

*THE RULE AGAINST PERPETUITIES,  
SAUNDERS v. VAUTIER,  
AND LEGAL FUTURE INTERESTS ABOLISHED*  
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**I. Introduction**

In its *Report on The Rules Against Accumulations and Perpetuities*<sup>1</sup> the Manitoba Law Reform Commission made five basic proposals.<sup>2</sup> The Commission recommended the abolition of the following rules:

(1) The rules restricting accumulations that are contained in the *Accumulations Act, 1800*.<sup>3</sup>

(2) The Rule in *Whitby v. Mitchell*;<sup>4</sup> and

(3) The modern rule against perpetuities.

To complement the abolition of the rule against perpetuities the Commission also recommended:

(4) That section 61 of *The Trustee Act*,<sup>5</sup> which provides for the variation and termination of trusts, be amended, the amendment to include, *inter alia*, the abolition of the rule in *Saunders v. Vautier*,<sup>6</sup> and

(5) That all successive legal interests be converted into equitable interests.<sup>7</sup>

The first, second, third and fifth of the proposals were implemented by the enactment of *The Perpetuities and Accumulations Act*,<sup>8</sup> and the fourth by amendments to section 61 of *The Trustee Act*.<sup>9</sup> Both the Act and the amendments came into force on October 1, 1983.<sup>10</sup>

This article will deal primarily with the abolition of the rule against perpetuities and with the two changes that are ancillary to it. Two aspects of the Report will not be dealt with at all, or will be mentioned only peripherally. The Report, quite rightly, took it for granted that, whatever happens

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1. (1982), Report 49 (C.H.C. Edwards, Q.C.), (hereinafter referred to as the "Report").

2. The Report makes these proposals in the form of ten specific recommendations. The recommendations are listed on page 60.

3. 39 & 40 Geo. III, c. 98 (U.K.).

4. (1890), 44 Ch.D. 85 (C.A.); aff'd (1889), 42 Ch.D. 494.

5. R.S.M. 1970, c. T160.

6. (1841), 41 E.R. 482.

7. One of the Commissioners, Professor D.T. Anderson, dissented in part: see Report, at 62-65. He was also concerned that if the majority recommendation were to be adopted, due consideration should be given to the effect of the change on registration of title to land.

8. S.M. 1982-83, c. 43 (P32.5). The Act is based on, but is not an exact reproduction of, *The Proposed Perpetuities Abolition Act*, set out in Appendix B of the Report.

9. See *An Act to Amend the Trustee Act*, S.M. 1982-83, c. 38, s. 4. This section is based on, but is not an exact reproduction of, the proposed amendment set out in Appendix C of the Report.

10. *The Perpetuities and Accumulations Act*, supra, n.8, at s.8; *An Act to Amend the Trustee Act*, supra, n.9, at s.8. When the legislation was first introduced into the legislature, the date for its coming into force was July 1, 1983. That explains the reference to July 1, 1983, which still appears in *An Act to Amend the Trustee Act*, s.4 where it provides for a new s. 61(2). The reference ought to have been changed to October 1, 1983. However, nothing of substance turns on the point.

to the rule against perpetuities, no case can be made for the retention of the *Accumulations Act*, 1800<sup>11</sup> or of the rule in *Whitby v. Mitchell*.<sup>12</sup> The only question that needs consideration is the extent to which the abolition of the Act and Rule should operate retroactively. The same question arises with respect to the abolition of the rule against perpetuities, and retroactivity as a general issue will be dealt with in Part VI of the article.<sup>13</sup> Although it recommended that the rule against perpetuities be abolished, the Report discussed the question of whether, if some control over the disposition of property is required, it should be by way of a reformed rule, or by the adoption of some new form of control. The Report did not explore these options in detail, or come to a definitive conclusion about them, and they will not be discussed here.<sup>14</sup>

Much ink has been spilled on the rule against perpetuities. What has been written has often served to confuse rather than to clarify, and, not surprisingly, those who have sought to reform the rule have tended to stress its inadequacies rather than its virtues. But the rule can be simply stated:

"No interest which does not vest when the instrument of creation takes effect, is valid unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."<sup>15</sup>

In many cases the rule can be applied without difficulty to a disposition whose validity is in question. The policy behind the rule was, in its inception at least, sound. As is well-known, it was developed in England in order to control what may be called family dispositions, that is, gratuitous dispositions of property made in favour of successive generations of a family group. The establishment of the rule represented an attempt to balance competing policies that have been constant factors in the law of property. There is a well-established principle that an owner of property should be free to make any disposition of it that he sees fit. If that principle were applied without qualification, it would mean that an owner could create a series of successive interests running for several generations into the future. But during the existence of those successive interests the absolute title to the property would be rendered inalienable. That runs counter to another general principle of the law of property, that property should not be withdrawn from the stream of commerce for excessively long periods of time. It is also undesirable in that it may permit dispositions of property which concentrate wealth in the hands of a few. The tying up of property for successive generations offends a more philosophical principle: the way in which property is currently enjoyed should be determined by the living rather than the dead. Thus, the general principle of freedom of disposition argues in favour of permitting a property-owner to create any series of successive interests that he wishes to create. Freedom of alienation, the fear of monopoly and the desire to give control to the living rather than the dead argue in favour

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11. Report, at 4-8. The Report relies heavily on Report 6 of the Alberta Institute of Law Research and Reform, *Report on the Rule Against Perpetuities*, at 67-77. For Professor Anderson's view, see *supra*, n. 7.

12. *Supra*, n. 4 see Report, at 10-11.

13. *Infra*, text at n. 115 *et seq.*

14. See Report, at 3, 39-40, 49-51, 71-79.

15. *Ibid.*, at 9.

of imposing some restraint on such absolute power. The rule represents a compromise between these competing policies. A disposition may create successive interests, but subject to the qualification that the interests must vest, if at all, within the perpetuity period. To some degree, therefore, a disposing owner retains freedom of alienation, but nonetheless is compelled, in order to give due weight to the other policies, to vest absolute title within a reasonable period of time in those who are to be the ultimate beneficiaries under any disposition.

However, even if all of this be accepted, the defects that have engrafted themselves on to the rule in its three hundred year life are notorious. They may be divided into two general categories. First, the courts mechanically applied the rule to virtually all types of contingent interests in property, both real and personal, no matter how those interests arose. The rule was originally developed to control family dispositions created by way of executory or equitable interests. It was extended, quite rightly, to cover common law interests as well.<sup>16</sup> It was also applied to commercial interests, such as options to purchase and other analogous interests, and to interests such as easements. As we shall see, the desirability of that extension is a matter of debate.<sup>17</sup> Second, one of the three basic elements in the rule was developed in a way which defies justification. No major difficulty arose with the rule so far as it turned on the vesting of interests.<sup>18</sup> The perpetuity period did not create any significant problems while the rule was retained in its common law form, though it has been a source of controversy in relation to the "wait and see" statutes.<sup>19</sup> The third element of the rule has been the subject of widespread and well-justified criticism. A contingent interest is void if, at the date of the coming into effect of the instrument creating the interest, there is any possibility that the interest could in due course vest outside the period of the rule. Interests which, in the events that happened, would in fact have vested comfortably within the period are nonetheless invalid if at the outset any possibility of vesting outside the period exists. In deciding whether or not there is such a possibility the courts have taken into account not only highly improbable developments, but also possibilities that in fact could never happen. This already indefensible operation of this aspect of the rule is made all the more indefensible by the fact that, in many cases, the invalidity could easily have been cured by proper drafting. In that respect the rule is one of form rather than substance, operating as a trap for the unskilled and the unwary.<sup>20</sup>

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16. Though not in Canada to possibilities of reverter: see Report, at 14-15. The position is open to argument in England: see J.H.C. Morris and W.B. Leach, *The Rule Against Perpetuities* (2d ed. 1962), at 209 *et seq.*. The Report, quite rightly, states that the rule ought never to have been applied to the administrative powers of trustees: Report, at 27. It also states that it ought not to apply to interests arising under a trust for sale: Report, at 27. This is a more arguable proposition. The rule is also used to limit the duration of those non-charitable purpose trusts to which the courts are prepared to concede some validity: see, *infra*, text at n. 109 *et seq.*
  17. *Infra*, text at n. 36. The distinction between family and commercial dispositions is not one that is at all watertight. Thus a right of entry or a possibility of reverter may arise under either type of disposition. In general the significant distinction is whether the transaction is gratuitous or for consideration, and at a general level it is suggested that it is a distinction which it is useful to draw.
  18. But see D.M. Schuyler, "Should the Rule Against Perpetuities Discard its Vest?"; (1958), 56 Mich. L.R. 683,887.
  19. The question is discussed in the various law commission reports on the rule against perpetuities: see, e.g., Report 6 of the Alberta Institute of Law Research and Reform, *supra*, n. 11, at 14-25.
  20. All of this is well documented in a myriad of writings on the rule, particularly those of W.B. Leach: see Morris and Leach, *supra*, n. 16; and the following articles by Leach: "Perpetuities in Perspective: Ending the Rule's Reign of Terror" (1952), 65 Harv. L.R. 721; "Perpetuities: Staying the Slaughter of the Innocents" (1952), 68 L.Q.R. 35.

There is no doubt, therefore, that something needs to be done about the rule. Many Commonwealth jurisdictions have legislation "reforming" it.<sup>21</sup> The Manitoba legislation, implementing the recommendations of the Report, uproots it completely. Before looking at the line of reasoning of the Report and the legislation in detail, it may be useful to summarize the general thrust of the Report. That can be done as follows:

(1) The principal reason that the Report gave for the abolition of the rule is that, in modern society, people no longer make family dispositions or enter into commercial transactions which give rise to any of the concerns which caused the rule to be created. If there is no social evil, there is no need for any sort of rule, be it the rule against perpetuities or any substitute for it.

(2) It could turn out that this assumption about family dispositions and commercial transactions is ill-founded. Even then, the Report argued, the rule is not needed. It should never have been applied to commercial transactions at all. Family dispositions are usually made by way of trusts. Modern trust law ensures an acceptable alienability of the subject-matter of a trust, and an even balance between the living and the dead.

(3) On occasion successive legal interests may be created. In that case there is no mechanism available to ensure alienability of the property in respect of which the interests exist, or to balance the claims of the living and the dead. All successive legal interests should, therefore, be automatically converted into equitable interests.

(4) The assumptions in (1) and (2) may turn out to be ill-founded, in whole or in part. Commercial transactions may create contingent interests running far into the future and, in the absence of a rule against perpetuities, that may give rise to difficulties. The law of trusts may not prevent adverse consequences flowing from the creation of a long series of equitable interests. If that should happen legislation would then need to be enacted to deal with specific problems as they arose.

(5) Given that the rule is to be abolished, it should, with some qualification, be abolished retroactively.

## II. Are "Undesirable" Dispositions Made?

The basic case that the Report makes for the abolition of the rule against perpetuities is simplicity itself. If no dispositions are made which would violate the rule then the rule is not needed. The validity of that argument needs to be looked at in relation to both family dispositions and commercial transactions.

### 1. Family Dispositions

Speaking primarily, it would seem, about family dispositions the Report summarized its conclusions as follows:

[W]e do not consider that the conditions in this province, either today or in the likely future, constitute the circumstances which call for a perpetuity rule. The original reasons for the

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21. See the list in R.H. Maudsley, *The Modern Law of Perpetuities* (1979), Appendix D, at 247. In Canada the legislation in the Northwest Territories should be added to the list: see *Perpetuities Ordinance*, R.O.N.W.T., 1974, c. p-3.

rule in England have never applied in this province, and we think that the number of resident or non-resident investors in the wealth of the province who will wish to create dynastic trusts is likely to remain so small, if they in fact exist, that there is no social or economic problem.<sup>23</sup>

On the other hand, the dissenting Commissioner concluded:

I suspect that the majority report understates both the risk of the mischief against which the rule is directed and the role of the rule in preventing objectionable dispositions.<sup>24</sup>

It appears that the opinion of both the majority and minority is in large measure impressionistic. There is no evidence of any systematic gathering of information on the current pattern of family disposition in the province.<sup>24</sup> Both the majority and the minority agree that there is little obvious pre-occupation with the rule. That could be for one of two equally plausible reasons.<sup>25</sup> It may be, as the majority<sup>26</sup> would have it, that very few, if indeed anyone, ever propose to make a disposition which would attract the rule, and that if they did, their desire would quickly wane once they became aware of the tax consequences of any such disposition. There is perhaps a minimal risk that the odd eccentric would attempt to tie up property in an undesirable way. That risk is so small that it may be ignored. In any event, any adverse consequences flowing from such a disposition would be minimized by various aspects of the law of trusts. If need be, in the last resort, special legislation could be enacted to protect the public interest. On that view of what Manitobans are doing and are likely to do with their property, the rule is indeed of little value.

The minority position<sup>27</sup> starts from the premise that it is for those advocating abolition to make out a case for totally uprooting such a fundamental branch of the law of property. There is, the argument runs, no clear evidence that the rule is not doing its job. It is possible that from time to time, and perhaps often enough to be significant, dispositions are contemplated which would contravene the rule, and which are forestalled because of the limits it imposes. The rule, although admittedly not the constraining force that it once was, still has a role to play in modern law. Even if it is needed only to guard against some new form of perpetuity not now foreseen, it is better to have the rule in place before rather than after the event.<sup>28</sup> Finally, if Manitoba abolished the rule it would, in the first instance at least, be out of step with the other Canadian provinces who have dealt with the defects of the rule by reforming rather than abolishing it. Particularly if the arguments for and against the retention of the rule are evenly bal-

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22. Report, at 51.

23. *Ibid.*, at 63.

24. The Report, at 29 refers to "our research", and to the Commission being "assured"; at 35 to the Commission being "told". It is not clear from the Report what research was done, or from whom the assurances or the information came. The Commission did send letters to "several" practising lawyers in the province. The responses were "few in number", but "many responses contained well-considered and thoughtful analyses on certain aspects of these questions": see Report, at 1. But note also the comments at 29-30 on the value of some of the responses.

25. There is a third possibility. Perpetuity issues may arise and lawyers may fail to see them: see, e.g. *Royal Trust Co. v. Crawford*, [1955] S.C.R. 184, at 206-207. This may flow from a failure to understand the rule, or from the rather cavalier attitude referred to on p. 28 of the Report.

26. See Report, at 28-46, 51-53.

27. *Ibid.*, at 46-48, 62-65.

28. A view shared by some of the practitioners who responded to the Commission: see *Ibid.*, at 29.

anced, there is a virtue in giving weight to maintaining uniformity of legislation across the country.

The main issue is what type of dispositions Manitobans are making, or are likely to make, in the future. It may be that on both sides points are made which are ancillary to this issue and whose weight may be doubted. The majority may over-rate the value of the law of trusts in controlling "undesirable" dispositions; and if there is a risk that such dispositions may be made it would be better to have legislation in place before rather than after the event.<sup>29</sup> Excessive reliance can also be placed on the impact of taxation. There is no doubt that the current pattern of taxation makes the tying up of property less attractive than it otherwise might be. That is, however, an incidental result of the taxation system. We cannot be sure that will always be the case, although we can be sure that tax laws are not specifically designed to supplement all of the policies lying behind the rule. If, apart from tax considerations, it was thought there was a danger that property might be tied up, it would arguably be taking a risk to assume that tax laws would always operate to eliminate that danger. On the other side, the stress of the minority on the desirability for uniformity of legislation can be overdone. As in the case of the doctrine of precedent, the virtue of uniformity is destroyed if the uniformity be one of error.

On the main issue — what type of dispositions are Manitobans likely to make — one could reach a conclusion on the basis of evidence, or on one's own impressionistic judgment. There has been little systematic gathering of information that would enable a well-documented answer to be given to the question of whether there is any disposition on the part of a significant number of people to tie up property, a disposition which the rule keeps under control.<sup>30</sup> Any assessment, therefore, must be a personal, and to some degree, an impressionistic one. The reading of the Report has confirmed the opinion I formed in preparing a report on the rule against perpetuities for the Alberta Institute of Law Research and Reform:

It would appear that there would not necessarily be any grave repercussions if the rule were abolished. If in theory the rule has still some purpose to serve, as a matter of fact it is unlikely that people would attempt to maintain excessive control over the future. In effect, if the rule is retained, it may be, as Lang put it, for 'the rare case'.<sup>31</sup>

One can appreciate the hesitancy about making such a major break with the past, and leaving what could be a dangerous vacuum in the law of property. But if law reform is to be effective it must, on some occasions at least, eliminate rules completely so that we are not constantly being put into the position that in order to understand the new we need to be as familiar as ever with the old. No doubt, such a drastic step should be taken

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29. As to the law of trusts, see *infra*, at "2. Family Dispositions and the Trust"; as to relying on future legislation, see *infra*, text at n. 108 *et seq.*

30. See the comments in the Report, *supra*, n. 24. In 1960 Leach reported that in Delaware and Wisconsin, where perpetual trusts may be created, there was no indication that settlors were going beyond the limits that the rule would impose: see W.B. Leach, "Perpetuities Legislation: Hail, Pennsylvania!" (1960), 108 U.Pa.L. Rev. 1124, at 1140-1141.

31. Report to the Alberta Law Institute of Law Research and Reform, 1969 (unpublished) at 5. The reference to Lang is to: O.E. Lang, "A Perpetuities Act for Saskatchewan" (1962), 40 Can. Bar Rev. 294, at 295.

only if the risks are non-existent or minimal. The risk that property owners will tie up property for excessively long periods of time by using successive interests is, it is suggested, so small that, in the case of family dispositions at least, the rule against perpetuities can be safely dispensed with.<sup>32</sup>

## 2. Commercial Transactions

The majority<sup>33</sup> took the same view with respect to commercial transactions as they did to family dispositions — in this day and age it is unlikely that commercial transactions will be entered into which will create contingent interests that may vest outside the period of the rule. Again, there is no evidence in the Report of any systematic survey of commercial transactions on the basis of which judgments could be made. It may well be, as the Report points out, that it is rare for options to purchase to run for more than two years. On the other hand, a tenant's option to purchase the landlord's reversionary interest is subject to the rule, and that type of option can last for considerably longer than two years. In the mining and oil and gas industries it is not uncommon to have options, rights of entry and rights of reverter running for comparatively long periods of time. Even in a commercial setting, the courts use the standard perpetuity period in applying the rule. If there are no applicable lives, and in the case of a transaction between companies that is a distinct possibility, the period is twenty-one years. The danger, therefore, of commercial transactions being caught by the rule is increased. Much may, of course, turn on the commercial practices of any given jurisdiction. The Report, however, does not on its face make out a clear case for reaching the conclusion that it is unlikely that some commercial transactions which could violate the rule may not arise. If the rule is to be abolished with respect to commercial transactions it must be, it is suggested, on the basis that the rule ought never to have invaded the commercial world in the first place.<sup>34</sup>

## 3. Why Bother?

If it is decided that the rule should be abolished because it is unlikely that family dispositions (or, let us assume, commercial transactions) will never run afoul of it, one argument against the rule's abolition should be noted. If the rule is never invoked, why go to the trouble of abolishing it? There are two answers to that question. First, if the rule is obsolete it is as a general principle better to get rid of it. Second, one of the requirements of the rule is that it must be certain from the date of the creation of an interest that, if it vest at all, it can vest only within the period of the rule. As we have seen, interests are often held invalid because the courts take into account not only contingencies which could reasonably materialize, but also improbable and indeed impossible contingencies, and to make matters worse, in many cases the invalidity could have been avoided by careful

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32. But one must acknowledge that forecasting is an uncertain art. For example, Canadians for many years have assumed the existence of a virtually inexhaustible supply of land. That assumption can no longer be made, particularly close to urban areas or, in some cases, with respect to recreational land. If it were perceived that some types of land were becoming scarce could it lead to the tying up of land in families?

33. See *particularly* Report, at 40-41.

34. See *infra*, text at n. 36 *et seq.*

drafting.<sup>35</sup> If the rule were retained there is a risk that dispositions which do not offend the substance of the rule would be invalid purely because of the form in which they were created. If that is the case, the rule then either needs to be reformed if it is to be retained, or, if a case for its abolition can be made, it needs to be abolished in order to protect interests that would violate it in form but not in substance.

### III. Even if "Undesirable" Dispositions are made, is the Rule needed?

Even if it is likely that dispositions will be made which would violate the rule, the Report would still recommend its abolition. Commercial transactions ought not to be governed by the rule at all. In the case of family dispositions the modern law of trusts carries out the objectives the rule was designed to achieve. In neither case, therefore, is the rule needed.

#### 1. Commercial Transactions

The most common type of commercial transaction to which the rule may apply is the option to purchase land. There is widespread agreement that the rule should never have been applied to a tenant's option to purchase the reversionary interest of his landlord. Whether or not it should apply to options in gross and other contractual rights that may give rise to contingent interests in land is more of a moot point.

The Report of the English Law Reform Committee on the Rule Against Perpetuities<sup>36</sup> concluded that options in gross should be valid only for a period of twenty-one years, and thereafter they should be void, even as between the original parties to an option. The Report took the view that such options discouraged development, for the option-giver, generally in possession, may be inhibited from developing property because the option may be exercised against him. It was also thought that if the option lasted too long, practical difficulties could arise in tracing the transmission of the benefit, for, while the burden would need to be registered in order to be enforceable, that is not necessarily true of the benefit of an option.

The Report thought it clear that the rule should not apply to "contractual options to purchase, to easements and other rights over another's land . . .",<sup>37</sup> and referred to the position taken by Morris and Leach.<sup>38</sup> Morris and Leach recognize that a case can indeed be made for applying the rule, or some variation of it, to options in gross. Nonetheless, they say:

In such cases the self-interest of the parties can be relied upon to see that long-term options are kept well within the limits of public interest. An owner of land will not be likely to give such an option if the development of the land is a real possibility; and if such an option is given, the self-interest of the option-holder will lead him to exercise the option and develop the land as soon as such action offers an opportunity for profit.<sup>39</sup>

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35. *Supra*, text at n. 20.

36. (1956), Cmnd. 18 at 19-20.

37. Report, at 42.

38. *Supra*, n. 16, at 219 *et seq.*

39. *Ibid.*, at 224-225.



The authors also point out that in New York there is no restriction on the duration of options, and that has not led to any difficulty. It can also be argued that options in gross may be used in assembling land for development, and this often aids development by ensuring that someone capable of developing is in a position to acquire title when the time for development is ripe. The arguments and evidence in favour of subjecting options to the rule are weak, and if that is so the general principle of giving full effect to contractual arrangements ought to prevail. All options ought therefore to be exempt from the application of the rule.

In addition to options, it is possible that there are other types of contractual rights capable of giving rise to rights in real property, and to which the rule could be held to apply. Morris and Wade give the example of a contract to buy land at Dover when a Channel tunnel is completed.<sup>40</sup> The arguments relating to options would apply in such a case, and it seems the rule ought not to apply to any contract giving rise to contingent interests in real property.<sup>41</sup>

There is also some question as to whether at common law the rule applies to options to purchase personal property. The issue has arisen in Canada in relation to options to purchase shares, but it cannot be said that the law is clear.<sup>42</sup> In considering whether or not the rule is in fact needed, the same arguments would apply with respect to personal property as apply to realty. Commercial transactions should not be upset by the application of the rule unless it is clear that there is a potential mischief that needs to be curbed. In the case of personalty it would seem that there is no such danger. Indeed, in the case of the small company the option and other like rights are often essential control devices, and it would be undesirable if the rule against perpetuities curtailed their use.

If a case can, therefore, be made for not subjecting commercial interests to the rule against perpetuities at all, there remains the question of tracing the benefit of such things as option rights. The English Report stated that could cause difficulty, but did not provide any evidence to support that statement. It is no doubt something which could occur in certain cases, but it is not so demonstrably likely to be a source of widespread difficulty that it ought to determine what the law should be.

The Report, it may be concluded, did not make out a strong case for abolishing the rule with respect to commercial transactions on the ground that it is rare for such transactions to run beyond the limits set by the rule. However, its assumption that the rule ought never to have applied to commercial transactions at all is, it is suggested, well founded and on that basis the rule may indeed be dispensed with.

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40. J.H.C. Morris and H.W.R. Wade, "Perpetuities Reform at Last" (1964), 80 L.Q.R. 486 at 525.

41. This argument, *mutatis mutandis*, would apply in the case of easements and restrictive covenants, whether they arose gratuitously or for consideration: see the comments in Morris and Leach, *supra*, n. 16, at 229.

42. Compare *Re Ogilvy* (1966), 58 D.L.R. (2d) 385 (Ont. H.C.) with *Kristal v. Hartigan* (1968), 2 D.L.R. (3d) 197 at 225 *et seq.* (N.S.S.C.).

## 2. Family Dispositions and the Trust

In the opinion of the majority, any likelihood of adverse consequences flowing from the abolition of the rule in the case of family dispositions is limited by the fact that successive interests are generally created as equitable interests behind the legal title of a trustee. Modern trustee investment powers and the law on variation and termination of trusts ensure a reasonable degree of alienability of property, prevent monopoly and preserve a fair balance between the living and the dead. Although it is apparently not a necessary element in the argument for the abolition of the rule, the Report also recommended that a better balance between the living and dead would be struck if the law on variation of trusts was amended so as to abolish the rule in *Saunders v. Vautier*. These are all, it is suggested, arguable propositions.

### (a) Trusts and Alienability

In considering the issue of alienability where a trust exists, a distinction needs to be drawn between equitable and legal title. In theory, any owner of one of a series of successive equitable interests may dispose of his interest, and today in most jurisdictions that is so whether the interest be vested or contingent. If all of the owners of the successive interests agree, they may dispose of the complete equitable title, or, assuming the existence of the rule in *Saunders v. Vautier*, the legal title. These are, however, often only theoretical possibilities. The owner of one in a series of equitable interests may not be able to find a buyer. Some of the interest-holders are probably going to be minors, unborn or otherwise unascertainable, and, even if all are ascertained and have capacity, it may not always be possible for them to agree on how the legal or equitable title is to be dealt with. It is not possible therefore to rely on the powers of alienation of the beneficiaries to ensure that the property subject to a trust is not taken out of commerce for an unreasonably long period of time.

The extent of the powers of disposition of trustees over the legal title varies from jurisdiction to jurisdiction and from trust to trust. In Manitoba, the 1983 amendments to *The Trustee Act* repealed the relatively narrow list of authorized trustee investments, and conferred on trustees the power of investing in any kind of property, real, personal or mixed. Subject to an express contrary intention in the trust instrument, these wide powers are in addition to any powers in the trust instrument itself, and, with some qualification, they apply to trusts created before or after the amending legislation came into force.<sup>43</sup> Thus, in general, Manitoba trustees will henceforth have unlimited powers of investment. If an investment clause does impose limitations on those powers the court has the authority under the variation of

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43. See *An Act to Amend the Trustee Act*, *supra*, n. 9, ss. 5 and 7. Section 5 repeals sections 70-77 of *The Trustee Act*, *supra* n. 4, replacing them by new sections also numbered 70-77. Of the new sections see in particular 70(1) and 74. Section 7 provides for the retroactive operation of the new sections, except where there is a clause setting out the investment powers of trustees. If an existing trust states the trustee shall have the powers of investment conferred by the general law of Manitoba then the new provisions apply to that trust.

trusts legislation to enlarge a trust's range of investments.<sup>44</sup> This, the Report would argue, ensures alienability and in that respect the rule against perpetuities is no longer needed.<sup>45</sup> But even assuming unlimited investment powers, there are still objections to excessively long trusts. Trustees are not as free to speculate as are absolute owners. A trustee with an unlimited power of investing is always inhibited by the fiduciary obligations owed to the trust, and clearly is not as free as an absolute owner to invest as he sees fit.<sup>46</sup> Leach has suggested that in the United States this is not a grave concern because there is not likely to be any shortage of speculative capital, and therefore, no harm will be done if some capital is tied up in non-speculative ways.<sup>47</sup> By contrast, one of the complaints often made about the Canadian economy is the lack of speculative capital. Absolute owners will not necessarily be courageous in how they invest their property; they have, however, wider options open to them than do trustees. Most trusts also carry with them a further economic disadvantage. During the existence of a trust, capital is generally not available for consumer spending, or if it can be spent in that way, it is only at the discretion of the trustees. Again, it may be argued that it would be economically undesirable if, for a long period of time, it was not possible to use capital for consumer purchases. Thus, the case for the abolition of the rule against perpetuities is weak so far as it rests on the assumption that modern trustee investment powers can ensure an acceptable degree of alienability of property that is subject to a long series of future interests.

### (b) Variation<sup>48</sup> of Trusts and Balance

The Report concluded that the law on variation of trusts preserves a balance between the living and the dead, and that the rule against perpetuities is no longer needed to preserve that balance.<sup>49</sup> The Report also proposed that various changes be made in the law on variation of trusts, changes which have largely, though not totally, been made. These changes are not, it would seem, essential to the main argument,<sup>50</sup> and that argument will be dealt with before the changes are considered.

If, the rule against perpetuities being abolished, a property-owner used a trust to run a series of successive equitable interests far into the future, *prima facie* the dead hand would be asserting excessive control. That possibility, so the Report argues, is counterbalanced by the modern law on variation of trusts. As the law now stands, under the rule in *Saunders v.*

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44. *The Trustee Act, supra*, n. 5, s. 61, as amended. The courts have been more reluctant than they ought to have been to extend trustees' investment powers under the variation of trusts legislation: see *Re Mitchell* (1969), 5 D.L.R. (3d) 123 (Ont. H.C.). Even if this case and others like it were correctly decided, their reasoning should no longer apply in Manitoba: compare *Re Kiely* (1972), 24 D.L.R. (3d) 389 (Ont. H.C.).

45. Report, at 27, 51. The Report assumed the old range of authorized statutory investment. Its argument is strengthened by the extension of those powers.

46. See *The Trustee Act, supra*, n. 5, as amended, ss. 70(2), 77, 79.1.

47. Leach, *supra*, n. 30, at 1124, 1136-37.

48. In general, a reference to variation should be read as also including termination of trusts.

49. See Report, at 42-46, 52-53. For the variation of trusts legislation in Manitoba see *The Trustee Act, supra*, n. 5, s. 61, as amended.

50. In particular, the arguments in the Report, at 43-44 and 52-53 appear to assume the continued existence of the rule in *Saunders v. Vautier*.

*Vautier*, if all the beneficiaries are ascertained and are competent adults, they may by agreement vary or terminate the trust as they see fit.<sup>51</sup> The impact of the rule on controlling the dead hand is, however, limited. It is likely to be effective only where there is either one, or a few beneficiaries. If there are a large number of beneficiaries, they either may not agree, or some of them may be unascertainable. That is certainly going to be the case where there is a series of successive interests. The statutory rules on variation of trusts offer a way round that dilemma. If all of the known competent adult beneficiaries consent, and the court is satisfied that a proposed variation is for the benefit of those who cannot consent for themselves, the court may, in its discretion, consent to a variation on behalf of the latter beneficiaries. Thus, the balance between the settlor (living or dead) or testator, and the living and future beneficiaries is maintained.

The value of the law on variation of trusts may be called in question on two grounds. First, before a court may consent to a variation it must find that the variation is for the benefit of those beneficiaries on whose behalf it is consenting. Consider the application of that requirement to a trust which consists of a series of equitable interests. A court could not decide it was for the benefit of some of the future holders of interests that the trust be terminated and the subject-matter divided between the now living beneficiaries. The Report deals with that question in the following way:

Our attention is drawn to the fact that there is no reason why the adult and capacitated beneficiaries should not be able to persuade the court that each beneficiary, whether in possession or contingently entitled, with a sum of capital in his pocket proportionate to his interest is a more beneficial arrangement than successive limited interests extending into the remote future. The capital shares of the infants and the unborn would be placed in new trusts for them until they attained majority, and the adults would have ready cash, or stocks and bonds absolutely owned which they can sell or employ as security.<sup>52</sup>

But that has its difficulties. The valuation of the partial interests, particularly if there is a long series of interests, may be difficult. And, in any event, the proposed solution is only a partial solution, for some of the property is going to be tied up awaiting future events.

Second, assuming the law of variation of trusts is of some value, it carries with it an attendant disadvantage. Despite the criticisms that may be levelled against it, the rule against perpetuities may be easily stated and is often easily applied. It functions with a reasonable degree of precision and certainty. Variation of trusts legislation operates on the basis of a broad discretion, a discretion which has not been put on any more precise a footing by the amendments to section 61 of *The Trustee Act*.<sup>53</sup> Before it approves a variation a court must be satisfied of two things. The court must find that the arrangement is for the benefit of those beneficiaries on whose behalf it is asked to consent. That is not always a decision which can be easily made,

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51. It is well established that they may terminate the trust under the rule in *Saunders v. Vautier*. It is less clear that they may retain the trust, but vary its terms: see Manitoba Law Reform Commission, *Report on the Rule in Saunders v. Vautier*, Report No. 18, 1975, at 1, 11.

52. Report, at 44.

53. The amendments are discussed in greater detail, *infra*, text at n. 55 *et seq.*

and the new definition of benefit in section 61 does not carry things further than the existing case law. The court must also find that the arrangement is otherwise "justifiable".<sup>54</sup> Among other things that will still permit the courts to take into account the purpose the creator of the trust had in mind when the trust was established. Beyond that, it is an open question what else may fall under the rubric of justifiable. If, however, the jurisdiction is to act as a substitute for an abolished rule against perpetuities there may be at least one additional factor in the exercise of the court's discretion. Should a court now assume that there is *prima facie* no objection to property-owners tying up property as long as they please; or it is to assume that the tying up of property is still considered a bad thing, and that the variation of trusts legislation should be used to prevent it? The variation of trusts legislation originally operated within the limits already set by the rule against perpetuities. If the rule is removed the nature of the legislation needs some more fundamental re-consideration.

The Report, it may be inferred, recognized that there was some validity in these criticisms, but in the end did not find them compelling. Nonetheless, if there is a need to control the excessive creation of future interests, it is not clear that variation of trusts legislation could by itself be, to any significant extent, an acceptable substitute for direct control through some rule such as the rule against perpetuities.

### (c) Amending the Variation of Trusts Legislation

In Manitoba the statutory provisions on variation<sup>55</sup> of trusts are to be found in section 61 of *The Trustee Act*.<sup>56</sup> The proposals made in the Report to amend the section fall into three categories.<sup>57</sup> First, the Report recommended a number of changes which were clearly desirable; unfortunately, not all of them have been implemented. Section 61(1) originally listed four groups of beneficiaries on whose behalf the court may consent to an arrangement varying a trust. The list was defective in both form and substance.<sup>58</sup> The Report recommended that the convoluted description of those beneficiaries be replaced by simpler language. That has not been done. Instead, the existing four groups of beneficiaries have been retained, and there has been added to them a further four groups of beneficiaries on whose behalf the court may also consent. However desirable this may be as a matter of substance, the language in which the amendments are drafted does not add to the clarity of the legislation. The opportunity has also been missed to deal with two substantive defects. Paragraph (b) of section 61(1) is retained. That means that it is still possible on occasions for a court to consent on behalf of competent adults. That runs counter to the general philosophy which underlies the legislation. Paragraph (d), an attempt to mold to Canadian circumstances the comparable English provision on pro-

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54. *The Trustee Act*, *supra*, n. 5, s. 61(7)(b) as amended.

55. *See supra*, n. 48, on the use of the word variation.

56. *Supra*, n. 5.

57. *See Report*, at 54-59 and 93-105, where the proposed legislation is set out and discussed.

58. On the immediately following text see the Report, at 96-97, and compare: (1) *The Trustee Act* R.S.M. 1970, c. T 160, s. 61(1); (2) the proposed s. 61(6) in the Report, at 96-97; (3) *The Trustee Act* R.S.M. 1970, c. T 160, s. 61(5), as amended.

tective trusts, remains, renumbered as paragraph (e), but with all of its attendant uncertainties and imperfections.<sup>59</sup> On the other hand, some of the recommendations in the Report are put into effect. The court may consent on behalf of missing persons, and, assuming consent cannot otherwise be obtained, on behalf of corporations, associations, charitable, non-charitable purposes and other trusts. This ensures the courts have jurisdiction to act in a wide range of circumstances where the extent of their jurisdiction was uncertain.<sup>60</sup> Finally, the amendments make it clear that the court has a dual authority under the section. It has always had what may be called a particular authority to consent on behalf of beneficiaries who cannot consent for themselves. The amendments make it clear that the court has the more general authority to vary the trust and that the variation is brought about by its order. That settles a dispute as to whether the court order varied the trust, or whether it was varied by the agreement of the beneficiaries, those who could do so agreeing in person and the court agreeing for the others.<sup>61</sup>

Second, the amendments implement, in part, the recommendation of the Report that the effect of the decisions on two aspects of the legislation be put into statutory form. Before the court may consent to an arrangement on behalf of a beneficiary, it has to be satisfied that the arrangement is for the benefit of the beneficiary. Benefit was not originally defined. In section 61(8) of the amended legislation it is defined in a way that encompasses the meaning given to it by the courts. Little has been gained by this. The definition does not provide any greater guidance than does the existing law, and the Report accepted that the courts might still wish to look at the earlier case law. The Report recognized that there was a danger that a statutory definition might tie the hands of the courts more than is desirable, and the definition in the draft legislation in the Report could have been interpreted as definitive and therefore potentially restrictive in its operation. Section 61(8) avoids that difficulty.<sup>62</sup> It was also settled under the original legislation that, even though an arrangement was for the benefit of those beneficiaries for whom the courts were consenting, the courts still had a general discretion to exercise in deciding whether or not to approve the arrangement. One of the factors taken into account was whether or not a

59. See Waters, *Law of Trusts in Canada*, (1974) 916 *et seq.*; A.J. McClean, "Variation of Trusts in England and Canada", (1965), 43 Can. B. Rev. 181, at 249 *et seq.*

60. *The Trustee Act*, *supra*, n. 5, s. 61(6), as amended, also requires that the court may not approve an arrangement unless it has "the consent in writing of all of the persons who are beneficially interested under the trust and who are capable of consenting. . . ." This implements a recommendation that appeared in the *Report on the Rule in Saunders v. Vautier*, *supra*, n. 51, at 25-26. The relationship between s. 61(6) and s. 61(5)(b) is not clear. Take the example on pp. 96-97 of the Report: a devise "to those of my children who by the age of 30 years have qualified as members of the legal profession in Manitoba." Suppose that two of the testator's children, Tom, a lawyer, and Harry, a minor, wish to vary the trust; Dick, aged 21 and attending university, is opposed to the proposal. Under s. 61 (5)(b) a court may consent for both Harry and Dick; and that despite Dick being an adult and objecting to the proposal: see the Report, at 97. As an adult, however, Dick is capable of consenting. Could he refuse to consent in writing under s. 61(6) and so block the proposal? That would, in part at least, implement indirectly the proposals made in the Report at 96-97. It may be however that s. 61(6) is intended to cover only those beneficiaries not within s. 61(5).

61. It may be argued that the legislation is still defective in one respect. S. 61(4) still refers to the enlargement of the trustee's powers of management or administration. The order may not diminish those powers (unless such an order might be held to fall within paragraph (a) of subsection (4)). It would be desirable to have that flexibility. This is all the more the case, given the extension in Manitoba of the statutory investment powers of trustees: see *supra*, text at n. 43.

62. In the draft legislation in the Report, "benefit" was defined as meaning certain things: see s. 61(8), at 98, 104. In the legislation it is, in effect, defined as including certain things, and that without otherwise restricting the generality of the meaning of the word: see s. 61(7), (8).

proposed variation would totally undercut the purpose the settlor or testator had in mind in creating the trust.<sup>63</sup> The Report recommended that that also should be put into statutory form. It proposed that the courts should not approve an arrangement unless it was "justifiable", and that the intent of the settlor or testator and the circumstances prevailing at the date of the application be taken into account in making a decision on that question. Again, the recommendation ran the risk of being unduly restrictive, for "justifiable" could have been interpreted as referring to those two specific factors and nothing else.<sup>64</sup> The amendment avoids that difficulty. It states that a court must be satisfied that the arrangement is for the benefit of the beneficiaries for whom the court is consenting, and that "in all the circumstances at the time of the application to the court, the arrangement appears otherwise to be of justifiable character."<sup>65</sup> On a narrow construction that might be read as excluding any consideration of the intent of the settlor at the time of the creation of the trust, for it might be argued that is not a circumstance existing at the date of the application. However, even if that be the case, it seems that in considering the justifiable nature of the proposed arrangement the court could always take intent into account. What is clear, however, is that the use of the word "justifiable" has not provided the courts with any greater guidance for the exercise of their discretion. Indeed it may be that the use of the word will give rise to more issues than it solves. The Report acknowledged that the benefits flowing from these amendments would at best be minimal; it may well have been better to have left the legislation as it stood.

The third change recommended by the Report and adopted by the legislation is of a more fundamental nature. Subject to any provision for variation or termination in the trust itself, a trust may not be varied or terminated before its natural date of termination without the approval of the court, even if all the beneficiaries are ascertained competent adults and agree to the variation or termination.<sup>66</sup> This would result in the abolition of the rule in *Saunders v. Vautier*. The Commission had already recommended the abolition of the rule in an earlier Report. That Report, in turn, as its foreword acknowledges, owed much to a Report of the University of Alberta Institute of Law Research and Reform.<sup>67</sup>

The debate on the rule in *Saunders v. Vautier* may be conducted at two levels.<sup>68</sup> The first raises the question of the justness or fairness of the rule, and involves balancing the claims of a donor or testator against those who

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63. See *Re Steed's Will Trust*, [1960] Ch. 407, [1960] 1 All E.R. 487 (C.A.).

64. See the Report, s. 61(9), (10), at 98-99, 104.

65. S. 61(7)(b).

66. See s. 61(2), (3), and the Report at 54-57, particularly recommendation 5 at 57, and at 93-95. The legislation also implements the recommendation that where a donee has a general power to appoint by deed he should not be able to appoint in his own favour unless the donor intends that he may so appoint: see s. 61(9) and the Report at 99. This is an issue that is not directly concerned with the variation of trusts.

67. The rule is set out, *supra*, at text at n. 51. The earlier report is the *Report on the Rule in Saunders v. Vautier*, *supra*, n. 51. The foreword to that report acknowledges the Manitoba Commission's debt to the University of Alberta Institute of Law Research and Reform, Report No. 9, *The Rule in Saunders v. Vautier*, (1972) (hereinafter referred to as "The Alberta Report").

68. The Alberta Report, *ibid.*, also notes that the rule may cause difficulty for trustees: should they or should they not inform their beneficiaries of their rights under the rule? See pp. 3 and 15.

are currently or who may in the future be enjoying the benefits of the property.<sup>69</sup> The general principle of freedom of alienation suggests that a donor should be free to confer benefits on his donees subject to such conditions as he sees fit. On the other hand, it is equally well-established that if a donor has conferred an absolute interest on a donee, the donee is entitled to enjoy that interest as he sees fit.<sup>70</sup> Thus, a donee to whom a legal fee simple interest has been transferred cannot be kept out of possession or otherwise curtailed in his enjoyment of property. That makes good sense. Even as between the living, a donor should not be able to give absolutely and then claim to control property which is no longer his. This analysis applies equally where successive legal interests are created. If title is shared between a life tenant and a remainderman in fee simple, each having absolute interests, the donor may not prevent them from dealing with their interests as they see fit. They may make whatever arrangements they please for the use and enjoyment of the property, and each may dispose of his interest, to the other party, or to a third party.

Should the same rules apply in the case of equitable interests? That can best be considered by looking at three types of trusts. First, suppose property is held on trust for a single adult beneficiary absolutely. *The Manitoba Report on the Rule in Saunders v. Vautier* recognized that in such a case the beneficiary ought to be able to vary or terminate the trust as he sees fit.<sup>71</sup> It is not clear that the new legislation leaves that option open, and it is arguable that in such a case the beneficiary would have to make an application to court.<sup>72</sup> On what basis would a court refuse to accede to an application? In all cases it could rely on the implied intention of the settlor; if he had wanted the beneficiary to have legal title and possession of the property he could have made a direct transfer to him. The court might also make a judgment about the "competence" of the beneficiary to manage the property. But is it not giving too much power to a court to decide if an adult beneficiary, the sole person with any interest in the property, should or should not enjoy that property as he sees fit? The rule in *Saunders v. Vautier* sees the trust as a mode of enjoyment of property and quite rightly, it is suggested, operates on the basis that an absolute owner should determine the mode of enjoyment, and not the donor or a court. If the court did refuse the beneficiary's application, the beneficiary always has the option of transferring the property, by way of sale or otherwise, to a third party. On what basis would a court consider an application

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69. See *The Alberta Report, ibid.*, at 7-8, 16. On p. 5 the report refers to the rule as being one of "legal theology". The reference is obscure. It may be that the rule is thought to be based on outdated dogma. It is suggested, however, that there are genuine policy issues connected with it.

70. *The Manitoba Report, supra*, n. 51, dismisses this as a lawyer's technicality, at 24. However, it is suggested the non-lawyer would see some merit in the argument that a donor who *prima facie* has given property to another should not control that property in the hands of the donee.

71. *Ibid.*, at 7-12. The Report refers to *Lewin on Trusts*, (16th ed. 1964) 6; but the authorities there cited are not clearly supportive of the propositions in the text.

72. This perhaps makes an arguable assumption about the legislation. Section 61(2) requires an application if the trust is to be varied or terminated before any prescribed or natural date for variation or termination. The accompanying text assumes that where a trust is held for the benefit of a single beneficiary there is no natural date for termination. Similarly if property is held for a life estate, with a remainder over, it is assumed that the death of the life tenant is not a natural date for the termination of the trust. This would only be the case if in fact the trust provided that on the death of the life tenant title was to be transferred to those entitled by way of remainder.



by any such transferee? If the transferee were to be denied the absolute right to the title or possession, the repeal of the rule in *Saunders v. Vautier* would indirectly impose a restriction on the beneficiary's power of disposition of his interest. That would be an unfortunate result. It may be objected that it is rare that a trust would be created for a single adult beneficiary<sup>73</sup> and the court would rarely deny an application. If the latter supposition is true, why require the application in the first place?

Second, suppose that property is held on trust for a widow for life, with a remainder to her two adult children absolutely. If all three beneficiaries made an application for legal title or for possession, presumably under the legislation the court could refuse the application on the ground that the settlor intended that the widow have the benefit of regular returns from the life estate. A court might be induced to grant the application if it formed a favourable opinion about the life tenant's power to protect her own interest. Again, however, if all the beneficiaries are agreed, why should the court determine the mode of enjoyment of property of those who are in substance the owners; and why should a court substitute for an adult's own opinion its opinion of what is good for her? *Prima facie* one way of avoiding the impact of the proposed amendments would be for the life tenant to have disclaimed her interest at the outset, or, if not disclaimed, to release it later to the remaindermen. These possibilities are, however, expressly covered by the amendments to section 61.<sup>74</sup> The Alberta Report, without explaining why, stated that any legislation should apply in the case of transfers between beneficiaries.<sup>75</sup> But what purpose is served by such a provision? If the life tenant has already ceased to have an interest in the property it is no longer possible to provide her with any protection, needed or otherwise. Is there any reason why the remaindermen should be kept out of possession until the widow in fact dies? The same issue arises if the three beneficiaries sell their interests to a third party who thereby becomes the absolute owner in equity. On what basis would the court now deny the purchaser legal title or possession? If it did, it would again serve only to impose an indirect and undesirable restriction on the beneficiaries' powers to deal with their own interests.

The third fact-pattern, illustrated by *Saunders v. Vautier*<sup>76</sup> itself, involves a trust which is construed as conferring an absolute interest on a beneficiary, but which also directs that the beneficiary is not entitled to claim possession of the property until some future date, often the attainment of a specified age.<sup>77</sup> In the latter type of case the arguments for and against the proposed

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73. Though not all that rarely: see, for example, the life tenant/remainder situation in n. 72, the annuity illustration discussed in *The Alberta Report*, *supra*, n. 67, at 14-15, and, in the commercial world, the nominee holding as trustee. Particularly in the latter case, one way to avoid the restrictions imposed by the new legislation would be to argue that the relationship is one of principal and agent rather than that of trustee and beneficiary.

74. Though with one question left open. The draft legislation in the Report referred, *inter alia*, to "merger": see s. 61(3)(b), at 94, 102. Presumably that was intended to cover the merger of interests of beneficiaries under the same trust. S. 61(3)(b) refers to merger, however, occurring, with another trust. The impact of that provision is not, at first glance, immediately clear.

75. *Supra*, n. 67, at 14, 15.

76. *Supra*, n. 6.

77. In addition to the postponement of possession until the attainment of a particular age, *The Alberta Report*, *supra*, n. 67, considered the following specific examples: (1) postponement of possession until a certain date, at 9; (2) installment gifts, at 9-10; (3) discretionary trusts and powers, at 10. These examples, as well as postponement until a specified age, are all expressly covered in the legislation: s. 61(3)(a).

amendment are more evenly balanced.<sup>78</sup> In the case of a spendthrift child, for example, it may be arguable that effect should be given to the intention of the donor. But it should be remembered that the beneficiary has the option of selling his interest, at a discount if need be, he may dispose of it by will and if he dies it will pass to his intestate successors. The donor has made him in all senses the owner of the property. Why should the donor then control the mode of enjoyment, requiring the owner to enjoy it as a beneficiary under a trust rather than as an absolute owner in possession?<sup>79</sup>

The second argument concerning the rule in *Saunders v. Vautier* is of a more technical nature. In the third type of trust, at least, the application of the rule turns on what is often a difficult point of interpretation. It needs to be decided if there is a gift, contingent on the beneficiary reaching a specified age, or on some other event, or if there is an absolute gift, with simply an attempt to postpone the right to possession. That distinction no doubt causes difficulty in drafting, and in the interpretation of documents.<sup>80</sup> In fact, the Manitoba Report on the rule in *Saunders v. Vautier* implies that courts may well decide whether it is desirable to allow a beneficiary to take possession, and then decide the disputed point of interpretation accordingly. The courts are covertly exercising the type of discretionary jurisdiction which the Report suggests should be openly given to them.<sup>81</sup> In any event, it is wrong, it is argued, to make so much turn on difficult and fine points of interpretation.

There is no doubt much merit in these arguments, but, it is suggested, the Report takes them too far. It may exaggerate the conceptual difficulty. There is nothing difficult of comprehension in the distinction between an interest which is given absolutely, coupled with the expression of a desire to postpone possession, and a gift which is not given at all until a specific contingency happens. It may often be difficult to decide which type of interest is created by a particular document, but the difficulty is not necessarily any greater than that posed by other issues of interpretation with which the courts have to deal. Even if the degree of difficulty postulated by the Report be conceded, it is arguable one should not draw the conclusions that it draws. Abolishing the rule in *Saunders v. Vautier*, and conferring a power of variation or termination on the courts, would not cause the difficulties of drafting and interpretation to disappear. Take as an example the facts of *Saunders v. Vautier*<sup>82</sup> itself. In that case, the testator left all his East India stock to accumulate until his great-nephew, Daniel, should attain the age of twenty-five; the principal and accumulations were then to be paid. Under the new legislation, a decision would have to be made as to who the appropriate parties would be on any application to

78. In fact, both the Manitoba and Alberta reports, *supra*, n. 51 and n. 67, deal primarily with this type of case.

79. On two occasions The Alberta Report, *supra*, n. 67, puts the issue in terms of an 18-year old being able to take advantage of the rule in *Saunders v. Vautier*, at 3, 15. That raises a question about the age of majority as much, if not more than, any question about the rule in *Saunders v. Vautier*.

80. Indeed, the Report, at 95, suggests that *Saunders v. Vautier* applications may arise because of an oversight, of substance or of form, in drafting. This may be of some relevance to applications for variations of trusts: see *Re Tinker's Settlement*, [1960] 3 All E.R. 85 (Ch. D.).

81. *Supra*, n. 51, at 15-21, 28-29.

82. *Supra*, n. 6.

vary or terminate the trust. If the interest were construed as being absolutely vested, only Daniel need be joined; if it were contingent then not only Daniel but the successors in title of the testator would need to be parties to any application. Suppose that Daniel dies under the age of twenty-five. Who then would take title to the property? If his interest were absolute it would be his successors in title; if contingent, it would be the successors in title of the testator. Thus, any proposal to abolish the rule does not avoid the difficulties of drafting or interpretation.

Even if in some measure the abolition of the rule does avoid technicalities, it substitutes for them judicial discretion. That may have the advantage of forcing the courts to decide directly if there is a good reason for varying or terminating a trust. But that discretion is in itself productive of uncertainty, it compels litigation and, with all respect to the courts, there is no guarantee of the wisdom of the exercise of the discretion. The Manitoba Report on the Rule in *Saunders v. Vautier* is rather sanguine about the prospect of needless litigation arising out of the conferring of a further discretion on the courts.<sup>83</sup> A consideration of legislation such as that on dependents' relief or family property will show that there is indeed a danger of excessive litigation in such cases. It may well be, taking all considerations into account, that one would still decide that the proper thing to do is to confer on the courts the discretion to decide whether or not a trust should be varied or terminated even if all adult beneficiaries consent. It is, however, a procedure which carries with it more disadvantage than the Report acknowledges.

In summary, it is suggested the Report and section 61 go too far in requiring that court approval be required for the variation of trusts, even when all the beneficiaries consent in person. That is clearly the case with respect to the first two types of trusts considered above. It may make more sense in facts similar to *Saunders v. Vautier* itself. Even then, a sole adult beneficiary should be able to decide how he or she enjoys property in which no other sole person is interested. That is sound policy, and on balance it is not clear that the present law ought to be changed.

#### IV. Successive Legal Interests

The Report assumed that the abolition of the rule against perpetuities could in some degree be compensated for by modern trustee investment provisions and by the law of variation of trusts. These two factors would not of course apply in the case of successive legal interests.<sup>84</sup> The Report considered two ways of closing that gap. One could apply some aspects of the law of trusts to legal interests, or one could convert all successive legal interests into equitable interests. The Report, with remarkably little analysis of the issue,<sup>85</sup> opted for the second alternative, and the legislation imple-

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83. *Supra*, n. 51, at 24.

84. The phrase "successive legal interests" should be read as including both common law interests and legal executory interests. This is the intent of *The Perpetuities and Accumulations Act*, *supra*, n. 8; see the definition in s. 1.

85. Report, at 58.

ments that recommendation.<sup>86</sup> Successive legal interests are created relatively rarely, and the question may not be one of major social importance. It does, however, affect some of the fundamental principles of the law of real property, and is in that respect worthy of more debate.

From the perspective of the Report, the need to do anything at all about the status of successive legal interests is, of course, dependent on the assumption that there is a link between the law of trusts and the abolition of the rule against perpetuities. That assumption, it has been suggested above,<sup>87</sup> is open to question. Moreover, it will be recalled that the basic premise upon which the abolition of the rule is based is that it is highly unlikely that people will dispose of property in such a way that the rule would be violated. That premise applies as much to legal as it does to equitable interests; indeed, if anything, it applies more strongly. Even if there was some link between the law of trusts and the rule, it surely would be a rare case in which a series of legal interests would need the benefit of any of the advantages that allegedly flow from being classified as equitable in nature. If this be the case, it follows that, on this ground at least, a strong case can not be made for meddling with the law on legal estates.

Apart from considerations relating to the rule against perpetuities there are changes in the law on legal estates that ought to be made. Presumably the creation of successive legal interests in Manitoba is still governed by common law rules and by the *Statute of Uses*.<sup>88</sup> These rules impose various restrictions on the way in which legal future interests may be created. A future legal interest in favour of a third party (i.e., someone other than a transferor) must be supported by a prior estate of freehold. A transferor cannot, therefore, transfer legal interests to, say, a child, contingent on that child reaching a certain age, unless some prior freehold estate is created to support the child's interest. A validly created contingent future interest in a third party will become void if the contingency to which it is subject is not satisfied by the determination of the prior estate. If a transfer is made to A for life, remainder to B on B attaining the age of twenty-one, and A dies before B reaches the age of twenty-one, B's interest is destroyed. A right of entry may not be vested in a third party. If property is transferred to A for life or to A in fee simple, but subject to a condition subsequent giving rise to a right of entry in favour of B, the right of entry is void and A takes an absolute life estate (with a reversion in the transferor) or fee simple. A possibility of reverter cannot be created in favour of a third party. A transferor cannot transfer a fee simple to A until a certain event happens and then create a possibility of reverter after determination of the fee simple in a third party. Both rights of entry and possibilities of reverter can arise only in favour of a grantor.<sup>89</sup> These rules may be avoided by the creation of executory interests, relying on the operation of a grant to uses under the

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86. *The Perpetuities and Accumulations Act*, *supra*, n. 8, s. 4.

87. *Supra*, text at "2. (1) Trusts and Alienability".

88. 27 Hen. 8 c. 10 (1535-6). But as to that assumption see the suggestion, *infra*, text at n. 107.

89. Although once created in a grantor the interest may in many jurisdictions be assigned to a third party. That calls in question the utility of the rule.

*Statute of Uses*.<sup>90</sup> In the case of a will executory interests may be created without the need to make an express devise to use.<sup>91</sup> All of these rules may be avoided by the creation of equitable interests, and if the decision in *Re Robson*<sup>92</sup> is correct, in many jurisdictions all interests created by will are inevitably equitable, and so not subject to any of the rules at all.

These restrictive rules are relics of feudalism and common law conveyancing, and never have had any significance in Manitoba. Even more than the rule against perpetuities, they are a trap for the unwary and serve no useful purpose. The law on legal future interests ought to be changed, whether or not one of the ancillary reasons for doing so is its relationship to the abolition of the rule against perpetuities. The question is in what way should the change be made. The Report opted in favour of changing successive legal interests into equitable interests. The legislation implements that recommendation by providing that all successive legal interests take effect behind a trust. The trustees are those who are the beneficial owners, subject to some qualification. One of the qualifications is that if there are more than four beneficiaries only the first four become trustees.<sup>93</sup>

The Report gave two reasons for its recommendation. In England legal interests were converted into equitable by sections 1 and 2 of the *Law of Property Act, 1925*. In general one should hesitate about introducing into Canada anything of the intricacies of the English 1925 legislation. It arose out of conditions peculiar to England, and is not obviously adaptable to Canadian conditions. The abolition of legal interests was done in order to facilitate conveyancing. That objective could have been better achieved by the introduction of a system of registration of title such as has long existed in Manitoba. There is no attempt in the Report to consider the impact which the change may have on other aspects of Manitoba law. It will, for example, confer on the first four holders of successive legal interests all the onerous obligations of trustees; that is not necessarily a desirable result, if not intended in the first instance by a transferor or testator.<sup>94</sup> What impact will the proposal have on registration of title to land? Presumably all who become trustees will be registered as fee simple owners, and it will be possible to protect the equitable interests by way of caveat. What effect will the change have on the guarantee of title offered under the Act?<sup>95</sup> There is passing reference but no discussion in the Report on the relationship between the change and the law of taxation.<sup>96</sup> It is suggested that these and probably other questions needed more complete consideration before the proposal was implemented.

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90. *Supra*, n. 88.

91. Subject however to the application of the rule in *Purefoy v. Rogers* (1671), 85 E.R. 1181 (K.B.).

92. [1916] 1 Ch. 116 (Ch. D.).

93. *The Perpetuities and Accumulations Act, supra*, n. 8, s. 4.

94. If the trustees are in fact unwilling to act then trustees may be appointed by the court. That would require an application to the court, and, assuming a professional trustee were appointed, would add to the expense of administering the property.

95. See Report, at 65, for Professor Anderson's reservations on the effect on registration of title to land. In some jurisdictions claims against the Assurance Fund may turn on whether interests are legal or equitable. See *Land Title Act R.S.B.C.*, 1979, c. 219, s. 276.

96. Report, at 12. But, as the Report suggests, lawyers would probably be hesitant about using legal estates to obtain advantages that could not be obtained by using the trust. If they did so, no doubt the tax legislation would be amended to nullify the advantage.

The other reason the Report gave for preferring to turn legal interests into equitable interests is that it would prevent the occurrence of the difficulties that can arise between life tenant and remainderman. This problem was illustrated solely by reference to the decision in *Chupryk v. Haykowski*.<sup>97</sup> That case raised the question of whether a person who was a life tenant (and who also had a partial interest in the remainder) could get an order for the mortgage or sale of the full fee simple interest. The court found that it had authority to order a sale under *The Law of Property Act*.<sup>98</sup> That, as is suggested in the Report, may not necessarily have been a terribly satisfactory procedure. But if there had been a trust arising in the way proposed by the Report the matter would not necessarily have been any easier of solution. Even if it be assumed that the wide investment powers in *The Trustee Act*<sup>99</sup> conferred a power of sale on the trustees, the two parties to the action would have been the trustees, and presumably they would not have agreed on what needed to be done. It therefore would have been necessary for an application to have been made to the court under the provisions of section 60 of the Manitoba *Trustee Act*.<sup>100</sup> The same result could have been achieved in the case of legal estates under the provisions of *The Settled Estates Act 1856*,<sup>101</sup> which, though not referred to in the case, is probably in force in Manitoba. But even if this case does point out a difficulty it is but one example. It seems it is going rather far to make fundamental changes in the law on the basis of a single instance.

The reasons given by the Report for adopting the option it did are not, therefore, totally convincing. The sole reason it gave for not selecting the other option is also open to question. The Report said it would not recommend applying some aspects of the law of trusts to legal interests because that had not been done in other jurisdictions. That sits rather oddly in a report which recommended the abolition of the rule against perpetuities. In any event, nineteenth century settled estates legislation in England had long anticipated some of the legislation which conferred on trustees the powers of making various types of dispositions of the trust property which they were not otherwise entitled to do.

It is suggested that the Report does not make out a very convincing case for changing successive legal interests into equitable. In one sense the issue is of little moment for the number of such dispositions must be few and far between. If, however, someone wanted, in transferring say a family home, to vest legal title for life in a spouse, with a legal remainder to children, and not to create a trust, the Report does not make out any convincing case for depriving the transferor of that option. Quite apart from the abolition of the rule against perpetuities, it may be desirable in the case of successive legal interests to make more express provisions for a judicial power to order a sale or other disposition of the property, or to re-arrange the legal interests. If so, it would be relatively easy to modernize settled

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97. (1980), 110 D.L.R. (3d) 108, [1980] 4 W.W.R. 534 (Man. C.A.); leave to appeal to S.C.C. refused: 110 D.L.R. (3d) 108n.

98. R.S.M. 1970, c. L90, ss. 19-26.

99. *Supra*, n. 5, as amended.

100. *Ibid.*

101. 19 & 20 Vict., c. 120 s. 12. (U.K.).

estates legislation, and to adapt some of the provisions now applying to trusts to successive legal interests.

Given that the legislation has opted to turn successive legal interests into equitable, there is one fundamental issue which it does not clearly resolve. This turns on section 4 of *The Perpetuities and Accumulations Act*,<sup>102</sup> and on the definition of "successive legal interests" which appears in section 1. These provisions read as follows:

- "1. In this Act . . .  
 successive legal interest includes
- (i) the first or particular estate
  - (ii) any following interest, whether the following interest is future, vested or contingent or is an executory interest, or a determinable or defeasible interest, or any interest over thereupon, and
  - (iii) a general or a special power of appointment.
4. (1) Successive legal interests take effect in equity as interest behind a trust.
- (2) The trustees of the property subject to successive legal interests are the beneficiaries who, at the time the trust takes effect,
- (a) are of the age of majority;
  - (b) are not persons with whom the court may, under clause 11(1)(a) of The Trustee Act, appoint new trustees in substitution; and
  - (c) are willing to act.
- (3) Upon the trust for successive legal interests taking effect, the trust property vests in the trustees."

These provisions are open to two interpretations. It may be that in the interpretation of any document, which on its face purports to create successive legal interests, one immediately assumes a vesting of legal title in trustees in accordance with section 4(3). Thus, if title was transferred to such of the transferor's children as reached the age of thirty, and if there be no such child then to the Salvation Army, title would vest in the children who were adults and, possibly, in the Salvation Army.<sup>103</sup> Similarly, if title were transferred to X in fee simple to the use of such of the transferor's children as reach the age of thirty, and if there is no such child then to the Salvation Army, it could be argued that title again vests in the adult children and in the Salvation Army. Section 4(2) states that the trustees are the beneficiaries, and X is not a beneficiary under the disposition.<sup>104</sup> Whatever the difficulties that arise from this approach, it has one great advantage. It by implication abolishes the common law rules relating to the creation of legal interests. Assume that in both of the above examples, there was no child aged 30 at the date of the making of the transfer. In the first example the disposition would be void at common law because of the absence of the

102. *Supra*, n. 8.

103. Presumably if there were not more than three adult children then the Salvation Army would be included as a trustee. If there were no adult children then it would be the sole trustee. It may be that one should also treat the transferor as a potential trustee. He has not yet totally deprived himself of his estate. It may be that it still should be treated as vested in him, subject to divesting on the happening of the conditions precedent. Even if he is treated as having disposed of his estate, subject to the possibility of the estate reverting to him if the conditions by chance are not satisfied, he would still be a beneficiary.

104. But would the children and the Salvation Army then hold for X who in turn would hold for them?

prior supporting estate. That would have no effect on the validity of an equitable interest. In the second disposition the use would be executed, creating a valid legal executory interest. The immediate creation of equitable interests avoids the need to rely on the law on executory interests.

The other possible interpretation of the legislation is that one must first decide whether or not valid successive legal interests have been created. The legislation itself does not say how that is to be done. One must assume, therefore, that common law rules continue to apply. If according to those rules no valid interest was created then the legislation turning legal into equitable would be inapplicable for there would be no legal interest created in the first place. If this approach were taken in the two examples given in the preceding paragraph, the first disposition would be invalid because of the absence of a prior estate of freehold. The interest created by the second disposition would be valid, but only because one could rely on the law relating to executory interests.<sup>105</sup> Unfortunate though this result may be, the language of the legislation tends to support the second interpretation. Section 4(1) states that "successive legal interests take effect in equity as interests behind a trust." That, it seems, assumes a valid series of successive legal interests. That interpretation is reinforced by the reference to executory interests in the definition of successive legal interests in section 1. That assumes that one has to go through the process of deciding whether or not there is a valid legal executory interest before it is then turned into an equitable interest under the provisions of section 4.

There is a danger, therefore, that the legislation as drafted has not yet got rid of the ancient law on common law and executory interests. A court could avoid that conclusion in one of two ways. It could give to the legislation the first of the two interpretations suggested above. It might, more courageously, decide that the law on common law and executory interests were never part of Manitoba law in the first place, being inapplicable by reason of local conditions.<sup>106</sup> But it would have been better, whether or not legal interests were being converted into equitable, to have directly abolished the old rules and to have repealed *The Statute of Uses*.<sup>107</sup> In that way, the danger of the remaining relics of feudal conveyancing causing trouble in the future would have been clearly eliminated.

## V. Special Legislation

The abolition of the rule against perpetuities is, as we have seen, based on two premises, first, that it is extremely unlikely that dispositions will be made or transactions entered into which violate the rule, and second, even if they are, no adverse social consequences will result. The Report did, however, make some passing comment on the possibility that both these premises may turn out to be ill-founded, and that adverse consequences

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105. If this interpretation be accepted the only effect of the legislation would be to prevent contingent legal remainders being destroyed because of the premature determination of the prior supporting estate. Given that on the creation of the contingent remainder it would be turned into an equitable interest the destructibility doctrine would no longer apply to it.

106. See *The Queen's Bench Act, R.S.M. 1970, c. C280, s. 51(3)*.

107. *Supra*, n. 88.



might flow from unrestrained dispositions or commercial transactions. In such a case, it suggested, it may be necessary to pass special legislation to deal with any particular problems that arise.<sup>108</sup> Some general comment needs to be made on that approach to the issue. Specific attention also needs to be drawn to the immediate need for a consideration of the position of non-charitable purpose trusts.

The Report gave some examples of dispositions or commercial transactions where things might go wrong. Farmers may at some time in the future try to tie up farming property. Non-residents may attempt to develop techniques for holding land for lengthy periods of time. In the commercial world, examples could arise of options or other contracts being used in ways which are thought to be against the public interest. The Report took the view that it would probably be better to deal with any problems thereby created by specific legislation directed at the particular problem rather than by the blunt and out-moded mechanism of the rule against perpetuities. There is considerable merit in particular problems being handled by modern legislation specifically tailored to deal with the problem. But there are objections to the suggestions of the Report. They could cause difficulty in advising clients. With the abolition of the rule against perpetuities there is no formal limit on the extent to which contingent interests in property may be created. Nonetheless, if the Report's comments are borne in mind a lawyer must remember that it could be possible to transgress some undefined limit which might attract legislative sanction. Moreover, there is the danger that the legislature may feel compelled to make its sanction operate retroactively. That would be particularly unfortunate in the case of legislation dealing with property rights. More generally, the "wait and see" attitude is the antithesis of law reform. One of the advantages of reform by commission rather than by court is said to be that commissions may anticipate and deal with problems before they arise. If, therefore, there is any sensible degree of risk that undesirable dispositions will be made, or undesirable commercial transactions entered into, it would be difficult to accept the approach suggested in the Report. Any judgment about the wisdom of abolishing the rule against perpetuities must be made on the basis of the validity of the two premises of the Report, referred to above. If there is any risk that either premise is ill-founded it would not be acceptable to simply wait for problems to arise before dealing with them.

The specific question which needs some discussion is the status of those few non-charitable purpose trusts whose validity the courts are prepared to recognize. The law relating to non-charitable trusts generally bristles with difficulties.<sup>109</sup> It would appear that *prima facie* all such trusts are void because of the lack of any machinery to enforce the trust. There are a few "anomalous"<sup>110</sup> exceptions to that rule. They include trusts for the maintenance of specific animals, for the maintenance of tombs and graves, and, in jurisdictions where they are not charitable, trusts for the saying of

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108. See, e.g., Report, at 38, 41.

109. See the appropriate portion of any book on trusts, and Morris and Leach, *supra*, n. 16, Ch. 12.

110. See, e.g., *Re Endacott*, [1960] Ch. 232, at 240; [1959] 3 All E.R. 562, at 564 (C.A.).

masses.<sup>111</sup> The courts, however, were not prepared to see these trusts running on a perpetual basis. They were, therefore, valid only to the extent that they did not last beyond the perpetuity period. This is an example of the rule being used to control the duration of a trust, and not the remoteness of vesting of interests. This may be justified as carrying out a policy of preventing "capital being tied up too long without any direct benefit to living persons."<sup>112</sup>

*The Perpetuities and Accumulations Act*,<sup>113</sup> following the recommendations of the Report, is careful in abolishing the rule to make it clear that it may no longer be used to limit the duration of such non-charitable purpose trusts as the courts are prepared to hold valid. In section 1 the modern rule against perpetuities is defined so as to include "the operation of the rule with regard to . . . perpetual duration". This poses something of a doctrinal dilemma. Take, for example, a trust expressed to be for the maintenance of a grave. A court could decide that such a trust, valid before the *Act* only if it did not last beyond the perpetuity period, is now valid even if *prima facie* it is to last perpetually. The Report's thesis would no doubt be that any adverse consequences which might flow from that are counterbalanced by the trustees' powers of investment and by the law on variation of trusts.<sup>114</sup> On the other hand, the fundamental problem in the case of a non-charitable purpose trust is the lack of a machinery for its enforcement. The anomalous exceptions to the general invalidity of these trusts were in part based on the fact that they would not last forever. The possibility that that may now happen raises more squarely the issue of the enforcement of such trusts and, therefore, of their general validity. It may be that the problem is doctrinal rather than social, and that there are not enough long-term non-charitable purpose trusts to justify an excessive amount of time being spent on the issue. Nonetheless the effect of the abolition of the rule on non-charitable trusts is deserving of some more extended consideration than the report accorded it.

## VI. Retroactive Operation

The Report dealt with an issue often neglected by law reformers — the retroactive and transitional operation of its proposals for reform. It recommended that in general all of the changes it proposed should apply to all interests, whether created before or after any legislation took effect, and that recommendation has been adopted.<sup>115</sup>

The arguments against this approach are obvious. The retroactive operation of the legislation on perpetuities (including the rule in *Whitby v. Mitchell*) and accumulations takes away property rights (in terms of the old law) from some individuals and gives them (under the new law) to

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111. See also the cases involving gifts to unincorporated associations: see the texts referred to, *supra*, n. 109.

112. See *Morris and Leach*, *supra*, n. 16, 326.

113. *Supra*, n. 8.

114. But that is an arguable proposition for the reason suggested, *supra*, "2. Family Dispositions and the Trust".

115. See the Report, at 84-88, 93; *The Perpetuities and Accumulations Act*, *supra*, n. 6, s. 5. In footnotes 116-127 references to sections are to sections of this *Act*.

others. The Report acknowledged that it could be argued that this "deprives persons of rights to properties that might otherwise have been established in litigation."<sup>116</sup> That understates the case. In principle, any litigation would not simply establish rights, but would recognize rights that had always existed under the instruments creating them. The retroactive effect of the legislation on the rule in *Saunders v. Vautier* and on legal estates is less drastic, but nonetheless significant. As the law stood, a beneficiary under a trust who was the sole owner of the equitable title could call for legal title, despite a clause in the trust postponing the right to possession. The legislation does not deprive him of his absolute interest, but it does postpone his right to call for possession and as a result reduces the present value of the interest. The change of legal interests into equitable interests will result in a change in the mode of enjoyment, but again not in any complete deprivation of title. Moreover, the owners of the new beneficial interests will cease to have any direct control over their property, and will, of course, feel the effect of the abolition of the rule in *Saunders v. Vautier*.<sup>117</sup> Unless they take steps to prevent it, the holders of legal interests (or, if there are more than four, the first four) will find the onerous obligations of trustees imposed upon them.

The report justified its recommendations primarily on the basis that if the law was to be changed it was better to have a clean break between the old and the new. If the amending legislation were to apply only to documents that took effect after the legislation came into force there would be for many years two sets of rules. In particular, the rule in *Whitby v. Mitchell*, the modern rule against perpetuities and the rules on accumulations would have continued their idiosyncratic reign, limited only, if at all, by limitation provisions. It may also be argued that in modern society these rules represent "bad law", and one ought not to have too much sympathy for those who are deprived of rights under such a regime. These arguments may no doubt appeal to the tidy mind. They will have little appeal to those who are told that their property rights have been taken away by legislation operating retroactively. The appeal will be even less if they are also told that if they had had the good luck to fall within the exceptions to the retroactive application of the new legislation, their rights would not have been affected at all.<sup>118</sup> It may well be that the greatest justification for legislation taking away existing rights in these circumstances lies in the fact that the Commission is correct in its assumption that few, if any, dispositions in existence will have attracted the rule against perpetuities, the rule in *Whitby v. Mitchell*, or the rules on accumulations. Even if objectionable in theory, the retroactive aspect of the legislation will have little impact in practice.

The exceptions to the general retroactive operation of the legislation fall into four classes. First, the legislation will have no effect on any express provision in a document which controls vesting or accumulation in accordance with the old law. Thus, those who knew their law and who drafted

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116. Report, at 87.

117. Though if the turning of legal interests into equitable interests abolishes the common law rules on the creation of legal interests the implications may be greater: see *infra*, n. 121.

118. For the exceptions to retroactivity see *Infra*.

accordingly are denied the benefits of the reforming legislation. The Report pointed out that it will always be open to the beneficiary under such a disposition to apply under the variation of trusts legislation.<sup>119</sup> It would seem, however, that there will be considerable limitations on what a court may do if such applications are made. In most cases any changes which would prolong the duration of the dispositions would take away interests from some and give them to others, and the courts may not of course consent on behalf of incapacitated or unascertained beneficiaries where that would deprive them of property rights.

Second, the old law will continue to apply where, before the amending legislation came into force, an interest was held void by a court on the ground that it contravened the rules against perpetuities.<sup>120</sup> Similarly, an order made before the legislation came into force on the basis of the old law relating to successive legal interests will continue to have full force and effect.<sup>121</sup> Presumably the same principle will apply in the case of the rule in *Saunders v. Vautier*; where an order has been made pursuant to that rule the legislation should have no effect on that order. The continuing effect of court orders could cause some difficulty in the case of successive legal interests. If a court held that an attempt to create a legal interest failed, no doubt the decision would stand.<sup>122</sup> On the other hand, suppose that a court had decided that a transfer of land had created a legal life estate, followed by a legal remainder in fee simple. If, as section 5(3) provides, that order continues to have full effect as if the *Act* had not been passed, it would nullify the general provision that all legal interests are henceforth equitable. It may be, therefore, that one should construe the section as applying only where the order declared an interest void. That is, however, not justified on the literal reading of its language.

Third, the legislation will not apply if, before it took effect, any period permitted for the vesting of an interest arising under the exercise of a special power of appointment, for the duration of a non-charitable purpose trust or for any accumulation has terminated, and any act or step has been taken as a consequence of that termination.<sup>123</sup> The effect of this can be considered in relation to valid non-charitable purpose trusts, for example, a trust for the maintenance of a grave. As the law stood, such a trust could be valid only for 21 years. If, therefore, the 21 year period had expired before the legislation took effect, and some act or step had been taken as a result, the termination of the trust is not affected. This, it would seem, is the case whether or not any court order was made. By contrast, if the 21 year period was running at the date the legislation came into effect, or, if terminated,

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119. Report, at 88.

120. S. 5(2)(a). This would include the rule in *Whitby v. Mitchell*: see s. 3.

121. S. 5(3). This has interesting implications if the intent behind the conversion of legal interests into equitable is to avoid the common law rules on the creation of future interests. If an order was made before the legislation takes effect deciding that an attempt to create legal future interests was ineffective the order stands. If no order was made the interests become equitable on the day the legislation came into effect, and are therefore validated.

122. The interests could have been held void because they violated the common law rules for the creation of future interests, or because they violated the rule in *Whitby v. Mitchell*.

123. S. 5(2)(b). These are intended to be periods arising as a matter of law (see the Report, at 86), though that is not necessarily clear from the language of paragraph (b).

no act or step had been taken as a result, the legislation will apply, and *prima facie* the trust will continue without reference to any restriction that might have been imposed by the rule against perpetuities. That again would seem to be the case even if a court order had been made declaring the trust to be valid only for a period of 21 years.<sup>124</sup> These provisions should not be the source of any difficulty, except perhaps with respect to the interpretation of the words "act or step". The same question arises in relation to the fourth exception, and what would be said about it would apply, *mutatis mutandis*, here.

Fourth, the *Act* deals with acts done before its commencement in reliance on the old law on perpetuities, accumulations and legal interests. Section 61 does not deal with similar problems that could arise with respect to the rule in *Saunders v. Vautier*, but that too requires consideration.

Where, before the *Act* came into force, any act or step was taken in reliance on the rules against perpetuities or accumulations, the law as it stood before the commencement of the *Act* applies to those acts or steps.<sup>125</sup> That exception is wide enough to cover acts or steps taken pursuant to court orders, and acts or steps taken without any reference to a court. Thus, if some one had assumed, rightly, that a gift contravened the rule against perpetuities, and an estate was administered on that assumption, the administration is not affected by the legislation. Some acts or steps are quite clearly covered. The *Act* itself provides that "the transfer of property to any person consequent upon any voidity (sic) or termination"<sup>126</sup> falls within the definition. Contracts, including compromise of litigation, based on the old law, would also continue to be enforceable. It may well be that it would also be possible to rely upon an estoppel. If, for example, persons who would benefit under the new law had acted in such a way that they had recognized the title of others arising under the old law, they might still, even in the absence of a transfer or contract, be estopped from claiming the benefit of the new legislation. Beyond this there may be some question as to how far the exception extends. The commencement of litigation, for example, would be an act or step, but the old law as applied to that act or step would have no effect for the commencement of litigation would normally not produce any legal result. Equally, if a client, say an intestate successor, consulted a lawyer and was told that he could claim under the old law, he could be said to have taken an act or step. Again, however, that in itself would not be productive of any legal result, and would not protect the client's proprietary interest, unless some further steps had been taken.<sup>127</sup> This may be reading the *Act* somewhat narrowly. In using the phrase "act or step" the *Act* may have intended to cover more than transfers, contracts or estoppel. On the other hand, it does talk of the old law applying to any act or step, and if the act or step would have had no legal effect, arguably, the new legislation applies. That result would be in accord with its general retroactive operation.

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124. It may be that s. 5(2)(a) applies if an order was made declaring the trust valid for 21 years. The order could be treated as an order as to invalidity beyond that period.

125. S. 5(2)(c). The reference to the rules against perpetuities is to be construed as including the rule in *Whitby v. Mitchell*, and the rule dealing with the duration of non-charitable trusts: see ss. 1, 3.

126. S. 5(2)(c).

127. This would not, however, rule out any possible actions in contract or tort.

In the case of successive legal interests, the *Act* provides that where, before the *Act* came into effect, any act was done arising out of the existence of successive legal interests, the interests affected by the act continue to have full effect.<sup>128</sup> This assumes, it would seem, the existence of a legal interest. If, therefore, an interest was invalid presumably the new legislation has no effect, whether or not there was an order making such a declaration; the exception would not apply because there was no interest in respect of which it could operate. On the other hand, if valid legal successive interests existed and acts were done on the basis of their existence; the same question arises as arose with respect to the effect of court orders: does the exception prevent these interests being changed into equitable interests? It may be, for example, that a legal life tenant has taken possession of property, or that there has been a registration of title. If that prevented the interest being turned into equitable it would again go a considerable way towards defeating the general retroactive nature of the legislation in respect of successive legal interests.

In the case of the rule in *Saunders v. Vautier*, section 61<sup>129</sup> is silent as to the effect of any act done pursuant to the rule. It is possible that a trustee may have transferred title to a beneficiary pursuant to the rule without any court order. Clearly the validity of that transfer ought not to be open to question. Equally, any contract entered into in reliance on the rule ought not to be affected. And it may be possible to argue that if a trustee had given an undertaking to a beneficiary that he would make a transfer pursuant to the rule, that transfer ought not to be prevented by the application of the new legislation.

## VII. Conclusion

*The Perpetuities and Accumulations Act*<sup>130</sup> and *The Act to Amend the Trustees Act*<sup>131</sup> implement in full four of the Commission's proposals, and partially implement the fifth.<sup>132</sup> Whether or not any other changes in the law were to be made, the case for abolition of the rule in *Whitby v. Mitchell* and the repeal of the Accumulations Act, 1800, is well nigh overwhelming. More questions may be raised about the automatic conversion of all legal interests into equitable interests, and the abolition of the rule in *Saunders v. Vautier*. The Report was almost cavalier in the making of its recommendations on legal interests, and failed to deal with the issues involved as fully as they ought to have been dealt with. Moreover, on what admittedly may be a narrow interpretation, the legislation may not have abolished some of the rules restraining the creation of future interests that ought to have been abolished. The reports of the Commission considered much more fully the arguments for and against the abolition of the rule in *Saunders v. Vautier*. In the end a decision to retain or abolish requires some fine exercise of

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128. S. 5(3).

129. *The Trustee Act*, R.S.M. 1970, c. T160, as amended.

130. *Supra*, n. 8.

131. *Supra*, n. 9.

132. For the five proposals see *supra*, text at n. 3 *et. seq.*

judgment. Personally, I am not convinced that the rule is so evil or that its disappearance will bring about so much good that its abolition is justified.

The Report and the legislation that followed will, however, be remembered primarily for the abolition of the modern rule against perpetuities. The widening of trustee investment powers, the amendment of the variation of trusts legislation and the impact of the law of taxation are, it is suggested, very much secondary considerations in deciding what should be done about the rule. The case for its abolition must rest on the premise that, the rule being abolished, people will not in fact make dispositions or enter into commercial transactions which run beyond the limit set by the rule; or, in the alternative in the case of commercial transactions, that the rule ought never to have been applied to such dealings in the first place. These are attractive arguments. Abolition carries with it a further attraction; it achieves one of the objects of law reform — simplification of the law. In that respect, abolition compares most favourably with legislation in other jurisdictions that has reformed rather than abolished the rule. But abolition is a great step into the unknown, and that is no doubt what has inhibited others from taking it. The Manitoba Law Reform Commission and the Manitoba legislature are not to be numbered amongst the law's timorous souls. It is to be hoped that the future will justify their courage in abolishing the rule.

