1959

Virginia's Drear Aridities: Its Rule of Perpetuities

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There is an old adage to the effect that everybody talks about the weather but nobody does anything about it. A comparable axiomatic premise can be established with reference to the rule against perpetuities in Virginia. When Virginia lawyers meet and assemble professionally or socially, nobody talks about the rule against perpetuities. Indeed, everybody prefers that nobody talk about the rule! It follows, therefore, that since nobody talks about it, nothing is ever done about it. The reason is self-evident. Whereas most Virginia lawyers know about the rule against perpetuities, many of the same lawyers do not know what it is all about. Perpetuities is a dry and dismal subject to an active practitioner, and the state of abject bewilderment with which he was indoctrinated about the rule against perpetuities while in law school lingers on to haunt his memory for the balance of his professional career. It is not until an actual client appears with a perpetuities problem that the same practitioner is forced to face the stark realities of the rule. It is only then that the complexities of the rule that perplexes stand out in all their infinite glory. With this horrible possibility always just over the horizon, it is time that somebody talked about Virginia’s own rule against perpetuities. This commentary purports to be just that—a dissertation about Virginia’s rule. What should be done about it, if anything, will be reserved for future consideration.

It was back in 1828 that they did more than talk about the rule against perpetuities in the State of New York. They did something about it. The historic revision of the New York law enacted in 1828 (effective in 1830) undertook not only to restate the case law of perpetuities up to that date, but also attempted to improve on the common law rule by the introduction of statutory changes. More than a century later, a Law
Revision Commission in New York concluded that the statutory cure had been worse than the common law ailment. Reasonable desires concerning the disposition of property had been frustrated and the New York courts had been led into refinements, fictions and the distortion of terms in deeds, wills and trust instruments to an unbelievable extent. *New York Legislative Document* (1936) No. 65(H), 477. In 1931 the late Professor Walsh of the New York University School of Law, in a preface to his book entitled "Future Interests in New York", commented that the essentially unreasonable and arbitrary provisions of the perpetuities statutes, based on an imperfect grasp of the problem by the revisors prior to 1830, was a disgrace to the bar of the state. The confusion in the statutory rule had been so confounded by the sporadic efforts of the New York courts to make something intelligible out of the existing muddle that the sad state of perpetuities affairs came to the attention of the public press. As a result, an obscure columnist was inspired to wax poetic about the New York rule against perpetuities. *New York Tribune*, issue of September 29, 1931. His composition, peculiarly adaptable to the common law rule against perpetuities, but particularly apropos to a modification of the common law rule such as had then been given a century of trial in New York, was phrased in lyrical style:

I

The law of perpetuities
Is strewn with technicalities;
Its crochets and circuities
Exhaust the best mentalities;
It involutes inanities,
The meshes which immure it, tease
The lips to pour profanities
Upon its dark obscurities.
II

Its maddening profundities
Wake murderous propensities;
However sage the pundit, he's
Befuddled by its densities,
Congeries of quiddities
That tax the ingenuities—
Such are those drear aridities,
The rules of perpetuities.

These are words without music, a lyric without song; but one needs not stretch the imagination very far in order to hear the sour notes which could have been appropriately composed as the perfect musical accompaniment.

New York was the first, but not the only state, to tinker with the common law rule against perpetuities by statutory enactment. A number of other states (about twenty) followed the lead of New York, their respective legislatures adopting the misguided viewpoint that the old common law rule could be improved upon. Practically every such attempt to change the common law rule has produced unsatisfactory results, to the extent that six such states (Alabama, Connecticut, Indiana, Michigan, Ohio and Wyoming) have either repealed the inadequate substitute thus re-establishing the common law rule, or have amended their statutes to merely re-enact the common law rule. Finally in 1958, New York radically amended its statutory law following one hundred and thirty years of trouble and difficulty with it, and in substance re-enacted the basic concepts of the common law. One lucid observation of this trend away from statutory changes in the common law rule is apparent: After almost three hundred years, the common law rule has proven itself to be more workable, more practical, than all of the modern efforts to improve upon it! What, then, is this common law rule that has been so impregnable to change in so many of the American jurisdictions? Will the recent judicial change away from Virginia's former common law rule open up a century or more of trouble such as
New York and other states experienced with their statutory changes?

A salutary prologue requires a review of the source and content of the common law rule and its early judicial history in Virginia. Although no longer of any great significance, the common law rule against perpetuities may be traced back to its earliest origin in the *Duke of Norfolk's Case*, 3 Ch. Cas. 1, 22 Eng. Rep. 931, decided in 1682. From Lord Nottingham's pronouncement against perpetuities in that case to the effect that they will be stopped "whenever any visible inconvenience doth appear", the English common law rule developed during the next century and a half and matured with most of its modern inflexibility in *Cadell v. Palmer*, 1 Cl. and Fin. 372, 6 Eng. Rep. 956, in 1833. That case settled the period in the common law rule of a life in being plus twenty-one years as that beyond which a vesting of interest was too remote, and therefore void. The common law had, of course, been brought to Virginia and the rule against perpetuities seems to have had its earliest consideration in *Dunn v. Bray*, 1 Call (5 Va.) 338 (1789). It is important to observe, however, that four years before the *Cadell v. Palmer* decision in England, Virginia not only adopted the common law rule but also made it applicable to executory bequests of personal property as well as executory devises of real property. In *Griffith v. Thompson*, 1 Leigh (28 Va.) 321 (1829), Judge Carr's opinion stated the rule to be that "in the very nature of a limitation, it must vest within twenty-one years after a life or lives in being, and that if more remote it is void in its creation." Thus, the prohibition against remoteness of vesting as the basic element of the common law rule against perpetuities seems to have been then firmly established in Virginia even before its English counterpart had reached full bloom. Furthermore, although the English common law rule was not made applicable to private trusts controlling personal property until the latter half of the nineteenth century (one of the earliest English cases being *Thomson v. Shakespeare*, 1 DeG. F. and J. 399, 45 Eng. Rep. 413, decided in 1860), the Virginia
case of Griffith v. Thompson, supra, had anticipated that application of the rule by three decades. Presently, although the application of the law in Virginia to private trusts of personal property is by far the more important, the early foundation for the rule as an inherent part of the real property law still continues with all of its original rigidity. Rose v. Rose, 191 Va. 171 (1950).

The authors of modern textbooks and treatises are in accord and all seem to allege that Virginia follows the common law rule against perpetuities. If this be so, what is the rule at common law? Perhaps the most widely-approved statement of the rule was propounded by Professor John Chipman Gray and appears in his monumental work, The Rule Against Perpetuities §201 (4th ed. 1942) as follows:

"No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."

Obviously, this is the same rule as applied in the early Virginia case of Griffith v. Thompson, supra, and is directed against remoteness in vesting of a property interest. The word "vest" is important to the common law rule and designates the particular point of time at which the remoteness is to be determined. Professor Minor's statement of the rule against perpetuities also incorporates the word "vest" as the significant event upon which the rule shall apply. 1 Minor, Real Property §809 (2d ed. 1928). The foundation of the rule as a directive against remoteness in vesting seems to be the same in all of the thirty-six American jurisdictions where the common law rule prevails. Virginia, it is alleged, as well as the neighboring states of Maryland, North Carolina, Tennessee and West Virginia, are among these thirty-six jurisdictions.

Are the authorities correct as to the nature of the rule against perpetuities in Virginia? Does Virginia follow the common law rule within its narrower scope as confined to the
concept of remoteness of vesting? Is it correct to conclude that Virginia statutory law has had no effect whatsoever on the rule against perpetuities and its application? The essence of this commentary is to suggest that these questions should all be answered in the negative. Virginia, it seems, has now adopted its own peculiar rule against perpetuities, a rule in which the significant word "vest" has been replaced, and a rule that has been embellished at the fringe by the influence of Virginia statutes. Let us examine the origin and nature of Virginia's own rule against perpetuities.

Three Virginia cases, the most recent having been decided in 1958, seem to confirm the present authoritative existence of a special rule against perpetuities, a rule that is quite different from its common law companion. The special Virginia rule was first applied in *Skeen v. Clinchfield Coal Corp.*, 137 Va. 397 (1923), was again adopted in *Claiborne v. Wilson*, 168 Va. 469 (1937), and more recently was emphatically acknowledged to be the existing Virginia rule in *Burruss v. Baldwin*, 199 Va. 883 (1958). Thus, over a period of the past thirty-five years, a new rule against perpetuities was judicially born, nurtured, and matured as the current rule of law in Virginia.

Prior to the recent 1958 case cited, there were several cases which refrained from clearly stating the applicable Virginia rule and seemed to indicate a preference for the original common law rule. All doubts, however, seem to have been erased by the 1958 case of *Burruss v. Baldwin*, *supra*. The special Virginia rule against perpetuities, as stated in that case, is as follows:

"Any executory interest which, by possibility, may not take effect until after lives in being and twenty-one years and ten months, is *ipso facto* and *ab initio* void. In other words, the executory interest is void for remoteness if at its creation there exists a possibility that it may not take effect during any fixed number of now existing lives, nor within twenty-one years and ten months after the expiration of such
lives, even though it is highly probable, or, indeed, almost certain, that it will take effect within the time prescribed."

The salient differences between this judicial pronouncement of the Virginia rule and the language of the common law rule are two-fold. First, the word "vest" has been replaced by the phrase "take effect"; and second, the twenty-one year period in gross has been extended by an additional term of ten months. Whereas the latter difference is of only minor importance and has its foundation in the English common law as later influenced by a Virginia statute, the substitution of the words "take effect" for the word "vest" is a radical departure from the common law rule, a change that will certainly provide a broader scope for vitiating otherwise valid executory interests. Indeed, if the common law rule employing the word "vest" instead of the Virginia rule with its phrase "take effect" had been applied in Burruss v. Baldwin, supra, it is probable that the court's decision would have been quite different.

Virginia's own rule against perpetuities has a rather obscure origin. Each time it has been stated and applied by the Supreme Court of Appeals of Virginia, citation has been made to Graves' Notes on Real Property, §215 at page 256 (1912 ed.). The citation to the rule in this scholarly treatise by the late Professor Graves is rather remarkable, because it would appear that the learned professor coined the rule himself and that it is a product of his inventive genius. He was apparently attempting to paraphrase the common law rule against perpetuities in terms of not what the rule actually was, but in terms of what he thought the rule ought to be. If so, it can properly be said that Professor Graves' new rule against perpetuities has, by judicial adoption almost a half-century later, become the special Virginia rule against perpetuities—thereby accomplishing the learned professor's objective.

To support his presentation of what he thought the rule
against perpetuities ought to be, Professor Graves cited several very old texts, commentaries and treatises, an annotation at 90 Am. Dec. 101 (1887), an encyclopedic section on perpetuities at 18 Am. & Eng. Ency. Law 335 (1892), and six American cases. A study of these citations gives only a small clue to the source of Professor Graves' rule. The common law rule built around the cornerstone of the word "vest" (not the Graves' version of it) appears at page 338 of the encyclopedia cited. The annotation cited merely elaborates on the same common law rule as it appeared in earlier texts and in the original edition (1886) of Gray's Rule Against Perpetuities, and points to Chapter Three of that volume to support the basic common law principle that vested interests are not subject to the rule. Of the six cases cited by Professor Graves, Whelan v. Reilly, 3 W. Va. 597 (1869), stated and applied the common law rule within the concept of "vesting", and in Otterback v. Bohrer, 87 Va. 548 (1891), Judge Lacy applied the common law rule with the word "vest" controlling but without spelling out the rule itself. Indeed, in Woodruff v. Pleasants, 81 Va. 37 (1885), cited by Professor Graves, Judge Hinton not only stated the common law rule in its original form, but also applied it using the word "vest" and not the phrase "take effect". Therefore, in citing these authorities to support his statement of the rule, Professor Graves was engaged in an empty gesture that contradicted rather than substantiated his newly-formulated perpetuities rule.

The only possible Virginia source for Professor Graves' use of the phrase "take effect" in his rule appears in Stone's Ex'r v. Nicholson, 27 Grat. (68 Va.) 1 (1876). In that opinion, Judge Moncure wrote that "to make an executory limitation valid, the event on which it is to take effect must of necessity happen, if at all, within the time of creation of the estate. . . ." Obviously the learned judge had reference here to the event upon which a condition precedent was based which (although simultaneous with the process by which an executory interest becomes a vested interest) had no
connection whatever with an interest already vested but subject to take effect, after postponed enjoyment, at some future date. This case, and two other cases decided by the United States Supreme Court before the turn of the century seem to be the sole precedents upon which Professor Graves could justify his tinkering with the common law rule.

These two other cases are *McArthur v. Scott*, 113 U. S. 340, 5 Sup. Ct. 652 (1885) and *Hopkins v. Grimshaw*, 165 U. S. 342, 17 Sup. Ct. 401 (1897). In both cases, the opinion was written by Justice Horace Gray. In neither case was there involved any connection, remote or otherwise, with Virginia persons or property. Yet, Professor Graves seems to have developed his new perpetuities rule from these cases, more particularly from the latter case of *Hopkins v. Grimshaw* which involved a charitable trust and was decided on appeal from a lower District of Columbia court. In both of these cases, the rule against perpetuities was stated in its common law form using the word “vest”, but was applied on the basis that a future executory interest must “take effect” in enjoyment (as well as vest) within the period of the rule in order to be valid. The earlier 1885 case, *McArthur v. Scott*, supra, concerned a class gift in remainder and came up on appeal from Ohio. Although this case is also cited by Professor Graves to support his invention of the current Virginia rule, an Ohio statutory rule against perpetuities was held to be controlling and that portion of the opinion which stated the vesting doctrine of the common law rule, but stretched its application in terms of taking effect in enjoyment, was mere *obiter dictum*.

This, then, is the source of Virginia’s own rule against perpetuities as propounded by Professor Graves in 1912, as adopted in Virginia in 1923, as followed in 1937, and finally established as the Virginia rule in 1958. It is a rule created by Professor Graves, carved out from federal law as adopted in two United States Supreme Court cases from Ohio and the District of Columbia respectively, and perhaps stimulated
by a misinterpretation of one Virginia case decided back in 1876, *viz. Stone's Ex'r v. Nicholson, supra*.

Until the 1958 decision in *Burruss v. Baldwin, supra*, there is some indication from the interim cases that Professor Graves' rule against perpetuities was not the established Virginia rule, notwithstanding its controlling influence in two earlier cases. For example, it was said in *Shirley v. Van Every*, 159 Va. 762 (1933), that the rule had no application where the estate must vest, if at all, within the prescribed time and that the rule definitely did not apply to an interest that was vested. In that opinion Justice Holt cited the earlier case of *Skeen v. Clinchfield Coal Corp., supra*, where Professor Graves' rule had first been recognized, but judiciously avoided incorporation of that rule as applicable Virginia law. Then, after the Graves rule had again been applied in *Claiborne v. Wilson, supra*, two subsequent cases seemed to repudiate its acceptance. In *Collins v. Lyon*, 181 Va. 230 (1943), Justice Browning's opinion clearly stated that the rule against perpetuities refers to the time within which the title vests, and has nothing to do with the postponement of enjoyment. Three years later in *Thomas v. Bryant*, 185 Va. 845 (1946), Justice Eggleston again pointed out that vesting of interest within the prescribed time limitations was well settled, and that the rule was not concerned with the postponement of enjoyment. The *Skeen* case was distinguished on the facts in *Collins v. Lyons*, and in *Thomas v. Bryant* the doctrine of the *Skeen* case was affirmatively rejected in favor of the common law application of the rule, pursuant to *Collins v. Lyon*. Neither of these later cases made any reference to the earlier and second adoption of the Graves rule in *Claiborne v. Wilson*.

After *Erie R. R. Co. v. Tompkins*, 304 U. S. 64, 58 Sup. Ct. 817 (1938), where the decision turned on common law doctrine, federal courts were obliged to ascertain and apply the substantive law of the state. Which rule against perpetuities in the law of Virginia has been followed by the federal courts in Virginia? Was a federal court in Virginia influenced by the Graves rule as applied in the *Skeen* and *Claiborne* cases? Ap-
parently not, according to the only federal case which found it necessary to examine Virginia’s rule against perpetuities. The opinion of Judge Barksdale in Brownell v. Edmunds, 110 F. Supp. 828 (1953), cited the common law rule as presented in 1 Minor on Real Property §809 (2d ed. 1928) which precisely deals with the process of vesting rather than taking effect. Although the Skeen and Claiborne cases were cited as supporting the conclusions reached, no reference whatsoever was made to Professor Graves’ rule as applied in those two cases. The appellate opinion in the same Brownell case, 209 F. 2d 349 (1953), affirmed the decision of the District Court and pointed out that the class gift involved might not vest within the time of the rule. It was the vesting, not the taking effect in enjoyment, that controlled the application of the rule according to Chief Judge Parker’s opinion therein.

The three cases which seem to establish Professor Graves’ rule as the Virginia rule against perpetuities require further analysis. Skeen v. Clinchfield Coal Corp., supra, involved a deed to a large tract of land in which deed there was either an exception or a reservation (the court found it unnecessary to decide one way or the other) of a smaller five acre parcel. By a covenant in the deed, the Coal company as grantee was given a pre-emptive right to purchase the five acres at an agreed price whenever Skeen, the grantor, decided to sell and so notified the grantee. The Coal company further covenanted to purchase the five acres on these terms, and there was no time limitation expressed as to the exercise of the respective rights of the parties. A suit in equity was brought some years later by the Coal company, grantee under the deed, seeking a decree to compel the grantor to convey his remaining interest in the five acres. In reversing the trial court’s decree which had granted the Coal company’s prayer, the appellate court introduced a novel process of reasoning on the facts. Although the transaction sounded somewhat in the nature of an option contract under the covenants in the deed, there was actually only a pre-emptive right to buy, in favor of the Coal company as grantee. However, this pre-emptive right was not exer-
cisable at the discretion of the grantee, but at the pleasure of the grantor. In the event that the grantor and his successors never decided to sell, the pre-emptive right in the grantee never became exercisable and the five acre parcel of land was indefinitely removed from the channels of commerce. This, then, was not a perpetuity at all, but a direct restraint on the alienation of land. As such, it was void and unenforceable regardless of the absence of a time limitation within the terms of the covenants in the deed.

The question of an unreasonable restraint on alienation was, however, brushed off by the court as "unnecessary to discuss", whereupon it grasped at the rule against perpetuities as the only alternative. This caused the reasoning process to run into trouble with the vesting of an executory interest under the common law perpetuities rule (then the Virginia law), because in this case there was no executory interest at all, no condition precedent upon which the vesting process could be applied. Obviously the court could not reach the result for which it was striving by applying the common law rule, and unwilling to reach that result by finding an unreasonable restraint on alienation, it proceeded to uncover Professor Graves' heretofore unrecognized perpetuities rule with its manufactured language of "taking effect". Apparently pleased at thus locating a rule that would strike down the restraint, the court proceeded to incorporate and apply that rule.

The impact of the rule against perpetuities on option contracts is rather new within the context of the common law. An option contract to purchase land (not appendant to a lease) first came within the scope of the English common law rule against perpetuities in *London and South Western Ry. v. Gomm*, 20 Ch. D. 562 (1882), and has been followed in no more than ten American jurisdictions since that time. The theory of the rule's applicability to such option contracts is founded on the concept that being specifically enforceable, such contracts create equitable interests in land which are future interests contingent upon election to exercise the option. Al-
though it seems clear that the fixed period in gross of the perpetuities rule was neither intended nor designed for commercial land transactions, this ill-adapted application of the common law rule has been used to a limited extent. Until the Skeen case, however, option contracts were entirely foreign to the Virginia perpetuities rule. Yet, the application of the rule to option contracts was much more appropriate under the “take effect” provisions of the Graves rule than under the “vesting” process of the common law rule.

No other Virginia case dealing with a regular option contract to purchase land has before or since been considered in Virginia within the scope of the rule against perpetuities, and it is noteworthy that the Skeen case did not involve an option contract at all, but rather a pre-emptive right to buy land. Such a pre-emptive right had been given the descriptive term of a “pre-emption option” by a New York court in Garcia v. Callendar, 125 N. Y. 307, 26 N.E. 283 (1891), and this misguided use of the word “option” influenced the thinking in the Skeen case. In order to bring the pre-emptive right within the broader scope of Professor Graves’ rule against perpetuities and classify it as an option contract, the court gave it the curious label of an “option to sell”, a label appropriated from an old federal appellate case that came up from Arkansas and is a judicial oddity, viz. Watts v. Kellar, 56 Fed. 3 (1893). As to this quaint construction as an “option to sell”, Virginia law is unique. No other state court has introduced this unusual description of a pre-emptive right to buy, and it found its way into the Virginia law in the same case that the Graves rule against perpetuities was initially recognized. Further, following the same pattern of development as the Graves rule, the fiction of an “option to sell” land was later affirmed by the acknowledgment of the existence and subsequent surrender of such a pre-emptive right, calling it an “option to sell”. Shirley v. Van Every, supra.

The Skeen case, therefore, is a landmark in the Virginia law governing perpetuities. There it was that the Graves rule first gained judicial acceptance, the stage having been set for
its adoption by an unlimited pre-emptive right to buy land as established by covenants in a deed. Unwilling to properly consider the arrangement as a restraint on alienation and apply the law accordingly, unable to apply the common law rule against perpetuities in the absence of any vesting process subject to a condition precedent, and unable to find in the deed covenants a true option contract for the purchase of land, the court resorted to a determination of the transaction as an "option to sell". Then finding nothing but the Graves rule that could properly strike down this "option to sell", it used that rule as a basis for reaching an otherwise correct conclusion. The Skeen case might well be called a comedy of errors in its reasoning, and is typical of a judicial decision-making process that applies the wrong rules of law to reach a proper decision but in so doing deforms and perverts the established law for the indefinite future. Subsequent developments might have been different if the Skeen case had been recognized as the oddity which it was, and had been laid away in the judicial closet to the forgotten. Unfortunately, however, the case did not meet the fate which it deserved. Fourteen years later, this skeleton from the judicial closet emerged again to shine in all its spectral glory, and once again the use of the Graves rule against perpetuities was quite unnecessary to reach a proper result.

The will of an illiterate testator was before the Virginia court for construction. This testator had devised a tract of land to his married daughter for life, remainder to his grandson, with the "wish" that the property should "revert" indefinitely to their heirs as his descendants. On failure of direct heirs of the testator, the will provided for a gift over of the property to three religious institutions, share and share alike. After death of the daughter ending the life estate in the property, the grandson died intestate, unmarried and without issue, leaving his father, the testator's son-in-law, as his sole heir. The contest was between the testator's son-in-law and the three religious organizations. In affirming the trial court's decree in favor of the son-in-law, a divided appellate court
with two justices dissenting) construed the testamentary gift over to the churches to be void as in violation of the rule against perpetuities. The Skeen case was cited as authority, and the Graves rule against perpetuities as controlling. Claiborne v. Wilson, supra. Once more Virginia had abandoned the common law rule in favor of the Graves revision.

In the construction of a will, it has long been established in Virginia that the first unalterable step is to ascertain the intention of the testator. Then (and only then) after the testamentary intent has been determined, follows the second step—the application of an existing rule of law such as the rule against perpetuities, to determine whether or not the testamentary intent, already established, shall be given full or partial effect, or no effect at all. Land v. Otley, 4 Rand. (25 Va.) 213 (1826); Sheridan v. Krause, 161 Va. 873 (1934); Shenandoah Valley Nat'l Bank v. Taylor, 192 Va. 135 (1951).

If this sequence had been preserved in the Claiborne case to construe the nature of the estate created in the testator’s grandson, the court could have avoided a circuitous process of reasoning and reached an opposite conclusion within the scope of either the common law rule against perpetuities or Professor Graves’ version of it. However, finding that the grandson’s estate was a remainder in fee tail because of the phrase “shall revert indefinitely” to his descendants as heirs of his daughter and grandson, and that the remainder after the fee tail to the churches could not take effect within the time limit of the Graves rule, the court declared the gift over to be void. After thus vitiating the charitable gift over as being too remote, the court then found the fee tail estate to be converted into a fee simple in the grandson by operation of Virginia statutory law (then Va. Code Ann., 1919, §5150), which fee simple passed to his father, the testator’s son-in-law, by intestate descent.

This result was patently contrary to the testator’s intent, since the court had previously observed that the testator’s intent was to expressly exclude the son-in-law as an estate beneficiary. Thus, by an improper application of the rule against...
perpetuities, the testator’s obvious intent was completely ignored. The opposite and possibly a more logical result could have been reached if the rules of construction, both at common law and under Virginia statute, had been first applied. This process would have found the grandson to have taken a vested remainder in fee tail, which would become a vested remainder in fee simple by statutory construction. Va. Code Ann. §5150 (1919), now Va. Code Ann. §55-12 (1950). The gift over to the three religious institutions would then be in the form of an executory limitation, conditioned on the precedent event that the grandson die without heirs descendant of the testator, pursuant again to Virginia statutory law. Va. Code Ann. §5151 (1919), now Va. Code Ann. §55-13 (1950). Since the death of the grandson with or without heirs descendant of the testator was certain to occur within the time limitations of either the common law rule or the Graves rule against perpetuities, the gift over to the churches could not possibly have been avoided as a perpetuity. Thus, when the grandson died without heirs descendant of the testator, the churches would take the property as the testator had intended. It follows therefore, that either as the Claiborne case was decided, or as it should have decided, there was no necessity for departing from the common law rule against perpetuities, no need whatsoever to apply the Graves invention by following the precedent of the Skeen case.

Finally in 1958, the Graves rule emerged as Virginia’s new rule against perpetuities in Burruss v. Baldwin, supra. Once more the Graves rule was applied to defeat the testator’s intent, here a result that might have been just the opposite if the common law rule was the law of Virginia. In his holographic will, the testator provided for the sale of his interest in certain properties, the proceeds of which were to be placed in a fund from which his grandchildren were to receive an education “as high as their abilities may acquire”. Proceeds from the sale of certain securities were also to become a part of this educational fund. A final provision in the will indicated that each of the grandchildren were to share and share alike
in the fund, a provision that clearly had reference to its ultimate distribution. At the testator’s death, the survivors included children both married and single, also several grandchildren for whose benefit, along with after-born grandchildren, the educational fund was intended. In its application of the Graves rule against perpetuities, the court observed the possibility that the educational benefits of the fund might not “take effect” in enjoyment as to after-born grandchildren within the time limit of the rule—hence the creation of the fund was void ab initio by impact of the rule.

No fault can be found with the case under the Graves rule. There was the possibility that after-born grandchildren might not enjoy the educational benefits of the fund within the time of a life in being plus twenty-one years and ten months. However, if the common law rule were the law of Virginia, and had been applied, it is submitted that the gift to the grandchildren vested in interest on the testator’s death in the then-living grandchildren, and that the class remained open to let in after-born grandchildren. Also, the class was certain to close within the time of lives in being at the testator’s death, those lives being the testator’s surviving children. Thus, the class gift already vested subject to open, would close within the time limit of the rule, and only the enjoyment would be postponed on a condition precedent—the “taking effect” concept of the Graves rule. The conclusion therefore is this: Only by the application of the Graves rule can the decision be sustained and by this decision the common law rule has been permanently discarded in Virginia. Citations in the Burruss case to the Skeen and Claiborne cases, together with a restatement of the Graves rule, seem to indicate that it is now settled law that the Graves invention of 1912 has become Virginia’s own rule against perpetuities.

The legal agnostic will inquire, so what? Are there any cardinal differences between the common law rule and Virginia’s new rule by Graves, and if so, what are these differences? The first and principal difference concerns the substitution of the phrase “take effect” for the word “vest”, the impact of
which is so obvious from the *Burruss* case. Although the phrases "vested estate" and "vested right" have been given judicial interpretation in Virginia, no Virginia case has construed the meaning of the simple word "vest". *Hayes v. Goode*, 7 Leigh (34 Va.) 452 (1836); *Kennedy Coal Corp. v. Buckhorn Coal Corp.*, 140 Va. 37 (1924). Similarly, no Virginia case has defined the meaning of the phrase "take effect" as appropriated by Professor Graves in his version of the rule. However, there is ample authority from other jurisdictions which should remove all doubt that the meanings are substantially different.

In cases involving wills, trusts, and the rule against perpetuities, the word "vest" has been defined as "to give an immediate fixed right of present or future enjoyment of property". *Kelly v. Womack*, 261 S.W.2d 599, 604 (Tex. 1953); *Curtis v. Maryland Baptist Union Assoc.*, 176 Md. 430, 5 A.2d 836, 840 (1939), and other cases too numerous for citation. The right must be immediate, regardless of whether the right of enjoyment is present or future. To the contrary, the phrase "take effect" in property law means to become operative or executed, implying not only a vested interest but a present (not future) right of enjoyment. *Jones v. Habersham*, 107 U.S. 174, 2 Sup. Ct. 336, 339 (1883); *Miller v. Oliver*, 54 Cal. App. 495, 202 Pac. 168, 171 (1921). Thus, to "take effect" indicates a present right of enjoyment, whereas to "vest" refers to an immediate fixed property right subject to either present or future enjoyment. It follows therefore, under the Graves rule, that vesting of an interest within the time limit of the rule against perpetuities is not enough; in Virginia, the interest must "take effect" in enjoyment within the rule's period, otherwise it is void. Consequently the Graves contrivance is different and broader in its scope, an impact that has been so well illustrated by the *Burruss* case.

One other difference in Virginia's own rule against perpetuities as incorporated by Professor Graves and some earlier cases concerns the extension of the twenty-one year period in gross to include an additional term of ten months.
The earliest extension of the time beyond the original life in being and twenty-one years had its origin in *Thellusson v. Woodford*, 11 Ves. 112, 32 Eng. Rep. 1030 (1805) where a period of actual gestation was first added. Later this period of gestation was fixed at nine months by the English case of *Cadell v. Palmer*, *supra*, and so became a part of the common law rule that was first adopted and followed in Virginia. As late as 1891, Virginia's time limitation under the then-applicable common law rule had become the "lives in being, and the utmost period of gestation, and twenty-one years thereafter". *Otterback v. Bohrer*, *supra*. Then in 1904, the additional fixed term of ten months as the period of gestation was first given judicial approval in *Loyd v. Loyd's Ex'r*, 102 Va. 519. That case, together with the predecessor to the current descent statute concerned with posthumous children (Va. Code Ann. §64-8, 1950), seems to have induced Professor Graves to incorporate the ten month period into his rule. The influence of this statute on the rule was obvious, since the ten month period appeared in the Virginia common law rule before the Graves rule was ever published. 1. Minor on *Real Property*, §§845, 846, (1st ed. 1908).

Another Virginia statute has had some effect on perpetuities and the impact of the rule. Since 1820, Virginia statutory law (now Va. Code Ann. §55-13, 1950) has sought to control the construction of deeds and wills in such a way as to minimize the rigid force of the rule against perpetuities. This statute operates to change the meaning of "indefinite failure of issue" in a deed or will, whereby the intent is construed to be "definite failure of issue". *Daniel v. Lipscomb*, 110 Va. 563 (1910). As a rule of construction, this statute has no direct effect on the rule against perpetuities, a rule of property law. It does, however, announce more than a century of public policy in Virginia directed toward the mitigation of the severity of the perpetuities rule. Unfortunately, the Virginia cases have shown no inclination to follow this policy, and in adopting a new rule against perpetuities as propounded by Pro-
fessor Graves, the policy trend is directly in opposition to any such palliation.

The common law rule against perpetuities was, and is, a rule concerned entirely with remoteness in the vesting of future interests. A separate body of common law rules has long been applicable to provisions in deeds, wills and contracts which, if valid, would tend to impede or impair the marketability of property. Such impairments to the free alienation of property may take the form of either disabling restraints, forfeiture restraints, or promissory restraints. However, regardless of form, most of the common law rules applicable to these direct restraints on alienation operate to invalidate the restraint regardless of any limitation as to time. 4 Restatement, Property §§414-417 (1944); 3 Simes & Smith, Future Interests §§1111-1171, (2d ed. 1956). It follows that since the time element of remoteness is the gravamen of the perpetuities rule, direct restraints should not fall within the scope of perpetuities at all. The fact that the Graves rule against perpetuities was applied in the Skeen case to a restraint on alienation in the guise of an "option to sell" opens up the possibility that Virginia's new perpetuities rule has incorporated by its phrase "take effect" some of the common law principles formerly limited to direct restraints on alienation. If this be so, it would seem that direct restraints on alienation in Virginia would no longer be void per se, but void only if the period of restraint is not confined in point of time within the permissive period of the perpetuities rule. Although the Skeen case stands as the genetic monument to Virginia's new rule against perpetuities, one may only speculate that it could also serve as a disturbing precedent to distort the Virginia rules governing direct restraints on alienation previously established by several significant cases. Dunlop v. Dunlop's Ex'rs. 144 Va. 297 (1926), Carson v. Simmons, 198 Va. 854 (1957). That this is possible, but perhaps not probable, is cause for the Virginia bar to rejoice.
Such are Virginia's drear aridities, its own rule against perpetuities, a rule that was the personal creation of the late Professor Graves, a rule that had no foundation in Virginia precedent, a rule that should never have been applied in the first two cases where it was given judicial recognition, but a rule that has finally matured in the *Burruss* case of 1958 as Virginia's own doctrine of public policy against perpetuities. The common law rule against perpetuities has departed from Virginia property law, and in its place there has been substituted a mongrel monstrosity that bodes well to duplicate the long and unhappy experience of a comparable change by statute in New York. In 1958 New York abandoned one hundred and thirty years of struggle with an unsuitable and unworkable property law of perpetuities, a product of its legislative attempt to improve on the common law rule. In 1958 Virginia affirmed the establishment of what has all the appearances of being an equally unsuitable rule against perpetuities, a product of professorial invention, misdirected application, and unfortunate judicial sanction, by which the common law rule was laid to rest. Will the experience in Virginia for the next one hundred and thirty years duplicate the prior sad experience in New York for such an extended period of time?

The same obscure poet who was inspired to comment on the New York perpetuities rule at the close of its first century of uncertainties and perplexities could easily have been stimulated to evaluate Virginia's new rule by this additional stanza:

> And there are many oddities  
> Which propagate uncertainties,  
> Proliferate complexities,  
> Prognosticate perplexities.

To which the Virginia bar might well respond in unison, loud and lusty, with this chorus of dismay:

> Virginia's law can bring no ease,  
> A lawyer's in an awful squeeze;  
> What can be done, how best appease  
> The rule of perpetuities?
Several years ago, Professor Leach of Harvard Law School suggested that the rule against perpetuities is so abstruse that it is misunderstood by a great majority of the legal profession, that it is unrealistic to the extent that its "conclusive presumptions" are laughable nonsense to any normal person of sound mentality, that its impact is so capricious that it destroys in the name of public policy perfectly valid gifts which offer no offense other than that they happen to be couched in the wrong words, and that the rule is so misapplied that it frequently defeats the objective that it was designed to promote. 65 Harv. L. Rev. 721 (1952). This learned and distinguished scholar of property law was commenting on the common law rule. If this be a fitting indictment of the common law rule, as it seems to be, how much worse will be the impact under Virginia's new rule by Professor Graves? The three cases that have incorporated, adopted and affirmed the Graves rule proclaim a new era of paradoxical absurdities with perpetuities in Virginia.