# A REEXAMINATION OF PERPETUITIES IN ARIZONA

JAMES J. LENOIR*

> Reform of the Rule Against Perpetuities is in the air. Every year new statutes modifying it are turned out in the legislative grist mill.[1]

In 1963, Arizona enacted new perpetuities legislation; section 33-261.01 of the Arizona Revised Statutes provides:

> The common law rule known as the rule against perpetuities shall hereafter be applicable to all property of every kind and nature and estates and other interests therein, whether personal, real or mixed, legal or equitable by way of trust or otherwise.

The former "perpetuities" section, and related sections, were repealed.[2]

It is the purpose of this article to examine the present law of perpetuities in this state, and to suggest modifications or changes, if any seem to be desirable.[3] This article will include an examination of (1) the section in the Arizona constitution (declaration of rights) which pro-

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* Professor of Law, University of Arizona. A.B. 1927, University of Mississippi; Ph.D. 1934, University of Illinois; LL.B. 1935, University of Mississippi; LL.M. 1937, Columbia University.

[1] COMMITTEE ON RULES AGAINST PERPETUITIES, AMERICAN BAR ASSOCIATION, PERPETUITY LEGISLATION HANDBOOK 1 (3d ed., 1967). The HANDBOOK at 1 explains the rule as follows:

> The common-law rule here considered has sometimes been called the rule against remoteness of vesting. It strikes down contingent interests which may vest within a designated period of time. The classic statement of the rule by John Chipman Gray is as follows:
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> > No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.
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> The rule is said to exist in order to prevent the taking of property out of commerce and rendering it inalienable. It is also said that its function is to prevent frozen assets and to strike a fair balance between the wishes of the present generation to dispose of property and the wishes of future generations. Those who do not feel secure in their grasp of the basic features of the common-law rule . . . may most readily restore their perception and perspective of the common-law rule by reading either Professor Leach's classic article, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638 (1938), or section 121 of SIMES HANDBOOK OF FUTURE INTERESTS (2d ed. 1966), or Chapter 6 of SCHWARTZ, FUTURE INTERESTS AND ESTATE PLANNING (1965).

For a clear statement of the permissible period and a general statement as to the nature of the common law rule see Powell, *Perpetuities in Arizona*, 1 ARIZ. L. REV. 225, 227-28 (1959).

[2] ARIZ. REV. STAT. ANN. § 33-261 (Supp. 1967).

[3] Professor Richard R. Powell performed an invaluable service for our state in leading us to repeal the troublesome two-life rule, and to affirm our adherence to the common law rule. *See* Powell, *Perpetuities in Arizona*, 1 ARIZ. L. REV. 225 (1959).

vides that "no law shall be enacted permitting any perpetuity;"[4] (2) the two-life rule which was adopted in 1913 and copied from Wisconsin;[5] and (3) the Act of 1963, which repealed the 1913 enactment and declared the common law rule to be applicable to all property, real and personal.[6]

## THE ARIZONA CONSTITUTIONAL PROVISION ON PERPETUITIES

Article II, § 29, of the declaration of rights of the Arizona constitution provides:

> No hereditary emoluments, privileges, or powers shall be granted or conferred, and no law shall be enacted permitting *any perpetuity* or entailment in this State. (emphasis added).

What did the framers of the constitution intend by the words "any perpetuity"? Was it their intention to recognize and reinforce the common law rule by adopting this explicit legislative restriction, or were they merely "borrowing" a provision from some other state bill of rights?

In an attempt to find answers to these questions, a study was made of the proceedings of the Arizona Constitutional Convention of 1910. One of the most complete records of the convention is found in the four volume *Verbatim Report* which was presented to the University of Arizona Library in 1927.[7] In addition, the library has a compilation by Judge Jacob Weinberger, an influential delegate in the convention, of the printed proposals submitted by the various delegates.[8] Inasmuch as these various proposals are referred to only by number in the *Verbatim Report*, the availability of the text of each proposal in the compilation is of primary importance.

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[4] ARIZ. CONST. art. 2, § 29.

[5] ARIZ. REV. STAT. ANN. §§ 33-261, -262 (1956).

[6] ARIZ. REV. STAT. ANN. § 33-261.01 (Supp. 1967).

[7] G. Hunt, Complete Verbatim Report, Arizona Constitutional Convention 1910 (unpublished typewritten manuscript in the Special Collection section of the University of Arizona Library) [hereinafter cited as Hunt's Report]. These four volumes contain daily reports of the constitutional proceedings, but do not contain the various proposals presented to the convention. Since there is no pagination, reference also will be made to the date of the recording in the report.

For an excellent portrait (politically speaking) of Hunt, who was president of the constitutional convention, see A. Johnson, Governor G. W. P. Hunt and Organized Labor (1964) (unpublished thesis in University of Arizona Library).

[8] J. Weinberger, Materials Pertaining to the Arizona Constitutional Convention of 1910 (papers in the Special Collection section of the University of Arizona Library). Among the papers is a bound volume of Invoices, a collection in numerical order of the printed proposals (designated as propositions) submitted to the delegates of the convention, with personal notations thereon by Judge Weinberger as to their disposition.

Judge Weinberger, a graduate of the University of Colorado Law School, practiced law in Gila County from 1905 to 1911. Then he moved to California where he practiced in San Diego until 1946, when he was appointed a United States district court judge. See WHO'S WHO IN AMERICA 1968-69; Wilson, *Arizona Days with Roscoe Wilson, "Lone Survivor of Convention,"* The Arizona Republic (Phoenix), Nov. 5 and 12, 1967 (Arizona Magazine).

Six different drafts or proposals for a declaration of rights were submitted to the convention, only one of which contained a "perpetuities" clause (Proposition No. 104).[9] This draft was submitted by Fred L. Ingraham, an attorney from Yuma County. Section 13 was as follows: "Perpetuities and estates tail are hereby forever prohibited." However, his proposal was not considered by the convention, and it does not appear that its § 13 received serious consideration by the Committee on Preamble and Declaration of Rights.

The basis of the Arizona declaration of rights is found in Proposition No. 94,[10] submitted to the convention by W. F. Cooper, a Republican delegate from Pima County, and, like Ingraham, an attorney.[11] Although it did not contain a "perpetuities" clause, § 28 provided that: "No hereditary emoluments, privileges or powers shall be granted or conferred in this State," a clause which was apparently copied from the constitution of the State of Washington.[12]

Cooper's Proposition No. 94 first went to the Committee on Legislative Department, Distribution of Powers and Appointment, which on November 1, 1910, recommended its referral to the Committee on Preamble and Declaration of Rights.[13] The composition of the latter committee was interesting. Its chairman was the Reverend James E. Crutchfield, a Methodist-Episcopal minister from Maricopa County.[14] The other two members were P. F. Connelly, a railroad engineer from Cochise County, and William Morgan, a cattleman from Navajo County.[15] It will be observed that no lawyers were members, yet this was the committee that took Cooper's draft and, with some amendments and additions (including the addition of the "no perpetuity" provision), on November 25th presented the substitute proposition to the Committee of the Whole for its consideration.

In so doing, Mr. Crutchfield, the chairman, said:

> Mr. Chairman [of the Committee of the Whole], a few words might be of assistance . . . Proposition No. 94 was taken entirely from the Constitution of the State of Washington . . . and in the consideration of Substitute Proposition No. 94 you will have the entire bill of rights from the State of Washington

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[9] Invoices, *supra* note 8, at Proposition No. 104.

[10] *Id.*

[11] So far as can be ascertained, however, Cooper had no further influence on the evolvement of the final draft of the declaration of rights and hence on the inclusion of the perpetuities clause. Republican delegates were in a distinct minority in the convention, and Cooper was not a member of the Committee on Preamble and Declaration of Rights. There were eleven Republican and forty-one Democratic delegates. D. VAN PETTEN, CONSTITUTION AND GOVERNMENT OF ARIZONA 28-29 (3d ed. 1960) lists the delegates and their occupations.

[12] 7 F. THORPE, CONSTITUTIONS 3973, 3975 (1909); WASH. CONST. art. 1, § 28.

[13] 3 Hunt's Report, *supra* note 7, Nov. 1, 1910.

[14] W. BELL, DIRECTORY OF PHOENIX AND THE SALT RIVER VALLEY 92 (1911).

[15] D. VAN PETTEN, *supra* note 11, at 28-29.

with one or two small amendments and four or five sections added.[16]

How or why the "perpetuities" section was added, we do not know. Perhaps it was because of Mr. Crutchfield's personal correspondence with a Judge Slough of California, in whom Mr. Crutchfield professed to have a great deal of confidence.[17] It is more likely that Jacob Weinberger, chairman of the Committee of the Whole that considered the declaration of rights, had something to do with the "perpetuities" addition.[18] Here, also, we find no statement to indicate his involvement in the phrasing of what is now § 29 of the declaration of rights. We do know that when this section was taken up by the Committee of the Whole (it was at that time § 36 of substitute proposition No. 94),[19] it was duly read, there was no discussion, no objection was offered, and the committee passed on to the next section without comment. This was the only time that this section was presented to the delegates for special consideration.

Although we do not know the precise authorship of the "perpetuities" clause, it was undoubtedly placed in the Arizona declaration of rights because the delegates were aware that a number of state constitutions either forbade or restricted perpetuities in the bill of rights.[20] As we have observed, the constitution of the State of Washington did not have a perpetuities provision, so Arizona could not have "borrowed" from Washington. An examination of other state constitutions likewise discloses no provision worded like the Arizona section.[21] Only in the Arizona constitution is it stated that "No law shall be enacted . . . ." In other words, only in Arizona is the restriction a legislative one.

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[16] 3 Hunt's Report, *supra* note 7, Nov. 25, 1910, at 12-13.

[17] *Id.* at 31. Mr. Crutchfield, however, did not disclose the nature of this correspondence.

[18] Mr. Weinberger, a delegate from Globe, was not only an able attorney and a member of the majority Democratic party, but was also a leading advocate of the initiative, referendum and recall. He, and Hunt, a master politician, must have worked closely together. If one may risk a guess, Weinberger was the guiding legal light behind the wording of Article II, Section 29. In any event, he was chairman of the Committee of the Whole that considered the declaration of rights.

[19] 3 Hunt's Report, *supra* note 7, Nov. 25, 1910, at 12.

[20] *E.g.*, ARK. CONST. art. 2, § 19; CALIF. CONST. art. XX, § 9; MONT. CONST. art. XIX, § 5; NEV. CONST. art. 15, § 4; N.C. CONST. art. I, § 31, art. II, § 15; OKLA. CONST. art. 2, § 32; TENN. CONST. art. I, § 22; TEX. CONST. art. I, § 26; VT. CONST. ch. II, § 59; WYO. CONST. art. I, § 30.

[21] It has been said that Arizona copied the New Mexico statute, which in turn had been copied from the Texas constitution. Powell, *supra* note 3, at 233. An examination of COMP. LAWS OF N.M. § 2600 (1885) reveals a wording almost identical with art. I, § 18, of the Texas constitution of 1845, which provided that "Perpetuities and Monopolies are contrary to the genius of a free government, and shall never be allowed; nor shall the law of primogeniture or entailments ever be in force in this State." 6 F. THORPE, CONSTITUTIONS 3547, 3549 (1909). An examination of the Arizona constitutional provision, however, will reveal a substantially different wording. The other states generally follow the wording of the Texas constitution. *See* J. GRAY, THE RULE AGAINST PERPETUITIES 670 (4th ed. 1942); Gerdes, *Perpetuities in California,* 16 CALIF. L. REV. 81 (1928).

It is believed this wording reflects the general distrust of legislative bodies widely held at that time. Certainly the incorporation of initiative and referendum provisions in the constitution[22] showed that the delegates shared the general distrust.

We may now ask: What significance should be attached to this constitutional provision restricting perpetuity legislation? Should it be taken literally? By forbidding legislative sanction of "any perpetuity" is an absolute rule intended so that no law may be enacted permitting any exceptions, whether for charitable or other purposes?

It is submitted that such a literal interpretation of article II, § 29 cannot be supported either by a study of the constitutional convention proceedings or by the logic of later developments. The paucity of information concerning the "how" and "why" of this section, coupled with its distinctive wording as a legislative restriction, supports the conclusion that it was intended as a declaration of policy only. One might say that the framers agreed that creation of a perpetuity was, as a general policy, an evil, not to be permitted through legislation. On the other hand, the general wording of the section indicates that it was not and could not be considered a rule or a formulation of rules which would precisely implement the policy.

## THE 1913 STATUTE

In 1913, the Arizona legislature adopted the Wisconsin statute pertaining to perpetuities affecting land. The copied provisions were as follows:

> 4679. Every future estate shall be void in its creation which shall suspend the absolute power of alienation for a longer period than is prescribed in this chapter; such power of alienation is suspended when there are no persons in being by whom an absolute fee in possession can be conveyed.
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> 4680. The absolute power of alienation shall not be suspended by any limitation or condition whatever for a longer period than during the continuance of two lives in being at the creation of the estate and twenty-one years thereafter, except when real estate is given, granted or devised to literary or charitable corporations which shall have been organized under the laws of this state, for their sole use and benefits, or to any cemetery corporation, society or association, and except also in the single case mentioned in the next section.[23]

An examination of these paragraphs is not an academic one, for,

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[22] *See* Houghton, *Arizona's Experience with the Initiative and Referendum*, 29 N.M. HIST. REV. 183, 185-86 (1954). He says the "principal contest was on the issue of whether the proposed constitution should embody the initiative, the referendum, and the recall . . . ."

[23] REV. STAT. OF ARIZ. §§ 4679-80 (1913).

although they were repealed by the 1963 legislature, they still control dispositive instruments in effect at the time the new act became effective.[24] The 1913 act was limited to real property in its application,[25] and its focus was on suspension of the power of alienation, which could not continue beyond the stated period of time. It applied to present interests which threatened to abridge freedom of alienation; it did not apply a remoteness of vesting rule.[26] The statute therefore did not cover all situations. Dispositions of personalty were not included. And what about those dispositions of realty which were in accord with the statute, but violated the common law rule forbidding undue remoteness of vesting?[27] Was the common law rule to be applied in conjunction with the 1913 statute, or was there simply no rule where the 1913 act did not apply?[28]

There are two main sources which might provide an answer to these questions: one is the interpretation which the Wisconsin Supreme Court had given its statute; the other the judicial interpretation which has been given to the Arizona act by our courts.

With respect to the Wisconsin decisions, a series of cases had held that, since the Wisconsin Legislature had borrowed the two-life statute with respect to realty, but had rejected the provisions involving personal property, the drafters must have intended to exempt dispositions of personalty from perpetuity restrictions.[29] It was also held that, since the Wisconsin statute was applicable only when there was a "suspension of the power of alienation," it could be avoided, if the real property could be alienated. The draftsman needed only to provide that the land involved could be sold; there was no remoteness of vesting rule applicable to real property. The result was that careful drafting could circumvent the Wisconsin statute.[30]

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[24] ARIZ. REV. STAT. ANN. § 33-261 (Supp. 1967).

[25] *See* Powell, *supra* note 3.

[26] 5 R. POWELL, REAL PROPERTY § 826 at 892-900 (1968). *See* Rundell, *Perpetuities in Personal Property in Wisconsin*, 4 WIS. L. REV. 1 (1926).

[27] For example, could the statute be construed to reach the same result as that in Walker v. Mercellus & Otisco St. Ry., 226 N.Y. 347, 123 N.E. 736 (1919), where the court was called upon to construe the New York suspension of power of alienation statute. This case "is generally assumed to have established a general rule of remoteness of vesting in New York, especially as it followed strong statements in favor of such a general rule in Matter of Wilcox, 194 N.Y. 288, 87 N.E. 497 (1909)." A. GULLIVER, CASES ON FUTURE INTERESTS 178-79 (1959).

[28] Mr. William Messinger of the Phoenix bar raised this question in his comment on Professor Powell's address. Powell, *supra* note 3, at 245.

[29] Will of Harrington, 142 Wis. 447, 125 N.W. 986 (1910); Becker v. Chester, 115 Wis. 90, 91 N.W. 87 (1902); Dodge v. Williams, 46 Wis. 70, 50 N.W. 1103 (1879).

[30] Rundell, *supra* note 26, at 18, observed:

> But in Wisconsin it was declared that the establishment of a rule with respect to real property without including a rule as to personal property constituted a legislative abolition of the common-law rule, and a declaration that there should be no rule against perpetuities in personal property. The very lack of logical justification for this view seems to show an absence of hostility to perpetuities, if not a partiality to them.

In examining the Arizona decisions, one of our questions will be whether the Arizona courts felt bound to follow the construction of the Wisconsin Supreme Court. There are three significant cases in which the Arizona Supreme Court was called upon to construe paragraphs 4679 and 4680 of the act of 1913:[31] *Lowell v. Lowell*;[32] *Valley National Bank v. Hartford Accident & Idemnity Co.*;[33] and *Shattuck v. Shattuck*.[34] *Lowell* is the most significant. Dr. Percival Lowell, a resident of Flagstaff, died in 1916. By the terms of his will he left his residuary estate in trust for the use of the Lowell Observatory. The greater portion of this estate consisted of personalty, but it also included the land and premises on which the Lowell Observatory is situated, and a house and two lots in Flagstaff. This real property was appraised at $32,500, less than two percent of the estate, which was appraised at approximately $2,000,000. As has been pointed out, the Arizona perpetuity statute applied only to real property and made an exception of gifts of real property "to literary or charitable corporations . . . organized under the laws of this state."[35] However, since the gift by Dr. Lowell was to an individual trustee, it was not within the statutory exception.

By the terms of the will, Mrs. Lowell was appointed one of the executors. She was also the only surviving heir and would have inherited the entire estate had Dr. Lowell died intestate. In her petition for final distribution she claimed that "the trust in favor of the Lowell Observatory was illegal as in violation of our statutes against perpetuities . . . ."[36] She asked that all the residuary estate be distributed to her as the sole heir at law of the decedent. The trustee under the terms of the will resisted the prayer of the petition and insisted that the gift was for a charitable use and thus not in contravention of the laws of Arizona. The superior court sustained the contention of the trustee, and held that the will was operative and lawful.[37] Mrs. Lowell appealed

[31] For a complete list of the perpetuities cases in Arizona see Powell, *supra* note 3, at 238-42. The only case found in the *Arizona Reports* since then which involved perpetuities is *In re* Estate of Harber, 99 Ariz. 323, 409 P.2d 31 (1965).

[32] 29 Ariz. 138, 240 P. 280 (1925).

[33] 57 Ariz. 276, 113 P.2d 359 (1941).

[34] 67 Ariz. 122, 192 P.2d 229 (1948).

[35] In 1921, while the *Lowell* case was pending, the 1913 Act was amended to read as follows:

> [w]hen real estate is given, *granted or devised to a charitable use* or to literary or charitable corporations which shall have been organized under the laws of this state, for their sole use and benefit, or to any cemetery corporation, society or association. Act of March 19, 1921, ch. 141, Ariz. Laws 313 (repealed 1963). (emphasis added).

[36] Lowell v. Lowell, 29 Ariz. 138, 141, 240 P. 280, 281 (1925). *See also* Brief for Appellant at 3.

[37] The will and codicil were admitted to probate, and letters testamentary were issued on December 2, 1916. Abstract of Record at 9. The notice of settlement of the final account and the hearing on the petition for final distribution was on November 15, 1920. *Id.* at 38.

from the court's order sustaining the trust. Its validity was thus brought before the supreme court of the state.

Mrs. Lowell based her case upon the fact that part of the trust assets were realty, and that, under the Arizona statute, a suspension of the power of alienation shall not be for a longer period than the continuance of two lives in being at the creation of the estate and twenty-one years thereafter. Counsel for Mrs. Lowell urged that since the devise in trust involved the realty upon which the observatory is situated, which was to be kept by the trustee in perpetuity and maintained as the permanent home of the observatory, the gift was not within the exception set forth in the statute.[38] In other words it was argued that the gift of realty was in "perpetuity" and thus prohibited.

Counsel then posed the further question: If the trust provision of the will is void as to real estate, does the trust provision as to personalty also fail? His argument on the point was as follows:

> The well settled rule is that when valid and invalid trust provisions of a will are so blended that it is impossible to separate them and give effect to one without doing violence to the intention of the testator, the whole trust must fail.[39]

It was the appellant's contention that the realty was inseparable from the personalty, and as a result the entire trust failed.

Appellee's counsel attempted to answer these arguments by pointing out, first of all, that the "power of alienation is not suspended for a moment."[40] Article seven of Dr. Lowell's will gave full power to the executor, as well as the trustee, to sell any portion of the property at any time.[41] This article provided:

> I empower my trustee at any time and for any purpose to sell and convey any real or personal estate wherever situated, of which I may die possessed, or which may at any time come into his hands as trustee, at public or private sale without the aid of any court, and to make all requisite deeds and transfers, and to invest and reinvest the proceeds of such sales, and to change real estate into personal estate, and personal property into real estate, and no purchaser from my executors or trustee shall be required to look to the application of the purchase money.[42]

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[38] Brief for Appellant at 21-28.

[39] *Id.* at 39.

[40] Brief for Appellee at 34.

[41] Appellee asserted that "The broadest powers of alienation have been granted the trustee, without reservation. Under the will the trustee has as full power to alienate every part and parcel of the estate as did the testator during his lifetime." *Id.* at 35.

[42] *Id.* at 34. Also quoted by the court, Lowell v. Lowell, 29 Ariz. 138, 145, 240 P. 280, 282-83 (1925).

This article was obviously designed to avoid the statutory provision forbidding the suspension of the power of alienation.[43]

With respect to the gift of personal property, appellee asserted that the common law rule was either repealed "as the Wisconsin decisions contend, and we have no law on the subject, or the common law is in effect and the alienation of the personal property may, in this case, be restrained forever."[44] Appellee was thus arguing that in so far as the gift of personal property was concerned it made no difference whether the common law rule was in effect or not. If it was not in effect, there would be no law prohibiting a perpetuity, since the act of 1913 did not apply to personalty. If it *was* in effect, it would not invalidate the gift in question, since this gift was for an educational (charitable) purpose, and under the common law such gifts were exempt from the application of the rule. Counsel for the appellant, Mrs. Lowell, did not bring the common law rule in issue, no doubt realizing that it would not help her case.[45]

The court, in upholding the validity of the trust, stated the determinative question as follows:

> Has the testator attached to his gift in trust for the Lowell Observatory the requirement that his trustee keep intact, as a part and parcel of that institution, the land and premises on which it is situated? or, Has he given to such trustee the present right and power to sell and dispose of such land and premises in the exercise of a proper discretion?[46]

The court found that the testator had not manifested an intention that the real estate be retained in perpetuity, but rather, showed clearly that he had given the trustee a present right and power to sell any part of

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[43] Counsel for the appellee supported this view, as follows:

> Conceding, for sake of argument only, that Doctor Lowell did not know the rule against restraint, the lawyer who prepared the will did know it, and prepared a will which did not violate such rule. The will shows a well thought out plan and discloses throughout lawful purposes prepared in conformity with all rules of law. Brief for Appellee at 180.

In the reply brief appellant's counsel had said:

> However much counsel for appellee may be impressed with this thought we are bold enough to suggest that it is quite apparent that the 'legal minds' [Massachusetts lawyers] so consulted did not as a matter of fact know that Arizona had adopted the Wisconsin law upon the subject of perpetuities, but assumed that the law of Massachusetts and other states recognizing the common law was in force in this State. Reply Brief for Appellant at 42-43.

The court in its opinion agreed with the appellee that Dr. Lowell and his legal counsel were aware of the dangers inherent in the gift to the trustee, and "he directed his will drawn in such manner as that no question could arise as to the suspension of the power of sale by the trustee, or concerning perpetuities." Lowell v. Lowell, 29 Ariz. 138, 153, 240 P. 280, 285 (1925).

[44] Brief for Appellee at 50.

[45] A further contention of the appellant was that the gift of personal property was not subject to the statutory provision unless it was so blended with the devise of realty that both must either stand or fall together if the testator's intent was to be carried out. Brief for Appellant at 39-42.

[46] Lowell v. Lowell, 29 Ariz. 138, 150, 240 P. 280, 284 (1925).

the estate, real and personal, and had expected that the power would be exercised with proper discretion as the times and conditions should warrant.

*Lowell* has been cited for the proposition that the statutory provision did not repeal the common law rule in its application to personal property.[47] On this point the court said:

> If it be granted that the legislature, in adopting paragraph 4680, *supra*, by implication forbade perpetuities in real property for charitable uses, its silence as to personalty must be taken as an adoption of the common law in that respect and as 'the rule of decision in all courts of this state.' The common law perpetuities in both real and personal estates when devoted to private uses were held to be against public policy, because the effect was to take such property out of commerce and to build up gigantic fortunes.[48]

In other words, the court refers to our adoption statute as the basis for the view that the common law rule is applicable to personalty.

Two considerations should here be noted, however. First, the court's statement was dictum. Nevertheless, the uncertainty concerning the applicability of the common law rule to personalty was so disturbing that many have accepted this dictum as a necessary and logical clarification of the law. Second, in making this pronouncement the court ignored the Wisconsin interpretation of the statute. The Wisconsin court had held that the silence of the statute as to personalty meant that the common law rule was not in effect in Wisconsin. Our court referred to the general rule of statutory construction with respect to borrowed statutes as a basis for its decision on the point at issue; that is, a borrowed statute should normally be interpreted as in the state of origin. But in the dictum quoted above, the court ignored and went counter to the Wisconsin court's interpretation.[49]

Further, it has been said that the *Lowell* case applied the doctrine of equitable conversion, making the statutory provision inapplicable.[50] It is submitted that it was unnecessary for the court to apply this doc-

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[47] Powell, *supra* note 3, at 238. Professor Powell states, "Thus the Lowell case deserves the term 'significant' because it settled for Arizona (a) the continuance of the common law Rule Against Perpetuities, applicable to personalty, side-by-side with the borrowed statutory rule applicable to land . . . ." *See also* W. SCHWARTZ, FUTURE INTERESTS AND ESTATE PLANNING 175 (1965), where the author says that Arizona "personalty [was] governed solely by the common law Rule Against Perpetuities." GRAY, *supra* note 21, at 691, states, "it *seems* as to personalty the common law Rule Against Perpetuities is in force" in Arizona. 3 L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS 286 (2d ed. 1956), states that, "as to personal property, the common law rule *appears* to be in force" in Arizona. (emphasis added).

[48] Lowell v. Lowell, 29 Ariz. 138, 149, 240 P. 280, 284 (1925).

[49] *See* F. HORACK, CASES ON LEGISLATION 370 (2d ed. 1954), where it is said that "if the construction in the foreign state is contrary to the policy of the adopting state the foreign construction will not be followed. Coombes v. Getz, 217 Cal. 320, 18 P.2d 939." *See also* J. SUTHERLAND, STATUTORY CONSTRUCTION §§ 5209-11 (3d ed. 1943).

[50] *See* p. 361 & note 69 *infra*.

trine; since there had been no suspension of the power of alienation, it was immaterial whether the realty was to be considered as personalty. As a consequence of the *Lowell* case, the practicing attorney continued to rely upon "power to convey" clauses to take real property outside the scope of the 1913 act.

In the second significant case, *Valley National Bank v. Hartford Accident & Indemnity Co.*,[51] the trustee brought an action under the Declaratory Judgment Act to determine the beneficiaries under the will of Governor Hunt. The will was dated July 7, 1931. Governor Hunt died on December 24, 1934. The will directed that after funeral expenses and debts had been paid, the remainder of his estate was to be turned over to the trustee. The order of distribution to the trustee was made on June 2, 1936. In addition to liquid assets in excess of $150,000, Governor Hunt's home, valued at $15,000, was placed in the trust.

Under the terms of the will, the trust estate was divided into two equal shares. Hunt's daughter was named beneficiary of one share, and the trustee was directed to pay her the income from that part until January 1, 1945, and then to pay over the corpus to her. As to the second share, the trustee was directed to hold it:

> for the benefit of any child or children of my said daughter . . . *then in being*, share and share alike . . . . The income from such half of my trust estate shall accumulate and be added to such half of my trust estate until any such child or children, the lawful issue of my said daughter . . . *then in being*, reaches the age of twenty-one years, at which time the income and net profits of said one-half of my trust estate thereafter accruing shall be paid to said child or children, the lawful issue of said Virginia Hunt Brannon, *then in being*, until said child or children, or either of them, attain the age of thirty years, at which time said one-half of said trust estate shall be distributed to said child or children, and, if more than one, shall be distributed share and share alike, and this trust shall cease and terminate. Each child upon attaining the age of thirty years shall receive his or her portion of said one-half of said trust estate free and clear of this trust . . . .[52] (emphasis added).

It was further provided:

> Should there be more than one child the issue of said Virginia Hunt Brannon and any child should die before reaching the age of thirty years, such child's share of the trust estate and any accumulations thereto and income thereof shall go to the remaining child or children and should all children die before this trust is distributed the balance of said trust estate shall go to my said daughter Virginia Hunt Brannon.[53]

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[51] 57 Ariz. 276, 113 P.2d 359 (1941).
[52] *Id.* at 279, 113 P.2d at 360.
[53] *Id.* at 279-80, 113 P.2d at 360.

When Governor Hunt died, his daughter had one son, born in April 1931. Another child, a daughter, was born to her on August 19, 1936, a date about twenty months after Governor Hunt's death, but only two and one-half months after the order of distribution to the trustee, of June 2, 1936.

In determining the beneficiaries under Governor Hunt's will the problem, of course, concerned his grandchildren. The framers of the will had been aware of the necessity of including a power in the trustee to dispose of real property in order to avoid the statutory rule against suspension of the power of alienation.[54] But what about the rule as to remoteness of vesting? It appears that the court, in its opinion, did not concern itself with this question. Yet, this question was inherent in the facts of the case. Let us examine the court's decision and the reasoning upon which it was based.

The court decided that the grandchildren were entitled to take under the will, basing its decision on the intention of the testator.[55] By approaching the problem in this manner it ignored any perpetuities problem which might be involved in the facts, for, as is well known, the intent of the testator cannot save a provision which violates the common law rule. The court's emphasis upon the testator's intent is seen in the following passage:

> We think there is no question but that the testator intended that the trust estate should go one-half to his married daughter Virginia and the other half to her child or children. The question is, did he express in his will that intention clearly enough that we can give it effect? We think he did. The phrase in the will "the other half of my said trust estate shall be held in trust for the benefit of any child or children of my said daughter Virginia Hunt Brannon, *then in being*, share and share alike," is the key to the donor's intention as to the beneficiaries of the trust.[56] (emphasis original).

The court thereupon interpreted the words "then in being" in accordance with what could have been the testator's intent — either a life in being at the time of the trust decree, or the date when the daughter Virginia received her half from the trustee. As pointed out above, the words "life in being" were not interpreted in the light of a perpetuities rule.[57]

Likewise, it appears that counsel for the parties were not primarily

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[54] Brief for Appellant at 26-27, Valley Nat'l Bank v. Hartford Accident & Indem. Co., 57 Ariz. 276, 113 P.2d 359 (1941).

[55] Valley Nat'l Bank v. Hartford Accident & Indem. Co., 57 Ariz. 276, 280-81, 113 P.2d 359, 361 (1941).

[56] *Id.*

[57] See Professor Powell's comment on this point: "Hence they [attorneys for the parties and judges deciding the case] blithely sidestepped the difficulties caused by (a) Arizona having two different rules of perpetuities, one applicable to land, the other to personalty; and (b) Arizona's lack of a remoteness ingredient in its statutory rule." Powell, *supra* note 3, at 241.

interested in the perpetuities issue. Counsel for the appellant merely pointed out that the Arizona perpetuities statute was inapplicable since, following the holding in the *Lowell* case, the trustee had been expressly given the power to sell or otherwise dispose of the whole or any portion of the trust estate.[58]

Counsel for appellee was in agreement, stating:

> Of course, it is certain that this will does not violate the rule against perpetuities. (See *Lowell v. Lowell*, 29 Ariz. 138, 240 Pac. 280). The will expressly gives the trustee the present right and power to sell or otherwise dispose of 'the whole or any portion of said trust estate.'[59]

Again, counsel for appellee stated:

> and again adverting to the rule against perpetuities, there are cases that hold that where the trustee is vested with the title to the property with the absolute power to dispose of said property by sale or otherwise, that the rule against perpetuities is not applicable and that a will might provide for after-born-grandchildren of the testator.[60]

As we have stated, however, the facts in the *Valley National Bank* case presented a perpetuities issue ignored by both the court and counsel for the parties. This was the provision for cross limitations between the children of Virginia should any child die before reaching the age of thirty. In such case, the share of such child or children was to go to the remaining child or children, or if none survived, to Virginia or her estate. Thus, the will created future interests not certain to vest within twenty-one years after Virginia's life, in violation of the common law rule against perpetuities. It will be noted that Virginia's life would have to be considered the life in being from which the twenty-one years would be measured. Virginia's daughter could not be considered a life in being, for she was born about twenty months after Governor Hunt's death.

It is unfortunate that this issue was not presented to the court, especially since the same judge (Judge Ross) had written the opinion in the *Lowell* case. One feels that the court missed an opportunity to make a much needed clarification of the status and application of the common law rule against perpetuities in Arizona.

The third significant case is *Shattuck v. Shattuck*.[61] There the testator left the greater portion of his estate in trust for a gross period of forty years, naming his six children as primary beneficiaries. The testator died on September 7, 1938; his will was admitted to probate

[58] Brief for Appellant at 26-27.
[59] Brief for Appellee at 7.
[60] *Id.* at 12.
[61] 67 Ariz. 122, 192 P.2d 229 (1948).

on October 11, 1938; and the distribution of the trust corpus to the trustee was ordered on December 21, 1939, at which time the administration of the estate was closed. There was no appeal from the probate court's decree.

The will set up a trust of

> all of the residue of the estate by the terms of which the corpus was to be held by the trustee for the term of 40 years beginning with the death of the testator, all income meanwhile to be paid semiannually in equal shares . . . to the testator's six children, or in the event of death to the issue living at the time of death, with the corpus finally divided equally among the children, the issue of any deceased child to take that share per stirpes. [Fifth paragraph of will as paraphrased by the court.][62]

This fifth paragraph further provided that if one of the six children were to die leaving no issue,

> the estate shall go to the survivors and to the issue living of every child of the testator who shall have previously died, in equal shares, per stirpes and not per capita.[63]

The assets in the trust were real as well as personal property. The trustee, however, was empowered to sell the realty and both sides consented that the case should be considered as though it involved only personal property.[64] As in the preceding case, certain provisions of the will indicated a possible violation of the common law rule against perpetuities. The gross period of forty years, as well as the cross limitations over, left the persons entitled to take uncertain for a period beyond the twenty-one years following the death of the testator.[65]

After receiving the trust corpus, the trustee made the semi-annual payments of income as directed in the will, but on November 5, 1942, one of the six children died without issue and the trustee refused to continue disbursement of the income to the deceased child's estate. Thereupon the widow of the deceased child, in her capacity as executrix of her husband's estate, brought suit under the Declaratory Judgment Act against the trustee and all other beneficiaries and parties interested as heirs or legatees under the will.

In her action the widow claimed that the trust violated the common

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[62] *Id.* at 125.

[63] Abstract of Record at 18-20.

[64] Brief for Appellant at 6; Brief for Appellees at 140. In the memorandum opinion and order of the superior court, Judge Udall said, "The Court concurs with counsel for both parties that for the purpose of this case the entire Shattuck estate should be treated as personal property . . . ." *Id.* at 52.

[65] In the Brief for Appellant at 16, counsel stated, "Just why Lemuel C. Shattuck chose forty years is not known. He either knew nothing of the rule or deliberately ignored it. Had he chosen one hundred forty years or four hundred years, the violation of the rule would have been more startling but not greater in legal contemplation. Yet under the reasoning of the lower Court, it would have been equally invulnerable to attack!"

law rule against perpetuities and restraints on alienation, and hence the plaintiff and the children of the testator

> are entitled to their respective shares forthwith and in fee . . . and if said will be construed as attempting to vest the corpus of said residue in certain persons who may be in existence 40 years from the death of the said decedent, said attempted disposition is in violation of said laws against perpetuities and the restraint of alienation and said decedent dies intestate as to said residue . . . .[66]

In upholding the trust the trial court (Judge Levi S. Udall) held that all of the matters relative to the trust set forth in the complaint "are now res adjudicata by virtue of the entering of the decree of distribution."[67] Judge Udall agreed with the counsel for the trustee that since the Arizona Probate Code had been taken from California, he was bound to follow, on principle, the rules announced by the California cases.[68]

In the memorandum opinion Judge Udall agreed with the counsel for both parties "that for the purpose of this case the entire *Shattuck* estate should be treated as personal property, this under the doctrine of 'equitable conversion.'"[69] In regard to the common law rule against perpetuities, he stated that the trust appeared to violate the rule "as extending control of personal property beyond the twenty-one year period fixed by the common law."[70] It was his opinion that if the question had been raised during probate, the offending part of the trust, if divisible, would doubtless have been nullified. He further stated that, in his opinion, the Arizona Supreme Court in the *Lowell* case had definitely declared that the common law rule as applied to personal property was in full force and effect in Arizona. He said:

> This Court is of the opinion that our Supreme Court in the *Lowell* case definitely declared that the common law rule prohibiting perpetuities (which involves future interests and postponement of the vesting) as applied to personal property is in

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[66] Abstract of Record at 8.

[67] *Id.* at 57.

[68] *Id.* at 56-57. Judge Udall said:

> It is probably true that Judge Hall [probate court judge] was not aware that in entering the decree of distribution in this estate he was actually passing upon the legality of the trusts set up in the will, as no issue had been made of it and the signing of decree was probably routine. The rule is that res adjudicata is a bar not only as respects matters actually presented, but also as to any other matter that could have been presented therein. It can not be denied that any heir of the estate could have made an issue of the validity of the trust and have secured an enlightened judicial determination thereof before distribution.
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> . . . Also I am of the opinion that Arizona should, on principle, follow the rules announced by the California cases.

[69] Abstract of Record at 52. Judge Udall pointed out: "We are not here concerned with the question of statutory restraint against alienation of realty, which is all our statutes purport to cover."

[70] Abstract of Record at 58.

> full force and effect in Arizona. Even though it is true that we did adopt our statute on alienation and perpetuities of realty from Wisconsin, and that the latter state, before our adoption of the statute, had judicially declared that the common law rule prohibiting perpetuities of personal property had been repealed, still our Court apparently felt that Wisconsin had gone 'haywire' in their interpretation of the matter, and that there was no justification for us to repeat their mistake . . . . *I therefore have no hesitancy in holding that the common law rule prohibiting perpetuities as applied to personal property is in full force and effect in Arizona.*[71] (emphasis added).

On appeal, the appellant put in issue two fundamental questions: (1) whether a decree of a probate court which does not construe the terms of the will is conclusive despite the fact that the will violates the common law rule against perpetuities;[72] and (2) whether the common law rule against perpetuities applies to dispositive instruments in Arizona.[73]

On the first question, counsel for the appellees took the position that the failure to appeal in proper time from the probate court's decree of distribution made the matter res adjudicata,[74] since the constitution and laws of Arizona vest sole and exclusive jurisdiction over probate matters in the superior court.[75] On the second question it was argued at length that there was no rule against perpetuities in Arizona other than that found in the statutory provisions, and hence no rule applicable to personal property.[76] Reference was made to the fact that the Arizona statute had been borrowed from Wisconsin, and that this interpretation was in accord with the Wisconsin cases. It was further argued that the statements in the *Lowell* case relative to the common law rule were "confusing and self-contradictory obiter dicta . . . . [and that] [a]n examination of the record filed in this court in the *Lowell* case will reveal no pertinent question relating to personalty was every raised by either side."[77] A further argument was that the will of the decedent as incorporated in the decree would not have violated the rule against perpetuities even if it had been in effect.

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[71] *Id.* at 52-54.

[72] Brief for Appellant at 8-9.

[73] *Id.* at 1017.

[74] Brief for Appellees at 11. A substantial portion of the brief supported the contention that "The Doctrine of Res Judicata is Based on the Highest Concepts of Public Policy and Applies to All Final Judicial Determinations, Including Those Which May be Erroneous Because of Some Constitutional or Statutory Provision, or Otherwise Offensive to Public Policy." *Id.* at 99. Appellees attempted to sustain this proposition at length. *Id.* at 99-138.

[75] ARIZ. CONST. art. 6, § 6, provides, "The superior court shall have original jurisdiction in all cases of equity and in all cases at law which involve the title to, or the possession of, real property . . . ."

[76] Brief for Appellees at 138-152.

[77] *Id.* at 144, 145.

In reaching its decision the supreme court found it unnecessary to pass on the perpetuities question. It merely said:

> Very interesting questions as to whether or not the rule against perpetuities applies to personalty, and whether the facts of this trust bring it within the proscription of the rule, and others, are learnedly and exhaustively discussed in the briefs. We find it unnecessary to discuss them, for if the rule of *res adjudicata* applies and the decision of the learned trial court dismissing the action was correct, there is an end to the matter.[78] (emphasis original).

The court held that a will is merged in the decree of distribution and that after such a decree no inquiry can be made into the validity of the will, otherwise than by an appeal from such a decree. It thus followed the California precedents.

The decision in *Shattuck,* it is submitted, was based upon a questionable foundation. As counsel pointed out in argument, the decree merely adopted the will and manifestly did not construe it.[79] Yet the will on its face obviously violated the rule against perpetuities, and there was no opportunity, nor could there have been, for the plaintiff to contest it in the probate proceedings. Should the probate judge have raised the question? It would have been an unusual judge who would have done so. Although one can readily understand the policy that supported the court's position, does this outweigh the rights of parties who are unable or are not in a position to raise questions? If the court had taken into consideration the careful argument of counsel for the appellees that there was no common law rule against perpetuities in Arizona and had made a definite ruling, it could have resolved much of the legal uncertainty centering on perpetuities in Arizona.

Our discussion of this period may be summarized as follows:

1. The Arizona suspension of alienation statute was easy to avoid by proper drafting. One had merely to insert a power to sell or dispose of the real property, and the suspension terms of the act were avoided.

2. There was no Arizona case directly holding that the common law rule against perpetuities either was or was not applicable to personalty. In spite of the lengthy argument of the appellees in the *Shattuck* case that Arizona had no law against perpetuities applicable to personalty, the supreme court avoided this issue by declaring that the rule of res adjudicata applied and the question therefore could not be raised. On the other hand, in support of the view that the common law rule filled in the gaps of the 1913 act with respect to personalty, we have the definite statement of the *Lowell* case, and the construction

[78] Shattuck v. Shattuck, 67 Ariz. 122, 126-27, 192 P.2d 229, 231 (1948).
[79] Brief for Appellant at 8-9.

placed upon that case by Judge Udall, trial judge in *Shattuck*, and one of the state's most respected jurists.

### ACT OF 1963 — REPEAL OF THE TWO-LIFE RULE

In 1950, a leading Arizona probate lawyer was asked for an opinion as to whether two inter vivos trusts presented for his consideration contravened the statutory rule against perpetuities. He concluded his opinion with this statement:

> It is regretted that this opinion is so long, and yet so inconclusive on some of the potential problems; but the confusion in the field, and the difficulties of the subject matter are so great, and so many problems have not yet been before the Arizona courts that the predictable results as to some considerations necessarily cannot be stated positively . . . .[80]

This uncertainty, as well as dissatisfaction, led interested members of the bar to conduct informal studies of the Arizona perpetuities statute of 1913. Suggested changes were submitted to the legislature, but nothing was done, probably because there was little unanimity as to what changes should be made. In 1959, the Continuing Legal Education Committee of the State Bar decided to ask a distinguished scholar to analyze the legal status of perpetuities in Arizona and to make recommendations relative to any needed legislation.[81] Richard R. Powell, reporter for the Restatement of Property and professor of law at Columbia University, was asked to assume this task. This he did in a carefully prepared paper which was presented to representative members of the Arizona bar.[82]

Mr. Powell recommended material changes. Initially, he would repeal the perpetuities sections that had been borrowed from Wisconsin. In place of these sections Powell stated that the simplest solution "would be an act . . . modelled either on the Wisconsin enactments of 1927 and 1931 or on the Michigan enactment of 1949."[83] He concluded with this statement:

> Such an enactment would free Arizona from the embarrassment of two different rules, one applicable to personalty, the other to land; would eliminate this state's mistaken following of New York in substituting two lives for multiple lives; would restore as to land dispositions the common law remoteness ingredient, now present in your law as to personalty; and would retain unchanged the freeing of most trusts' duration from

[80] Memorandum Re: Perpetuities, prepared by the Hon. William H. Messinger of the Phoenix bar, Feb. 17, 1950, copy in the possession of James J. Lenoir.
[81] *See* Foreward, *Symposium on Trust Planning*, 1 ARIZ. L. REV. 175 (1960).
[82] Powell, *supra* note 3.
[83] *Id.* at 242-43.

> compliance with the permissible period of the rule accomplished by the wise decision of your supreme court in the *Lowell* case.[84]

Arizona was slow to follow these recommendations; in fact, it is doubtful that they would have been acted upon had there not been a belated realization that the uncertainty and confusion surrounding the perpetuities and accumulation statutes could cause the state to lose trust business.[85]

The first step was taken in 1962, when an amendment to § 33-238 (the accumulation statute) was proposed and a bill drafted to accomplish this purpose.[86] The Senate Judiciary Committee, however, found defects in the bill. The Corporate Fiduciary Association of Arizona, its counsel and interested members of the bar, thereupon proposed that legislation be enacted in accordance with the recommendations Professor Powell had made in 1959. This resulted in senate bill No. 110 which followed the wording of the Michigan Act. As first drafted, the bill read in part as follows:

> The common law rule known as the rule against perpetuities *now in force in this state as to personal property* shall hereafter be applicable to all property of every kind and nature and estates and other interests therein, whether personal, real or mixed, legal or equitable by way of trust or otherwise, thereby making uniform the rule as to perpetuities.[87] (emphasis added).

One change was made in the proposed bill. In 1959, in commenting on Powell's recommendations, the Honorable William Messinger of the Phoenix bar pointed out that the construction which had been placed on the *Lowell* case, supporting the proposition that the rule against perpetuities applied to personalty in Arizona, was subject to doubt.[88] In line with this thought, senate bill No. 110 was redrafted to read:

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[84] *Id.*

[85] It was rumored that trust business was being attracted to other jurisdictions. Professor Powell's address to the Arizona bar had awakened attorneys to the dangers inherent in our accumulation and perpetuities statutes. He had performed a similar service for New York attorneys with respect to the New York Thellusson Act. See Leach, *Perpetuities: The Nutshell Revisited*, 78 HARV. L. REV. 973, 984-85 (1965), where it is stated that "the very lucrative New York trust business started to emigrate, to the consternation of New York trust companies and attorneys. When Professor Richard R. B. Powell of Columbia called attention to this, reform was rapid."

[86] S. 81, 25th Leg., 2d Sess. (1962), would have amended ARIZ. REV. STAT. ANN. § 33-238 (1956) to read as follows:

> A trust of real and personal property may be created by will or deed for the benefit of the settlor's relatives, which may direct the accumulation of rents and profits therefrom, provided that any such trust shall terminate and all its property shall be distributed to the beneficiaries within the lives of those beneficiaries in being at the time of the execution of such will or deed, and twenty-one years thereafter.

[87] S. 110, 26 Leg., 1st Sess. (1963). This bill followed in general the Michigan enactment of 1949, MICH. COMP. LAWS § 554.51 (Supp. 1952), which had been suggested by Professor Powell. *See* Powell, *supra* note 3, at 243.

[88] Powell, *supra* note 3, at 245.

> The common law rule known as the rule against perpetuities shall hereafter be applicable to all property of every kind and nature and estates and other interests therein, whether personal, real or mixed, legal or equitable by way of trust or otherwise.[89]

The active interest of the corporate fiduciaries and the work of their counsel led to a speedy passage of the bill through both houses of the Arizona Legislature. In a technical matter of this sort the legislators, most of whom were non-lawyers, had to rely on the judgment of those pushing the bill. An attorney who had been asked to explain the perpetuities legislation to two committees of the lower house, none of whose members were attorneys, tells this story: While he was waiting to appear before one of the committees, he overheard one member explaining to another that there was to be a hearing on senate bill No. 110 which involved perpetuities. On being asked what was meant by the term, the legislator stated frankly that he did not know, but thought that it concerned the population explosion.

On its passage, senate bill No. 110 was immediately signed by the Governor.[90] We may now ask, what is the effective date of the 1963 act? We note that the Arizona constitution provides that any measure enacted by the legislature and not marked as an emergency measure does not become effective until ninety days after the adjournment of the legislature passing the measure.[91] Senate bill No. 110 was approved

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[89] When senate bill No. 110 was in draft form a colleague in the field of property law was asked to comment and criticize the proposed bill. In his memorandum he wrote,

> I realize that I have only a general knowledge of Future Estates in general and of the "Rule" in particular . . . .
>
> Having gotten the students to realize that springing and shifting uses were conversely turned into legal future estates, I want them to realize, at least that the courts put brakes upon what thus had become possible. So I try to get them to realize, at least in general, the reasons for and the operation of the Rule. I use just one case, the Brattle Square Church case. I make it clear that all they have gotten at that point is a mere *glimpse* of Future Estates and the Rule, enough I hope, that they may realize when they have a question on which to get the advice of a *real* lawyer!
>
> Unless one can deduce, with reasonable degree of accuracy, from Arizona cases, a Rule as to Personalty, and I don't know the answer to that, I think the legislature has wisely abandoned the proposed wording [of the unamended bill, see *supra* note 87].
>
> The remaining question is whether for legislative purposes 'The common law rule known as the rule against perpetuities' is sufficiently agreed upon. I believe pundits have differed as to just what the Rule is or was. So, from that point of view, it might be desirable to see whether it is possible to agree upon a wording, without too much prolixity which could be incorporated in the statute. Memorandum to James J. Lenoir, Feb. 1963.

[90] For an analysis of the new act see McClennen & Wiley, *Common Law Rule on Perpetuities Adopted by Arizona Legislature,* Arizona Weekly Gazette, April 25, 1963, at 1, cols. 1-3.

[91] ARIZ. CONST. art. 4, § 1 (3).

by the Governor on March 21, 1963 and the legislature adjourned on April 2, 1963; hence the act became effective on July 2, 1963.

How are dispositive instruments to be treated which were drawn up during the period of the 1913 act, but did not become effective until after the 1963 act was passed? The answer is that "any part of a will or other instrument executed prior to the effective date of this [the 1963] Act and any such part which would have been valid prior to the effective date shall be valid irrespective of the provisions of this Act."[92] This prevents the new act from having the harmful effect of invalidating dispositive provisions which were valid when executed. This, of course, is a sound provision in view of the uncertainties and conflicting opinions concerning the status of perpetuities in Arizona during the period of the 1913 act.

To the extent one accepts the view that during this earlier period the common law rule supplemented the areas covered by the 1913 act, this provision is meaningless, for the requirements of the 1963 act (multiple lives) are more liberal than the prior law (two lives) as to the length of the suspension period. A dispositive instrument valid under the prior law would be valid under the more liberal provisions of the new act. But if one rejects the view that the common law rule supplemented the 1913 act, a dispositive instrument could be drawn up valid under that act, but invalid under the 1963 act. For such instruments the provision of the new act would have meaning.

The 1963 act makes the common law rule against perpetuities applicable to all property of every kind and nature. It is not the purpose of this paper to analyze the common law rule, since there is much available literature on the subject,[93] but it should be pointed out that authorities are not in complete agreement in their statement of the rule.

## Summary and Recommendations

In summary we may say that the common law rule against perpetuities is in force in Arizona; certainly, since the act of 1963, and, less certainly, during the years before the act. Article II, § 29 of the Arizona declaration of rights seems to be merely a recognition that perpetuities are, as a general policy, to be forbidden, and that there should be no legislation to controvert this policy. The section was not, however, a rule, or a set of rules; something else was needed to imple-

[92] Ariz Rev. Stat. Ann. § 33-261.03 (1956). On the effective date of new legislation of this type see Eckhardt, *Perpetuities Reform by Legislation*, 31 Mo. L. Rev. 56, 57-58 (1966). Eckhardt points out that "One of the first problems that will face a lawyer concerned with a perpetuities problem is whether the old law governs his case or whether the new statute applies." *Id.* at 57.

[93] See the texts on the Rule Against Perpetuities listed in Perpetuity Legislation Handbook, *supra* note 1, app. III at 34.

ment the policy. It seems the better view that this "something else" was the common law rule against perpetuities, which can be said to have been adopted by the state when it adopted the common law.

As has been pointed out, the 1913 act was more restrictive than the common law rule in that there was to be no suspension of the period of alienation for a shorter period (two lives) than that set forth in the common law rule (multiple lives). The problems of interpretation result from the fact that since the 1913 act was borrowed from Wisconsin, our courts would normally accept the decisions of the Wisconsin courts with respect to the statute. However, the Wisconsin courts had declared that the silence of the statute as to personalty meant that Wisconsin had no rule against perpetuities as regards personalty. The Wisconsin decisions also applied the statute only when there was a suspension of the power of alienation in the dispositive instrument.

The writer has not accepted these interpretations of the 1913 act for the reasons previously discussed and which we briefly summarize here. First of all, Wisconsin had no constitutional provision similar to article II, § 29 of the Arizona constitution's declaration of rights. Second, persuasive dictum by the supreme court in the *Lowell* case and the construction put on that case by trial Judge Udall in *Shattuck* give strong support to the view that the common law rule has been in effect in Arizona with respect to personalty. Also, there has been no actual holding refuting this position.

The weight of authority and logic seems to lie in the view that the common law rule against perpetuities supplemented and filled in the gaps of the 1913 act. This is, of course, not merely an academic question, for the validity of dispositive instruments executed before the 1963 act is involved.

Having examined the development of Arizona perpetuity legislation and the significant cases, we have found much uncertainty. This led to the declaration in the act of 1963 that the common law rule is in effect in this state. Is this a final answer? It should be noted that there has been widespread recognition of the need for legislative modifications of the rule against perpetuities, especially in view of the economic and other changes which have taken place in recent years. The Committee on Rules Against Perpetuities of the American Bar Association, in its *Perpetuity Legislation Handbook*, has listed the perpetuities statutes of the various states.[94] Statutory modifications of the rule are frequent; for example, thirty-seven states list pension and profit-sharing trusts as exempt from its application.[95] Other exceptions

[94] *Id.* app. I at 27-32.
[95] *Id.* at 10-25, 19-26.

include condominiums, burial lots, and cemetery funds. Modifications also have been enacted or suggested to deal with administrative contingencies, the fertile octogenarian situation, and the unborn widow possibility.[96]

One may ask whether such statutes are desirable in Arizona. It may be argued, on the one hand, that a liberal construction of the common law rule by our supreme court could go far in attaining the same results that other states have secured through legislation.[97] Arizona, being a young state, has only a few cases construing the rule. Nor have the much-vaunted terrors of the rule appeared in the judicial decisions of this state. If anything, the Arizona Supreme Court has given more attention to following the intention of the dispositive party, than to the relentless application of any rule which would strike down that intention. We need only notice how the court upheld the trust in the *Valley National Bank* case. And again, in *Shattuck*, the forty-year gross period was nineteen years longer than the permissible period laid down by the common law rule against perpetuities.

On the other hand, uncertainties in applying the common law rule

[96] The writer has recently received, from the Chicago Bar Association, the draft and supporting memorandum of a proposed act for Illinois, incorporating a number of modifications of this type. The proposed act (drafted by Daniel M. Schuyler, well-known Chicago attorney) is carefully prepared and comprehensive in scope. Among other things, it would except from the application of the rule (1) powers to sell, lease and mortgage; (2) leases to commence in the future (but such leases must actually commence in possession within a forty year period); and (3) options in gross (but such options may not be exercised more than forty years from the date of their creation). As for revocable trusts, it would make certain that the period of the rule begins to run on the death of the grantor.

The proposed act would create presumptions designed to minimize the risk of a violation of the rule. For example: (1) a presumption that an interest is intended to be valid, and that the probate of a will, the payment of debts and other administrative contingencies are intended to occur within twenty-one years from the date of the creation of an interest which depends upon the happening of such a contingency; (2) a presumption that references in an instrument to a gift to a widow shall be presumed to refer to a person living at the date that the period of the rule commences to run; and (3) a presumption that the validity of an interest depends upon the possibility of the birth or adoption of a child. A person over the age of sixty-five and under the age of thirteen is, for the purpose of the rule *only*, deemed incapable of having a child, and medical evidence may be received as to the incapacity of any person who is under sixty-five to have a child. (For these purposes the possibility of having a child by adoption is to be disregarded).

The proposal would provide for the reduction of age contingencies in excess of twenty-one years where this would result in validating an otherwise invalid gift. It has a built-in savings clause for situations such as arose in *Shattuck*. It provides that where a trust might violate the rule, the trust is to terminate twenty-one years after the death of all of the beneficiaries who are living at the effective date of the interest creating the trust.

Although the above is but a rough outline of some of the provisions of the Illinois proposal, it indicates the area in which similar suggestions could very well be considered in Arizona. An act of this nature could be an effective way of clarifying our law, and thus help avoid future litigation.

[97] See the critical comments on this approach by SCHUYLER, *36th Midcontinent Trust Conference*, 106 TRUSTS AND ESTATES 1115, 1119 (1967).

exist in Arizona as well as elsewhere, and our lawyers understandably do not wish to rely on future litigation to clarify matters presently confronting them. For example, there are numerous pension and profit-sharing plans in this state; it is believed that these probably violate the common law rule. Other states are studying this question and suggesting modifications that will preserve the purpose of the rule without preventing needed innovations. It is urged that the bar, the corporate fiduciaries and other interested parties give serious consideration to a similar study in this state.