used in that section—" rights and advantages "—are not apt to describe land itself and do not include it.

In the result, the plaintiff shewed no title to the disputed land and X's title had been transferred to the defendants by the transfer in 1947.[5] The plaintiff's claim therefore failed.

A. L. T.

5. The common law rule as to non-assignability of rights of entry has been abolished—Section 19 (1) (*b*) of the *Property Law Act* 1928 : and see note by Mr. A. D. G. Adam appended to the report of *Kirk v. Sutherland*, [1949] A.L.R., at p. 267.

PROPERTY : THE RULE AGAINST PERPETUITIES.

Re Gaite's Will Trusts ; Banks and Anor. v. Gaite and Ors.[1]

Most Property students are familiar with what has been called " the problem of the fertile octogenarian." One well-known example of this occurs where T leaves property in trust to pay the income to his sister A (a widow aged eighty) for life, then to pay the income to the children of A for their lives, then to pay the principal to the children of such children[2]. The gift of the principal is bad, since in contemplation of law, A may have further children, whose children by possibility might not be ascertained until after the period allowed by the rule against perpetuities. The courts have refused to designate any age beyond which a person may be held incapable of having further children so as to make a gift to children of such person a gift to children in being.

In *Re Gaite's Will Trusts*, Roxburgh J. was faced with a will which raised both this kind of problem and also the not dissimilar problem of " the fertile five-year old." The difficulty arose under a provision directing that a legacy of £5,000 and a share of residue should be held on trust " for such of the grandchildren of H. G. as shall be living at my death or born within five years therefrom who shall attain the age of twenty-one years or being female marry under that age in equal shares."

At the date of the testatrix's death, H. G. was aged sixty-six, and a widow. She had two children and one grandchild living at that date. H. G.'s grandchildren might be in one of two classes—either they would be children of the two children living at the date of the testatrix's death, or they would be children of children of H. G. born after that date. As to the former class, no question of perpetuity could arise, since the children of parents who are lives in being for the purposes of the rule can only attain the age of twenty-one within the period allowed by the rule. It was therefore only the possibility that there might be grandchildren in the latter class which placed the validity of the gift in jeopardy, since children of such after-born children might not attain the age of twenty-one within the required period.[3] At first glance, therefore, the gift

1. [1949] 1 All E.R. 459.
2. See Leach, *Perpetuities in a Nutshell*, 51 H.L.R., at p. 643.
3. In a class gift, the precise interest of every member of the class must be ascertained within the perpetuity period, otherwise the whole gift will fail. See *Pearks v. Moseley*, (1880) 5 App. Cas. 714.

would appear to be bad since, however unlikely it might be in fact that H. G. would remarry and have further children, the law cannot regard this as impossible.

However, Roxburgh J. held the gift to be good, because in terms it operated only in favour of those grandchildren who should be born within five years of the death of the testatrix, and it would be impossible for any grandchildren falling within this description to be in the second class mentioned above. It would be impossible for any child of H. G. born after the death of the testatrix to have a lawful child within five years—not because of physical impossibility, but because of the provision in the *Age of Marriage Act* 1929[4] that " A marriage between persons either of whom is under the age of sixteen shall be void." A child of five could not marry and therefore could not have a legitimate child who could be a " grandchild " of H. G.

This ingenious solution has met with some criticism from students with whom the writer has discussed the case. These criticisms are mentioned without any attempt being made to determine their validity. Firstly, it is said that the learned judge was not entitled to rely on the provision in the *Age of Marriage Act* since it was not impossible that this Act would be repealed within the five year period, and the rule against perpetuities must take into account the possibility of such a repeal.[5] Secondly, if H. G. married a man domiciled abroad in a country where there was no restriction on infant marriages, there might be no legal bar to the legitimacy of grandchildren in the second class. The rule of construction that, in an English will, " grandchildren " *prima facie* means the legitimate children of legitimate children, does not require that the parents of the grandchildren should satisfy the English tests for capacity to marry, if they are domiciled in a country where no such tests are applicable.

In a Victorian will, the solution offered by Roxburgh J., whether it is satisfactory or not, would not be available, since the *Age of Marriage Act* has not been adopted here.[6] Solicitors therefore would be well advised to avoid the form of words used in the will under consideration. The easiest way of resolving the difficulty in this case would have been to limit the gift to the grandchildren of H. G. to the children of the children of H. G. already born (naming them), which would of course restrict the gift to the grandchildren in the former class and render it valid.

A. L. T.

4. 19 *and* 20 *Geo. V. C.* 36, S. 1. For another application of this section see Polak, *More Legal Fictions*, p. 55.
5. In one case, at least, the necessity for complying with some other rule of law ensures that a grant does not infringe the rule against perpetuities. A legal contingent remainder limited after a life estate is valid, despite the fact that the event on the happening of which the estate is to vest is one which, in terms of physical possibility, might happen outside the period. This is so because it is read subject to the rule of law that such a remainder must vest, if it is to vest at all, during the time that it is supported by the particular estate, *i.e.* before the dropping of a life in being.
6. The common law rule derived from the Canon Law was that the ages of capacity to marry were 12 in the case of females and 14 in the case of males. However a marriage where one or both of the parties was below that age was not void, but voidable. Therefore a child born of such a marriage was not necessarily illegitimate. 2 Com. Dig. B. 5.