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## Morris & Leach: The Rule Against Perpetuities

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## RECENT BOOKS

THE RULE AGAINST PERPETUITIES. By *J. H. C. Morris* and *W. Barton Leach*. London: Stevens & Sons. 1956. Pp. xviii, 336. \$8.90.

It is more than seventy years since the publication of a book on the Rule Against Perpetuities intended for the use of lawyers of the British Commonwealth. That period has seen John Chipman Gray's definitive exposition of the Rule, basic statutory changes in the English law of property, and a vast accumulation of precedent by the courts of the Commonwealth and the United States. The publication of such a book by a competent English scholar and a leading American authority is an event of major importance.

The preface states that the book, in its present form, was written by Dr. Morris. The first nine chapters (Introduction, Vesting, Elements of the Rule, Application of the Rule to Gifts to Classes, Application of the Rule to Powers of Appointment, Effect of a Violation of the Rule, Application of the Rule to Charitable Gifts, Application of the Rule to Various Types of Interest, Construction and the Rule) are based mainly on the *American Law of Property*<sup>1</sup> and on articles previously published by the authors.<sup>2</sup> These chapters were "read and commented on" by Professor Leach. The remaining three chapters (The Rule in *Whitby v. Mitchell* and the *Cy-près* Doctrine Before 1926, The Rule Against Accumulations, Trust for Non-charitable Purposes) are the work of Dr. Morris alone. Dr. Morris has been remarkably successful in blending these diverse materials into a unified treatise while preserving Professor Leach's pungent style and adapting his illustrations (set off typographically from the text and based on actual cases or vivid hypothetical situations) to English conveyancing practices. The work attempts to be exhaustive in the citation of English, Irish and British Commonwealth decisions.<sup>3</sup> It is selective in the use of United States authority but contains numerous citations to the American Law Institute *Restatement of the Law* and to treatises and law review articles published in this country. It must be somewhat novel to British readers to find an English treatise suggesting that legislatures of American states have improved on Parliament (pp. 34, 86-89) and that the courts of Georgia and Missouri have reached sounder conclusions than those of the Court of Appeal. (pp. 231, 245)

<sup>1</sup> Leach and Tudor, "The Common Law Rule Against Perpetuities," 6 AMERICAN LAW OF PROPERTY 1-64 (1952).

<sup>2</sup> Notably, Leach, "Powers of Sale in Trustees and the Rule Against Perpetuities," 47 HARV. L. REV. 948 (1934); Leach, "The Rule Against Perpetuities and Gifts to Classes," 51 HARV. L. REV. 1329 (1938); Morris and Leach, "Options to Purchase and the Rule Against Perpetuities," 18 CONV. (N.S.) 576 (1954); Morris, "Ulterior Limitations and the Rule Against Perpetuities," 10 CAMB. L.J. 392 (1950); Morris, "The Rule Against Perpetuities and the Rule in *Andrews v. Partington*," 70 L.Q. REV. 61 (1954).

<sup>3</sup> The Table of Cases lists approximately 957 English cases, 65 Irish, 199 from other countries of the Commonwealth and 46 from the United States.

The authors' exposition of the law as it is leaves little to be desired. It is lucid, almost invariably accurate, well illustrated and as simple as the abstruse nature of the subject permits. At one point the authors state that, to comply with the Rule Against Perpetuities, an interest must be certain to become "vested" within the perpetuity period.<sup>4</sup> This is, of course, inaccurate. If it were correct, no interest could be limited to a person not in being. What the Rule requires is that a future interest be incapable of vesting at a time beyond the perpetuity period. Although they are careful to admit the dearth of authority on the question, the authors are perhaps a little too positive in asserting that all facts occurring before the expiration of a special power of appointment may be considered in determining the validity of a gift in default of appointment. (pp. 152-155) In discussing the application of the Rule Against Perpetuities to possibilities of reverter and rights of entry on breach of condition subsequent the authors appear to assume that, apart from the Rule, English law permits the use of these devices to impose use restrictions in conveyances to private persons. (p. 211, illus. 18, 19) The soundness of this assumption is open to question.<sup>5</sup>

In the *American Law of Property* Professor Leach conceded that either the Rule Against Perpetuities or an associated rule invalidates provisions making private trusts indestructible for longer than the perpetuity period.<sup>6</sup> He prescinded from this aspect of the Rule on the ground that Professor Scott was about to treat it fully in a new edition of his treatise on trusts.<sup>7</sup> In the present work Dr. Morris has included an elaborate chapter (c. 12) on the permissible duration of honorary trust in which he takes the position that it is an associated rule rather than the Rule Against Perpetuities itself which limits their duration. (p. 314) In another place he appears to state that the Rule itself limits the duration of restraints upon anticipation imposed on married women. (p. 224) He omits discussion of this proposition, however, on the ground that such restraints "have now been abolished in England and are rarely encountered elsewhere." Although *Claflin v. Claflin*<sup>8</sup> and the dictum in *Nichols v. Eaton*<sup>9</sup> are not followed in the British Commonwealth, it seems unfortunate that the authors did not choose to discuss the perpetuity problem connected with restraints on termination of trusts for private persons. Such a discussion might well be related to one of the possibility of ameliorating the harshness of the Rule Against Perpetuities by allowing interests which violate it to be enforced in part.

<sup>4</sup> P. 37. The passage is a paraphrase of §24.18, AMERICAN LAW OF PROPERTY, which is similarly inaccurate. The Rule is correctly stated in the quotation from Gray on page 50.

<sup>5</sup> CHESHIRE, MODERN LAW OF REAL PROPERTY, 6th ed., 522-523 (1949); Fratcher, "Defeasance as a Restrictive Device in Michigan," 52 MICH. L. REV. 505 (1954). Massachusetts law does permit such use.

<sup>6</sup> Leach and Tudor, "The Common Law Rule Against Perpetuities," 6 AMERICAN LAW OF PROPERTY §24.1 (1952).

<sup>7</sup> Id., §24.67.

<sup>8</sup> 149 Mass. 19, 20 N.E. 454 (1889).

<sup>9</sup> 91 U.S. 716 (1875).

The authors have criticized Professor John Chipman Gray on the ground that he stressed history and logic and seldom reexamined the basis of rules from the standpoint of modern requirements.<sup>10</sup> By "logic" they appear to mean the solution of new problems by deductive reasoning from principles laid down in old cases. Their book is certainly not subject to this criticism. The preface states:

"Its main emphasis is placed, not on history and logic, but on the way the Rule functions in its modern environment and fulfils the needs of modern society. A feature of the book to which we attach some importance is that it offers critical comment, segregated and designated as such, to assist the profession in developing a law of perpetuities adapted to modern needs and free from the defects of existing doctrine."

This is the most valuable feature of the book for scholars in the United States.

The authors do not propose to abolish the Rule Against Perpetuities or to change its nature from a rule against remoteness of vesting. They do propose a number of modifications designed to mitigate the harshness or inconvenience of its present operation. As to the perpetuity period, they suggest legislative limitation of the number of permissible measuring lives.<sup>11</sup> They also suggest that the twenty-one year period beyond lives in being be increased by at least four years.<sup>12</sup> As to the determination of whether an interest is certain not to vest beyond the period, the authors suggest that such contingencies as "when my will is proved" or "when my estate is realized" ought not to be deemed too remote. (pp. 73-74) They propose legislative abolition of the conclusiveness of the presumption that everyone is capable of having children, regardless of age or physical condition, and favor the English courts following the tendency of the American in construing limitations to the children of a person known to the testator to be very old as not including possible afterborn children. (pp. 74-81) They propose abolition of the "all or nothing rule" under which a gift to a class is wholly void if the interest of any possible member of the class may possibly vest beyond the perpetuity period although the interests of some members are already vested or certain to vest within the period. (pp. 118-

<sup>10</sup> Leach and Tudor, "The Common Law Rule Against Perpetuities," 6 AMERICAN LAW OF PROPERTY §24.1 (1952); Morris, Book Review, 72 L.Q. REV. 137 (1956). Compare T. C. Williams' commendation of Gray for "bold and original criticism of the authorities." Book Review, 22 L.Q. REV. 323 at 324 (1906). In the Preface to the first edition of THE RULE AGAINST PERPETUITIES (1886) Professor Gray criticized R. G. Marsden, the contemporary English authority, for failure to consider history.

<sup>11</sup> Pp. 66-67. Unlike the New York statutes, this change is not proposed with a view to shortening the period but merely to avoid the inconvenience and expense of determining the fact of the deaths of a hundred or more persons.

<sup>12</sup> Pp. 67-68. As to non-commercial dispositions, the authors cite with apparent approval the Wisconsin legislative extension of the period to lives in being plus thirty years but consider the Prince Edward Island extension to lives in being plus sixty years excessive. As to commercial transactions they suggest a different period in gross for each type and that the disposition be void only as to the excess instead of *in toto*. The same suggestion, that invalidity be only as to the excess, is made as to the rule limiting the duration of honorary trusts. P. 311.

125) They think that the exemption from the Rule of shifting interests from one charity to another should be limited to those in which the event upon which the shift is to take place is relevant to the fulfilment of the charitable purpose. (pp. 185-188) They suggest legislation wholly exempting options and administrative powers from the operation of the Rule. (pp. 220, 232) On the other hand, the authors think that possibilities of reverter and rights of entry on breach of condition subsequent should be subjected to the Rule with, possibly, legislative permission for such interests to be enforceable for thirty years after the fee simple becomes possessory. (pp. 206-211) Except, possibly, that relating to the conclusive presumption of ability to procreate, the foregoing proposals are constructive, conservative and unlikely to evoke much opposition except inertia.

Under the common law Rule Against Perpetuities an interest is void if, at the time when the instrument creating it becomes effective, any possible combination of events could cause it to vest beyond the perpetuity period.<sup>13</sup> This is true even though the interest actually vests within the period and before its validity is litigated. Because the Rule is thus applied on the basis of possibilities rather than actualities and so strikes down as "perpetuities" interests which did not in fact tie up property for an excessive period, an English writer proposed fifty years ago that the Rule be modified to permit interests which actually vest within the period to stand.<sup>14</sup> This modification was adopted in Florida by judicial decision and in Pennsylvania by statute.<sup>15</sup> For the past five years Professor Leach has waged a vigorous campaign for its adoption elsewhere.<sup>16</sup> Professor Lewis M. Simes has opposed such a modification of the Rule on two grounds: (1) it would postpone determination of the validity of interests for an undesirably long time after the instrument creating them became effective, rendering the property involved practically inalienable in the meantime, and (2) it would unsettle the rules for determining the measuring lives in computing the period of the Rule Against Perpetuities.<sup>17</sup> Professor Leach's original pro-

<sup>13</sup> There are exceptions in the case of destructible interests, interests created by the exercise of a power of appointment and, possibly, interests limited in default of exercise of a power of appointment.

<sup>14</sup> Sweet, "The Monstrous Regiment of the Rule Against Perpetuities," 18 JURID. REV. 132, 158 (1906).

<sup>15</sup> *Story v. First Nat. Bank & Trust Co.*, 115 Fla. 436, 156 S. 101 (1934); Pennsylvania Estates Act, 1947, §4, Pa. Stat. Ann. (1950) tit. 20, §301.4. See also *Merchants Nat. Bank v. Curtis*, 98 N.H. 225, 97 A. (2d) 207 (1953).

<sup>16</sup> Leach, "Perpetuities in Perspective: Ending the Rule's Reign of Terror," 65 HARV. L. REV. 721 at 728-730, 747-749 (1952); Leach, "Perpetuities: Staying the Slaughter of the Innocents," 68 L.Q. REV. 35, 42-44, 58-59 (1952); Leach and Tudor, "The Common Law Rule Against Perpetuities," 6 AMERICAN LAW OF PROPERTY §§24.11, 24.21 (1952); Leach, "Reform of Rule Against Perpetuities: A Proposed Statute," 92 TRUSTS AND ESTATES 769 (1953); Leach, "Perpetuities Legislation, Massachusetts Style," 67 HARV. L. REV. 1349 (1954); Leach, "Perpetuities Reform by Legislation," 70 L.Q. REV. 478 (1954); Leach, "An Act Modifying and Clarifying the Rule Against Perpetuities," 39 MASS. L.Q. 15 (Oct. 1954).

<sup>17</sup> Simes, "Is the Rule Against Perpetuities Doomed? The 'Wait and See' Doctrine," 52 MICH. L. REV. 179 (1953); Simes, "Reform of Rule Against Perpetuities: Qualified Endorsement," 92 TRUSTS AND ESTATES 770 (1953); Simes, "The Policy Against Perpetui-

posal on this point was for legislation providing "that the Rule will be applied to any interest on the basis of events which have actually occurred at the termination of preceding interests, not on the basis of events which might have occurred but did not."<sup>18</sup> Probably as a result of Professor Simes' criticisms, the authors of the book under review have narrowed the proposed modification of the Rule Against Perpetuities to one for legislation providing that in applying the Rule to an interest limited to take effect at or after the termination of one or more lives of persons in being when the period commences, the validity of the interest shall be determined on the basis of facts existing at the termination of such lives.<sup>19</sup> Even as so narrowed, this proposed modification of the Rule Against Perpetuities seems undesirable. It should not be necessary to wait for eighty years after a testator's death before the construction and validity of his will can be determined. As Professor Simes has pointed out, in view of the doctrine of "infectious invalidity," the validity of present life estates would not be determinable until their expiration.

Under the so-called Old Rule Against Perpetuities, abolished in England in 1925 and never applied in this country, a limitation to the issue of the unborn taker of a life interest was void. In applying this rule the English courts applied a "cy pres" doctrine similar to, but not identical with, the doctrine of the same name applied in the law of charities. When, because of the Old Rule Against Perpetuities, a limitation to descendants of an unborn life tenant was invalid, the unborn life tenant was given an estate tail if that would approximate the intent of the grantor or testator. Although no similar doctrine has been developed by the English courts under the modern Rule Against Perpetuities, section 163 of the Law of Property Act adopted a cy pres approach to one situation arising under the modern Rule by providing that where vesting of an interest is postponed until a possibly unborn person reaches an age in excess of twenty-one years, the age of twenty-one years shall be substituted for that stated.<sup>20</sup> The American courts have developed a sort of negative cy pres doctrine, known as the doctrine of "infectious invalidity." Under this doctrine, if one interest violates the Rule Against Perpetuities, not only it but other interests limited by the same instrument will be deemed to fail if such failure is deemed to approximate the probable intent which the grantor or testator would have had if he had known that the first interest was void.

In his earlier publications Professor Leach advocated the development of a positive cy pres doctrine in the application of the modern Rule Against Perpetuities. He criticized the present rule that an interest which violates

ties," 103 UNIV. PA. L. REV. 707, 732-733 (1955); SIMES, PUBLIC POLICY AND THE DEAD HAND 65-66, 72-73 (1955).

<sup>18</sup> 65 HARV. L. REV. 747 (1952).

<sup>19</sup> Pp. 83-89. This narrower modification of the Rule is embodied in Massachusetts legislation of 1954 and Connecticut and Maine legislation of 1955.

<sup>20</sup> 15 Geo. 5, c. 20, §163 (Law of Property Act, 1925). The Massachusetts, Connecticut and Maine legislation referred to in the preceding note contains similar provisions.

the Rule is always wholly void and asserted, "Court should have power to apply the Rule Against Perpetuities by striking down only those aspects of a gift which exceed permissible limits and then 'framing a scheme' (to use the terminology of *cy pres*) which will most nearly approximate the estate plan of the testator or settlor while still remaining within the limits of the Rule."<sup>21</sup>

Although they state that "the introduction of a general *cy pres* jurisdiction would probably render all other statutory changes unnecessary," (p. 34) the authors, in the book under review, suggest that its adoption would be impracticable because it is likely to prove "unpopular with the judges who would be called upon to exercise it." (p. 35) If this is true, it does not follow that the judges would object to statutory provisions like section 163 of the Law of Property Act, providing *cy pres* solutions for specific common situations arising under the Rule. Dr. Morris even opposes the doctrine of "infectious invalidity." (pp. 125, 163-165) This virtual abandonment of the proposal for a positive *cy pres* doctrine under the Rule Against Perpetuities contrasts oddly with the authors' views as to the "all or nothing" rule (pp. 118-125) and their strong preference for the view that the effect of the Rule Against Perpetuities may be considered in determining the construction of limitations. (pp. 236-247) It seems unfortunate that two such able proponents of reform should have withdrawn their support from what is probably the most promising proposal for reducing the harshness of the operation of the Rule Against Perpetuities.

This book is a major contribution to the literature of the law. Every British Commonwealth lawyer who deals with property or trusts must have it. American scholars, whether or not they agree with the proposals for reform, will welcome their lucid presentation.

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<sup>21</sup> 65 HARV. L. REV. 736 (1952). Professor Simes favors this proposal. 52 MICH. L. REV. 193 (1953); 92 TRUSTS AND ESTATES 770 (1953); 103 UNIV. PA. L. REV. 728, 733-736 (suggesting a special legislative *cy pres* solution for each common situation); SIMES, PUBLIC POLICY AND THE DEAD HAND 69, 74-79 (1955).