Perpetuities in Arizona

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Ladies and Gentlemen of Arizona:

My pleasure in being with you for this conference has many bases. It is a real joy to renew an old acquaintance with Professor Lenoir and his delightful family. There is great promise of new friends in this opportunity to meet the representative leaders of your bar. The change from the climate of New York at the end of February to the climate of your state at the same period provides a credit entry on the ledger. Basically, however, my desire to be here at this time rests upon my hope that I can provide you with adequate reasons for an early statutory modification of five sections in the Arizona Revised Statutes of 1956, namely, §§ 33-229(B), 33-230(A), 33-232(B), and most important of all, §§ 33-235 and 33-261.

These sections constitute a 1913 borrowing by Arizona from the statutes of Wisconsin, which had in turn been borrowed from Michigan in 1849, which had in turn been taken from the New York Revised Statutes of 1830. Thus I come to you from New York, seeking to prevent you from reaping the undesirable harvest of a mistaken confidence in the New York innovations made thirteen decades ago. Despite the genuine and interesting antiquity of your Spanish and Indian heritages, the fact remains that on the problems involving the Rule Against Perpetuities, yours is a young state. Accumulations of wealth among your citizens are growing more significant day by day, but the number of wealthy persons who have heretofore died resident in your state is relatively small, even in proportion to your population. This means that you have not yet had the accumulation of bitter experiences with the New York-derived rules on this topic which have caused every other erstwhile follower of New York's statutory innovations of 1830 on this topic to backtrack either by decisions or by legislative action. Even New York itself, in 1958, abandoned the two-life provision for multiple lives. While your body of decisions on this topic is still small is the time when a change to a more workable rule can be made with a minimum of dislocations.

Any important change in statutory law requires a basic acquaintance with what exists, so that the "operation" can be judged wisely as to its necessity, and if found necessary, can be executed with a minimum of

* See Contributors' Section, p. 284, for biographical data.

shock to the body of the law. I propose, therefore, (a) to trace quickly the evolution of the common law Rule Against Perpetuities in England, since that constitutes presently the Arizona law applicable to all disposition of personal property, except estates for years; (b) to outline sketchily the changes injected into the law on this topic by the New York Revised Statutes of 1830, as interpreted by the New York courts, until modified slightly by a statute of 1929, and drastically by a statute of 1958; (c) to deal briefly with the partial borrowing of the New York system by the Revised Statutes of Michigan enacted in 1846, and made bearable by judicial interpretation down to the restoration of the common law made by statute of 1949; (d) to discuss the Wisconsin borrowing of the Michigan statutes of 1849, and the mitigation of their hardships down to the Wisconsin return to the common law rule in 1927; and then to present the Arizona constitutional provision barring perpetuities, dating back to 1851, the provision of the Howell Code of 1864 receiving the common law, followed by the partial abrogation thereof by the Arizona borrowing of statutes in 1913 from Wisconsin, which was in turn followed in the succeeding five decades by a handful of Arizona decisions dealing with scattered aspects of this broad topic.

Going back even to the late seventeenth century does not suffice to find the real beginnings of the common law Rule Against Perpetuities. For centuries prior to that, English judges had been astute in throttling at birth the efforts of lawyers and of dynasty-minded families to curtail the alienability of their chief type of asset, namely, land.

This struggle, however, appeared in a new context during the seventeenth century. Conveyancers undertook to create indestructible future interests, and the question had to be soon faced as to how far this practice could be extended without "inconveniently" lessening the alienability of land. The ultimately affirmed opinion of Lord Nottingham in the *Duke of Norfolk's Case*,[1] decided in 1682, started the ball rolling. He decided that an elimination of alienability for the duration of one life, incident to the creation of an indestructible future interest, was not "too long," was not so long as to require a prohibition based on social policy. At the same time he issued an invitation typical of common law. Said he, in effect, get busy, lawyers. Work out limitations of this type operative for varying periods of future time. As each is litigated, the courts will hold it good or bad. Eventually the resultant body of decisions will establish the outer limit of goodness. The next century and a half exemplified this process of trial, followed sometimes by success, sometimes by invalidity.

In 1697, *Lloyd v. Carew*[2] found two lives plus one year *not* too long.

[1] 3 Ch. Cas. 1, 22 Eng. Rep. 931 (1682).
[2] Show. P.C. 137, 1 Eng. Rep. 93 (1697).

In 1736, *Stephens v. Stephens*[3] sustained the use of a period measured by one life plus a minority of a person in being when the first life ended. In 1797, *Long v. Blackall*[4] added the refinement that the measuring life might be lawfully both preceded and followed by a period of gestation without incurring the misfortune of ineffectiveness.

In 1805, the great case of *Thellusson v. Woodford*[5] was decided under the will of a thrifty Swiss who had accumulated a great fortune in English business; had been appalled at the consequences of new wealth on his own offspring; had conceived the notion that later generations among his issue might prove better than those he knew; and, in the light of these convictions, had postponed the ascertainment of his ultimate distributees until the death of the survivor of nine persons, two of whom were *en ventre sa mere* at his death, and none of whom were ever to get any corpus or any income. The court decided that the permissible period, under both the Rule Against Perpetuities and the rule against accumulations, could be measured by multiple lives of persons in being when the instrument spoke, provided only that the persons so used were neither so numerous, nor so chosen as to make it inconveniently difficult to ascertain the death of the survivor. It declared that the measuring lives need not be persons benefitting in any way from the limitation, and that the possibility of a gestation period at the beginning and at the end of the multiple lives did not invalidate the limitation.

The final landmark in this tale of judicial legislation was *Cadell v. Palmer,* decided in the lower court in 1827, and finally affirmed in 1833.[6] In this case the sustained period was measured by twenty-eight lives plus a term in gross of twenty years. The theory as to the added term in gross was that it was not longer than the then already long permitted minority following lives in being.

Thus as the result of six landmark cases, stretching over a span of a century and a half, the permissible period under the common law Rule Against Perpetuities became crystallized at (a) lives of persons in being when the limitation spoke (within an outer limit as to number fixed by the evidence rule); plus (b) a period of twenty-one years; plus (c) such periods of gestation as might be called for by the circumstances of the persons affected. This is the permissible period stated and discussed in section 374 of the *Restatement of the Law of Property.*

[3] Cas. t. Tal. 228, 25 Eng. Rep. 751 (1736).
[4] 7 Term R. 100, 101 Eng. Rep. 875 (1797).
[5] 11 Ves. 112, 32 Eng. Rep. 1030 (1805).
[6] Bengough v. Edridge, 1 Simon 173, 57 Eng. Rep. 544 (1827); affirmed as Cadell v. Palmer, 1 C. & F. 372, 6 Eng. Rep. 956 (1833).

This is the period still in use in most of the United States. This is the period governing in Arizona all dispositions of personal property (other that estates for years). More, however, on this aspect of Arizona law, a bit later in this address.

The common law had another problem demanding solution. From the beginning it had been clear that any limitation which *suspended the power of alienation* for longer than the permissible period would be declared invalid. Most of the decisions both in England and in the early American days were of this sort. Sometimes, however, a limitation which made no suspension of the power of alienation for too long a time did in fact lessen the probability of alienation by creating indestructible future interests involving uncertainty as to the ultimate takers which could last for longer than the permissible period. For example, *A*, by will, created a trust for the benefit of his son *B* for life, with an ultimate distribution of the trust's corpus "to those children of *B* who reached the age of thirty years." By *B's* death, all of *B's* own children were either alive or at least conceived. By nine months after *B's* death there were certain to be in existence persons who by joining could (if they chose) convey complete ownership. Hence the *power of alienation* was not too long suspended. The common law courts held, however, that the policy of the Rule Against Perpetuities to protect society against lessened alienability was broad enough to cover such cases. Thence grew the broad applicability of the common law rule to future interests, popularized by John Chipman Gray in terms of "remoteness of vesting."

Let us now turn our attention to the State of New York. Down to 1830 no English speaking jurisdiction had adopted a topically organized set of statutes. The law of each jurisdiction consisted of a fluid and adaptable body of judicial precedents, with scattered statutory factors, immensely important when applicable but operative as to almost a negligible percentage of the whole area covered by law. Jeremy Bentham had begun as a voice crying in the wilderness in 1776, advocating codification and more codification as a cure-all for the unpredictability of judge-made law. On the Continent of Europe, Bentham found enough disciples to make him largely responsible for the French Code, first published in 1803, and for the Codes of Louisiana, adopted in 1808 and 1825. The Bentham bug was on the loose in New York and Benjamin Butler and John Duer became convinced as to the wisdom of a topically organized system of statutes. Due to the influential political connections of these two gentlemen, the Legislature authorized their project. The New York Revised Statutes of 1830 were the product. This two volume compilation was a milestone in Anglo-American jurisprudence. It was the first codification of substantially the whole area of a state's law,

organized on a more or less scientific basis. Their work begat the large and expensive statute alcoves in modern American law libraries.

The revisers had envisaged their task as chiefly one of restatement, that is, the putting into succinct words of the existing rules as established theretofore, chiefly by decisions, but partly also by statutes. From time to time, however, they felt the surge of a spirit of reform, and, on such occasions they formulated what they conceived to be "improvements" in the pre-existing fabric. In dealing with the topic of the Rule Against Perpetuities, the revisers acted partly as "restaters" and partly as "innovators." An awareness of exactly what they did produce is an essential step in understanding the present content of Arizona law.

In making a topical organization of the statutes they had one chapter devoted to real property and a separate chapter devoted to personal property. The provisions of the real property chapter on perpetuities were quite detailed. In setting forth the types of transactions subject to the rule's regulation, the restatement approach predominated. It was declared that the rule applied to limitations "suspending the power of alienation." Such limitations included the bulk of the cases governed by the rule at common law. But the revisers knew that the common law rule had been more inclusive than this. Hence they sought to encompass this additional area by a subsequent section which required that a fee "limited on a fee" be "upon a contingency which, if it should occur, must happen within the" period established by the statute as permissible. This section was later correctly construed by the highest court of New York to have incorporated into the New York statutory system, the so-called "remoteness" ingredient of the common law.[7] Provisions worded somewhat differently but similar in effect were inserted in the separate chapter on personal property. Thus far the revisers had endeavored merely to restate the rule as they found it.

The New York revisers innovated with a vengeance, however, in shortening the permissible period of the rule. They permitted only two lives instead of the multiple lives allowed at common law. They banished completely the term in gross, which had become fixed in England at twenty-one years during the 1820's. They permitted the employment of a minority only in dispositions of land, and only when the land had been given to a minor, with a gift over on the death under age of the first recipient. In passing it should be noted that this restricted minority also became permissible as to dispositions of personalty in 1929.[8] This wholesale shortening of the rule's permissible period has been the

[7] Matter of Wilcox, 194 N.Y. 288, 87 N.E. 497 (1909).
[8] N.Y. Sess. Laws 1929, c. 229, §§ 18, 21, amending N.Y. PERS. PROP. LAW § 11.

aspect of the New York statutory system most seriously troublesome in later decades.

The New York revisers further innovated by formulating new rules regulating the creation of estates for life which were the prototypes of Arizona Revised Statutes of 1956, §§ 33-229(B), 33-230(A) and 33-232(B).

Another new feature of the New York Revised Statutes of 1830 was a provision making inalienable the interest of a beneficiary of a trust to receive and apply income. It is doubtful whether this section was intended to have as drastic consequences as the New York courts attributed to it. In two decisions made respectively in 1835[9] and 1836,[10] it was decided that this section caused the affected trusts to "suspend the power of alienation"; and, consequently caused such trusts to be invalid if created to last for longer than the statutorily shortened permissible period. It can readily be seen that this judicial application of the Rule Against Perpetuities to the type of trust most commonly created gave the rule an applicability much more restrictive than had existed at common law.

It is not useful to take the time of Arizona practitioners to recount the details of the struggles in New York lasting over a century and a quarter to live with the incubus thus placed on reasonably desired familial dispositions of property. The New York courts labored manfully to mitigate its hardships (a) by changing established rules of construction for the salvaging of disposition; and (b) by largely emasculating the restrictions imposed on the use of a minority as an ingredient in the permissible period.[11] Finally, a crescendo of protests[12] brought about ameliorative legislation in 1958. From and after September 1, 1958, the two-life limit has been replaced in New York by multiple lives, within the limits of the evidence rule established at common law.[13]

Westward migrations from the early northern states followed the channel of the Erie Canal to Buffalo and the routes of the covered wagons thereafter. Thus New York legal experience played a large role in the early decades of Michigan, Wisconsin, Minnesota, and the Dakotas. Shortly after Michigan became a state in 1837, it adopted a compiled code, modelled in many particulars on the then recent New York legislation. The identity of substance with respect to the law of land was greatly increased in the Michigan Revised Statutes of 1846. The exact scope of this Michigan borrowing was importantly determinative of

[9] Coster v. Lorrillard, 14 Wend. 61 (N.Y. 1835).
[10] Hawley v. James, 16 Wend. 61 (N.Y. 1836).
[11] See Matter of Trevor, 239 N.Y. 6, 145 N.E. 66 (1924).
[12] 1936 N.Y. Law Rev. Comm. Rep. 491-608; POWELL, REAL PROPERTY ¶ 807, n. 30 (1956).
[13] N.Y. Sess. Laws 1958, chs. 152, 153.

the present law of Arizona. It has four significant aspects. In the *first* place Michigan borrowed *only* provisions contained in the New York chapter on *Real* Property. This led to the problem common to Michigan, Wisconsin, and Arizona, as to what this partial borrowing did with respect to the Rule Against Perpetuities concerning dispositions of personalty. Michigan early decided it had two rules: the borrowed statute as to land and estates for years and the common law rule continued as to all other personalty.[14] In the *second* place, Michigan in its land borrowings omitted the "fee on a fee" section of the New York statutes which provided the peg in New York for the "remoteness" ingredient in the rule. In consequence the Michigan statutory rule applied only to "suspensions of the power of alienation," and had no governing force as to remote and indestructible future interests in land, not suspending that power.[15] This position narrowed the destructive force of the otherwise tight statutory rule, but is of questionable wisdom, if the rule is to serve genuinely as a protection against the dead hand. In the *third* place, Michigan borrowed the section making inalienable the interest of the beneficiary of a trust to receive and to apply income, and, because of this, found that the statutory permissible period applied to the duration of such trusts.[16] In the *fourth* place, Michigan borrowed the New York innovations restricting the creation of estates for life. Thus as to land Michigan had a statute almost, but not quite, as tight as New York had had. This tightness was practically mitigated, however, by an early decision that the survivor of several persons meant only one life,[17] and by extraordinary liberality in resorting to equitable conversion of land dispositions, thus making applicable the more liberal permissible period of the common law applicable to dispositions of personalty.[18] Despite these ameliorative factors, Michigan, in 1949, repealed its statutory borrowings from New York on the Rule Against Perpetuities and restored the common law rule to full applicability to dispositions of all types of property.[19]

As might have been expected, Wisconsin, which had been a part of the Territory of Michigan after 1818, followed the grooves established by New York and Michigan. An early compilation of 1839, taken chiefly from New York, was followed, in the year following the attainment of statehood, by the Wisconsin Revised Statutes of 1849. These statutes had the same four significant aspects as have been discussed above in connection with Michigan, but the Wisconsin handling of the resultant problems was quite different. The borrowing of only the provisions

[14] Toms v. Williams, 41 Mich. 552, 2 N.W. 814 (1879).
[15] Torpy v. Betts, 123 Mich. 239, 81 N.W. 1094 (1900).
[16] Niles v. Mason, 126 Mich. 482, 85 N.W. 1100 (1901).
[17] Toms v. Williams, 41 Mich. 552, 2 N.W. 814 (1879).
[18] See Penny v. Croul, 76 Mich. 471, 43 N.W. 649 (1889).
[19] Mich. Sess. Laws 1949, Act 38.

relating to land led to an 1879 decision that Wisconsin had a statutory Rule Against Perpetuities applicable to land dispositions but no rule whatever governing dispositions of personalty other than estates for years.[20] The omission of the "fee on a fee" provision in the land statute had the same result as it had had in Michigan, namely, the exclusion of the "remoteness" ingredient.[21] As to trust duration, Wisconsin deviated from the New York and Michigan holdings, and followed the lead of a Minnesota decision of 1892[22] by holding that the "suspension of the power of alienation" injected by the statutory inalienability of the beneficiary's interest was eliminated by the presence of a discretionary power in the trustee to change the form of the trust res.[23] Meanwhile, the Wisconsin statutory permissible period had been enlarged by the addition, in 1887, of a twenty-one year term in gross.[24]

In the middle 1920's Wisconsin realized that it had very little of the social protections afforded elsewhere by the Rule Against Perpetuities. By decision it had no rule applicable to dispositions of personalty. By decisions it had liberalized the doctrine of equitable conversion so that most dispositions of land moved over into the unregulated area. By decisions it had rejected all regulation of trust duration, where the trust instrument authorized the trustee to sell and convey. By following the Michigan omission of the "fee on a fee" section in its real property law it had excluded the "remoteness" segment of the rule confining its statutory rule to dispositions found to have "suspended power of alienation." By statutes it had made generous exceptions of charitable gifts of land from regulation by the statute.[25] New legislation was obviously needed. The first step was taken in 1925, by legislation making the statutory period of two lives, plus twenty-one years applicable alike to dispositions of land and personalty.[26] This enactment, for the first time, brought home to Wisconsin lawyers the inconveniently tight character of this permissible period. Two years later, in 1927, Wisconsin eliminated this part of its New York heritage, substituting multiple lives, as had been allowed at common law, in place of its two-life limit, and an additional thirty years in gross in place of the twenty-one year term theretofore operative in Wisconsin.[27] Thus Wisconsin adopted the most liberal permissible period for the Rule Against Perpetuities existent in any Anglo-American jurisdiction. It has retained this dis-

[20] Dodge v. Williams, 46 Wis. 70, 50 N.W. 1103 (1879).
[21] Ford v. Ford, 70 Wis. 19, 33 N.W. 188 (1887).
[22] *In re* Tower's Estate, 49 Minn. 371, 52 N.W. 27 (1892).
[23] Beurhaus v. City of Watertown, 94 Wis. 617, 69 N.W. 986 (1897).
[24] Wis. Sess. Laws 1887, c. 551.
[25] WIS. REV. STAT. 2039 (1878); Wis. Sess. Laws 1905, c. 511.
[26] Wis. Sess. Laws 1925, c. 287.
[27] Wis. Sess. Laws 1927, c. 341.

tinction except for the 1931 enactment by Prince Edward Island, allowing lives in being plus sixty years.[28] In 1931, Wisconsin completed its elimination of the New York ingredient on this topic by repealing its statutes regulating the creation of estates for life.

All of the foregoing has been background—but needed background—for our discussion of the present law of Arizona on this topic.

Your relevant history begins in an Act of July 12, 1851, whereby the Territory of New Mexico borrowed the 1836 Texas constitutional prohibition of perpetuities. This enactment is now found in the Constitution of Arizona, Art. II, § 29. It 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.

The small content of this admonitory clause makes its unnecessary to trace the Texas clause back into earlier appearances of similar language in the constitutions of Florida, North Carolina, and Tennessee.[29]

In 1863, the Territory of Arizona was split off from New Mexico. By Congressional action "all legislative enactments of the Territory of New Mexico not inconsistent with the provisions of this act, are hereby extended to and continued in force in the said Territory of Arizona until repealed or amended by future legislation."[30] An itinerant territorial government, sent out complete from Washington, arrived in Arizona on December 27, 1863. The five top officials were a governor from Maine, a secretary from New York, and three judges respectively from Connecticut, Iowa, and Michigan. The first legislative assembly of twenty-seven members included two persons born in Arizona, three persons from southern states, seventeen persons from northern states east of the Mississippi, two from Missouri, and one each from California, Mexico, and Germany. The first act of the legislative assembly empowered the Governor "to appoint a commissioner to prepare and report a code of laws for the use and consideration of the Legislature."[31] Associate Justice William T. Howell, fresh from the Michigan borrowings from New York, produced the "Howell Code" modelled on the laws of New York, Michigan, and California. By Chapter 61 of this Code, which became effective November 10, 1864, all of the Spanish, Mexican, and New Mexican background of law was swept away and the following provision was adopted:

[28] 21 & 22 Geo. V. c. 15, now P.E.I. REV. STAT. c. 108 (1951).
[29] Gerdes, *Perpetuities in California*, 16 CAL. L. REV. 81 (1928).
[30] Thorpe, CONSTITUTIONS (1909) 1, at p. 260.
[31] LAWS, ARIZONA, 1864, at p. 19.

> The common law of England, so far as it is not repugnant to, or inconsistent with, the constitution and laws of the United States, or the bill of rights or laws of this Territory, is hereby adopted, and shall be the rule of decision in all the courts of this Territory.

This enactment appears in a somewhat more guarded form in A.R.S. § 1-201 (1956), and now reads:

> The common law only so far as it is consistent with and adapted to the natural and physical conditions of this state and the necessities of the people thereof, and not repugnant to or inconsistent with the constitution of the United States or the constitution or laws of this state, or established customs of the people of this state, is adopted and shall be the rule of decision in all courts of this state.

This reception statute made the common law Rule Against Perpetuities at least the *paper* law of Arizona from November 10, 1864, to the new legislation of 1913, and still suffices to fill the gaps in the present statutory system on this topic with a common law ingredient.

In the first year of statehood (1913) Arizona borrowed the then operative Wisconsin statutes on perpetuities together with the Wisconsin sections regulating the creation of estates for life. This is the source of the present relevant statutes of this state. Section 33-261 is the chief and central section. It appeared originally in the Civil Code of 1913 as §§ 4679 and 4680. Some slight changes of wording and some transpositions of sentences have occurred since 1913, but the substance remains exactly as it was borrowed in 1913, except for a liberalization of the charity exception injected by statutes of 1921 and 1928.[32] The present wording of § 33-261 is as follows:

> A. The absolute power of alienation shall not be suspended by any limitation or condition for a period longer than during the continuance of two lives in being at the creation of the estate and twenty-one years thereafter, except in a grant or devise to a charitable, literary or cemetery use, and except in the instance specified by § 33-235.
>
> B. Every future estate which suspends the absolute power of alienation for a period longer than that specified in Subsection A is void in its creation.

[32] Ariz. Sess. Laws 1921, c. 141; ARIZ. CODE ANN. § 2761 (1928).

C. The absolute power of alienation is suspended when there are no persons in being by whom an absolute fee in possession can be conveyed.

It will be noted that this statute imposes its restricted permissible period only on dispositions of land and is applicable only when such a disposition suspends the power of alienation. Stated negatively it applies neither to dispositions of personalty, except future interests in a term of years,[33] nor to dispositions of land involving "remoteness" rather than suspensions of the power of alienation. The text of the statute, as given above, includes the twenty-one year term in gross taken in 1913 from the Wisconsin legislation of 1887.[34] This inclusion made the continued existence of what is now Section 33-235[35] completely meaningless. No situation can come within the restricted minority period allowed by § 33-235, which is not fully covered by the twenty-one year period in gross allowed by subsection A of § 33-261. Thus your law would be in no way changed by the complete repeal of present § 33-235 and the reference to that section in § 33-261.

The regulations on the creation of estates for life, first produced by the imaginations of the 1830 New York revisers, and later imported by Wisconsin in 1849 from Michigan, appeared in the Arizona Civil Code of 1913 as §§ 4682-4686. This material has been scattered into the subsections of present §§ 33-229, 33-230, and 33-232. Some parts of this borrowing from New York are wholly innocuous. Other parts of it hang on the peg of the two-life rule and serve no useful purpose. Let us examine these sections for the purpose of separating the good grain from the chaff.

Section 33-229 has two parts:

A. A remainder shall not be created upon an estate for the life of any person other than the grantee or devisee of the life estate unless the remainder is in fee, nor shall a remainder of a term of years be created upon an estate for the life of any person other than the grantee or devisee of the life estate unless it is for the whole residue of the term.

This first part of the section is not open to any serious objection. It prohibits limitations not likely ever to be made. It serves no discoverable purpose, but it has no real vice.

[33] A.R.S. § 33-262 (1956) which embodies CIVIL CODE § 4688 (1913).
[34] Wis. Sess. Laws 1887, c. 551.
[35] Which embodies CIVIL CODE § 4681 (1913).

B. When a remainder is created upon a life estate for the life of any person other than the grantee or devisee, and more than two persons are named during whose lives the life estate shall continue, the remainder shall take effect upon the death of the two persons first named as if no other lives had been introduced.

This subsection B of § 33-229 is a corollary of the two-life principle embodied into § 33-261. Any change of § 33-261 to a more rational form, requires the repeal of this subsection B.

Section 33-230 also has two parts:

A. A contingent remainder shall not be created on a term for years unless the contingency is such that the remainder must vest during the continuance of not more than two lives in being at the creation of the remainder or upon termination thereof.

This first part of the section is another corollary of the two-life principle embodied into § 33-261. Furthermore, the provision, as worded, perpetuates the Wisconsin failure to incorporate its twenty-one year term in gross into this, as well as into its principal section, and constitutes an anomalous incongruity in the existing statutes of Arizona. Any change of § 33-261 to a more rational form requires the repeal of this subsection A of § 33-230.

B. No estate for life shall be limited as a remainder on a term of years except to a person in being at the creation of the life estate.

This subsection B of § 33-230 is innocuous. If anyone likes it enough to draw a repealing statute applicable only to subsection A, no real harm will result from the continuance of subsection B.

Section 33-232 also has two parts:

A. Successive estates for life shall not be limited unless to persons in being at the creation thereof.

This is a restrictive provision generated in New York in 1830. It had no counterpart in the common law, but it has been harmless for a century and a quarter in New York and it may well prove equally innocuous for Arizona.

B. When a remainder is limited upon more than two successive

> estates for life, all the life estates subsequent to the first two are void, and upon the death of those first two persons, the remainder shall take effect as if no other life estate had been created.

This subsection B of § 33-232 is another corollary of the two-life principle embodied into § 33-261. Its fate should depend upon your decision to keep, or to repeal that central section.

As I stated at the very beginning of this address, I strongly urge the prompt repeal of your present sections 33-229(B) (on life estates), 33-230(A) (on life estates), 33-232(B) (on life estates), 33-235 (on a minority as part of the permissible period), and 33-261, which is the basic section establishing the Arizona permissible period at two lives plus twenty-one years. In the place of these unfortunate takings, immediately from Wisconsin, but ultimately from New York, you would be well-advised to follow the examples of the states from and through which you made the borrowings. New York, just last year, restored multiple lives instead of its erstwhile hamstringing two; Michigan restored completely the common law permissible period, ten years ago; Wisconsin restored the common law permissible period and lengthened it to multiple lives plus thirty years, twenty-two years ago. Michigan and Wisconsin have both repealed their sections embodying the two-life principle into their regulations of estates for life. Arizona, by following in the footsteps of Michigan, New York, and Wisconsin, would also be bringing its law into closer conformity to the common law, which has continuously functioned in most of the United States, including the important states of Illinois, Massachusetts, New Jersey, and Pennsylvania, and which has become the guiding principle in the great State of California.

Why should Arizona take this action, and take it now? Because you are a young state in your body of precedents on this topic. Because you have not yet experienced the crippling consequences of the two-life principle and you can avoid that pain and travail, if you act promptly.

I have searched the reported decisions of your supreme court for holdings in this field. The earliest important case is *Lowell v. Lowell*.[36] Dr. Percival Lowell had died in 1916 leaving an estate, valued at about $2,000,000, which included some land, but much personalty. His will created a trust which comprised both land and personalty. As to the personalty, the Court declared it wholly governed by the common law; but as to the land, resort must be had to the statutes "lifted bodily from the statutes of Wisconsin" in 1913. Do you see the germs of future trouble implicit in this recognized bifurcation of your law? Residuary

[36] 29 Ariz. 138, 240 P. 280 (1925).

clauses typically deal with assets partly land, partly personalty. These dispositions of different types of property must be untangled, must be separated, and each part subjected to a different criterion of validity. When Michigan was faced with this question, it decided that if either part failed the whole failed as an inseparable entity.[37] This caused the whole of a residuary clause to fail in a 1938 case, where the personalty (as to which the common law rule applied) was worth over $56,000 but the land (as to which the statutory rule required invalidity) was only $800.[38] So long as Arizona has *two* rules, the common law rule applicable to personalty and a statutory tight rule applicable to land, you have in your law the seeds of serious trouble. In the *Lowell* case, your supreme court was able to sidestep this pitfall. The trust for charity, as to land, although then subject to the statutory short permissible period was found to be outside the statute because the power conferred on the trustee to sell the affected land, eliminated the "suspension of the power of alienation" otherwise implicit in the trust. This second half of the *Lowell* decision represents a tremendously important judicial contribution to your jurisprudence. It represented a following of judicial positions which had been taken in Minnesota in 1892[39] and in Wisconsin in 1897;[40] and repudiated the contrary position early adopted in New York[41] and thence crystallized in the statutes of California.[42] For all practical purposes, this decision freed Arizona largely from the necessity of measuring the duration of private land trusts by the statutory short permissible period. Seldom are such trusts created without conferring on the trustee discretionary power to sell and such a power sidesteps the statute. 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; and (b) freed this state from the application of its shortened permissible period to trusts of land containing a discretionary power to sell the land.

Other than the *Lowell* case I have found only eleven decisions of the Arizona Supreme Court, dealing even remotely with the operation of the Rule Against Perpetuities in your state. Five of these are only indirectly significant, dealing as they do with aspects of the law of future interests out of which problems under the rule can emerge.

[37] Palms v. Palms, 68 Mich. 355, 36 N.W. 419 (1888).
[38] Richards v. Stone, 283 Mich. 485, 278 N.W. 657 (1938).
[39] *In re* Tower's Estate, 49 Minn. 371, 52 N.W. 27 (1892).
[40] Beurhaus v. City of Watertown, 94 Wis. 617, 69 N.W. 986 (1892).
[41] Coster v. Lorillard, 14 Wend. 265 (N.Y. 1835); Hawley v. James, 16 Wend. 61 (N.Y. 1836).
[42] CAL. CIV. CODE § 771 (1872).

Schornick v. Schornick, decided in 1923,[43] held merely that a condition subsequent certain to be performed, if ever, by the end of one life, was valid. *Smith v. Teel,* decided in 1929[44] sustained a disposition of land to testator's wife for life, with a power to consume, followed by a gift over of "whatsoever remains" to three named children. Here, again, only one life could elapse before possession would reach the ultimate takers. *In re Baxter's Estate,* decided in 1941,[45] involved a more complex disposition involving land. A trust for ten years was created under which the trustee was directed to convert. Thus it became a disposition of personalty. Also, the trustee's power to sell eliminated any otherwise caused "suspension of the power of alienation." Even if these two salvaging factors had been absent, the trust was for only ten years, which is not "too long" under even the statutory rule. A second point involving future interests rather than trust durations was also present. The ascertainment of the ultimate takers, described as "heirs" of the primary takers was valid, was postponed as to each share by only one life and hence was valid. *In re Conness' Estate,* decided in 1952,[46] had several interesting aspects, but only one of them is here relevant. A will clause directed the sale of lands located in six states, the payment of many specific legacies, and the utilization of the "excess," which proved to be $128,584, "for the education of my brothers' and sisters' children." When the will was executed all of the testator's then living nieces and nephews were thirty-eight or older and several were college graduates. Having decided that the references to "education" were not imperative, the court had to decide when the class of "brothers' and sisters' children" was to be picked. By selecting the date of the testator's death, the court simultaneously followed sound principles of law and eliminated all questions of validity under the Rule Against Perpetuities. In *Dreyer v. Lange,* decided also in 1952,[47] the court was faced by an application filed by the settlor-beneficiary of an inter vivos trust to terminate the trust. The trustee, an uncle, was opposing. It is an interesting circumstance, although not perhaps legally relevant, that during three and one-half years of the trust's operation, the trustee-uncle drained off about seven-eighths as much as the settlor-beneficiary had received. Despite a reserved power to appoint, the settlor was held to have the "reversion," and the limitation to her heirs was held nugatory, and hence she was the "sole beneficiary" and was entitled to revoke the trust. This case accepts the age-old rule of worthier title. If Arizona has an experience like New York, this case is only the

[43] 25 Ariz. 563, 220 P. 397 (1923).
[44] 35 Ariz. 274, 276 P. 850 (1929).
[45] 58 Ariz. 16, 117 P.2d 91 (1941).
[46] 73 Ariz. 216, 240 P.2d 176 (1952).
[47] 74 Ariz. 39, 243 P.2d 468 (1952).

beginning of a long line of cases turning on "remainder" or "reversion," where there is a limitation to the heirs or next of kin of a settlor of an inter vivos trust.

There are three Arizona decisions which require more detailed consideration. *Valley Nat'l. Bank v. Hartford Acc. and Indem. Co.*, was decided in 1941.[48] Governor Hunt had died December 24, 1934. His will established a trust as to liquid assets amounting to $150,000 and a home valued at $15,000. As to one-half, the trustee was directed to pay the income to a daughter, Virginia, until January 1, 1945, and at that date to pay over to Virginia the corpus of this half. Even as to the land, this postponed full possession only for a period measured possibly by less than eleven years or by one life. At all events this half was valid. As to the second half, the disposition was more troublesome. The trustee was directed to hold this second half for the benefit of the child or children of Virginia, accumulating income until twenty-one, paying income for the period from twenty-one to thirty, then delivering the corpus, *but if any die under thirty*, cross interests to the other children, and if all died before thirty, corpus to Virginia. Virginia had one son, Carlton, born in April, 1931, before Governor Hunt executed his will. She had also a daughter, Helen, born August 19, 1936, a date about twenty months after testator's death but only two and one-half months after the "trust was set up." This apparently had occurred after about eighteen months of the estate's administration. The lower court held that Carlton and Helen shared in the second half and this result was affirmed. Probably this result was sound as all of Virginia's children were certain to be in existence by the end of one life, her own. Certainly the reason that the court gave as to Helen, namely, that she had been conceived before the day the trust was set up was wholly unsound. A child conceived has always been treated as a "life in being" for purposes of measuring lives under both the common law and statutory Rules Against Perpetuities. But to be usable, the life must have been in being at the moment when the instrument creating the interest spoke. This Helen had not been. Her conception must have occurred between ten and eleven months after Governor Hunt died. Assuming that the court could lawfully have held this second half to have a group of beneficiaries enlarging with each birth of a new child of Virginia all such new memberships must cease with Virginia's death. How about the provision for cross limitations as between the children of Virginia if any child died under thirty? Any such interest would violate the common law Rule Against Perpetuities because it would involve an indestructible future interest not certain to vest within twenty-one years after Virginia's life. This

[48] 57 Ariz. 276, 113 P.2d 359 (1941).

shifting future interest would probably not violate the statutory rule forbidding only suspensions of the power of alienation because, by Virginia's death, all her children would be in being, and they, by joining, could convey complete ownership. We are not told whether the trust included a discretionary power in the trustee to sell the land. If it did not, the potential prolongation of the trust as to land beyond twenty-one years after Virginia's death would inject another basis for invalidity. As far as one can tell from the reported opinion, neither the lawyers for the parties nor the judges deciding the case saw the difficulties implicit in this will. Hence they 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. These problems, although not seen in this case, lurk in the shadows of every lawyer's office, awaiting an opportunity to make a devastating pounce on some luckless victim.

In re Hayward's Estate brought the will of Theodora L. Hayward before the Supreme Court of Arizona twice.[49] In the earlier of these two cases, an uncle's will was construed to give the decedent, Theodora, an undivided half in fee simple in a piece of Arizona land. The second case is of present interest. It found that an attempted perpetual trust, not exclusively for a charitable purpose, failed, and the asset passed to the intestate takers. Interesting as this case is in evidencing Arizona's strict views on what constitutes a charity, and because of its denial of the existence of a cy-pres doctrine in this state, it has importance to the present topic because it shows that a private trust to receive and apply income "suspends the power of alienation" and must, therefore, comply with the statutory permissible period of two lives plus twenty-one years when there is no discretionary power in the trustee to sell the land in question.

Shattuck v. Shattuck, decided in 1948,[50] provides an eloquent testimonial to the value of the doctrine of res judicata to salvage past errors from later inquiries. Lemuel C. Shattuck died in 1938 leaving an estate of personalty and a will which at least arguably violated the common law Rule Again Perpetuities, since it left the persons entitled uncertain for a period of forty years from the death of the testator. A decree of distribution to the trustee was made on December 21, 1939. Noting that the Arizona statutes on probate had been borrowed from California, the court followed California precedents to the effect that a will is merged in the decree of distribution and that after such a decree

[49] 57 Ariz. 51, 110 P.2d 956 (1941); 65 Ariz. 228, 178 P.2d 547 (1947).
[50] 67 Ariz. 122, 192 P.2d 229 (1948).

no inquiry can be made into the validity of the will, otherwise than by an appeal from such decree. The court made it clear that it could not even consider an invalidity based on the Rule Against Perpetuities, saying:

> The rule is not varied by the consideration that the judgment under attack may have been rendered upon a claim *tainted with the vice of being contrary to public policy.* (Emphasis added.)

This decision makes it incumbent on all members of the bar in this state to have intimate familiarity with the state's laws on perpetuities. Unless one sees and raises promptly the invoked question, the moment of opportunity is soon gone.

It is a sound rule in Arizona and elsewhere that when a statute has been borrowed from another state, the borrowed statute is normally interpreted as it had been interpreted in the state of origin. This was stressed in the *Shattuck* case, discussed above with respect to a borrowing from California, and in *O'Malley Lumber Co. v. Martin*[51] with respect to a borrowing successively from Texas and California. It was applied in the *Lowell* case, discussed above, to the statutory Rule Against Perpetuities borrowed in 1913 by Arizona from Wisconsin. If the present statute of Arizona remains unchanged, this sound rule will require the gradual importation from Wisconsin, and from Wisconsin's legal ancestors, Michigan and New York, all of those subtleties and construction strainings which sufficed to cause all three of these states to seek relief in statutory modifications. This process has not *yet* gone far enough to reveal adequately in this state its bad consequences, the wastage of judicial time in attempting to salvage reasonable dispositions; the expenditure of clients' money on expensive litigation; the creation of formulae of disposition to which testators and settlors must conform or fail in the accomplishment of their desires. You can still find some help in the three to two decision of *Newhall v. McGill*,[52] declaring that where two constructions are possible, one good and one invalid, courts prefer the good one. But why continue, on your books of statutes, provisions which in the longer experience of three other states have been the source of frustrations, complexities, and public expense?

The simplest solution would be an act of your legislature modelled either on the Wisconsin enactments of 1927 and 1931 or on the Michigan enactment of 1949. The Michigan statute is short:

[51] 45 Ariz. 349, 43 P.2d 200 (1935).
[52] 69 Ariz. 259, 212 P.2d 764 (1949).

> 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 real property, and estates and other interests therein, whether freehold or non-freehold, legal or equitable, by way of trust or otherwise, thereby making uniform the rule as to perpetuities applicable to real and personal property.[53]

This was accompanied by a repeal of the corollary provisions with respect to estates for life.[54]

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

The need for action exists. The trail of remedy has been blazed by other states similarly affected. The result depends on you.

DISCUSSION

Comment by William H. Messinger*

We have just been favored with a most enlightening presentation of an exceedingly difficult subject. My feelings of inadequacy in responding to the chairman's request for comments know no bounds. I recall that the great Ralph Waldo Emerson, in expressing himself on the theme that, at least, bits of wisdom may sometimes come from the lowly, said, "Perhaps the hired man may be the apostle or the evangel of wisdom." Yes, perhaps the hired man may be such, in the case of Emerson, for I believe that at one time his hired man was Henry David Thoreau.

[53] MICH. COMP. LAWS § 554.51 (Mason. Supp. 1952).
[54] MICH. COMP. LAWS §§ 554.14-.20, 554.23 (Mason. Supp. 1952).
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