> 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).
* Member of the Phoenix Bar.

Mr. Powell has made a powerful appeal for Arizona to recognize its error in following the false prophets of New York, Michigan, and Wisconsin in adopting the statutory rules modifying the common law rule as to perpetuities. With much logic Mr. Powell has pointed out that those states have learned by bitter and costly experience the folly of their innovations and have abandoned them. He urges us to do likewise. The Bar and the people of Arizona generally are greatly indebted to you, Mr. Powell, for this able and timely presentation. I am sure that thoughtful consideration will be given to these recommendations. As has been pointed out, we are a young state and perpetuities problems seldom have been presented in any form to our courts. Our lawyers, too, generally speaking, are a conservative lot, disposed to lean over backwards in the drafting of documents involving perpetuities problems, endeavoring to keep their clients from becoming juridical guinea pigs in the development of the law, while perhaps satanically hoping that some other lawyer will stub his toe and start the grinding out of the determinative decisions.

I'm sure that most lawyers everywhere have a feeling of anxiety when faced with problems of perpetuities, and the problems, as we all know, arise constantly. These problems are bad enough, as Mr. Powell has pointed out, under the common law Rule Against Perpetuities and its corollary rule against restraints on alienation which apply to real and personal property alike. They are doubly bad under the statutory rules which frequently do not apply both to real and personal property and often intermingle or mold into one, and sometimes confuse, the common law rule requiring vesting, that is, commencing within a prescribed time, and the corollary rule inhibiting the lack of a power of alienation beyond permitted time. Arizona is one of those states which has practically resolved the two common law concepts, "inhibition of remoteness of vesting" and "restraints on alienation," into one by its statute relative to restraints on alienation.

As Mr. Powell has emphasized, we have few guideposts in the way of judicial decisions in Arizona. Our leading case, as he has mentioned, is *Lowell v. Lowell,* and then we have, of course, *In re Hayward's Estate,* and *Shattuck v. Shattuck.* Those, I believe, are our most important decisions. All have been discussed by Mr. Powell, so I shall take very little time on them. The *Lowell* case is quite commonly cited as authority that Arizona follows generally the common law of perpetuities as to personal property. Yet all that our court really decided in that regard was that Arizona follows the common law to the extent that we permit personalty to be held in perpetuity for a charitable use. *In re Hayward's Estate* throws little light on our law. In that case the final statement in Thompson's will was, "It is my wish, though this is not a restriction

or limitation upon the use and enjoyment of the legacies and bequests herein made, that my estate . . . shall be kept among the descendants of my late father and mother." This was held to be but the expression of a wish. However, our court *said* that if it constituted a disposition of his estate it would violate our statute, as it would restrain the alienability of property through future generations ad infinitum.

In *Shattuck v. Shattuck*, the will set up a trust for a term of forty years, beginning with the death of the testator. It was claimed that this provision continuing the trust for forty years violated our statute. The court, as Mr. Powell has stated, applying the rule of res adjudicata, gave effect to the decree of distribution, so we don't have any decision further on our point. But the court did say, "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 judicata applies and the decision of the learned trial judge dismissing the action was correct, there is an end to the matter." The court then, of course, did find that the rule applied. An examination of the supreme court briefs in the *Shattuck* case discloses that counsel strenuously maintained that Arizona has not definitely committed itself to the position that the common law rule of perpetuities applies as to personalty generally and that in fact we have no perpetuities rule at all as to personalty. The language of our court in this case certainly throws doubt on the broad construction often placed on the earlier *Lowell* case. Also, this case should serve as a warning against basing a term on years instead of life. Where years are used as a base, the term, of course, should never exceed twenty-one years.

Mr. Powell has discussed the saving grace which a power to sell, given to a trustee, may have to prevent a trust from otherwise being held invalid. Most careful Arizona lawyers probably include a broad power of sale and in many instances make it a direction, depending thereby upon the equitable conversion theory, or hoping that our statute will be held, as its wording may imply, simply a rule on restraints on alienation and not a rule against remoteness in vesting. Many Arizona lawyers also make it a practice to include another saving clause spelling out expressly that, anything appearing to the contrary notwithstanding, there shall be vesting not later than twenty-one years after the death of the survivor of the two named or designated persons in being. If the client is unwilling to be so limited, perhaps we may do as Mr. Bowe suggested this morning—cause the perpetuities rule of a more favorable state to be made applicable. An illustration which Mr. Bowe also used is the setting up of an inter vivos trust in such more favorable state.

Mr. Powell also has mentioned the matter of partial invalidity, and that is a troublesome problem. He has pointed out some of the disastrous situations wherein the whole estate program or plan failed because of partial invalidity. Section 402 of the *Restatement of the Law of Property,* of which Mr. Powell, as you know, was the Reporter for so many, many years, in substance lays down the rule that when part of an attempted disposition fails, as a direct consequence of the Rule Against Perpetuities, the effect, if any, of this partial invalidity upon the balance of the attempted disposition is determined by judicially ascertaining the desire of the conveyor or testator if he had known of this partial invalidity. Our Arizona courts are disposed to follow the *Restatement,* so it is suggested that it may be advisable on occasion to use in wills a paragraph something like this: "If any part of this will, or of the trust created, should be invalid, illegal, or inoperative for any reason, it is my intention that remaining parts so far as possible and reasonable shall be effective and fully operative. My executors and my trustees, or any of them, may seek and obtain court instructions for the purpose of carrying out as nearly as may be possible the intention of this will, as shown by the terms thereof, including any terms held invalid, illegal, or inoperative."

It seems to me that the great hardships in applying the Rule Against Perpetuities have come often from the fact that the rule is violated if by any possibility a situation *might* arise wherein vesting would not take place within the permitted period; and in determining that a situation might arise, courts sometimes have based their determination more on historical, archaic, syllogistic, or fallacious, rather than realistic, reasoning. For example, the determination may be based upon a possibility that a woman might give birth to offspring, regardless of how old she is. In Massachusetts in 1954 there was enacted, I believe, a statute sometimes referred to as the "wait and see" statute, permitting a wait and see principle in certain cases involving the Rule Against Perpetuities. Maine and Connecticut have somewhat similar statutes. Pennsylvania has a so-called "second look" statute under which I understand the validity of all interests is determined on the basis of "actual rather than possible events." I am sure that we all will agree that no paper is properly drafted on the basis that we will wait and see if it proves to be valid. Yet it would seem that such statutes might save many dispositions which otherwise would be found invalid. If time permits, I believe we would profit greatly, Mr. Powell, if you would tell us briefly how those statutes are working out and whether we should consider adoption of such or a similar statute in Arizona.

We have also another closely related future interest statute concerning which I would like to question Professor Powell. It is Section 33-238, Arizona Revised Statutes, and it pertains to the accumulation of rents

and profits from lands. It is my understanding that under the common law rule against accumulations, income may be accumulated and added to principal for a time not exceeding the period of the Rule Against Perpetuities. It is my understanding further that in 1830 New York adopted a statutory rule against accumulations, that thereafter Michigan adopted a similar act, which later was followed by Wisconsin, and that we have based our own present section 33-238 upon the Wisconsin act. In fact, the history of the adoption of the statutory rule against accumulations seems to have paralleled in practically identical fashion the adoption of the statutory Rule Against Perpetuities, and like the latter, it appears to be more restrictive than the common law rule and to be very difficult to understand and apply. I'm sure it would be exceedingly helpful to our Bar, Mr. Powell, if you would tell us what you think we should do with respect to our statute on accumulations and with respect to the so-called "second look" principle in connection with a statutory Rule Against Perpetuities.

MR. POWELL: The courts find no difficulty in facing and resolving the question as to the possibility of further issue when, for tax purposes, they have to value a remainder given to charity. It's a litigable question on which evidence can be received as elsewhere. We need a statute on that. You need a statute also that will take care of the possibility that I, for instance, will in the future marry a person not yet born a year ago; actually that's a continuation of the common law concept that any possibility of violation destroys the gift. The "wait and see" statute does care for these two things, but does much more. It makes it remain uncertain, oftentimes for the period of thirty to forty years, as to who is going to be entitled to the property of the claim. Consequently it makes it extremely difficult to deal with the title of land or to deal with the title as security. I think the "wait and see" statutes accomplish more harm than they do good, although they do good—no question about it. There's an extremely good discussion of that, also, in the Niles article in the February 1959 issue of *Trusts and Estates* magazine.[1]

Coming to the accumulations question, Mr. Messenger is, of course, right that the accumulations statute of Arizona has had exactly the same history as I traced on perpetuities. It's a statute that has bad results in two ways, and I'm speaking now from the New York experience with it. In the first place, it is frequently unwise to dump a chunk of accumulated money into the hands of a person at twenty-one. Apart from the question of tax-savings and other things of that sort, that is socially an undesirable

[1] Niles, *Two Lines Down—and Goal to Go: Change in New York Perpetuities Rule Appraised—Further Reform Suggested*, 98 TRUSTS & ESTATES 104 (1959).

thing to compel, as your statute and ours both do. In the second place, as Mr. Bowe pointed out this morning, one of the great ways of saving taxes is by an accumulation trust which causes the accumulated income to be taxed to the new and separate tax entity, the trust. In common law jurisdictions, like his state of Colorado, that can be done for the life of the settlor. In your state and ours it can be done only for the benefit of a minor and only when the minor gets the property. It severely lessens the utility of the accumulation device for the purpose of tax saving under the income tax. The result is that in New York there is now pending in the legislature this year a statute recommended by the Association of the Bar of the City of New York, backed by a very large number of other groups, that would substantially lessen the rigidity of our rule.[2] I think you would do well to do likewise.

Comment by James Powers*

First, let me join with Mr. Messenger in expressing my appreciation and admiration to Mr. Powell for a most enlightening address. Like most lawyers, I've had a nodding acquaintance with our statutory rule on perpetuities, but it was not until today that I felt myself reasonably well educated, as the result of listening to Mr. Powell. My only regret is that he proposes to deprive me of any benefit from that new-found learning by having all those statutes repealed.

I have two thoughts on which I think we all might be interested in having Mr. Powell's observations. As he rightly pointed out, we have not had a large number of wealthy decedents in Arizona and, as a consequence perhaps, the interest in the Rule Against Perpetuities is not as great as it might otherwise have been. We do have, however, our share, I think, of other kinds of trusts. I'm thinking in particular of profit-sharing plans—trusts that are set up in connection with profit-sharing plans. As I understand it, there are a number of states which have statutes exempting trusts set up as a part of a profit-sharing or retirement plan from the Rule Against Perpetuities. I wonder if perhaps Mr. Powell might comment on that. Is such a statute necessary? Does it do any good? Is the ordinary employees' profit-sharing trust subject to the Rule Against Perpetuities in the absence of such legislation?

[2] This statute was enacted in 1959. N.Y. Sess. Laws 1959, c. 452, amends Real Property Law §§ 43, 45, and 46, to eliminate limitations of successive life estates to two and permit any favorable number of lives in being, to conform to the new Rule Against Perpetuities adopted in 1958. See Lacovara, *State Legislation Affecting Trusts and Estates*, SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW, PROBATE AND TRUST LAW DIVISION, PART I, 1959 A.B.A. PROC. 159.

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Secondly, I would like to have Mr. Powell's observations on the Rule Against Perpetuities in relation to its application to a trust of land where the trustee is given a power of sale. As I understand Mr. Powell, that does not constitute equitable conversion, so that you don't treat it as personalty. If it's still realty and our statutory rule doesn't apply, what rule does, if any?

MR. POWELL: The first is a very easy question. Pension plans in many instances do provide for interests that would be beneficial to persons not necessarily born when the plan was set up. I think, therefore, there is little question that there are risks in pension plans of that character under the Rule Against Perpetuities, and under the rule against accumulations, unless you have an exempting statute. I think the general practice throughout the country, in the states that have become acquainted with the necessities of pension plans, is to pass such a statute. I think it would be a desirable one for you.

Now on your second question of the rule applicable to a trust of land where there is a discretionary power to sell and where, therefore, there is no suspension of the power of alienation and where, therefore, there is no applicability of the statutory rule, my answer to that would be that there is no regulation applicable to trust duration. This is the situation which exists in two-thirds of the United States and has existed in two-thirds of the United States for a century without harm. There is a practical restriction. The Rule Against Perpetuities, even if it does not apply to trust duration, does apply to the successive interests in the beneficial rights under the trust and to the future interests created to take effect after the trust. By virtue of the invalidation of such future interests and the complementary principle that a trust lasts no longer than it serves the purpose of the limitation, you have a practical limit on the duration of trusts which has served adequately at common law to restrict the duration of trusts within decent limits.

Comment by Ozell M. Trask*

Mr. Powers was just lamenting the fact that under the recommendation of Mr. Powell the legislature would repeal all the knowledge and learning that he had been able to accumulate by following the statutory rule which we have in Arizona; now I'm commencing to lament the fact that, if that's repealed, I'll have to go back and try to remember what I didn't learn in the course in future interests which I took, and I think I will be in worse shape than Mr. Powers with his problem. I would like to pose questions, likewise, to Mr. Powell, rather than comments.

Mr. Powell, I did enjoy your presentation very much. I noticed that in your outline of the Arizona decisions on the Rule Against Perpetu-

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ities which, you pointed out, came from following similar decisions in two other states—I believe you said Minnesota and one other—that where a trust is established and the power is given to the trustee to sell, there is no violation of the Rule Against Perpetuities. In answer to the question which Mr. Powers just asked you, you commented on that very problem to a certain extent, pointing out that there are practical limitations on the duration of a trust which in themselves take care of the Rule Against Perpetuities. I would like to ask the question as to whether or not this existence of the power of sale which renders inapplicable the Rule Against Perpetuities was a matter of public policy; and whether, assuming the policy of the Rule Against Perpetuities is good, in order to avoid alienability, is this trust power which defeats that restraint, also good? You have in some sense commented on that already. I would also have some fear of statutory change of this trust power and would like to ask you if my fear is justified in a state like Arizona where people who are interested in estate planning have relied upon the *Lowell v. Lowell* decision, and the decisions of our supreme court, and our general understanding that a power of sale in a trust will prevent the trust from being subject to the Rule Against Perpetuities. In any modification of the Rule Against Perpetuities by eliminating it by statute, shouldn't there be some statutory retention of that principle where trusts have been created in reliance upon it?

Secondly, I believe you commented in your presentation that there is some doubt in your mind as to whether or not the state of Arizona is committed to the cy-pres rule, perhaps just with respect to charitable trusts, but I understand that in some of the legislation that has been proposed modifying the Rule Against Perpetuities it has been recommended that the cy-pres rule, or some modification thereof, be adopted so that it could be a statutory saving clause. Perhaps the "wait and see" principle is some answer to that. But I would think that a statutory cy-pres rule would be good, and I would like to have your comment on it.

Finally, I wonder if there is not a model perpetuities act. I understand that there is such an act proposed by the commissioners on uniform state laws. I know very little about it, but I would like to have your comment on the advisability of enacting a substitute piece of legislation which would solve the perpetuities question, rather than just eliminate the statutory rule which we now have and take it back to the common law rule which, for me at least, poses problems of some magnitude.

MR. POWELL: First of all, on the policy question. If the policy of the Rule Against Perpetuities is to safeguard the alienability of specific properties, a power of sale in the trustee completely safeguards that. There is no inalienability of any single asset where such a power of

sale exists. Now if you are suggesting that perhaps society needs protection against the pocketing of wealth for the accomplishment of stated objects, that's a policy other than the Rule Against Perpetuities. It might be socially desirable, but it's not the rule against perpetuity policy. So I would say that insofar as there is present a discretionary power of sale, the reason underlying the historical, century-old policy of the Rule Against Perpetuities is safeguarded fully.

Now for your second question, do we need to save this significance of the *Lowell* case on the discretionay power of sale, in any new legislation? I say, "No." There was no regulation of the duration of trusts at common law. If you repeal the statute that you have, there would be none. There would, therefore, be nothing to save it from, and you wouldn't need an explicit saving of the significance of the discretionary power because that would be the law anyhow.

Now as for the cy-pres doctrine which Mr. Trask mentioned a moment ago, he is using the phrase in the fashion in which it has been used some places in the country in connection with noncharitable gifts. The doctrine of cy-pres primarily and normally is confined to the doctrine of charitable gifts, but what Mr. Trask means is the kind of thing that Wisconsin and Massachusetts have done, providing that if in the limitations there is a requirement that people attain thirty or forty or some other age, it shall be sustained as if the maker of the requirement had said twenty-one, and in that sense I think it a good rule. In other words cut down the long term tie-up that the chap has made, without invalidating his whole disposition. Now if you want to call that cy-pres, fine. I'm for cy-pres so defined. The model perpetuities act was something that I had something to do with in the days of the *Restatement*. We got terribly involved in drawing it up. Lewis Simes of Michigan did the major part of the work on it. It's never been adopted anywhere and I'm just as happy it hasn't.

Comment by Gerald Jones*

I join with others in thanking the University for making this conference possible and for having Professors Thurman, Bowe, and Powell give their carefully prepared and helpful papers.

Even if nothing can be done toward the legislative action suggested by Mr. Powell in his paper on perpetuities, he has recalled to our attention two noteworthy particulars important in the application of our laws affecting perpetuities and alienations as they now stand, *viz.*, that section 33-235 and allied ones do not apply to personal property and that the common law Rule Against Perpetuities in Arizona governs only dispositions of personal property (excepting estates for years),

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and also that if the disposition is in trust and the trustee has the power of sale of all property, then the common law rule applies to the real estate on the theory of a kind of equitable conversion.

But Mr. Powell has done far more—he has awakened us to perpetuities and restraints on alienation problems presented by our statutes which he believes should be corrected by legislation. Personally, I agree with him almost completely and trust the Bar does not let his effort die a-borning.

It seems we are behind the times and that we are retaining the two rules, one affecting real estate (statutory) and the other personalty (common law), when the states which created the distinction between the two classes of property have abandoned it as highly undesirable and have returned, either completely or very largely so, to the common law for disposition of real or personal property. Even as written and undisturbed, there are inconsistencies in the statutes, as well as provisions useless if innocuous, that ought in any event to be removed.

Personally, I favor the elimination of any distinction at all based on the nature of the property disposed and that the common law rule as created and developed by the courts over many decades should, in the main, be applied. In any event, Arizona courts should not be in the position of having to resort for interpretative aid to decisions in New York, Michigan, and Wisconsin (as is now the case, I am sure any Arizona lawyer who has studied the problem will agree) based on statutes found unworkable and actually repealed in each of those states.

I am reluctant to go quite as far as Mr. Powell in the period of suspension of vesting. It does seem to me that a vesting deferred longer than two, maybe three, lives in being when the interest is created and twenty-one years thereafter is unreasonably long—else we may find ourselves tied to the *Thellusson* rule, nowhere considered desirable.

Any Arizona lawyer who pretends to draw instruments with future vestings will, I believe, find profit in reading Mr. Powell's excellent paper. He will find there, and I do not know of any other place, a thorough and penetrating discussion of all the Arizona cases which touch even remotely on this difficult subject of perpetuities—one which has laid low many a will and inter vivos trust and defeated the grantor's purpose.