PERPETUITIES REFORM:

London Proposes, Perth Disposes.

In October 1956 the Lord Chancellor's Law Reform Committee published its Fourth Report[1] analyzing defects in the Rule against Perpetuities and recommending legislative reform. Without wish to criticize our British brethren who face certain difficulties in finding a place for such legislation in competition with other matters of great import, it must be noted that in the intervening period of more than five years no Bill has been introduced in Parliament, and none has even been drafted.[2] But Western Australia has done the job in the Law Reform (Property, Perpetuities, and Succession) Act, assented to 6th December 1962.[3] Bravo, Western Australia!

The Law Reform Committee Report was no hasty job by amateurs. It was over two years in the making, the matter having been referred to the Committee in July 1954. The Committee of twelve included two Lords Justices, two other Justices of the High Court, three practicing Q.C.'s including R. E. Megarry, Professors Arthur L. Goodhart and Sir David Hughes Parry, and two solicitors. My co-author, Dr. J. H. C. Morris of Magdalen College, Oxford,[4] was seconded to the Committee for this project. The Report, in 35 pages, made some 22 recommendations, substantially all of which were adopted in the Western Australian Act.

1 *Cmd.* 18, H.M. Stationery Office, London.

2 The Old Country does not hurry these things. A Report to Parliament in 1832 recommended that where interests were void under the Rule due to age contingencies in excess of 21, the contingencies should be reduced to 21. This finally became law in 1925 in s.163 of the Law of Property Act, 15 Geo. 5, c. 20. Similar legislation was enacted in Western Australia in section 5 of the Law Reform (Miscellaneous Provisions) Act, 1941, which is superseded by section 9 of the 1962 Act.

3 11 Eliz. II, No. 83. I shall comment only on the Perpetuities sections. The Act also deals with wills in contemplation of marriage, statutory substitutional gifts to surviving children where a devisee or legatee predeceases the testator, disposition of intermediate income of executory or contingent gifts, recovery of payments made upon mistake of law or fact, and abolition of restraints on anticipation of property of a woman which would not be valid if the property were owned by a man. In passing permit me to evaluate the substitutional gift provisions (which in America we call an anti-lapse statute) as the most sophisticated and comprehensive of any which have come to my attention in the Anglo-American world.

4 See MORRIS & LEACH, THE RULE AGAINST PERPETUITIES (2d ed., 1962). The key sections of the Western Australian Bill, though not enacted at the date of publication, appear at 336.

The Rule and its Gremlins.

The Rule against Perpetuities is often stated in the formulation of my most distinguished predecessor in teaching property law at Harvard, John Chipman Gray:

> *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.*

With unconscious irony he declared: "It is a well-established, simple and clear rule," and then expounded it in a volume of 833 pages (in its latest edition).[5]

It is probably pointless for me to voice my belief that if there were no Rule against Perpetuities today nobody would think of calling for one; the impact of the income tax and death duties is such as to preclude the perpetuation of great landed estates or even great personal fortunes, at which the Rule was aimed. I cite as evidence our state of Wisconsin, which has its share of wealthy men but no Rule against Perpetuities applicable to the usual testamentary or inter vivos trust.[6] No inconvenience has appeared, for property owners simply have no inclination to tie up property for long periods, the uncertainties of life and taxes being what they are.

However, it is not pointless to indicate the hobgoblins, leprechauns, and gremlins that have infested the Rule in the nearly three hundred years of its existence. Permit me to list some of these with occasional comment:

1. The required absolute certainty of vesting within the period of perpetuities. (We decide other civil cases on a "preponderance of the evidence." We send men to the gallows on "proof beyond a reasonable doubt." But in perpetuities cases we demand absolute certainty. What nonsense!). Thus,

> a. A gift to testator's issue who shall be living when certain gravel pits are exhausted by his trustees is not certain to vest within 21 years despite uncontradicted testimony that the pits would probably be exhausted in three to four years and that they actually were worked out in six years, the litigation taking place after this event.[7]

5 GRAY, THE RULE AGAINST PERPETUITIES (4th ed., 1942).

6 See Will of Walker, (1950) 258 Wis. 65, 45 N.W. 2d 94, holding that if the trustees have a power of sale there is no "suspension of the power of Alienation" (the Wisconsin statutory test, superseding the common law rule) and that such a power will be implied if it is not expressly given.

7 In re Wood, [1894] 3 Ch. 381. Note that the court had control over the action of the trustees and could compel them to move faster if they faltered.

b. A ten-year lease of a civic auditorium to commence on completion of the building, which the municipality covenanted to prosecute in good faith and with due diligence, was void since the building might not be completed within 21 years.[8]

c. In a gift to A. for life, remainder to A.'s widow for life, remainder to A.'s issue surviving him and his widow, the remainder to issue is void since A. might marry a woman who was unborn at the date of the gift. (This is the case of the Unborn Widow. There is no report of an actual case where the necessary sequence of events occurred; but there are many where the possibility that it might have occurred has destroyed a perfectly reasonable disposition.)[9]

d. Oddly enough, a gift to the children of A. who shall reach the age of 25 is valid if A. is "proved" to be dead. But death of any individual at any particular time is not certain. Any life insurance attorney will testify to the number of cases in which fraudulent claims under life policies are made upon false allegations of death. Many doubted that Hitler died in the bunker in Berlin or that Ivar Krueger's was the body that was cremated in Paris. Soldiers deemed dead have re-appeared to the discomfiture of wives who have remarried. In 1909 one Kumar Ramendra Narayan Roy was believed to have been cremated in Darjeeling; but he reappeared some decades later and was awarded his estates after a trial lasting 608 days.[10]

2. The conclusive presumption that any male or female can procreate or bear children at any age. (The next heading in this paper makes some observations on this).

3. The all-or-nothing rule under which the whole gift to a class will fail if the gift to any member of the class is void.[11] Thus:

a. In a gift to A. for life, remainder to his children who shall reach 25, the entire remainder is void due to the possibility that A.

[8] Haggerty v. City of Oakland, (1958) 161 Cal. App. 2d 407, 326 P. 2d 957. This decision produced near-panic among attorneys for chain stores who had advised their clients to take leases on stores in "shopping centres" which were in process of construction. I obtained access to the standard form of lease of a well known chain store; it covered everything under the sun in many complex paragraphs, but no protection against the Haggerty Case.

[9] See MORRIS & LEACH, *op. cit.*, 72 *et seq.*

[10] Devi v. Kumar Ramendra Narayan Roy, [1946] A.C. 508.

[11] Leake v. Robinson, (1817) 2 Mer. 363, 35 E.R. 979. I did my best to knock this out in Leach, *The Rule against Perpetuities and Gifts to Classes,* (1938) 51 HARV. L. REV. 1329. After being turned down by a 1940 Kansas case my arguments ultimately bore fruit in Carter v. Berry, (1962) 140 So. 2d 843, in which the Supreme Court of Mississippi expressly rejected Leake v. Robinson.

might have a child after the date of the gift and that this child might be less than four years old at A.'s death.

4. The requirement that any gift be viewed from the date of creation of the interest on the basis of possibilities then existing rather than on the basis of the actual events that occurred before termination of the preceding estates or at the time of litigation. This might-have-been rule forbids the court to wait and see what happens to determine whether there is any actual vesting beyond the period of perpetuities.

5. The dogma that if the Rule is violated the offending interest is wholly stricken out instead of being cut down to a size which will not offend the Rule. Most courts refuse to exercise a *cy-près* jurisdiction with which they are quite familiar in the law of charitable trusts.[12]

Short Course in Obstetrics—Geriatric, Infantile, and Post-Mortem.

It is the dogma of the Rule that any person, male or female, can bear or procreate children at any age as long as he or she lives (plus a period of gestation for males) and without regard to physical condition or medical history. There is a lot of nonsense in this, but advances in genetic science bring it about that in 1963 it is not, in some respects, as nonsensical as it used to be.

Can a woman of 70 bear children? The Bible records that Sarah bore Isaac to Abraham at her age of 90, although the courts that mention this do not usually add that "Abraham fell upon his face and laughed" when the Lord told him this would happen.[13] *Jee v. Audley*[14] is the fountainhead of authority that women of any advanced age are conclusively presumed to be able to bear children. Critics have derided this holding for decades, though few have done anything to remedy it. Now, however, the geneticists may be making things more difficult for us. Oral contraceptive pills have been developed which prevent ovulation. On the authority of Dr. C. A. Douglas Ringrose of the Royal Alexandra Hospital, Edmonton, Alberta, it appears that (a) a woman at maturity has two ovaries, each containing about 200 ova, (b) that the menopause comes when the 400 ova have been used up, one a month, in the process of ovulation and menstruation, (c) that the pills, by preventing ovulation, also prevent the depletion of the supply of ova,

12 The only exceptions that have come to my attention are Edgerly v. Barker, (1891) 66 N.H. 434, 31 A. 900, and Carter v. Berry. In each case age contingencies in excess of 21 were cut down to 21 to save the gift.

13 Genesis, xvii, 15 *et seq.*

14 (1787) 1 Cox Ch. 324, 29 E.R. 1186.

and (d) therefore, a woman of advanced age who has been using the pills may still retain an ample supply of ova, ovulation may be resumed, and she may bear a child. He labels this "speculation," but he considered the matter worthy of note at a meeting of the American College of Surgeons.[15]

Can a girl of five bear a child? This question was raised in *Re Gaite's Will Trusts*.[16] Roxburgh J. skirted the problem on grounds which Dr. Morris and I have criticized,[17] but he seemed to feel bound by authority not to deny the possibility. And indeed, scientifically, he may be right. On 14th May 1939, in Lima, Peru, a very young girl, one Lina Medina, gave birth to a 6½-pound boy. The birth was scientifically authenticated, but there was some doubt about her age; medical experts differed on the basis of examining her. The lowest conclusion of the various experts was 5 years, the highest 9.[18]

Can a man have a child more than the period of gestation after his death? An affirmative answer must be given. One of the medical aspects of the American astronaut programme is designed to protect the issue of the astronauts from the genetic effects of ionizing radiation in space. This is done by creating a sperm bank to which the astronauts make contributions before their space flights. The contributions are deep frozen and thus preserved for later use, a process that has been familiar for years in getting maximum utility out of pedigreed bulls. Of course the intent is that the unfrozen sperm should be used to enable the astronauts to procreate children during their lifetimes, but the possibility exists that the sperm can be similarly utilized for a considerable period after death.[19]

What do we do about these late developments? My answer is: Forget them. The Rule against Perpetuities, as well as any other rule of law, must adapt itself to advances in science. Remember that advances in general medical science have doubled or trebled the life expectancy of men and women since the days of Lord Nottingham, but no one has yet suggested that we should therefore restrict the period of the Rule to one-half or one-third of lives in being. Can anyone see a possible threat to the public weal by these recent activities

15 N.Y. Herald Tribune, 19th October 1962.

16 [1949] 1 All E.R. 459.

17 MORRIS & LEACH, *op. cit.*, at 84-86.

18 The references appear at MORRIS & LEACH, *op. cit.*, 85 n. Mother and child are still living: The Miami Herald, 21st October 1962.

19 I have commented on the perpetuities effects of this new development in (1962) 48 A.B.A.J. 942. The scientific authority for this is Dr. Hermann Muller of the University of Indiana who received the Nobel Prize in Physiology in 1946.

of our geneticists? Besides, the "wait and see" provision of the 1962 Act will take care of actual situations that arise.

Obstacles to Legislative Reform.

Why should decades, nay centuries, have been allowed to pass without legislation which would remove the widely-acknowledged defects in perpetuities doctrine? There are, I believe, two answers: (a) apathy, (b) the influence of John Chipman Gray.

There is no legislative sex appeal in perpetuities legislation; no votes will be won or lost by any legislator's activity or inactivity in this matter. Further, there are no special interest groups, such as one finds in tax law or labour law, to exert pressure for reform. Most American legislation on the subject has been the result of uncompensated and often frustrating activity by university law faculties, and surely members of the faculty of the University of Western Australia are entitled to a large share of the credit for the 1962 Act.

Gray's RULE AGAINST PERPETUITIES, first published in 1886, was widely heralded as one of the most distinguished law texts of the nineteenth century; and indeed this evaluation was well justified. But it must be recalled that Gray was a product of his era. I do not doubt that he was brought up on Blackstone, and surely his attitude toward law was Blackstonian. He would doubtless have subscribed to the following quotation from Blackstone's reversal of Lord Mansfield in *Perrin v. Blake*:

> "The law of real property in this country is now formed into a fine artificial system, full of unseen connections and nice dependencies, and he that breaks one link of the chain endangers the dissolution of the whole."[20]

Dean Christopher Columbus Langdell of Harvard Law School, the great innovator who introduced the case method in legal education, was fairly representative of the predominant school of thought of Gray's day when, in discussing the world-shaking problem of when an acceptance by mail takes effect, he said:

> "It has been claimed that the purpose of substantial justice, and the interests of the contracting parties as understood by themselves, will be best served by holding that the contract is complete the moment that the letter of acceptance is mailed; and cases have been put to show that the contrary view would produce not only unjust but absurd results. The true answer to this argument is that it is irrelevant."[21]

20 HARGRAVE, TRACTS RELATIVE TO THE LAW OF ENGLAND, 489 (1787).
21 LANGDELL, SUMMARY OF THE LAW OF CONTRACTS, 188 (1880).

It was The Law that counted, not what it did to people, not "substantial justice", and not "the interests of the parties." Gray believed that the Rule against Perpetuities should be applied "remorselessly" (his word) and that any deviation from the dogma of the Rule, including all the aberrations, was heresy. He devoted sixteen pages to castigating the New Hampshire decision in *Edgerly v. Barker* which reduced an age contingency to 21 to save the gift.[22] Yet of course we know that this is exactly what was done in section 163 of the Law of Property Act 1925 (based on a recommendation dating from 1832) and what has been done in Western Australia and half a dozen American states.

Gray's mien was that of an Old Testament prophet, complete with beard and an expression of unrelaxed severity. And he certainly dominated legal thought in America in those fields of the law to which he devoted himself. He still has his disciples,[23] though not at Harvard. I am sure that I shall have an unpleasant quarter hour when and if Gray and I meet in Valhalla. Yet I must risk this and I am delighted that the Western Australian legislature has not recoiled at the prospect.

Alternatives in Statutory Reform.

Having diagnosed the evils that have crept into the Rule, there should be little difficulty in eradicating them. Certain measures immediately suggest themselves:

a. Eliminate the might-have-been rule and permit the court to "wait and see" whether, as events turn out, there are still contingent interests which may vest beyond the period of perpetuities. (The 1962 Act does this in section 7).[24]

b. Give the court a *cy-près* jurisdiction to cut down to size an offending limitation. (The 1962 Act in section 9 does this only as to age contingencies over 21).

c. Combine (a) and (b). This is my preference, and it produces a statute (enacted in Vermont and Kentucky) of great simplicity:[25]

22 GRAY, *op. cit.*, 752-766.

23 I have listed them and answered, I hope, their arguments in Leach, *Perpetuities Legislation: Hail, Pennsylvania,* (1960) 108 U. OF PA. L. REV. 1124.

24 Several American states—Pennsylvania, Massachusetts, Maine, Connecticut, Maryland—have adopted various forms of wait-and-see statutes between 1947 and 1960. For details, see the appendices to MORRIS & LEACH, *op. cit.*

25 Vt. Stat. Ann. tit. 27, s.501, enacted in 1957 by No. 177; Ky. Acts, 1960, ch.167. The Kentucky statute adds a requirement that the measuring lives must "have a causal relationship to the vesting or failure of the interest." This addition strikes me as being helpful though not necessary.

"Any interest in real or personal property which would violate the rule against perpetuities shall be reformed, within the limits of that rule, to approximate most closely the intention of the creator of the interest. In determining whether an interest would violate said rule and in reforming an interest the period of perpetuities shall be measured by actual rather than possible events."

d. Knock out the rule that a class gift is wholly void if the gift to any member may vest too remotely. (The 1962 Act does this in section 10).

e. Put some realism into the business of child-bearing by fixing maximum and minimum age presumptions as to procreative capacity and admitting medical evidence to establish incapacity. (The 1962 Act does this in section 6).

f. Knock out the Unborn Widow cases by providing that the widow or widower of a person who is a life in being shall be deemed to be a life in being. (The 1962 Act does this in section 12).[26]

Further Commentary on the 1962 Act.

The reader will not have failed to note that I would prefer a *cy-près*/wait-and-see statute on the Vermont-Kentucky model above quoted. But I have great admiration for the Western Australian Act, for the skill of its draftsmen, and for the understanding of the legislature. I am afraid that if it were presented in any American state it would be howled down as incomprehensibly technical. In addition to the matters above mentioned it does the following things, some of which would be superfluous in America.

It permits the draftsman of an instrument to create his own period of perpetuities as "such period of years not exceeding eighty as may be specified in the instrument" (section 5). This is an attempt to wean the profession away from the "royal lives clauses" which have caused such great practical difficulties.[27]

It gets away from the "absolute certainty" criterion, at least in child-bearing matters, by substituting "a high degree of improbability" (section 6).

It permits a trustee or "any person interested" to call upon the Court for a declaration as to validity, but permits the Court to refuse

[26] This is an ingenious implementation of Recommendation No. 10 of the Law Reform Committee Report, *op. cit.*, 31.

[27] See MORRIS & LEACH, *op. cit.*, 61.

to act where validity cannot be determined at that time (section 8). I am led to wonder whether the tax authorities come within the definition of "any person interested," for it is increasingly true in the United States that those charged with the collection of death duties raise perpetuities issues which would never be raised by the family.[28]

It provides the order in which the various reforms shall be applied, as follows: First, the wait-and-see principle, second, the age contingency reduction, and third, the class-gift saving provision (section 11).[29]

It eliminates the doctrine of "infectious invalidity" by providing that a limitation which is of itself valid is not rendered invalid by the invalidity of a prior or subsequent limitation (section 13).

It validates options to purchase by a lessee which are limited to the period of the lease plus one year. As to other options which by their terms might last longer than twenty-one years, it validates them for 21 years and then terminates them (section 14).[30]

It subjects possibilities of reverter and rights of entry for conditions broken to the Rule against Perpetuities as amended by the Act (section 15).

It repeals the ill-starred Thellusson Act, 39 & 40 Geo. III, c. 98, and provides that an accumulation is valid if the disposition of the accumulated income is, or may be, valid (section 17).[31]

28 For example, suppose A. creates an irrevocable inter vivos trust in which a remainder is subject to attack under the Rule. If the attack is successful, there is a reversion in A. and the assets are taxable in his estate at death. For a case in which only the tax authorities were challenging the interest, see Smith's Estate v. Commissioner of Internal Revenue, (1944) 140 F.2d 759 (C.C.A. 3d Circuit).

29 This was a matter of dispute in the Law Reform Committee Report, *op. cit.*, 34-35.

30 It should be noted that this is a limited application of the *cy-près* principle in cases which were previously dominated by London & S.W. Ry. v. Gomm, (1882) 20 Ch. D. 562.

31 There has been an amusing history on accumulations statutes in the United States. In 1830 a New York legislature put very stringent limitations on directions to accumulate; but the neighbouring states of Connecticut and New Jersey did not. Result: Wealthy New Yorkers set up inter vivos trusts with Connecticut or New Jersey banks instead of with New York banks. To stem this flight of capital, which was becoming increasingly acute, the New York restrictions were removed in 1959. See N.Y. Real Property Law, ss. 61-63; N.Y. Personal Property Law, ss. 16-17a; an article by Professor Richard B. Powell of the Columbia Law School in (1958) 58 COLUM. L. REV. 1196, 1206. The decline of accumulations statutes in the few other states which had them is detailed in LEACH & LOGAN, FUTURE INTERESTS AND ESTATE PLANNING, (1961) 901.

It knocks out (if it ever existed in Western Australia) the prohibition of a "possibility on a possibility", usually known as the Rule in *Whitby v. Mitchell* (section 18).[32]

And finally it protects pension (and similar) trusts from the operation of the Rule (section 19).

I have not the temerity to discuss in detail the application and interpretation of the provisions of the 1962 Act, but the Western Australian courts should derive great assistance from the detailed discussion in the Law Reform Committee Report upon which the Act is so obviously based.

One cannot help hoping that this fine legislative product will stir the imagination, and even the desire for emulation, at Westminster and elsewhere in the Commonwealth.

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[32] See MORRIS & LEACH, *op. cit.*, 256 *et seq.*

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