

http://www.law.harvard.edu/faculty/cdonahue/courses/prop/lec/outcl19_19S_classtest.html.

The Policy of the Rule

1. economics—3 possibilities
 - a. Removing an asset entirely from market forces—c rdr at common law—by and large solved today by making all interests alienable also by the use of the trust. Land use restrictions can have this result too, though they are not included within the Rule.
 - b. Holdout problems—the longer the time before the interest falls in, the less its present value
 - c. Transactions costs (a variant, perhaps, on the holdout problem, but we can make it separate by assuming that everyone is “rational” and has something that is worth something), $G \rightarrow A, B, C, D, E, F, \text{ and } G$
2. dynasties—the use of the taxing power
3. internal contradiction—the fundamental problem
4. the basic cut of the Duke of Norfolk’s case (1682): “. . . Shall . . . a Man . . . be disabled to provide for the Contingencies of his own Family that are within his View and Prospect . . . when there is no Tendency to a Perpetuity, no visible Inconvenience?”

What happens if an interest violates the rule?

Ryan

1. $D \rightarrow \text{le } A \rightarrow \text{rdr } B, C, D, \text{ and } E$, if they be living, or if they be not living, the share of any of them who is deceased to go to his or her exr or admr to be applied by such as if it formed a part of his or her estate.
2. What does the case hold about the Rule Against Perpetuities? *Johnson v. Preston*
3. Why does the court spend most of the opinion asking whether the remainder in the siblings was vested or contingent? (This is not “infectious invalidity”; the rdr in the sibs is perfectly good whether it is vested or contingent, the question is what do we do if the contingency is not met.)
4. Is there any way to avoid this result? (Hint: does the exr or admr have a beneficial interest in the land?)

Brown

Brown v. Independent Baptist Church. The first paragraph tells us that a receiver had been appointed. Hence, even though the church no longer had any members, it still could be the defendant in the case while the receiver was winding up its affairs. Although it is not completely clear, I think that Brown was the heir of one of the legatees.

1. “To the Independent Baptist Church of Woburn, to be holden and enjoyed by them so long as they shall maintain and promulgate their present religious belief and faith and shall continue a Church; and if the said Church shall be dissolved, or if its religious sentiments shall be changed or abandoned, then my will is that this real estate shall go to my legatees hereinafter named, to be divided in equal portions between them.” What does the court hold about this language?
2. Any way to avoid this result?
 - a. Interpret the fsd as a fscs (if fscs we will not imply a r/e, see *Storke*)
 - b. Are p/rvtrs devisable?
 - c. Why does R/Perp not apply to p/rvtrs?

- d. Did Sarah Converse intend to keep a p/rvtr?
- e. Statutory solutions. They come in various forms. There's a note about them in the book (p. S272–275). Almost all of them serve, as practical matter, to bar the exercise of rights of entry or possibilities of reverter within a relatively short period of time. Some of them require that such interests be rerecorded, for example every 30 years, in order to remain valid. Very few of them say what is to happen once the future interest is barred. Presumably in both the case of the fsd and the fscs the holder of such an interest becomes the holder of a possessory fsa, but such a person probably needs a quiet title action to end up with a totally marketable title.

Hamm

- 1. DBH → MBC “the property to automatically revert to DBH in the event RWC ever acquires any interest therein”
- 2. Is the holding in this case the same as *Independent Baptist of Woburn*?
- 3. So what is the issue in this case?
- 4. What seems harsh about the result in this case?

A whole series of problems asking the question what next:

- 1. D → le A → rdr le A's children → rdr A's grandchildren. The concept of “infectious invalidity.”
- 2. D → to those members of the Newton Democratic Club who are alive at the end of the next presidential election
- 3. D → A but if a descendant of Barak Obama becomes president → rdr B
- 4. D → A so long as a descendant of Barak Obama is not president → rdr B
- 5. D → le A → rdr B when a descendant of Barak Obama becomes president
- 6. D → A but if a descendant of Barak Obama becomes president → rdr Newton Lions' Club (a charity)
- 7. D → Newton Lions' Club (a charity) but if the Newton Lions' Club ceases to exist → Newton Community Chest (a charity)

The Sample Exam Problem (p. S110): “I devise the Stark Farm to my son Bartholomew and his heirs in fee simple for as long as they shall farm the property; and if they shall ever cease to farm it, then to my daughter, Clarissa and her heirs in fee simple, if she shall then be living; otherwise to the Eden Audubon Society.”

Statutory Changes

- 1. Wait and see – rather than striking down violating provisions *ex ante* we wait to see if the conditions are, in fact, fulfilled during the perpetuities period.
- 2. Cy pres – rather than striking down violating provisions *ex ante*, we reform them so that they comply. One obvious application of this doctrine would, for example, reduce a violating age condition of 30 years to 21.
- 3. A term in gross – the common-law rule allows a term of gross of 21 years (“so long as the property is used for residential purposes for 21 years”). There is no magic in 21 years in this context. It might be changed statutorily to 30 or 60 or even 90.

The Rule today and its Future

- 1. When I wrote DKM3 in 1993 there was a gradual move to loosening the Rule. An increasing number of jurisdictions were having their doubts about the inexorable

application of the Rule. The two basic approaches were wait-and-see and cy pres. Perhaps statute was more common than judicial decision, but judicial decision was a way to do it too. Statute might also add the notion of an expansive term in gross.

2. The move was very gradual, and the statutes and cases that I put in the book in the Further Note on 'Wait-and-See' (pp. S259-S261) were typical of what was going on. Then something happened. As a result of considerable pressure from the banking industry a number of states in the last fifteen years have enacted laws exempting trusts from the Rule or enacting a perpetuities period for trusts of 360, 365, 500 or 1000 years, or even forever. A recent count brings us up to 26 plus D.C. Slightly more than this number have adopted, with or without a special rule for trusts, the Uniform Statutory Rule Against Perpetuities. That's important because the Uniform Rule deals with legal future interests as well as with trusts. A few states have adopted a statute that attempts to abolish the Rule entirely.
3. Adoption of the Uniform Rule is probably a good idea. It gives us the common-law rule plus wait and see for 90 years, and a possibility of cy pres.
4. I think the statutes that greatly extend the period for trusts are a bad idea. Perhaps more to the point, I don't think that these statutes will survive. The popularity of these statutes is dependent on what can only be regarded as a loophole in the federal estate tax code. Much depends on what Congress does when it finally gets around to reforming the estate tax code, and it is likely that it will impose sufficiently heavy taxation on these trusts that they will disappear. Another possibility is that Congress will eliminate the loophole by removing the wall in which the loophole was found.

The note on concurrent interests and legislation will be the topic of considerable discussion in the next class. Pay particular attention to Wisconsin.