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Rule Against Perpetuities - Recent Legislation in Massachusetts, Maine and Connecticut

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RECENT LEGISLATION

RULE AGAINST PERPETUITIES—RECENT LEGISLATION IN MASSACHUSETTS, MAINE AND CONNECTICUT—Three very significant statutes dealing with the rule against perpetuities and containing identical language in their important provisions[1] have recently been passed in Massachusetts, Maine, and Connecticut. There are three basic provisions. (1) In applying the rule against perpetuities to an interest limited to take effect at or after the termination of one or more life estates in, or lives of, persons in being when the period of the rule begins to run, the validity of the interest shall be determined on the basis of the facts existing at the termination of the life estates or lives. (2) If any interest would violate the rule against perpetuities because it is contingent upon any person attaining or failing to attain an age in excess of 21, the age contingency shall be reduced to 21 as to all persons subject to the same age contingency. (3) A fee simple determinable or fee simple subject to a condition subsequent shall become a fee simple absolute if the specified contingency does not occur within 30 years from the date when the fee simple determinable or fee simple subject to condition subsequent becomes possessory. This also applies when the succeeding interest is limited to a person other than the grantor or his heirs. However, if such a fee is limited so that the specified contingency must happen within the period of the rule against perpetuities, such interests shall take effect as limited. This provision does not apply where the fee interest and the succeeding interests are both given for public, charitable, or religious purposes. Mass. Laws Ann. (1955) c. 184A, §§1 to 3; Me. Rev. Stat. (1954; Supp. 1955) c. 160, §§27 to 29; Conn. Laws (1955) p. 269.[2]

With the possible exception of a recent Pennsylvania statute[3] the legislation under consideration is probably the most significant statutory revision of the rule against perpetuities since the passage of the "two lives" statute in New York in 1830.[4] The basic innovation of the first provision of the principal statutes is that the validity of interests is to be determined on the basis of actual rather than possible events. It thus seeks to avoid certain pitfalls which, because of their rarity of occurrence, have often been

[1] The language and provisions of the statutes are identical except that Connecticut has no severability clause and Connecticut and Maine have provisions as to what instruments the statute affects whereas the Massachusetts statute does not.

[2] At the request of a subcommittee of the Massachusetts legislature, Professor W. Barton Leach of the Harvard Law School prepared an explanation of the statute as an aid to its interpretation. See Leach, "Perpetuities Legislation, Massachusetts Style," 67 HARV. L. REV. 1349 at 1356 (1954).

[3] Pa. Stat. Ann. (Purdon, 1950) tit. 20, §§301.4, 301.5, passed in 1947.

[4] Statutory rules differing from the common law rule against perpetuities exist in about fourteen states, exclusive of the principal legislation. Five states which once had statutory rules have returned to the common law. Many states also have statutes directed at specific problems. E.g.: Ala. Code (1941; Supp. 1953) tit. 47, §152(1) (pension trust exempted from rule against perpetuities); Ill. Rev. Stat. (1955) c. 30, §37b to 37h (50-year limitation on possibilities of reverter and powers of termination). See, generally, Leach, "Perpetuities Legislation, Massachusetts Style," 67 HARV. L. REV. 1349 (1954); 48 MICH. L. REV. 1158 (1950); 6 AMERICAN LAW OF PROPERTY, part 25 (1952); 4 PROPERTY RESTATEMENT, Appendix (1944).

overlooked by the unwary, for example, the unborn widow,[5] the fertile octogenarian,[6] the precocious toddler,[7] and the administrative contingency.[8] Because of the harshness of the rule's operation when applied to these cases, there is legitimate ground for advocating revision. However, the principal legislation introduces a modified version of the "second look" or "wait and see" doctrine[9] which brings new problems of its own.[10] Under these statutes the determination of the validity of an interest is deferred until the termination of certain life estates or lives in being. Thus, there is a period of time during which it cannot be ascertained to whom the future interest belongs. This is contrary to the custom of our legal system to consider the validity of an interest at the time it arises,[11] and as a natural consequence it hinders the alienability of land.[12] It also creates problems as to who can sue for waste, embezzlement of trust funds, and other wrongs in order to protect a future interest.[13] While the purpose of this provision may be desirable, it should be possible to devise presumptions to avoid specific pitfalls without introducing the "wait and see" doctrine.[14]

The two remaining sections do not seem to contain any objectionable provisions. The second section of these statutes is modeled after the English Law of Property Act of 1925[15] and is a limited introduction of the cy pres doctrine which the courts apply to a charitable trust that fails. Some writers have suggested a full application of the cy pres doctrine,[16] but, evidently, this was not attempted by the draftsmen of the Massachusetts legislation for

5 Re Curryer's Will Trusts, [1938] Ch. 952; Perkins v. Iglehart, 183 Md. 520, 39 A. (2d) 672 (1944). But in Willis v. Hendry, 127 Conn. 653, 20 A. (2d) 375 (1941), the will was construed to refer to the wife in being when the will was executed.

6 Jee v. Audley, [1787] 1 Cox Ch. 324 (70-year old woman presumed capable of having issue). *Contra,* Worcester County Trust Co. v. Marble, 316 Mass. 294, 55 N.E. (2d) 446 (1944).

7 See Re Gaite's Will Trusts, [1949] 1 All E.R. 459.

8 Estate of Campbell, 28 Cal. App. (2d) 102, 82 P. (2d) 22 (1938) (probate of will might not be within the period of the rule).

9 This doctrine is followed by Pa. Stat. Ann. (Purdon, 1950) tit. 20, §301, which directs that the validity of interests be determined by actual rather than possible events. It has been suggested that this doctrine is also supported by Sears v. Coolidge, 329 Mass. 340, 108 N.E. (2d) 563 (1952) and Merchants Nat. Bank v. Curtis, 98 N.H. 225, 97 A. (2d) 207 (1953). See Leach, "Perpetuities Legislation, Massachusetts Style," 67 HARV. L. REV. 1349 at 1352 (1954). But see Simes, "Is the Rule Against Perpetuities Doomed? The 'Wait and See' Doctrine," 52 MICH. L. REV. 179 at 181 (1953).

10 See Simes, "Is the Rule Against Perpetuities Doomed? The 'Wait and See' Doctrine," 52 MICH. L. REV. 179 (1953).

11 Id. at 184.

12 Id. at 188.

13 Id. at 185.

14 E.g.: a presumption in the unborn widow case that the testator meant the wife in being when the will was executed; a presumption in the administrative contingency case that the will will be probated within the period of the rule against perpetuities, etc.

15 15 Geo. 5, c. 20, §163 (1925). For the same result at common law, see Edgerly v. Barker, 66 N.H. 434, 31 A. 900 (1891).

16 Quarles, "The Cy Pres Doctrine: Its Application to Cases Involving the Rule Against Perpetuities and Trusts for Accumulation," 21 N.Y. UNIV. L.Q. REV. 385 (1946); Simes, "The Policy Against Perpetuities," 103 UNIV. PA. L. REV. 707 at 733 (1955).

fear that such a change would be too radical to pass the legislature.[17] By easing the harshness of the common law rule against perpetuities, the principal statutes probably come much nearer the testator's intent and do not add the new complications embodied in the "wait and see" doctrine.

The third provision, which puts a 30-year limit on possibilities of reverter and powers of termination, is also a step toward making titles to land more marketable. Historically, the rule against perpetuities was never applied to these interests[18] because they antedated the rule.[19] Thus, if an interest was given to a church so long as the land was used for church purposes, the property could be tied up forever.[20] Other jurisdictions have passed statutes dealing with this particular problem[21] and the English cases have rejected this rule.[22]

This is basically a moderate piece of legislation designed for easy adoption. It presses neither the "wait and see" doctrine nor the cy pres doctrine to the fullest extent. But neither does it deal with vested interests which can also prevent the free marketability of land.[23] Before advocating its adoption, however, it may be well to draft, as a standard for comparison, a statute to accomplish the same objectives but which does not utilize the "wait and see" doctrine.[24]

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17 Leach, "Perpetuities Legislation, Massachusetts Style," 67 HARV. L. REV. 1349 at 1353 (1954).

18 Fletcher v. Ferrill, 216 Ark. 583, 227 S.W. (2d) 448 (1950) (possibility of reverter); Hinton v. Gilbert, 221 Ala. 309, 128 S. 604 (1930) (power of termination). See also 2 SIMES, FUTURE INTERESTS §§506, 507 (1936); 4 PROPERTY RESTATEMENT §372 (1944).

19 4 PROPERTY RESTATEMENT §372, comment *a* (1944).

20 See Brown v. Independent Baptist Church, 325 Mass. 645, 91 N.E. (2d) 922 (1950).

21 E.g.: Ill. Rev. Stat. (1955) c. 30, §37(e); Minn. Stat. (1953) §500.20(2); R.I. Acts (1953) c. 3213.

22 In re Trustees of Hollis' Hospital, [1899] 2 Ch. 540 (power of termination); Hopper v. Liverpool, 88 Sol. J. 213 (1944) (possibility of reverter). It would seem that the decision in the Hopper case is in conflict with at least one single-judge decision of the High Court. In re Chardon, [1928] 1 Ch. 464. See 6 AMERICAN LAW OF PROPERTY §24.62 (1952). See also 15 Geo. 5, c. 20, §4(3) (1925), which applies the rule against perpetuities to powers of termination.

23 Professor Simes advocates an extension of the rule to vested interests in "The Policy Against perpetuities," 103 UNIV. PA. L. REV. 707 at 737 (1955).

24 See Simes, "The Policy Against Perpetuities," 103 UNIV. PA. L. REV. 707 (1955); Simes, "Is the Rule Against Perpetuities Doomed? The 'Wait and See' Doctrine," 52 MICH. L. REV. 179 (1953).