period of time. In other words, those making wills and disposing by deed understand that society imposes a limit. And, if it is indeed effectively performing its task, it is also keeping the balance, of which the commentators speak, between the competing interests of the generations. The argument is not persuasive for abolishing a rule which is quietly and effectively performing its task, and in circumstances where no evidence has been produced which proves that this is not the case. Indeed, the case must be made for abolishing it; it is not a question of whether the proponents of the rule are able to show that it ought to be maintained.

As to the access of the parties who are beneficiaries to section 61 of *"The Trustee Act"*, under which the court can consent on behalf of incapacitated, infant, unborn and unascertained beneficiaries to any arrangement varying or revoking the trust, we have been told that this is no adequate cure for perpetuity problems. It replaces the defined and certain limits marked out by the rule against perpetuities with a process that produces from case to case no definition and no certainty. What happens in any particular instance in which the parties ask the court for its consent depends upon the exercise of judicial discretion. There is no stated policy, and no guidance is given to the courts, as to what constitutes the type of 'arrangement' which should meet with their approval or disapproval. Under section 61, we are reminded, the court is not only

required to ensure that the proposed arrangement is for the *benefit* of the parties on behalf of whom it consents; the section specifically says that "the court may, if it thinks fit, . . . approve". Thereafter the section is silent.

Another objection put to us is that under section 61 the court is merely authorized to give its consent on behalf of those who are unable to object or consent for themselves. The court has no authority to override any adult and capacitated beneficiary who refuses his consent, and yet the lack of that consent means that, even with the court consenting, the arrangement varying or revoking the trust cannot be put into effect. Suppose, we were told, just one beneficiary does refuse his consent. He is in effect blackmailing the others, or putting forward an objection which no one else evidently thinks is justifiable. Yet, even if an overlong succession of estates is the situation which led the other beneficiaries into court,nothing can be done.

Yet a further argument for retention of the perpetuity rule might be the fact that three provinces and the two territories have now legislated in this matter, and all have retained the case law rule, adding statutory measures to correct the patent faults possessed by that rule. It might be more in tune with the desired end of uniformity between the Canadian jurisdictions in matters of private law, and reduce the possibility of conflict of laws problems, if we in Manitoba also followed the same route.

G. The Recommendations of the Commission

1. The abolition of the rule.

It seems to us that the choices before the legislature are fivefold:

(1) to leave the law as it now is;

(2) to retain the present case law vesting rule, but to take away its traps for the unwary by the introduction of repairing legislation;

(3) to abolish the case law rule, and introduce a new statutory vesting rule;

(4) to abolish the present vesting rule, and introduce a statutory duration rule (or, perhaps, a degrees rule);

(5) to abolish the present rule.

Even though the present case law rule as it prevails in Manitoba is rarely a concern in practice, no one has suggested that it should remain as it is. This we can appreciate; the chances are not inconsiderable of a draftsman unsuspectingly bringing into existence an invalid limitation, the object of which could have been achieved quite properly with a differently drawn limitation. Moreover, such an invalidity may not be discovered until other transactions have been carried through on the assumption of its validity, and it is evident that this sort of occurrence can lead to expensive settlements. We therefore conclude that there is a need for reform.

The second option has been adopted in Ontario, Alberta and British Columbia, and in the two territories. Indeed, this is clearly the most popular solution to the

problem; in England, in Northern Ireland, in New Zealand, in the states of Victoria, Western Australia and Queensland in Australia, and in a significant number of states of the United States, this was the solution chosen. The third option emerges from Professor Maudsley's writing. He has criticized the extension of the case law rule, and its combination with 'wait and see' legislation, as likely to lead to confusion between what survives of the case law rule and the statutory amendments, especially as to lives in being for the purpose of measuring the period. He is of the view that the faulty common law rule should be abandoned entirely, and a new self-sufficient vesting rule should take its place. The fourth option, the adoption of a duration rule or degrees rule, assumes that any rule based on vesting is inferior. The degrees rule is based on the actual lives of succeeding family generations; institute and two substitutes (three degrees) is the usual civil law jurisdictions' response. We have not learned of any common law jurisdiction which possesses either of these alternative rules. The fifth option is abolition and its non-replacement with any other rule. In Wisconsin the courts have determined that the perpetuity rule does not apply where a power of sale is contained in the trust instrument.[55] In Appendix A to this Report, the Commission has set forth in greater detail the history and relationship of options 2, 3 and 4.

As we have indicated in Chapter I of our Report, the first question for our own consideration is whether the rule should be abolished or simply improved upon. If we conclude that there should be a rule against perpetuities, then

the second issue must be resolved on how best to improve it. The choice is between a vesting rule and a duration rule (or a degrees rule). If the former is chosen, then we must decide as between supporting (or repairing) legislation of the case law rule, and a new self-contained statutory rule.

The Commission has concluded that, as to the first question, the case for abolition of the rule, and its non-replacement, is the more persuasive course of action. Consequently, we do not need to deal with any of the aspects of the second question regarding the improvement of the rule.

Our major reasons for favouring abolition have been previously set forth, especially in Part E. of this Chapter. They can be summarized as follows: we do not consider that the conditions in this province, either today or in the likely future, constitute the circumstances which call for a perpetuity rule. The original reasons for the rule in England have never applied in this province, and we think that the number of resident or non-resident investors in the wealth of the province who will wish to create dynastic trusts is likely to remain so small, if they in fact exist, that there is not a social or economic problem. In any event, we are persuaded by the significance of the argument that the rule against perpetuities does not bring about the alienability of property; we think this is the attribute that most people incorrectly associate with the rule, and that alienability is the concern that most people would entertain about property. The rule against perpetuities does not prevent hoarding of land; it is the fact that trustees have the power to change investments, and to apply to the court under section 60 of *"The Trustee Act"* for a power of investment (if it is lacking), that meets this problem.

So far as the balancing of the interests of the 'dead' and the 'living' is concerned, which is the current reason for the rule accepted by almost all, we have failed to see how that argument retains force once the courts are given the power to consent on behalf of the incapacitated, the unascertained, and the unborn to the variation or revocation of trusts. The idea that the rule balances those interests was persuasive in those days when legal successive estates were as common as their equitable counterparts - those were the days of the land settlements - and there was no way in which either strict settlements or trusts could be terminated by the living. There was, of course, the rule in *Saunders v. Vautier* by which trusts could be terminated, but even so far as *trusts* of successive interests were concerned, strict settlements aside, the very fact of remote successive interests meant that infants and unborn persons would hold interests in the trust property, and for that reason the rule was not available as an instrument of termination. Indeed, in the U.S.A. that rule was actually rejected by the courts as unacceptable, in all but one or two states. Trust law in the United States has always treated the intention of the creator of a trust with very considerable respect, affording very little opportunity to the beneficiaries to have the trust terms varied. In England and the other common law Commonwealth countries today, however, not only are common law estates very seldom found in practice (if they can legally be created at all), but the enactment of the *Variation of Trust* provisions in England, Canada, Australia, and New Zealand has extended *Saunders v. Vautier* termination possibilities to all trusts, though they be in favour of beneficiaries who are or include the incapacitated, the unascertained or the unborn.

The balance idea assumes that settlors and testators have the freedom to create whatever future interests they wish, unless a rule imposed limits upon them, while beneficiaries are , of necessity, bound to accept what-

ever interests the donors create. In the seventeenth century the perpetuity rule did bring a balance of positions between trust creators and trust beneficiaries;[56] it rectified a total imbalance between all-powerful creators and powerless beneficiaries. It put the 'dead' and the 'living' in what society and the courts judged to be a reasonably equal position. Each had a measure of control over property enjoyment.

Section 61 of *"The Trustee Act"*, however, gives all adult and capacitated beneficiaries of trusts in Manitoba, whatever the terms of the trust and whatever their reason for wishing to vary or terminate its dispositive provisions, the right to put together an arrangement varying the terms, or terminating the trust and distributing the trust property. The court consents, if it is satisfied that the provision for each of those who cannot consent for themselves is truly beneficial, and the whole arrangement, varying or terminating the trust as it does, appears to the court to be appropriate. In other words, the balance to the competing interests of trust creators and trust beneficiaries is now brought about by this legislation - some would say there is now an imbalance in favour of the beneficiaries.

It seems clear that the reasons for the modern rule against perpetuities no longer exist. The Commission therefore recommends:

3. *That the modern rule against perpetuities be abolished.*

The legislation to implement the abolition of the rules against accumulations and perpetuities is contained in a draft bill "An Act to Abolish the Rules against Accumulations and Perpetuities", which is attached to this Report as Appendix B.

The Commission further recommends:

4. *That the Legislature enact a statute similar to that found in Appendix B to this Report to implement the Commission's recommendations regarding the abolition of the rules against accumulations and perpetuities.*

2. Section 61 of *"The Trustee Act"*.

Retentionists of the rule have argued, and we should meet this criticism, that section 61 offers no guidance to the courts in the exercise of their discretion, either as to what constitutes 'benefit' or as to when the court should 'think fit' to approve a proposed arrangement. It is on this basis that it is said section 61 replaces the certainties of an objectively determinable perpetuity period with the vagaries and unpredictability of the exercise of judicial discretion.

We must first remark that the criticism so levelled is not against the abolitionist response to the perpetuity rule, with which we have agreed, but to the adequacy of the eighteen year old section 61 jurisdiction. Its character now is as it has been from the beginning; we examined that section in our Report No. 18, entitled *The Rule in Saunders v. Vautier*, dated 8 January 1975, and we would only note on this occasion that the inception of the jurisdiction contained in Manitoba's section 61 lay in the recommendations of the Law Reform Committee in England.[57] The Committee was clearly of the opinion that the judicial discretion in the process should be left as open as it is in order that the court might treat each application on its merits, without having to meet criteria which might or might not be relevant or helpful in the consideration of the particular case. The Committee obviously foresaw that the possible reasons for applications would be so diverse, and the character of all these applications so difficult to discern in advance

of the statute's enactment, that the discretion was better left in this form. We might add that we have not found one jurisdiction in Australia, New Zealand, or Canada that has departed from this position, which was adopted in the *Variation of Trusts Act,* 1958, by Parliament at Westminster.

Nevertheless, there is now a significant body of reported case law on the section 61 jurisdiction, looking at the Commonwealth countries and their several jurisdictions as a whole,[58] and it would certainly be possible for the province to enact statutory criteria for the guidance of the courts, based on what has been decided in reported judgments. These criteria would reflect the case law, and serve as a compensation reference for the courts. This idea lay behind our consideration of guidelines at page 26 of our Report No. 18. However, since these criteria already have case law authority, it could be said on the other hand that the legislature would merely be codifying case law, and that there is limited value in an isolated and small-scale exercise of that kind. All the same, after twenty-four years of precedent, the time may have come when a statutory statement of criteria would reflect a settled judicial approach.

As to recommending further criteria, not yet enunciated by the courts, here there is considerable reason for hesitation. The difficulty in going beyond what the judges themselves have said since 1958 about how they will be guided, or what criteria they will employ, in exercising their discretion, is that we may innocently tie the hands of future courts, or waste judicial time considering criteria which may be only partly relevant to the application in hand. The nature of the particular application in the setting of the circumstances we had not, perhaps could not have, perceived.

On balance we have decided that it would be advantageous if the principles of Commonwealth case law were reduced to a statutory reference. This would serve as an immediate source for the courts in seeking the criteria they should apply, and at the same time would not hinder them from looking further into the case law, if they so desire. Accordingly, we recommend that section 61 contain a description of the "benefit" which the courts must find in a proposed arrangement on behalf of each beneficiary unable to consent for himself. We also consider that the intentions of the settlor or testator in creating the trust is something which the section should expressly require the courts to consider in deciding in each case whether overall the proposed arrangement should receive the court's sanction. This, too, is established practice in England and other jurisdictions, as we noted in our earlier Report.

What this requirement means is that, though the court is satisfied that the proposed arrangement confers "benefit" upon each beneficiary unable to consent for himself, it will also examine the evidence that is available to the court as to the purpose or object of the settlor or testator in creating the trust. It will then examine the circumstances which prevail when application is made to the court for an approval, and determine two things; first, whether the purpose or object which the settlor or testator had in mind reflected circumstances which continue to exist, and, secondly, if so, whether those or other current circumstances reasonably justify the withholding of judicial approval to the proposed variation or termination. We can point to no better examples of those circumstances which might lead a court to withhold overall approval than *Re Steed's Will Trusts*[59] *and Kinnee v. Public Trustee for Alberta.*[60] In both of those cases the court's essential concern was with the best interests of the adult beneficiary and

applicant in light of the intentions of the creator of the particular testamentary trust. In each instance the evident reasons for the creation of the trust were considered to be still relevant when application to the court was made for trust termination, and to justify the refusal of the court to approve the proposed arrangement.

The Commission recommends:

5. *That the recommendations set forth in the Commission's Report on The Rule in Saunders v. Vautier regarding section 61 of "The Trustee Act" be now adopted.*

6. *That it be made clear that the court is empowered under section 61 of "The Trustee Act" both to act on behalf of any person, natural or corporate, who is in any way unable to consent on his, her or its own behalf, and also to bind with its consent any trust interest which is dedicated to a charitable or non-charitable purpose, and where there is no person qualified to bind that purpose.*

7. *That the "benefit" which the court must find in order to consent to a proposed arrangement under section 61 of "The Trustee Act" be defined.*

8. *That it be made clear that the court must consider the intentions of the settlor or testator in creating the trust and the circumstances that prevail at the time of the application under section 61, before the court gives its approval to a proposed arrangement.*

The legislation to implement our recommendations regarding section 61 of *"The Trustee Act"* is contained in a draft bill, "An Act to Amend The Trustee Act" which is attached to this Report as Appendix C. The Commission further recommends:

9. *That the Legislature enact a statute similar to that found in Appendix C to this Report to implement the Commission's recommendations concerning section 61 of "The Trustee Act".*

3. Common law successive estates.

Section 61 of *"The Trustee Act"* does, as we have said earlier, create a balance between the trust creators and trust beneficiaries. It thus assumes one of the original purposes of the perpetuity rule. However, the perpetuity rule applies both to legal common law interests and also to trust interests. It therefore has a wider application than does section 61 of *"The Trustee Act"*, which, of course, extends only to the latter.

The Commission is of the view that if section 61 is to perform the same "balancing role" as the perpetuity rule, that it should apply to the same degree as that rule. This objective can be achieved in one of two ways. First, the section 61 jurisdiction could be made applicable to all successions of limited interest, whether common law or behind a trust, in equity. Alternatively, one could abolish common law or legal interests by deeming them to be held on trust for the owners of the estate.

The Commission recommends the second alternative. The abolition of common law estates has occurred elsewhere; England and Wales abolished them in 1925.[61] The route therefore has been taken previously, and in this respect differs from the former which, to our knowledge, is without precedence. The abolition of common law estates is also the preferred choice because it would prevent the occurrence of the difficult problems that can arise as between common law life tenant and remainderman.[62]

The Commission therefore recommends:

10. *That common law successive estates be deemed to be held on trust for the owners of those estates. The trustees would be the adult and capacitated estate beneficiaries, and they would hold the legal or other title to the underlying property in trust for all vested and contingent beneficiaries, whether born, capacitated, ascertained, or otherwise.*

Section 4 of the Draft Bill contained in Appendix B to this Report would implement this recommendation.

IV SUMMARY OF RECOMMENDATIONS

1. That the Act of the Parliament of Great Britain, 39 & 40 Geo. III, Chapter 98 (known as the *Accumulations Act*, 1800) cease to apply in this province.

2. That the rule in *Whitby v. Mitchell* be abolished.

3. That the modern rule against perpetuities be abolished.

4. That the Legislature enact a statute similar to that found in Appendix B to this Report to implement the Commission's recommendations regarding the abolition of the rules against accumulations and perpetuities.

5. That the recommendations set forth in the Commission's *Report on The Rule in Saunders v. Vautier* regarding section 61 of "*The Trustee Act*" be now adopted.

6. That it be made clear that the court is empowered under section 61 of "*The Trustee Act*" both to act on behalf of any person, natural or corporate, who is in any way unable to consent on his, her or its own behalf, and also to bind with its consent any trust interest which is dedicated to a charitable or non-charitable purpose, and where there is no person qualified to bind that purpose.

7. That the "*benefit*" which the court must find in order to consent to a proposed arrangement under section 61 of "*The Trustee Act*" be defined.

8. That it be made clear that the court must consider the intentions of the settlor or testator in creating the trust and the circumstances that prevail at the time of the application under section 61, before the court gives its approval to a proposed arrangement.

9. That the Legislature enact a statute similar to that found in Appendix C to this Report to implement the Commission's recommendations concerning section 61 of "*The Trustee Act*".

10. That common law successive estates be deemed to be held on trust for the owners of those estates. The trustees would be the adult and capacitated estate beneficiaries, and they would hold the legal or other title to the underlying property in trust for all vested and contingent beneficiaries, whether born, capacitated, ascertained, or otherwise.

This is a Report pursuant to section 5(3) of *"The Law Reform Commission Act"*, dated as of the 12th day of February, 1982.

Clifford H.C. Edwards, Chairman

Patricia G. Ritchie, Commissioner

David G. Newman, Commissioner

Knox A. Foster, Commissioner

Beverly Ann Scott, Commissioner

Victor Rosenman, Commissioner

D. Trevor Anderson, Commissioner *

*See Memorandum of Dissent p. 62 *et seq.*

MEMORANDUM OF DISSENT

The Report agreed to by my colleagues makes an important and original contribution to the study of the law of perpetuities and accumulations. Great credit is, in my view, due to the Commissioners and to our learned adviser, Dr. D.M. Waters, for the combination of careful scholarship and imaginative, not to say audacious, proposals for change that they have presented. It is with regret that I have found myself unable to join in their recommendations. I hope I am not standing against the light. In any event, for whatever they may be worth, my own views may be outlined as follows.

1. On the Reform of the Rule Against Perpetuities

There is no doubt that the rule against perpetuities, as now elaborated and applied, requires some reform. It is widely agreed that under the prevailing authorities, the rule catches too much. It nullifies interests that are almost but not absolutely certain to vest within the permitted period, as in the cases of administrative contingencies, unborn widows, and 'fertile octogenarians', and perhaps in some cases of age contingencies over age 21. In some commercial transactions both the application of the rule and the compelled attempts to frame arrangements to stay within its bounds may be awkward and artificial. On the other hand, in some few cases, the rule may be too lenient and allow to escape its terms some interests that should be governed by it, such as possibilities of reverter.

However, it does not follow that the rule itself should now be abolished. Its essential provision is sound in policy: it allows some latitude to testators or others

making dispositions of property to set up arrangements extending some measurable time into the future, while restraining them from seeking to regulate the control and devolution of the property past the point where the interests and wishes of the later or beneficiary generations with respect to the management and disposition of the property should prevail. The basic rule is intelligible, and its existence and terms are known by those who advise persons making dispositions or contracts affecting property; it seems reasonable to assume that whatever may be other factors that today may discourage dispositive arrangements postponing the vesting of interests to a remote future, one important control still continues to be the rule itself. Virtually every jurisdiction has the rule, or some functional equivalent, and in those common law jurisdictions where the rule has been most rigorously scrutinized with a view towards reform, the decision has been to keep the rule, whatever modifications in details of its operation may have been proposed. I suspect that the majority report understates both the risk of the mischief against which the rule is directed and the role of the rule in preventing objectionable dispositions.

As the experience of those other jurisdictions shows, it is possible to retain the rule, which is straightforward and sound, while eliminating, or relieving from, its undesirable effects in those situations where its application has been found inappropriate or harsh. The methods of doing this are ably outlined in the first Appendix to this Report. While appreciating the reasons that led to the late Professor Maudsley to seek to formulate a new rule to replace entirely the existing rule, I think that for practical purposes

the method of reform to adopt would be one developed along the lines of the type of legislation adopted in Ontario, Alberta, British Columbia and the Territories, under which the basic rule is preserved and applied but then, if its tests are not met, remedial provisions are applied in order to preserve dispositions thus brought within the limits allowed by the policy of the rule. Taking this approach would offer the further advantage of enabling Manitoba courts to benefit from considered judicial views on the interpretation of the statutes in cases arising in the other provinces.

If (as has been suggested in the preceding paragraphs) there is a continuing need for control over dispositions of property that would postpone vesting to a remote future time, the rule against perpetuities provides that control in a fair and intelligible form, and occasional inappropriate results or unnecessary complexities in the application of the rule can be avoided by other legislative means already established and tested elsewhere, there would seem to be no persuasive case for Manitoba to proceed 'all by its lonesome' to a complete abolition of the rule.

Notwithstanding, the majority of the Commission have recommended that the rule be replaced by a scheme in which all settlements of property interests, even if not originally established by way of trust, would be converted into the form of trusts. All future interests, as equitable interests under trust, would be liable to being varied or terminated on application to a court, which would be constrained in the exercise of its discretion only by vague and occasionally hard-to-reconcile statutory directions that it consider both benefit to the beneficiaries and the intentions of the settlor. This risks replacing existing but curable complexity

with the continuing uncertainty that flows from a loosely governed discretion exercised on a case-to-case basis.

2. On the Abandonment of the Existing Law as to Accumulations

I agree with my colleagues, for the reasons they have given, that the *Accumulations Act*, 1800, need no longer be applied in Manitoba. However, I would recommend its abandonment only if, as in Alberta, the common law perpetuities rule continued to apply.

3. Miscellaneous

If the Legislature should adopt the recommendations of the majority of the Commission in its Report, I would advise careful attention to the practical implications of the proposal that would convert all "legal" successive interests into equitable interests or otherwise affect the administration of trusts. In particular, no special or additional duties should be imposed on Land Titles offices to inquire into the qualifications, capacity or conduct of the trustees or to see to the administration of the trust or the application of trusts moneys beyond what is absolutely necessary for the implementation of the new legislation. Nor should there be any expansion of the registrar's duties that would exceed the limits now determined by both the inherent principles and general scheme of *"The Real Property Act"* and constitutional restrictions on the exercise of functions, judicial in nature, by provincially-appointed officials.

Respectfully submitted

D. T. Anderson

D. Trevor Anderson

NOTES

1. 39 & 40 Geo. III, c. 98. That the Act applies in Manitoba was confirmed in *Fonseca v. Jones* (1911), 21 Man. R. 168 (C.A.), and *Re Aikins Trusts* (1961), 35 W.W.R. 142 (Man., Q.B.).

2. (1889), 42 Ch.D. 494.

3. And in any event once a beneficiary is of age (and assuming he is of sound mind), and the accumulations are intended for him alone, he can terminate the trust and call for the capital (together with the accumulations to that point) there and then: *Saunders v. Vautier* (1841), 4 Beav. 115. A class of beneficiaries, all of whom are adult and capacitated, can also stop an accumulation, and call for the capital for division between them, though the trust be discretionary: *ibid.*

4. (1799), 4 Ves. 227.

5. (1805), 11 Ves. 112.

6. The issue is normally between the capital remaindermen and testamentary next-of-kin. But it can be much more complex. See, e.g., *Re Struthers* (1980), 7 E.T.R. 307 (Ont. C.A.). Since *Berry v. Green* [1938], A.C. 575, the next-of-kin have a markedly better winning record; see, e.g., *Re Martin* (1980), 98 D.L.R. (3d) 570 (Ont. C.A.).

7. In 1925 legislation (England and Wales) converted all common law limited estates, other than leaseholds, into equitable estates, and made it impossible to create such estates after that date. Therefore, in 1964 the issue concerned trust estates only.

8. *Law of Property Act*, 1925 (15 & 16 Geo. V, c. 20), ss. 164-166.

9. *Accumulations Amendment Act*, S.O. 1966, c. 2.

10. *The Law Reform (Property, Perpetuities and Succession) Act*, 1962.

11. *Perpetuities Act*, 1964.

12. *Perpetuities and Accumulations Act*, 1968.

13. *Perpetuities Act*, S.A. 1972, c. 121.

14. *Perpetuity Act*, S.B.C. 1975, c. 53, s.24(1).

15. *Report on the Rule again Perpetuities*, 3 August, 1971, at pp. 67-77.

16. Section 104 of the *Income Tax Act* (Canada) sets forth the tax provisions regarding trust income and capital property.

17. 3 Ch. Cas. 1, 22 E.R. 931.

18. *Supra* n. 2.

19. See, for instance, the Alberta *Perpetuities Act* supra n. 13, section 21, and the British Columbia *Perpetuity Act*, *supra* n. 14, section 2(2).

20. Wolfe Goodman, *Transactions in Reversionary Interests*, (1973) 21 Can. Tax J. 251.

21. In the example above it will be seen that the right of re-entry has been alienated to Frederick and his heirs.

22. E.G., *Fast v. Van Fliet*, (1965), 51 W.W.R. 65 (Man. C.A.).

23. (1791), 3 Bro. C.C. 401.

24. *Duke of Norfolk v. Howard*, (1682) 3 Ch. Cas. 1, 22 E.R. 931, known as *The Duke of Norfolk's Case*.

25. (1614), 10 Co. Rep. 35b, 77 E.R. 976.

26. Cro. Car. 231, 79 E.R. 801.

27. *Sambach v. Dalston*, (1634) Tot. 188, *sub. nom Morris v. Darston*, (1635) Nels. 30.

28. *Chudleigh's Case*, (1585-1595) 1 Co. Rep. 120a.

29. *Purefoy v. Rogers*, (1671) 2 Wmns. Saunders 380.

30. 2nd ed., 1962, at 224.

31. Professor R.H. Maudsley, *The Modern Rule of Perpetuities*, 1979, at p. 232, concludes that the period of life in being plus 21 years is no longer than is ideal in present conditions. He points to the English statutory period of 80 years, adopted in 1964 as a conveyancer's alternative to lives in being, as having been very successful. This alternative was rejected in Ontario in 1966, and in Alberta in 1972, but was adopted later in British Columbia.

32. 2nd ed., 1962, London, Stevens, at 18.

33. Fourth Report (*The Rule against Perpetuities*) Cmnd. 18, November, 1956.

34. 1979, London, Butterworths, at 221, 222.

35. *Ibid.* at 224.

36. Section 24 of The British Columbia Act repeals the Rule as does section 24 of the Alberta Act.

37. Or that his essential object in writing his work was to examine what would constitute the most effective reforming statute.

38. Ontario Law Reform Commission, *Reports Nos. 1 and 1A. Report No. 1,* at 4.

39. *Ibid.* at 5.

40. *Supra* n. 7.

41. *Id.* at 2.

42. *Ibid.*

43. *Supra* n. 7 at 3.

44. *Ibid.*

45. The Act was proclaimed in force as of January 1, 1979. See B.C. Regulations, 1978, 464/78 (1978) B.C. Gazette (Part II) 1220, October 11, 1978.

46. Nor should it be overlooked that in the Quebec *Succession Duty Act,* S.Q. 1978, c. 37, ss. 5 and 6, duty is now levied on the entire capital every time an income beneficiary's life terminates. This is an innovation so far as succession duty Acts in Canada are concerned. Does it herald a new epoch?

47. A.J. McClean, "The British Columbia Perpetuities Act - A Primer", (1979), 13 U.B.C. Law Review 240, at 269.

48. *Report on The Statute of Frauds,* (1980), M.L.R.C., Report 41.

49. *Supra* n. 32 at 224ff.

50. *Supra* n. 7 at 2-3.

51. (1841) 41 E.R. 482.

52. 6 & 7 Eliz. II, c. 53.

53. It has been adopted in the states of Victoria, Western Australia, and Queensland, but not as yet in New South Wales, South Australia, or Tasmania.

54. The section was enacted in 1964: *"An Act to amend The Trustee Act"*, S.M. 1964 (1st Sess.) c. 56 s. 2, and took effect on the day of royal assent, March 12, 1964.

55. That state has only legislation which controls the length of time during which property may be inalienable. See 'Further Trends in Perpetuities', (1970) 5 *Real Property, Probate and Trust Journal* 333-337.

56. And between strict settlement creators and strict settlement beneficiaries.

57. Sixth Report (*Court's Power to Sanction Variation of Trusts*, Cmnd. 310, November, 1957. Para 14: "Justice alone, in our view, demands that the Court should have an unlimited jurisdiction". Para. 15: "to sanction on behalf of infants dispositions of their property which are beneficial to them and are morally unobjectionable". Para. 17: "There are many cases of settlements involving quite small sums in which it would be beneficial to all the beneficiaries to be enabled to spend the capital". This Committee was throughout concerned with the benefit of those on behalf of whom the court would consent; the general discretion, "if it thinks fit", was an introduction of the Act itself. See further *Underhill's Law of Trusts and Trustees,* 13th ed., 1979, pp. 387-406.

58. *Underhill, id.,* pp. 387-407 (England and Wales); *Trusts, Trustees and Executors,* 1975, Wilson, W.A., and Duncan, A.G.M., pp. 155-167 (Scotland); *Law of Trusts Australia,* 4th ed., 1977, Meagher, R.P., and Gummow, W.M.C., pp. 309-311; *Nevill's Trusts and Wills,* 6th ed., 1976, pp. 92-94 (New Zealand); Waters, D.W.M., *Law of Trusts in Canada,* 1974, pp. 911-926; *Re Harris* [1974], 6 W.W.R. 97, 47 D.L.R. (3d) 142 (B.C.S.C.); *Re Tweedie,* [1976], 3 W.W.R. 1, 64 D.L.R. (3d) 569 (B.C.S.C.); *Re Irving,* (1976), 66 D.L.R. (3d) 387, 11 O.R. (2d) 443 (Ont. H.C.); *Farrington v. Rogers* (1980), 19 B.C.L.R. 373, 6 E.T.R. 156 (B.C.S.C.); *Kunater v. Royal Trust Co.,* (1981), 23 B.C.L.R. 287 (B.C.S.C.).

59. [1960], Ch. 407, [1960] 1 All E.R. 487 (C.A.).

60. (1977), 3 Alta. L.R. (2d) 59 (S.C.).

61. *Law of Property Act*, 1925 (15 & 16 Geo. V., c. 20), ss. 1, 2.

62. See, for instance *Chupryk v. Haykowski*, [1980] 4 W.W.R. 534, 110 D.L.R. (3d) 108 (Man. C.A.).

APPENDIX A

A Description of the Options for Reform of the Modern Rule Against Perpetuities.

In Part G of Chapter III of this Report we indicated that, quite apart from the choices of retaining the present case law rule and of abolishing it, there are three intermediate options available for reform of the rule. The first is retention coupled with repairing legislation; this has the benefit of taking away the traps for the unwary. The second is abolition of the case law rule and the introduction of a new statutory vesting rule. The third choice is a duration or degrees rule.

In this Appendix, these three means of reform are described in greater detail. They are dealt with here, rather than in the body of the Report, because of the Commission's decision to answer the first question - is there a need for a rule? - in the negative. Given this response, it became unnecessary to consider the other approaches for the rule's retention and improvement. They are set forth here to provide further information on the reform of the rule.

Retention Coupled with Repairing Legislation.

There are several approaches to removing the traps of the rule. The first is the reduction of ages to twenty-one if that would cause an interest to vest within the period of life in being and twenty-one years. England took this approach in legislation in 1925, and, as a matter of fact, made the change mentioned in the previous sentence. Otherwise the case law rule is left untouched. The second is "wait and see". Legislation provides that one is not to look at the instrument when it takes effect, and asks one's

self if any contingent interest in that instrument *might* vest outside the perpetuity period (as the case law requires), but when the instrument takes effect one is to assume the validity of all contingent interests, and only invalidate them if they do not *in fact* vest within the period or when it is evident that they cannot vest within the period. The third is sometimes described as particular *cy-près*. Legislation empowers the trustees to apply a given sequence of amendment processes to the instrument until the interest does vest within the perpetuity period. This is done at the taking effect of the instrument (though it can be done later), so that it can be said from the beginning that the contingent interest is valid. Effectively, the settlor's, or testator's, instrument is altered as to its offending dispositive provision(s) so that an interest as close as possible to what the settlor or testator wishes is produced thereby. The final method to improve the rule is to apply the principle of general *cy-près* which gives the court a wide jurisdiction to bring the offending instrument within the rule. The amending processes are usually planned so that the least change is produced by the first, and the greatest change by the last.

The first method, legislation to meet particular problems, was often regarded in the past as having the merit that it only made changes to the rule at those points where experience showed that dispositions, innocent in terms of the policy of the rule, were commonly failing for violation of the rule. This was thought enough. Reformers today call it the 'patching up' method, because they regard the problem posed by these failures as more evident of a need for root and branch changes.

The second method, "wait and see", has largely won favour due to the efforts of Dr. Morris and Professor Barton Leach, who pointed out that, if those dispositions had been allowed to run their course, the great majority of contingent dispositions would have been found to vest in interest within the perpetuity period. This method therefore retains the rule against remoteness, and the case law thereon, and literally waits in each instance to see what happens. Its merit is undoubtedly that Messrs. Morris and Leach are correct. The rule which invalidates on the basis of what might happen is - in terms of policy - an 'overkill'. The critics of this method, of which in Canada Mr. Terence Sheard, Q.C., has been the most outspoken, point out that this suspends the judgment of whether an interest is valid or invalid and leaves title in suspense. When ultimate invalidity occurs, estates could be re-opened which have long since been administered and closed. Mr. Sheard shuddered at this type of "solution".[1]

The third method, particular *cy-près*, which takes the form of a sequence of amendments applied to the instrument until the invalidity is cured, has the merit that Mr. Sheard's concerns are met,[2] and only such change is made to the disposition(s) of the settlor or testator as are necessary to 'save' his gift. The thought is that the settlor or testator would rather have his gift in its changed form (not quite what he wanted) than have it destroyed altogether, and his property pass to hands which he had not intended to benefit at all. The critics object that the changed form is not what the settlor or testator wanted, and the law should not change his gifts, often after he is dead, if any other method exists which would have allowed him what he wanted. The critics are usually advocates of "wait and see".

The fourth method, general *cy-près*, which confers upon the court the power to bring the offending disposition into as close a form as possible to what the creator of the gift intended, is commended for the flexibility it has.[3] Change can be tailored to the specific needs of the particular disposition. Most dispositions, it is said, readily suggest how they can be brought within the rule, and the change can be made at once on the instrument taking effect. Critics point out that, had it been allowed, time might have shown that no change at all was necessary (the "wait and see" advocates), and that general *cy-près* does not retain just the length of the perpetuity period, it retains the case law, so that knowledge of it is still crucial to the draftsman. The Law Reform Committee in England said of the general *cy-près* jurisdiction, "We are far from convinced that the complexities inherent in such a vague and uncertain jurisdiction would be outweighed by any practical advantage".[4] On the other hand California, Missouri and Oklahoma regard general (or rectification) *cy-près*, which they possess, as the best solution.

The reform which appears to have appealed to Dr. Morris and Professor Barton Leach is the compromise of "wait and see" combined with particular *cy-près*. Under this approach one waits to see whether the offending disposition will indeed vest in interest within the perpetuity period, and when it is clear that it will not,

or has not, one *then* applies the sequence of amending processes to the disposition until it is valid. One can vary things by applying one or more amending processes before applying "wait and see"; then one applies the remaining amending processes. In Canada, Ontario in 1966 was the first Canadian jurisdiction into the field, and with this compromise, then of the provinces came Alberta, and most recently British Columbia has followed suit. The Yukon and the Northwest Territories have also adopted this type of legislation, the former with a revised version which took effect in 1980. This second version essentially abandons the Ontario definition of lives in being in favour of the listing technique adopted later in Alberta and British Columbia.

British Columbia, with the latest provincial edition of the original model, requires the remedial provisions of the Act to be applied in the following order:

(1) Capacity to have children (medical facts now govern the formula used);

(2) Wait and see;

(3) Age reduction;

(4) Class splitting;

(5) General *cy-près*.

The fifth remedy gives the court power to amend only when all else has failed.

Abolition Coupled with A New Statutory Rule

Section 3 of the *Perpetuity Act* R.S.B.C. c. 321 of British Columbia provides for a vesting period of 80 years from the date of the creation of the interest. The section permits a draftsperson "to select any fixed period of years, up to a maximum of eighty, in lieu of the period determined by reference to lives in being".[5] This follows the English Act which also has fixed a maximum of 80 years. Both the Ontario Law Reform Commission and the Alberta Institute of Law Reform decided against the 80 year period. British Columbia and England's provisions pertaining to the new statutory rule are in addition to their repairing legislation, discussed under the previous heading. Both have therefore chosen solutions concerning the first and second options as described in the Appendix.

For many years, Prince Edward Island has had a period which is a life in being plus 60 years.[6] This period also acts as the permitted length of accumulation.

The Duration or Degrees Rule

Yet another method of controlling perpetuities, not widely canvassed, is to jettison the rule against remoteness of vesting and to adopt degrees. That is, the donor may dispose of his property to the spouse (his own generation), his children, his grandchildren, and his great-grandchildren, whether born or unborn, but to no later generation. Brothers and sisters of the donor, his nephews and nieces, the children of his nephews and nieces, and the children of those children, mark the same permitted generations or degrees. Civilians have this system, and often express surprise that common lawyers have got them-

selves into such a complex system as the rule against remoteness of vesting in order to control perpetuities. Civilians in Quebec, who in the past have been inclined to admire the practicality and flexibility of the common law in dealing with "real" problems, are literally taken aback at the absorption with doctrine, which seems in this area to have overtaken their common law brothers. However, though a degrees control is simple enough to apply, common lawyers point out that, if the deaths of the succeeding generations follow rapidly upon each other, it too is an 'overkill' situation. One should think of perpetuity, it is said, in terms of a definitive period of time. What happens within that time, even if it is the case that new vesting in possession takes place every other year, should not be a concern of the law. The law is concerned that control of the future enjoyment of property shall be brought to an end within a measured period of time. Civilians would no doubt respond to this that, since most men and women in any part of the common law world, like the civil law world, are primarily concerned with surviving spouse, children, and grandchildren, the common lawyer is merely saying that he thinks in terms of time, and not of degrees.

However, there may be another criticism. It has been pointed out that shrewd conveyancers, instructed to finance a hoped-for family dynasty, would select as the settlor a callow youth, a grandchild who has just achieved majority, and thus defeat the system, which imagines the patriarch as the first donor. The patriarch instead donates his wealth to the callow youth on condition that a trust be set up by the youth, exploiting all the degrees to the full. The youth gets an allowance for his pains. In other words, the shrewd conveyancer re-creates the technique of the eighteenth century 'strict settlement' which

was broken and resettled every time the oldest son came of age. Father offered a significant allowance to the son, if he would fall in with this plan. When father died, and the son became head of the family, he bitterly regretted what he had done to 'tie himself up'. By the time the son himself had a first son attaining his majority, he agreed with his deceased father, and carried out the same manoeuvre. Whether such fears of the shrewd conveyancer, and of the dynastic patriarch, are just fanciful, others may judge.

CONCLUSION

Undoubtedly it is a mix of "wait and see" plus particular *cy-près* which has attracted reforming commissions and legislatures throughout the older Commonwealth common law jurisdictions, and the reference is to England and Wales, Canada, Australia and New Zealand. The lead was clearly given by the *Perpetuities and Accumulations Act*, 1964, in England, though others have not followed the English retention of a separate accumulations rule nor has there been much enthusiasm for the alternative 80 year limitation during which vesting in interest must take place.

Professor Maudsley's view is that a combination of "wait and see" and a general *cy-près* to correct perpetuities that survive, presents probably the best solution, provided the case law rule is abolished and the statutory rule is therefore self-contained. It is interesting to note that Alberta and British Columbia have employed general *cy-près* as a final correcting measure, but each has retained the case law rule. They thus possess 'repairing' legislation.

The central technical problem with the case law remoteness of vesting rule is the determining of what are the lives in being, and the 'patching up' and "wait and see" reforms inevitably retain that problem. "Wait and see" need not be wedded to a retention of the case law, but this wedding seems the much preferred solution, as Professor Maudsley admits. Defining lives in being has proved a difficult problem; it always was a problem in applying the case law rule, and some think it has got little better under the reforms. There are those who would list the classes of lives that may be used, and there are others who describe in a general manner what they mean by lives. British Columbia is a listing reform, Ontario a general description reform. With "wait and see" the lives problem can be as difficult to apply as under the unreformed case law, and critics of "wait and see" waste no effort to point this out.

The United States jurisdictions between them possess the widest range of reforms.[7] However, though there is much writing on the subject of perpetuities, there is only one writer known to the Commission who has put forward a set of arguments for abolition.[8]

NOTES:

1. (1966) *Chitty's Law Journal* 3, at pp. 5-6.
2. If the changes are made when the instrument takes effect.
3. General *cy-près* as a sole method of controlling perpetuities would be carried out when the instrument takes effect.
4. *Supra* note 33, para. 30.

5. A.J. McClean, "The British Columbia Perpetuities Act - A Primer" (1979) 13 *U.B.C. L.Rev.* 240 at 241.

6. *Perpetuities Act*, R.S.P.E.I. 1974 c. P.3.

7. The most recent survey is that of the Committee on Rules against Perpetuities of the American Bar Association Section of Real Property, Probate and Tax Law. See 'Perpetuity Legislation Handbook', 3rd ed., 1967, published in (1967), 2 *Real Property, Probate and Trust Journal* 176-221.

8. (1975) *Cornell Law Review*, 380, esp. at pp. 380-388 (Samuel M. Fetters).

APPENDIX B

The (Proposed) Perpetuities Abolition Act and Commentary

The draft Act is divided into three parts:

(1) Section 3, which abolishes the case law rules against perpetuities and the rule against accumulations, and is supported by the definition of section 2;

(2) Section 4, which converts all common law estates into equitable estates, and is also supported by the definitions of section 2; and

(3) Section 5, which concerns the application of the Act to existing as well as future dispositive documents.

The proposed Act and the commentary for sections 3, 4 and 5 of the Act are set forth below.

AN ACT TO ABOLISH THE RULES AGAINST ACCUMULATIONS AND PERPETUITIES

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

1. Short Title

This Act may be cited as The Perpetuities Abolition Act

2. Definitions

In this Act

(a) "property" includes real property, personal property, and mixed real and personal property,

(b) "successive legal interest" includes the first or particular interest and any following interest, whether any such interest is future, vested or contingent, or is an executory interest, or a determinable or defeasible interest or any interest over thereupon; also a general or special power of appointment; but excludes the interests of landlord and tenant within the meaning of The Landlord and Tenant Act.

(c) "the modern rule against perpetuities" includes the operation of the rule with regard to remoteness of vesting and perpetual duration, and also to testamentary executory interests in personalty,

(d) "the rule against accumulations" means the provisions of the Accumulations Act, 1800,

(e) "trustee" includes within its meaning a trustee for the purposes of The Trustee Act.

3.1(1) Non-applicability of the Accumulations Act

The Act of the Parliament of Great Britain, 39 and 40 Geo. III, chapter 98 (known as the Accumulations Act, 1800) ceases to apply.

(2) Rules against perpetuities abolished

The rules of law against perpetuities, sometimes known as the rule in Whitby v. Mitchell and the modern rule against perpetuities, are abolished.

Since the *Accumulations Act*, 1800, 39 & 40 Geo. III, c. 98 constitutes the sole provision in Manitoba of permitted accumulation periods, its repeal means that the only restriction which would remain is that all accumulating funds vest in interest within the perpetuity period. This is the position in Alberta and British Columbia. The following subsection, (3.1(2)) by abolishing the rules against perpetuities, therefore also abolishes all restrictions by way of accumulation control. Specific mention is made of the two case law rules of perpetuity which are abolished in order that there be no possible question as to what is meant by perpetuities. Paragraph 2(c)(d) supports this policy of achieving complete clarity. The language in which the rules are defined in section 3(2) is language employed and familiar to the Alberta and British Columbia perpetuity Acts. The reference in section 2(c) to testamentary executory interests in personalty covers an application of the modern rule against perpetuities discussed, e.g., in *Crossley Vaines on Personal Property*, 5th ed., at pp. 41-43. Hence property is defined in section 2(a) as embracing both real and personal property subject to successive interests.

The alternative reference to 39 & 40 Geo. III, c. 98 and to the rules against perpetuities are contained in section 3, rather than in section 2, because they are central to what is being done by section 3. That is, these references are more than "Definitions".

4. Successive legal interests taking effect in equity

(1) Successive legal interests take effect in equity as interests behind a trust.

(2) The trustees of the property subject to such interest are the beneficiaries who

(a) are of age, and

(b) do not fall within the description of disqualification in paragraph 11(1)(a) of The Trustee Act, and

(c) are willing to act,

at the time when the instrument or words of creation take effect.

(3) Upon the instrument or words of creation taking effect the trust property vests in the trustee.

(4) When there are more than four beneficiaries who qualify for trusteeship under subsection 2 of this section, the first four as set out in the instrument or words of creation, seniority of age determining such persons in a class of beneficiaries, are the trustees.

(5) When there is no beneficiary who qualifies for trusteeship within subsection 2 of this section, an application may be made to the court under The Trustee Act for an order appointing an appropriate person or persons, including a trust corporation, as trustee or trustees.

Each of these subsections following subsection 1 implements a change necessary to convert *successive common law interests* into *equitable interests*. The word *legal* is the long accepted adjective to describe these interests (as opposed to *equitable interests*). Paragraph 2(b) supports subsection 4(1), and is designed to make completely clear

by "inclusion" the reference to *successive legal interests*. Landlord and tenant interests are expressly excluded, because, though successive, there is no necessity or intent to convert them into *equitable interests*.

Vesting of the property underlying the successive interests in the trustees corresponds with vesting in new trustees under the provision of *The Trustee Act*, and entitles them to be registered as owners under the land title legislation.

The limitation on the number of trustees - trustees also for the purposes of *"The Trustee Act"* (paragraph 2(e)), and therefore entitled to exercise the rights and powers of that Act, plus giving the courts' jurisdiction - is limited to four solely for practical purposes. The choice of the first four beneficiaries named in the trust instrument (and limits being included *ex cautela*[1] (meaning "out of caution") is an idea taken from the creation of statutory trusts of joint tenancies and tenancies-in-common under the *Law of Property Act*, 1925, in England, where it has worked successfully. The reference to a class of beneficiaries covers successive interests under existing law, such as the following example: "The farm to Mother for her lifetime, and then to all my children equally". The testator has six children. The widow and the oldest three children when the instrument takes effect are the trustees. Subsection 5 makes it clear that, where there might be a question as to whether *"The Trustee Act"* does apply, it shall, in fact, apply.

5. *Application of the Act*

(1) This Act applies to all instruments or words of creation, whether taking effect before, upon, or after the date of its coming into force, except as provided in this section.

(2) Where, prior to the coming into force of this Act, under any instrument or words of creation,

(a) an interest was held void by a court for breach of a rule against perpetuities, or

(b) the period permitted for the vesting of an interest, or for any duration or accumulation, has terminated, or

(c) any act was taken in reliance upon the applicability of a rule against perpetuities or the rule against accumulations, including the transfer of property to any person or corporation consequent upon any voidity or termination,

the law applies as if this Act had not been passed.

(3) Where, prior to the coming into force of this Act, any order of the court was made, or any act was taken, arising out of the existence of any successive legal interest, which order or act was in accordance with law if the interest or interests concerned were legal interests, the order or act continues to have full effect as if this Act had not been passed.

(4) Where the instrument or words of creation of successive legal interests took effect prior to the coming into force of this Act, the trustees are those beneficiaries who survive at the date of the Act coming into force, and who at that date qualify under subsection 4(2).

(5) Where under subsection 4 of this section there are more than four beneficiaries who survive, and so qualify, the first four thereof as set out in the instrument or words of creation, seniority of age determining such persons in a class of beneficiaries, are the trustees.

(6) Where at the date of the Act coming into force there is no surviving beneficiary who qualifies under subsection 4(2), subsection 4(5) applies.

The policy behind this section is that the Act applies to all instruments creating successive interests, whenever the instrument came, or comes, into effect. This means the rules against accumulations and perpetuities are

abolished, and successive legal interests become equitable interests, not only for instruments coming into effect (e.g., by the death of a testator or on the execution date of the deed) after the Act becomes law, but for instruments which come into effect before the Act becomes law. First, all common law successive estates become trust estates on that date, and, secondly, no challenges to *any* instrument may be originated after that date on the basis that the instrument violates the rule against accumulation or one of the rules against perpetuities.

Lest it appear that the policy behind this section is ill-advised, it can be said that a saving measure is needed to prevent matters that are closed from being re-opened, and this is provided by paragraphs 5(2)(b) and (b). The object of (a) is obvious, and (b) means that where accumulation periods or permitted duration of non-charitable trusts or the case law "wait and see" period permitted to the exercise of special powers,[2] have closed, the matter cannot be re-opened. In keeping with this same policy, paragraph 5(2)(c) protects from future challenge, in reliance upon the Act, those instances where trustees, as beneficiaries of common law interests, took note that an interest was void (or that a permitted period had run - though this is already protected by paragraph 5(2)(b)), and acted thereon. E.g., property was accordingly transferred to a person, a trust or for a purpose. The pre-Act law is to continue to apply, so that the position of no such transfer, or any other consequent act is prejudiced by the enactment of this legislation. The intent of the Commission is that no deceased's estate should be re-opened, or any document or act be brought into question, as a consequence of the Act being passed.

However, the application of the Act, as provided in subsection 5(1)(2), also prevents any challenge being made after the Act is in force to any provision in an instrument in effect when the Act comes into force. This means that, if for instance, a will which took effect in 1980, governed by the law of Manitoba, contained a violation of the modern law against perpetuities, and was thereupon challenged successfully in the courts, that successful challenge remains fully effective. On the other hand, if it is only recognized after this Act comes into force that a perpetuity violation exists in a will or deed that took effect before the Act comes into force, or that a permitted period of accumulation or duration had run, and that the legal consequences of this had not been put into effect, no challenge to the will or deed will then be allowed. It is true that in a sense this is arbitrary; it also deprives persons of rights to properties that might otherwise have been established in litigation. However, in the Commission's view, given the clear policy of the Act, it is preferable to have a clean break with the old law, rather than allow the old law to linger on into an indefinite future, subject only to the limitation of actions, and with respect only to some instruments, namely those taking effect before the Act comes into force. Given the policy of the Act, we can see no compelling justification for leaving "skeletons in the cupboard", wills and deeds in strong rooms and desks that in years to come are recognized as having provisions which are in violation of the perpetuity or accumulation rules, with all that may flow therefrom. Therefore, while paragraphs 5(2)(a), (b) and (c) keep the old law in effect to prevent the reopening or questioning of what has been done, subsection 5(1) prevents any new perpetuity or accumulation challenges, whether in litigation or with a view to settlement, being raised in the future.

Subsection 5(1) also has the effect that, as to instruments in effect when the Act comes into force, and under which periods of duration or accumulation are running, which could last for longer than the old law permits, no legal significance will attach if they do prove in future to last longer than the old law permits. However, it will be seen that where a will, deed or other document is expressly subject to a period of duration or accumulation, which has been tailored to accommodate the modern rule against perpetuities, or the rule against accumulations, this Act does nothing to change that period. If beneficiaries wish to have the period removed or changed in any way, an application to the court under section 61 for approval of an "arrangement" varying or terminating the trust would be necessary, and we consider that appropriate. The object of the Act is abolition, and such changes to the law as we think abolition necessitates; it is not concerned to make gratuitous changes to the terms of instruments.

Subsections 5(3), (4), (5) and (6) provide transitional arrangements consequent upon the conversion by the Act of all existing common law estates into equitable estates at the coming into force of the Act. Subsection 5(3) protects all court orders that were made, or acts that were done, before the Act comes into force. This means, for instance, that the order that was made in *Chupryk v. Haykowski*, [1980] 4 W.W.R. 534, 110 D.L.R. (3d) 108 (Man. C.A.) remains fully effective. Subsections 5(4) and (5) are designed to deal with existing instruments when the Act comes into force, whose then living beneficiaries are different from the number who became beneficiaries when the instrument took effect. The subsections follow the policy adopted in subsections 4(2) and (4). Subsection 5(6) ensures the availability of subsection 4(5) access to the courts, when successive interests are already in existence when the Act comes into force, and one or more original beneficiaries may be deceased.

NOTES:

1. Oral creations of successive interests must surely be exceedingly rare, but the Act must be comprehensive. Hereafter in this commentary a reference to the instrument of creation should be understood as including an oral creation.

2. See *Cheshire's Modern Real Property*, 12th ed., 1976, pp. 330-331.

The (Proposed) Perpetuities Abolition Act: Complete Text

AN ACT TO ABOLISH THE RULES AGAINST ACCUMULATIONS AND PERPETUITIES

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

1. *Short Title*

This Act may be cited as The Perpetuities Abolition Act

2. *Definitions*

In this Act

(a) *"property" includes real property, personal property, and mixed real and personal property,*

(b) *"successive legal interest" includes the first or particular interest and any following interest, whether any such interest is future, vested or contingent, or is an executory interest, or a determinable or defeasible interest or any interest over thereupon; also a general or special power of appointment; but excludes the interests of landlord and tenant within the meaning of The Landlord and Tenant Act.*

(c) *"the modern rule against perpetuities" includes the operation of the rule with regard to remoteness of vesting and perpetual duration, and also to testamentary executory interests in personalty,*

(d) *"the rule against accumulations" means the provisions of the Accumulations Act, 1800,*

(e) *"trustee" includes within its meaning a trustee for the purposes of The Trustee Act.*

3.1(1) *Non-applicability of the Accumulations Act*

The Act of the Parliament of Great Britain, 39 and 40 Geo. III, chapter 98 (known as the Accumulations Act, 1800) ceases to apply.

(2) *Rules against perpetuities abolished*

The rules of law against perpetuities, sometimes known as the rule in Whitby v. Mitchell and the modern rule against perpetuities, are abolished.

4. *Successive legal interests taking effect in equity*

(1) *Successive legal interests take effect in equity as interests behind a trust.*

(2) *The trustees of the property subject to such interest are the beneficiaries who*

(a) *are of age, and*

(b) *do not fall within the description of disqualification in paragraph 11(1)(a) of The Trustee Act, and*

(c) *are willing to act,*

at the time when the instrument or words of creation take effect.

(3) *Upon the instrument or words of creation taking effect the trust property vests in the trustee.*

(4) *When there are more than four beneficiaries who qualify for trusteeship under subsection 2 of this section, the first four as set out in the instrument or words of creation, seniority of age determining such persons in a class of beneficiaries, are the trustees.*

(5) *When there is no beneficiary who qualifies for trusteeship within subsection 2 of this section, an application may be made to the court under The Trustee Act for an order appointing an appropriate person or persons, including a trust corporation, as trustee or trustees.*

5. *Application of the Act*

(1) This Act applies to all instruments or words of creation, whether taking effect before, upon, or after the date of its coming into force, except as provided in this section.

(2) Where, prior to the coming into force of this Act, under any instrument or words of creation,

(a) an interest was held void by a court for breach of a rule against perpetuities, or

(b) the period permitted for the vesting of an interest, or for any duration or accumulation, has terminated, or

(c) any act was taken in reliance upon the applicability of a rule against perpetuities or the rule against accumulations, including the transfer of property to any person or corporation consequent upon any voidity or termination,

the law applies as if this Act had not been passed.

(3) Where, prior to the coming into force of this Act, any order of the court was made, or any act was taken, arising out of the existence of any successive legal interest, which order or act was in accordance with law if the interest or interests concerned were legal interests, the order or act continues to have full effect as if this Act had not been passed.

(4) Where the instrument or words of creation of successive legal interests took effect prior to the coming into force of this Act, the trustees are those beneficiaries who survive at the date of the Act coming into force, and who at that date qualify under subsection 4(2).

(5) Where under subsection 4 of this section there are more than four beneficiaries who survive, and so qualify, the first four thereof as set out in the instrument or words of creation, seniority of age determining such persons in a class of beneficiaries, are the trustees.

(6) Where at the date of the Act coming into force there is no surviving beneficiary who qualifies under subsection 4(2), subsection 4(5) applies.

APPENDIX C

The (Proposed) Act to Amend the Trustee Act and Commentary

AN ACT TO AMEND THE TRUSTEE ACT

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

Sec. 61 rep. and sub.

1. *Section 61 of the Act is repealed and the following section is substituted therefor:*

61(1) Definitions

"beneficiary" for the purposes of this section includes a person, corporation, trust, association of persons, and a charitable or non-charitable purpose; and applies whether the benefit in question is a vested or contingent interest, however remote, an annuity or other right charged on an interest or the property of a trust, a general or special power of appointment, or any other proprietary right conferred by a trust.

The proposed Act would repeal the existing section 61 of *"The Trustee Act"* in accordance with recommendations 5 to 9 (inclusive) in this Report. The definition subsection (section 61(1)) seeks to include all possible beneficiaries within the meaning of "beneficiary", and to ensure that all possible proprietory interests under a trust are also included.

61(2) No variation or termination without court approval

Subject to any trust terms reserving a power to any person or persons to revoke or in any way vary the trust or trusts, a trust arising before or after the coming into force of this section, whatever the nature of the property involved and whether arising by will, deed or other disposition is not to be varied or terminated before the expiration of the period of its natural duration as determined by the terms of the trust, except with the approval of the court of an arrangement varying or terminating the trust or trusts.

61(3) Application of subsection 61(2)

Without limiting the generality of subsection (2), the prohibition contained in subsection (2) applies to

(a) any interest under a trust whereunder the transfer or payment of the capital or of the income, including rents and profits

(i) is postponed to the attainment by the beneficiary or beneficiaries of a stated age or stated ages,

(ii) is postponed to the occurrence of a stated date or time or the passage of a stated period of time,

(iii) is to be made by instalments, or

(iv) is subject to a discretion to be exercised during any period by executors and trustees, or by trustees, as to the person or persons who may be paid or may receive the capital or income, including rents and profits, or as to the time or times at which or the manner in which payments or transfers of capital or income may be made,

and

(b) any variation or termination of the trust or trusts

(i) by merger, however occurring;

(ii) by consent of all the beneficiaries;

(iii) by renunciation of his interest by any beneficiary so as to cause an acceleration of remainder or reversionary interests.

Subsections 61(2) and (3) extend the jurisdiction of the Court to those variations or terminations of trust, for which the consent jurisdiction of the court is not required, because there is no beneficiary unable to consent for himself. Nevertheless, as we explain in our Report on *The Rule in Saunders v. Vautier* and in this Report, the lack of need for court approval of the variation or termination means that the intention of the settlor testator in creating the trust is never given "its day in court" and no one is concerned with

whether the circumstances at the time of variation or termination unwisely override an object in the setting up of the trust in the first place. As we explain, this opportunity of the beneficiary or beneficiaries to vary or terminate prematurely may even have occurred because of initial oversights, linguistic or substantive, in his composition of the trust by the draftsman. These situations are now all brought into the approval jurisdiction of the court. Subsection 61(2) confers the necessary broader jurisdiction upon the court; and subsection 61(3), identical with the Alberta *Trustee Act*, Section 42(2) (R.S.A. 1980, c. T-10), sets out each of those situations in which premature termination or variation is now possible.

61(4) *Types of court orders*

> *The approval of the Court under subsection (2) of a proposed arrangement shall be by means of an order approving*
>
> *(a) the variation or revocation of the whole or any part of the trust or trusts,*
>
> *(b) the resettling of any interest under a trust, or*
>
> *(c) the enlargement of the powers of the trustees to manage or administer any of the property subject to the trusts.*

Subsection 61(4) enumerates the types of court approval which may be given in the order, whether the court is approving only, or both approving and consenting, on behalf of beneficiaries.

61(5) *Consent by court to arrangement*

> *In approving any proposed arrangement, the court may consent to the proposed arrangement on behalf of any beneficiary when it is satisfied that for any reason the beneficiary is unable to give his, her, or its own consent.*

Subsection 61(5) continues the present authority under the existing section 61 to consent on behalf of beneficiaries unable to give their consent.

61(6) Beneficiaries for whom consent may be given

Without limiting the generality of subsection 61(5), the court may consent when the beneficiary is:

(a) an unborn person, or

(b) an infant or minor, or

(c) a mentally disordered person within the meaning of The Mental Health Act, or a person who is a defective within the meaning of The Trustee Act, or

(d) a person who to the satisfaction of the court cannot be traced, or

(e) a person who is totally unascertained, which includes a person described as any future spouse, and the statutory next of kin of a living person, as if that living person were dead, or

(f) an association of persons, or a corporation or trust, where there is no person able or empowered to consent on behalf of such association, corporation or trust, or

(g) a charitable or non-charitable purpose, where a corporation or trust for such a purpose is not itself the beneficiary.

Subsection 61(6) avoids the language of the existing section 61(1)(b) and section 61(1)(d), which were copied from the English legislation of 1958, as was the whole of section 61(1) and (2). The existing paragraph 61(1)(b) is designed to allow the court to consent on behalf of contingently interested persons, e.g., "to those of my children who by the age of 30 years have qualified as members of the legal profession in Manitoba"; at the testator's death, Tom is a lawyer, Dick

is 21 and attending university, while Harry is a minor in high school; Tom, Dick and Harry would like to divide the fund equally between them now; under the present paragraph 61(1)(b) the court can consent on behalf of Dick, though he is of age and able to consent (or refuse) for himself. The Commission notes that existing paragraph 61(1)(b) is not therefore in conformity with the conception of the court's consenting jurisdiction, which is to consent when consent (or refusal) cannot otherwise be forthcoming. As for present paragraph 61(1)(d), protective life interest trusts are less familiar in Canada than in England, none appears to have come before a Canadian court under this jurisdiction, and in any event there appears to be no ascertainable reason in Manitoba conditions for departing once again from the above conception of the court's consenting jurisdictions. Moreover, we have observed that almost all reported applications to Canadian courts have been for consent on behalf of minors and the unborn. For these reasons we are of the opinion that there is a good case for simplification and clarification of the whole consent jurisdiction. Subsection 61(6) aims to meet that requirement.

61(7) *The benefit of a beneficiary*

> *The court is not to approve an arrangement on behalf of any beneficiary unless it is satisfied that the nature or the terms of the arrangement appear to be for the benefit of that beneficiary.*

Subsection 61(7) continues the present requirement of the existing section 61(2) but the benefit of the beneficiary on behalf of whom the court's consent is to be the concern of the court.

61(8) *Meaning of benefit*

For the purposes of subsection 61(7) benefit means the enhancement of the financial, family, social, or moral wellbeing of the beneficiary, or in the case of a corporation, trust, association of persons, or a purpose the advancement or furtherance of the corporation, trust, association, or purpose.

Subsection 61(8) spells out the existing commonwealth case law, and expands to non-natural persons, groups of persons, and purposes the notion of benefit, as explained in this Report. Our aim is to assist the courts by spelling out the criteria which the legislation has in mind for the exercise of the judicial discretion.

61(9) *Arrangement to be justifiable*

The court before giving its approval to any arrangement must be satisfied that overall the arrangement is justifiable.

61(10) *Considerations for the purposes of 61(9)*

For the purposes of subsection 61(9) the court is to consider the intentions of the settlor or testator in creating the trust, and the circumstances that prevail at the time of the consideration by the court of the proposed arrangement.

As to the approval which the court must give to the whole arrangement, subsection 61(9) requires that it be "justifiable" in terms of the intentions the creator of the trust had in setting it up, and all the circumstances that exist at the time of the application to the court (subsection 61(10)). The equivalent legislation in Scotland, the *Trusts (Scotland) Act*, 1961, section 1(4)(a), employs the word "reasonable" in a provision, unique to the Scottish Act, concerned with the variation of an alimentary liferent, but the Commission is of the opinion that in the context of Manitoba's section 61

"justifiable" more precisely represents the inquiry which the courts are asked to make in these cases, a subject which the Commission addresses in its Report No. 18.

61(11) *General power of appointment exercisable by deed*

When an instrument creates a general power of appointment exercisable by deed, the donee of the power may not appoint to himself unless the instrument and other admissible evidence show an intention that he may so appoint.

Subsection 61(11) concerns the rule in *Basford v. Street*, which we discussed at pages 11-12, and 28, of the Report No. 18. In future a general power of appointment over capital exercisable by the life tenant by deed will not be exercisable in his own favour, unless there is evidence that the creator of the power intended such an exercise. E.g., "to my widow, Lucy, for life, remainder as she shall appoint by deed or will"; by not giving her the absolute ownership originally, the testator in fact intended that she should appoint to the children of the marriage, to other members of the larger family, or to charities, as she should think fit in the light of circumstances the testator could not foresee; as the law stands, the widow can appoint to herself by deed (unless the draftsman has drawn a special or fiduciary power, as perhaps he ought to have done), and acquire the absolute ownership for herself as soon as the assets in question are released by the testator's personal representatives.

61(12) *Property or interest to be held on trusts*

When a will or other instrument contains no trust, but the court is satisfied that, having regard to the circumstances and the terms of the gift or devise, it would be for the benefit of an infant or minor or other incapacitated donee or devisee that the court approve an arrangement whereby the property or interest taken by that donee or devisee is held on trusts during the period of incapacity, the court may approve such an arrangement.

Subsection 61(12) extends the jurisdiction of the court to cases where a trust is considered by the court to be advantageous, but where there is no existing trust to vary or terminate. This jurisdiction is at present lacking in Manitoba. Ontario precedent exists where the court was unable to assist because it lacked the jurisdiction and the Commission has adopted the current Alberta provision (section 42(9)) for putting this matter in hand.

61(13) *Effect of the court order*

> *Provided all beneficiaries able to do so, if any have to the satisfaction of the court given their consents, and the court, should there be any such beneficiary, is prepared to give its consent on behalf of all those unable to do so, the court may make an order not only approving, but giving immediate effect to the terms of the arrangement varying or terminating a trust under subsection 61(2), or creating a trust under subsection 61(12).*

Subsection 61(13) ends the present difficulty discussed in British texts (see *Underhill's Law of Trusts and Trustees*, 13th ed., at pp. 403-405), as to the precise effect of a court order of approval. Does the order itself vary or terminate the trust, or does the date of variation or termination occur when the trustees implement the approved arrangement? The new subsection clarifies the position by expressly adopting the first of these alternatives.

61(14) *Jurisdiction of court under sec. 60*

> *Nothing in this section affects the powers and authority of the court under section 60.*

Subsection 61(14) re-enacts the existing subsection 61(3) of *The Trustee Act*.

The (Proposed) Act to Amend the Trustee Act: Complete Text.

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Subject to any trust terms reserving a power to any person or persons to revoke or in any way vary the trust or trusts, a trust arising before or after the coming into force of this section, whatever the nature of the property involved and whether arising by will, deed or other disposition is not to be varied or terminated before the expiration of the period of its natural duration as determined by the terms of the trust, except with the approval of the court of an arrangement varying or terminating the trust or trusts.

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(iii) is to be made by instalments, or

(iv) is subject to a discretion to be exercised during any period by executors and trustees, or by trustees, as to the person or persons who may be paid or may receive the capital or income, including rents and profits, or as to the time or times at which or the manner in which payments or transfers of capital or income may be made,

and

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(d) a person who to the satisfaction of the court cannot be traced, or

(e) a person who is totally unascertained, which includes a person described as any future spouse, and the statutory next of kin of a living person, as if that living person were dead, or

(f) an association of persons, or a corporation or trust, where there is no person able or empowered to consent on behalf of such association, corporation or trust, or

(g) a charitable or non-charitable purpose, where a corporation or trust for such a purpose is not itself the beneficiary.

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The court is not to approve an arrangement on behalf of any beneficiary unless it is satisfied that the nature or the terms of the arrangement appear to be for the benefit of that beneficiary.

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For the purposes of subsection 61(7) benefit means the enhancement of the financial, family, social, or moral wellbeing of the beneficiary, or in the case of a corporation, trust, association of persons, or a purpose, the advancement or furtherance of the corporation, trust, association, or purpose.

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The court before giving its approval to any arrangement must be satisfied that overall the arrangement is justifiable.

61(10) *Considerations for the purposes of 61(9)*

For the purposes of subsection 61(9) the court is to consider the intentions of the settlor or testator in creating the trust, and the circumstances that prevail at the time of the consideration by the court of the proposed arrangement.

61(11) *General power of appointment exercisable by deed*

When an instrument creates a general power of appointment exercisable by deed, the donee of the power may not appoint to himself unless the instrument and other admissible evidence show an intention that he may so appoint.

61(12) *Property or interest to be held on trusts*

When a will or other instrument contains no trust, but the court is satisfied that, having regard to the circumstances and the terms of the gift or devise, it would be for the benefit of an infant or minor or other incapacitated donee or devisee that the court approve an arrangement whereby the property or interest taken by that donee or devisee is held on trusts during the period of incapacity, the court may approve such an arrangement.

61(13) *Effect of the court order*

Provided all beneficiaries able to do so, if any have to the satisfaction of the court given their consents, and the court, should there be any such beneficiary, is prepared to give its consent on behalf of all those unable to do so, the court may make an order not only approving, but giving immediate effect to the terms of the arrangement varying or terminating a trust under subsection 61(2), or creating a trust under subsection 61(12).

61(14) *Jurisdiction of court under sec. 60*

Nothing in this section affects the powers and authority of the court under section 60.