Perpetuities Under the New Amendment

John Kehoe
PERPETUITIES UNDER THE NEW AMENDMENT*

JOHN KEHOE

With the adoption of the amendment to the statute 230.14 governing perpetuities in Wisconsin, there has arisen a flood of conjecture as to what may be the effect of this measure upon the creation of future estates in personalty hereafter or its effect upon executory devises already created but not as yet in operation. The judicial interpretation of this statute is to be expected in the near future and this decision is awaited with considerable expectancy as it involves an issue of tremendous importance toward the disposition of much of the accumulated wealth of individuals in the state. Heretofore the law has permitted the tying up of real property for any number of lives so long as the instrument creating the estate provided the trustee with power to sell or convert. Estates in personalty could be tied up indefinitely. It may not be out of place before delving into an exposition of this law, to say a few words as to the merits of this measure making personal property subject to the same restrictions as real property.

Comparatively speaking, Wisconsin is still in its infancy in regard to the building up of industry and the centralization of capital. Ordinary foresight will be sufficient to estimate the effect of the rapidly increasing tendency to create future estates, taking vast properties out of the paths of commerce, tying them up in trust companies for decades to come, thereby stifling all initiative and checking the throbbing ambition of young blood which might often have infused new life into a dying enterprise. Take as an example the concentrated wealth of the insurance companies alone. It has already become a matter of grave concern to the officials of these companies to find sufficient securities of proper qualifications to meet the ever growing and already enormous surplus which is rapidly piling up. In addition to this if we consider the possibility of the great fortunes of the state or nation being tied up in trust companies which are restricted in their investment to securities of proven worth, from whence could new enterprises expect financial backing? In a financial center, such as New York, the grave consequences of such a situation can readily be estimated and the condition the resources of the country would be in if this tendency went unchecked by timely restriction. The inherent desire to accumulate and control one’s fortune and to exert and extend that control as far into the future as possible is perhaps natural and legitimate. But when we consider the governmental protection which

* Thesis submitted in partial fulfillment of requirements for degree of Juris Doctor.
made possible the accumulation of this wealth and that this same wealth is now allowed to clog the wheels of progress or stifle the expansion of ambitious generations, we can more readily understand the wisdom and necessity of placing some restraint upon a tendency that cannot fail to bring alarming if not disastrous results to our industrial welfare.

The tendency to exert control over property has been a dominating force, yet perhaps a human and natural desire, which we find manifesting itself in the history of English property after the Norman Conquest. The pride of possession engendered a desire to direct the destiny of that property through generations to come. So not content to exert this control during life, owners of wordly goods insisted on devising means whereby this control could be exerted even after their departure from this life. "Te teneam moriens" (dying I will keep you), is the expiring lord’s apostrophe to his manor, for which he is forging these fetters that seem, by restricting the dominion of others, to extend his own. (Jarmain)

The Statute De Donis is a conspicuous illustration of the force of that tendency manifesting itself in early legislation. The Statute De Donis (1285), as a restriction upon the alienation of fee tail estates, remained in force for three hundred years, which of itself explains the tenacious persistence with which the landed classes sought to keep property within the lines of blood descendants.

The evils or objectionable characters of these future estates were felt by the early judges and resulted in a judicial invention to evade the statute in the form of a conveyance known as the fine and common recovery. This permitted the owner of an estate tail to pass a title in fee barring the entail. Taltarum’s Case, Y.B. 12 Edw. IV, 19. Contingent remainders, therefore, being destructible at common law by the owner of the prior estate, the need for future restriction was not felt for some time. To this may be ascribed the fact that the law of perpetuities is of camparitively modern origin, not having come into a crystallized form until 1820. But when the Statute of Uses (1535) and the Statute of Wills (1540) came into existence, making possible the creation of future estates at variance with all the rules of common law, the struggle was renewed between courts and parliament.

In the celebrated case of Pells v. Brown 1620 (Cro. Jac. 590), the rule was first promulgated that executory devises were indestructible. In that case, the testator being siesed of lands in fee, devised said lands to his son Thomas with the provision that if Thomas died without issue living, then his brother William should have the lands, his heirs and assigns forever. Upon the death of the testator Thomas entered and suffered a common recovery to the use of himself and his heirs.
The question was whether the devisee of Thomas had a good title as against William. The court held that Thomas took the estate in fee subject to the limitation over to William, and that although this was a limitation of a fee upon a fee, and although William had only a possibility of a fee, effective upon the happening of the event which was to control the limitation over, nevertheless the common recovery did not bar William. Counsel for the devisee of Thomas argued that the recovery should bar William because otherwise "it would be a mischievous kind of perpetuity." But the court ruled that if the recovery were allowed it might frustrate all devises and that there was no "mischievous perpetuity" because "the person who had the contingency could join in the recovery thus passing complete title."

This decision opened up an avenue for the creation of estates upon executory devises with the possibility of tying up property indefinitely. The courts realized the dangers incumbent upon the lack of some kind of restraint upon the propensity for perpetuating these estates, but they were slow to form a rule. A hazy conception of a rule against perpetuities was enunciated by Baron Tanfield in the case of *Child v. Baylie* but it was not until the celebrated case of Duke of Norfolk (1682) that the rule against perpetuities assumed a concrete and determinate form. Here we find the definition of a perpetuity laid down by that "father of equity," Lord Chancellor Nottingham, as follows: "A perpetuity is the settlement of an estate or an interest in tail, with such remainders expectant upon it, as are in no sort in the power of the tenant in tail, in possession, to dock by any recovery or assignment, but such remainders must continue as perpetual clogs upon the estate; such do fight against God, for they pretend to such a stability in human affairs as the nature of them admits not of, and they are against the reason and the policy of the law, and therefore not to be endured." Later on, in speaking of what should be a suitable limitation to impose upon future estates, the same jurist remarked: "I will tell you where I will stop; I will stop wherever any visible inconvenience doth appear; for the just bounds of a fee upon a fee are not yet determined, but the first inconvenience that ariseth upon it will regulate it." The Duke of Norfolk's Case held that a contingent future limitation which must necessarily vest within a period of lives in being, was good. "The candles were all burning at once," so the estate would merely be tied up during the life of the longest liver. Fifteen years later, the House of Lords hearing the case of *Lloyd v. Carew* (Shaw P.C. 137) decided that the addition of twelve months to a period of lives in being "was not too remote." In the celebrated case of *Thellusson v. Woodford* it was held that be the lives ever so numerous, so long as they were in being and capable
of being ascertained the vesting of a conditional limitation might be postponed until the termination of the life of the longest liver.

Thus as the cases arose, the rule was gradually built up and the period of time was extended from lives in being (Duke of Norfolk's Case), to lives in being plus twelve months (Lloyd v. Carew), to lives in being plus twelve months plus the period of gestation (Long v. Blackhall, Kings Bench 1797), to lives in being plus twenty-one years (Cadell v. Palmer, Eng. Reprint 956). In Cadell v. Palmer the period of twenty-one years was not considered as a term in gross without reference to the infancy of any person who was to take under such limitation, or any other person, born or en ventre so mere. Having developed a crystallized rule, the courts refused to extend the time beyond lives in being (plus twenty-one years) plus the period of gestation as a life in being.

Up to this time the question of alienability as distinguished from the time within which the estate must vest, was not seriously considered. This was perhaps due to the facts and circumstances of the cases presented not having called for any decision upon this point. It seems that the predominating thought in the minds of the judges was to set a limit upon the period of time during which a testator would be allowed to control the vesting of his property. They endeavored to formulate a rule to bring the time for vesting out of the future and up as far as possible to the present. However, it cannot be said that the question of alienability never arose. The fine and common recovery was in itself a court made rule which permitted an alienation. It was also brought up in the case of Pells v. Brown where the court mentioned that "there was no mischievous perpetuity since the contingent remainderman could join in the recovery." This of course would destroy any suspension of alienation. Yet we are struck with the force of Lord Nottingham's words in the case of the Duke of Norfolk when he says: "Such (estates) do fight against God, for they pretend to such a stability in human affairs as the nature of them admits not of, and they are against the reason and policy of the law, and therefore not to be endured." It is evident that the Lord Chancellor was referring to the postponement of the time within which the estate should vest. From the language of the courts in the line of cases building up the rule, it may be gathered that the uppermost thought was that of a limitation upon the remoteness of vesting.

In Washburn v. Downes (1 Cas. ch. 213), this definition was laid down: "A perpetuity is where, if all that have interest join, and yet cannot pass or bar the estate, but if by the concurrence of all having an interest, the estate tail may be barred, it is no perpetuity." The language of the court is none too clear, but they seem to refer to the
rule as one of alienability. In *Scattergood v. Edge* (20 Chan. Div. 562) it was remarked that a perpetuity existed where an estate would be inalienable though all mankind joined in the conveyance. At any rate the question remained open as to whether a contingent estate which might not vest within the period of the rule, would nevertheless be valid if it were capable of being alienated.

The case of *London & South Western Railway Co. v. Gomm* settled this question in a decision handed down by the English Court of Appeals in 1882. Certain land was conveyed by a Railway Corporation to one Powell subject to a covenant on the part of the latter giving the corporation an option to require a reconveyance upon certain contingencies which might not happen until after the expiration of lives in being plus twenty-one years. The defendant had succeeded to the interests of Powell and later the Railway Company exercised its option to require a reconveyance. The defendant contended that the covenant to reconvey was void as tending to create a future estate in land that might not vest within the period prescribed in the Rule against Perpetuities. The situation in this case did not give rise to a question of alienation. The property was alienable since the Railway Corporation could easily have joined in a conveyance and passed full title, therefore the statement in the case of *Scattergood v. Edge* would not apply to the Gomm case. The court stated that, "It is impossible to assert as a general proposition that where the owner of an estate and the owner of such a contingent interest can pass a good title, the rule of perpetuities does not apply." Accordingly, after reviewing the various authorities, the court held that the criterion of a perpetuity was not alienability but was whether the estate must necessarily vest in interest within the period of the rule. They held the option too remote, thereby establishing the rule of Remoteness of Vesting which has been followed ever since in England and adopted in the great majority of jurisdictions in America.

The Gomm case had not as yet been decided, when the New York statutes relating to future interests in property were adopted. Consequently when the revisors sought to codify the common law upon this subject there was, no doubt, some confusion as to what was the true rule of perpetuities. With all due respect to the ability of the advisers it must be conceded that they were guided by the remarks in the decisions prior to the Gomm case, including *Scattergood v. Edge* and *Washburn v. Downes*. As a result of the lack of clarity in these early cases, the statutes of New York as adopted, embodied the rule of Suspension of Alienation and failed to mention the test of Remoteness of Vesting.

It is not questioned but that the revisors intended the statutes to be declaratory of the common law with even further restrictions, since
PERPETUITIES UNDER NEW AMENDMENT

The early New York statutes cut the period of time from any number of lives in being to two lives. Evidently the intention was to shorten the period within which contingent estates must vest, but the result was that, under the judicial interpretation, the door was opened wide for the creation of future estates unlimited as to the time of vesting.

Section 230.14 of the Wisconsin statutes, which is a counterpart of the New York statute, reads as follows:

Every future estate shall be void in its creation, which shall suspend the absolute power of alienation for a longer period than is prescribed in this chapter; such power of alienation is suspended when there are no persons in being by whom an absolute fee in possession can be conveyed. Limitations of future or contingent interests in personal property are subject to the rules prescribed in relation to future estates in real property; provided, however, that this limitation upon interests in personal property shall not apply to any instrument which shall have taken effect prior to July, 1925.

With the exception of the last sentence pertaining to personalty this statute is similar to Section 14 of the New York Real property act, having been adopted from the New York statutes. Section 230.15 sets the period of time at two lives in being and twenty-one years thereafter. The corresponding New York section provides for a period of two lives in being, thus cutting off the twenty-one year addition existing at common law. It will be seen from the above statutory quotation that alienability was made the apparent criterion of a perpetuity. The earlier New York decisions in construing this statute interpreted it as a rule of Suspension of Alienation. In Robert v. Corning (89 N.Y. 225) the court in its opinion stated as follows: "The Statute of perpetuities is pointed only to the power of alienation and not to the time of its actual exercise, and there can be no unlawful perpetuity unless the power of sale is suspended." Under this construction the common law was changed so as to place no limit upon the time within which a contingent future interest must vest, but so long as the property could be aliened, it did not offend against the statute. The following example will illustrate the difference between

*Editor's Note: Since the writing of the above article, section 230.15 has been changed to read:

"The absolute power of alienation shall not be suspended by any limitation or condition whatever for a period longer than during the continuance of a life or lives in being at the creation of the estate, and thirty years thereafter, except in the single case mentioned in 230.16, and except when real estate is given, granted, or devised to a charitable . . . . etc. . . . ."

230.16 reads: "A contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited shall die under the age of 21 years, or upon any contingency by which the estate of such persons may be determined before they attain their full age."
the application of the two rules: X devises an estate to A and his heirs, but if used for business purposes, then to B and his heirs. If decided according to the common law, the contingent estate would be void because the time of vesting in B and his heirs might be too remote, but if decided according to the New York statutes, it would be valid because there would be no suspension of the power to alienate. A and B could get together and convey absolute title.

In *Dugan v. Wade* (144 N.Y. 573) the testator devised real estate to an executor directing him to sell the same at public auction to the highest bidder at some convenient time preferably not before the spring of 1891. Contention was made that the clause violated the statute of perpetuities in that it fixed a time for the sale so as to suspend the power of alienation for a period not measured by lives. In its opinion the court stated as follows:

The absolute power of alienation is not suspended merely because the executor may require a period of time not measured by lives in being, in which to execute the power of sale, thereby converting the land into personality. That result is accomplished only where there are no persons in being by whom an absolute estate in possession can be conveyed.

This criterion of alienability was severely criticized and pressure was brought to bear upon the unsoundness of it as a principle of the common law. The New York court began to realize that this interpretation of the statutes which opened wide the door for creation of estates unlimited as to time of vesting, was not in conformity with the trend of the common law. Estates were being created which tied up property indefinitely, restricting its investment or removing it from the paths of commerce entirely. The inevitable consequences were foreseen with the result that the court was constrained to establish a different interpretation of the statute governing perpetuities.

In *Allen v. Allen* (149 N.Y. 280) the court by way of dicta said, "The power to sell and reinvest does not save a trust from the condemnation of the statutes." Evidently the court had in mind that there must be a power given to terminate a trust entirely, in order to be valid under the statute. The criterion of alienability established by the New York statutes was attacked by Professor Gray of Harvard in his work on the Rule against Perpetuities. There is little doubt but that in a large measure it was due to Professor Gray's teaching and his labors on the subject of perpetuities that sufficient pressure was finally brought to bear by men sent out from Harvard with convictions opposed to the criterion of alienability, to expose the unsoundness of that criterion as a fundamental proposition of the common law.

Up until 1909, the criterion of alienability appeared to be quite firmly established by judicial decision in New York, when the case
of Matter of Wilcox came before the court. The testator, Bethuel McCoy, in his will provided among other things:

That one third of the residue of my property both real and personal be held in trust for the benefit of my daughter, Frances Wilcox, for life and at her death I devise and bequeath to her issue such income, and as each of said issue reach the age of twenty-one years, I give devise and bequeath to it, one equal share of the principal of said one-third. In case my daughter die leaving no issue, which shall attain the age of twenty-one years, then said remaining one third of my estate, I devise and bequeath to my daughter, Maria E. Sanders and my son Charles McCoy, share and share alike forever.

Charles McCoy and Frank McCoy, children of the testator's son William, contended that this clause was invalid because it might suspend the absolute ownership of personal property during lives not in being at the death of the testator. It was also contended even if the provision for the issue of Frances was invalid, yet it did not affect the validity of the gift over. The court in its opinion stated: "For a contingent limitation of a remainder in personal property to be valid, the contingency must be such as to necessarily occur within two lives in being at the death of the testator. The limitation to take effect on the death of all issue of Frances is void." The court thereby rejected the criterion of alienability, thus overruling all prior decisions to the contrary, and held that since the interest, even though alienable, would not necessarily vest within the period of that statute, the estate sought to be created was void for remoteness. The sections of the New York statutes following section 14 and 15 were brought into issue by the court. Section 24, upon which their decision seems to be based, reads as follows:

Subject to the rules established in the preceding sections of this article, a freehold estate as well as a chattel real, may be created to commence at a future day; an estate for life may be created in a term of years, and a remainder limited thereon; a remainder of a freehold or a chattel real, either contingent or vested, may be created expectant on the determination of a term of years; and a fee may be limited on a fee, upon a contingency, which, if it should occur, must happen within the period prescribed in this article.

The court held that this section was declaratory of the common law rule against remoteness of vesting. They questioned the assertion in former cases that there was only one rule against perpetuities in New York which was the suspension of alienation rule. The court asked why these elaborate and minutely detailed provisions followed sections 14 and 15, if the devisors did not intend that the rule of Remoteness of Vesting be established in conformity with the common law. The revisors, being familiar with the common law, it is evident that they intended the statute to be declaratory of the common
law with a further limitation. They certainly did not intend to remove all restrictions, thereby making possible the creation of estates unlimited as to the time of vesting. The tendency was to shorten the time and this is borne out by their cutting off the twenty-one year period of the common law rule. It must be admitted that the judicial reasoning was somewhat strained in order to bring about the results of the Matter of Wilcox decision. It is asserted by some authorities that there are now two rules in New York. The first that of suspension of alienation, laid down by sections 14 and 15 of the statutes, while the second is that of remoteness of vesting, laid down by section 24 of the New York statutes. Still other authorities including Professor Rundell of Wisconsin maintain that since the statutes were intended to be declaratory of the common law, the sections, as a whole, lay down a rule of remoteness only. Had this view been adopted in the earlier New York cases, it would have avoided the strained construction of the statutes necessary to accomplish the desired result in the Matter of Wilcox. The Rule of Remoteness of Vesting laid down by the Wilcox case has since been upheld in New York in *Walker v. Otisco Lake Railway Co.* (226 N.Y. 347).

The situation in Wisconsin is somewhat analogous to that in New York since the Wisconsin statutes have been adopted from New York and Wisconsin courts have to some extent followed New York decisions. Wisconsin is now facing the same problem that confronted the New York courts before the decision of the Matter of Wilcox. A way is being sought either through the legislature or a decision of the Supreme Court, whereby the law upon this subject may be clearly defined. Since the Matter of Wilcox decision, coupled with the passing of the recent amendment, a way has been opened which may lead to a solution of the problem. However there are some obstacles to be overcome before that decision can be adopted by the Wisconsin court.

The Wisconsin statute 230.24, corresponding to section 24 of the New York statutes, is not as inclusive as the New York section. Section 230.24 reads as follows: "Subject to the rules established in the preceding sections of this chapter, a freehold estate, as well as a chattel real, may be created to commence at a future day; an estate for life may be created in a term of years and a remainder limited thereon." It will be noted that the provision of the New York statute, section 24, stating that "a fee may be limited on a fee, upon a contingency which, if it should occur, must happen within the period prescribed in this article," is not included in the Wisconsin section. Section 24 having been the "ratio decidendi" for the Matter of Wilcox, the Wisconsin court, if a case is presented calling for a test of remoteness, may not feel inclined to follow that decision, in view of the
modification of our own statute. The New York court followed the Gomm case, which case found no support in Wisconsin in the decision of Becker v. Chester. This leaves the principle of remoteness of vesting either covered by section 230.24 or else not at all included in the Wisconsin code. If it is not included in the code, then the common law ought to be in force. The Wisconsin decisions have left this question in a state of much confusion. In Dodge v. Williams (46 Wis. 70) Chief Justice Ryan in the course of his opinion remarked that "The statute limiting the rule against perpetuities to realty, manifestly abrogates the English doctrine as applicable to personalty." "Expressio unius, exclusio alterius." The Wisconsin statute, now 230.14, at that time referred only to realty and Chief Justice Ryan reasoned that since the statute expressly adopted one portion of the common law, that the remaining portion was rejected. But what should be said of the constitutional provision that the common law in this state is in force unless expressly suspended by statute. The statute had not as yet spoken as regards personalty, therefore the common law should have been in force in the absence of any express abrogations. This remark of the Chief Justice was unnecessary to the decision of that case and its accuracy was also questioned in the case of De Wolf v. Lowson (61 Wis. 469) and Harrington v. Pier (105 Wis. 493) as being merely obiter dictum.

Later in the case of Becker v. Chester (115 Wis. 90), which involved the validity of a trust of personal property that was to continue during the lives of certain persons named therein, plus a gross term of twenty-one years, the court held that under the common law this limitation did not violate the Rule against Perpetuities, inasmuch as the vesting of the future estate was postponed no longer than until the expiration of lives in being plus the gross term of twenty-one years. The court followed Cadell v. Palmer. The important issue of the case was that of equitable conversion, however Justice Marshall took up the remark made in Dodge v. Williams and also concluded that the rule against perpetuities was not applicable to personalty in Wisconsin. This conclusion was not necessary in deciding the case and may not have been approved by the court as a sound principle of law because Justice Marshall later in his opinion remarked: "In states having a statutory situation similar to ours, it has been held that the common law is in force. It is by no means improbable that were we permitted to deal with the subject as an original matter that we would so hold." Chief Justice Cassoday dissented from the holding that the common law rule was not in force in Wisconsin in regard to personalty, in an able opinion concluding with the following remark:

While I have no doubt that my brother have made the ruling here complained of, in pursuance of a sense of duty, nevertheless I have
been constrained to write this separate opinion, in which I have attempted in a respectful manner, to expose what I regard as a legal monstrosity, in the hope that the legislature may do something to relieve the state of Wisconsin from being the only state in the Union where personal property may be given in trust for a private purpose and rendered inalienable for all time.

Justice Cassoday's convictions finally found the support of other men of foresight, with the result that section 230.14 was amended so as to include personal property, making personality subject to the same rules of restraint as realty.

Whatever may be its final effect, it is now certain that since the legislature has spoken, there remains but one rule in Wisconsin governing both real and personal property. This puts an end to much of the discussion that featured the cases involving perpetuities, but whether it will accomplish the desired result is still another question. It is contended that even though the rule of suspension of alienation applies now to personality, yet, in the matter of trusts where the trustee has the power or is even obligated to sell and invest the funds of a trust, there is no unlawful suspension, since there is always someone in being who can alienate the property.

Whether a trust estate continuing for more than two lives in being and twenty-one years, giving to the trustees the power to alienate will be valid, is yet to be seen. And again if the power to terminate the entire trust at any time they see fit, were vested in the trustees, and this trust should extend beyond the period of the rule, would the courts hold that such a trust estate is valid? These are questions that must now be determined. Some authorities maintain that under the new amendment, suspension of alienation means suspension of the power to terminate the trust, in other words to remove the corpus of the estate from the fetters of the trust. This is but another way of expressing the Remoteness of Vesting rule.

The Will of Hamburger (185 Wis. 270) is the latest Wisconsin decision regarding alienation of trust property. In that case the First Wisconsin Trust Company held 23,000 shares of Gimbel Brothers' stock in trust for the wife of testator Nathan Hamburger, Sr. "subject only to this bequest in trust for and during the life of my said wife, the principal of this bequest is given, devised and bequeathed to my wife to become her sole and separate estate, to be disposed of by her by will or otherwise; and if she does not dispose of it, to become upon her death, a part of her intestate estate." The wife attempted to transfer 1,000 shares to her son who was in the employ of Gimbel Brothers Corporation. The trust company refused to transfer and appealed from an order to transfer. The Supreme Court held that the beneficiary of a trust in personality could not terminate the trust
in the absence of express power to so terminate it. The cardinal rule laid down by the court is to find out the intention of the testator and to give it effect. Thus we find a court made rule governing the alienation of the corpus of a trust in personalty by a beneficiary, conforming to the statutory rule in New York. This decision settled the question of beneficiaries terminating the trust estate in the absence of express power in the instrument creating it.

There remains the situation where, if no power is given to a trustee to terminate the trust within the statutory period, but only to invest, will the trust be void for suspension?

The rule is statutory in New York that neither trustee nor beneficiary can terminate a trust estate without an express power. It is quite probable that in view of the late Wisconsin decisions and the Matter of Wilcox in New York, coupled with the passing of the amendment, the Wisconsin court will be constrained to follow the New York decision, which in turn followed *London & South Western Railway v. Gomm*, and thereby re-establish the common law rule regarding perpetuities in Wisconsin.

In *Becker v. Chester*, Justice Marshall, speaking of the remark of Chief Justice Ryan in *Dodge v. Williams* to the effect that the common law was abrogated, said: "It has stood as so established, though somewhat clouded, it is true, by intimations indicating that the way was open for reconsideration, without change for twenty-three years—long enough to be regarded as a rule of property and safe from danger of change except by legislative enactment. *Stare decisis et non quies move re*, should be regarded as the governing principle."

Now that this change has been accomplished by the legislature, it is hoped that the dicta in these former cases may be cleared up and a decision made, declaratory of the common law and bringing into effect the Rule of Remoteness of Vesting.