REFORM OF THE RULE AGAINST PERPETUITIES IN WESTERN AUSTRALIA.

While the common law Rule against Perpetuities has been the subject of revision in the United States ever since the New York legislation of 1830,[1] a new movement to reform it has developed during the past ten or fifteen years. Nor have efforts during this period to reform the Rule been limited to the United States. Indeed, one of the most important steps in this direction was taken by the publication in 1956 of the Fourth Report of the English Law Reform Committee, on the Rule against Perpetuities. While this Report did not draft legislation, its proposals were specific and detailed. And though they have not yet been enacted in the form of legislation in England, they have been extremely influential elsewhere in the British Commonwealth. Thus the Law Reform (Property, Perpetuities, and Succession) Act of 1962, enacted in that year by the legislature of Western Australia, in many of its provisions follows the recommendations of the English report.

It is the purpose of this comment to examine the Western Australian Law Reform Act in so far as it modifies the common law Rule against Perpetuities; and to consider it particularly in the light of the proposals of the English Report of 1956.

Criticisms of the common law Rule against Perpetuities, both in England and America, have centred around the following objections to it:—(1) It operates with undue harshness in that, if a limitation violates the Rule, it is wholly void, and cannot be cut down or modified so as to make it comply with the Rule. (2) In considering whether the happening of a contingency might occur beyond the period of the Rule, highly improbable, and sometimes actually impossible, future events are assumed. (3) Certain future interests, such as possibilities of reverter, which are, or may be, entirely outside the Rule, are just as objectionable as those interests which the Rule strikes down.

Both the English proposals and the Western Australian Act contain a number of provisions applicable to the Rule as a whole; and, also, other provisions dealing with very specific problems which have been of rather frequent occurrence. One of the most important of the general provisions is that which introduces the so-called "wait and see" principle. I shall first consider general provisions of the Act,

[1] The New York legislation of 1830 is considered in SIMES AND SMITH, THE LAW OF FUTURE INTERESTS (2d ed., 1956), ss. 1415-1423.

concluding with a discussion of the "wait and see" section; and then I shall deal with specific provisions.

Section 5 of the Law Reform Act, containing the first provision dealing with the Rule against Perpetuities, provides for a blanket period of eighty years for the vesting of future interests, if the period is specified in the instrument creating the limitation. This follows the recommendation of the English Report. It provides a simple way in which a relatively unskilled draftsman can avoid most violations of the Rule. And, as is stated in the English Report, it is definitely superior to the "royal lives" clauses which have long been included in English form books.

Section 8 provides for a declaratory judgment at any time after the instrument takes effect, determining the validity or invalidity of a limitation under the Rule against Perpetuities. It is believed that this is to be preferred to the practice followed in Massachusetts, Pennsylvania, and probably elsewhere, to the effect that, under any ordinary circumstances, the court will not construe the limitations of a future interest which follows a beneficial life interest in a trust, until the life interest terminates. The writer has, for over a quarter of a century, been familiar with the practice in States in which a construction of a future equitable interest in a trust may be secured at any time, and has never seen any reason to find the practice objectionable.

Section 7 embodies the so-called "wait and see" rule, which has been widely publicised ever since Professor Leach wrote his article advocating it in 1952[2] as the great panacea for the ills of the Rule against Perpetuities. I have never felt that this is the way to reform the Rule; but I do not intend to argue that proposition here as my views have already been stated elsewhere.[3] However, the English committee did recommend the "wait and see" rule, and the Western Australian legislature has endeavoured to follow its recommendation. But the question remains: How far does section 7 go in adopting it? Subsection (1) says: "A limitation shall not be declared or treated as invalid, as infringing the rule against perpetuities, unless and until it is certain that the interest that it creates cannot vest within the perpetuity period . . ." Standing by itself, this section seems to say that you can wait until the contingency happens and then determine

2 Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror,* (1952) 65 HARV. L. REV. 721; practically the same article was also published as follows—Leach, *Perpetuities: Staying the Slaughter of the Innocents,* (1952) 68 L.Q. REV. 35.

3 Simes, *Is the Rule against Perpetuities Doomed? The 'Wait and See' Doctrine,* (1953) 52 MICH. L. REV. 179; SIMES, PUBLIC POLICY AND THE DEAD HAND (1955), cc. 2 and 3; LEGISLATORS' HANDBOOK ON PERPETUITIES (1958), 36.

whether, in fact, it has occurred within lives in being and twenty-one years. If there were no other provision about "wait and see", it would seem that, as I and other critics of "wait and see" have pointed out, there is no satisfactory way of determining who are the lives in being. Any person's life could be taken who, in fact, was alive when the instrument took effect, and who either was still alive when the contingency happened, or died within twenty-one years prior to that time.[4] Obviously the draftsmen realized this difficulty, and so they added subsection (3), as follows: "Nothing in this section makes any person a life in being for the purpose of ascertaining the perpetuity period unless that person would have been reckoned a life in being for that purpose if this section had not been enacted." Just how does this subsection restrict the selection of lives in being?

Before attempting to deal with that question, I should like to make a few general observations about the determination of the lives in being under the common law rule; for I believe that there has been more muddled thinking about the question who are the lives in being than about any other aspects of the Rule. Why is it that, when the common law rule is unmodified by statute, the selection of the lives is so restricted? It is simply because human life is uncertain, and, if we are looking forward to a future event, and apply the Rule at the time of the inception of the instrument, we do not know that any particular human life will last an appreciable period thereafter. Therefore, the only life which can be selected with reference to a future event is a life in some way related to that event. Thus, if a testator devises his residuary estate "to such of the children of A. as live to attain the age of twenty-one," that is certainly good, because the devise to the children of A. is so related to the duration of A.'s life that, regardless of when A. dies, whether ten minutes or fifty years after the death of the testator, the vesting will take place within the prescribed period. How do we express that relationship? Certainly it is not that the life in being is named in the instrument. A devise to such of the testator's grandchildren as live to attain the age of twenty-one is valid; and the testator's children are the lives in being. It is not that the persons who are the measuring lives must take beneficially under the instrument. That was decided in England long ago.[5] Then what is the test of determining who are the lives in being?

[4] Of course, there is no serious problem about determining the lives in being, if the determination is at any time prior to the happening of the contingency, even though determination is not made at the inception of the instrument. Thus, there is no problem if determination is made on the exercise of a power of appointment, or on the termination of a life estate.

[5] Thellusson v. Woodford, (1805) 11 Ves. Jun. 112, 32 E.R. 1030.

In my opinion there is no satisfactory test other than to keep trying different lives until you find one which was in being at the inception of the instrument and which is bound to be in being also when the contingency happens or twenty-one years before the contingency happens. In other words, a life in being is one that can be used to show that the limitation is good. *If the limitation is bad under the Rule, that is because no lives in being can be found.*

Thus suppose a testator devises his estate "To A. for life, and then to A.'s oldest son living when A. dies [A. having no son or other issue at the testator's death], and then to such of the issue of A. as are living on the death of such son." According to the common law, the limitation to the issue of A. is void. A. is not the life in being. That is true even though it turns out that A. subsequently has a son who survives A. by only twenty years and then dies leaving issue surviving him. To say that A. is the life in being is to say that A. would have been the life in being if the facts at the time of the inception of the instrument were different. Thus, taking the illustration I have given, immediately after the testator's death, we try A. as the life in being. We conclude that A. may have a son who lives more than twenty-one years after A.'s death and, therefore, vesting may not take place within the period.

Assume again the same limitation as I have given, but also assume that A.'s son, unborn when the testator dies, lives more than twenty-one years after A.'s death. But also assume that the will, in addition to the limitations assumed, contains a legacy of £1,000 to X. a living person, and X. dies less than twenty-one years before the oldest son of A. dies. Can we then use X. as the life in being under the Law Reform Act? I would suppose not, since X.'s life has no relation to the limitations in question. But can we use A.'s life as the life in being, if A.'s son lived only twenty years after A.'s death? If one takes subsection (3) of section 7 literally we could not do so, since we could not do so in the absence of section 7. If that is our conclusion, then section 7 (except in so far as it concerns powers) has not changed the common law. Obviously the legislature did mean to change the law. Finding the lives in being unmodified by section 7 must refer to the preliminary steps in finding the lives in being.

It would seem likely that the Australian courts will, by a process of interpretation, make this "wait and see" provision mean something. It may be pointed out that the framers of the recent Kentucky perpetuities statute,[6] which enacts "wait and see", attempted to solve

[6] Kentucky Acts (1960), c. 167.

this problem by providing that "the period shall not be measured by any lives whose continuance does not have a causal relationship to the vesting or failure of the interest." Even that is none too definite. Professor Dukeminier, writing about the statute, has suggested that "In practically all cases the measuring lives will be one or more of the following as fits the particular facts: (a) the preceding life tenant, (b) the taker(s) of the interest, (c) a parent of the taker(s) of the interest, (d) a person designated as a measuring life in the instrument, and (e) some other person whose actions or death can expressly or by implication cause the interest to vest or fail."[7] It is possible that something of the sort is what the Australian draftsmen may have had in mind in drafting subsection (3); and it is even possible that a court might make that interpretation of the Act. In any event, I believe some interpretation of this subsection will eventually be required before its import is clear.

With few exceptions, I find that the provisions dealing with specific problems are highly desirable. Among these should be mentioned the following: Section 6, which changes the absurd common law doctrine that, for purposes of the Rule against Perpetuities, every human being is conclusively presumed to be capable of having issue as long as he lives; section 9 (substituting for the Western Australian Law Reform (Miscellaneous Provisions) Act of 1941, section 5, and similar to section 163 of the (English) Law of Property Act of 1925), which cuts down the age in invalid age contingencies; section 10, which permits the splitting of a class gift so that it may be valid as to some members, though void as to others; section 12, which deals with the problem arising from a limitation to vest on the death of the surviving spouse of a living person; section 14, validating certain options to buy which are incident to leases for years, making other options which may be exercisable at a time more than twenty-one years from their creation, valid for twenty-one years, and making options which are void under the rule, void between the parties as well as with respect to third parties; section 15, which applies the perpetuity period to rights of entry, possibilities of reverter, and resulting trusts, but makes them valid to the extent that they do not exceed the period.

While, on the whole, these are admirable pieces of legislation, two questions may be raised. As to section 12, the statute declares that "The widow or widower of a person who is a life in being for the purpose of the rule against perpetuities shall be deemed a life

[7] DUKEMINIER, PERPETUITIES LAW IN ACTION: KENTUCKY CASE LAW AND THE 1960 REFORM ACT (1962), 81.

in being . . ." Does this mean that we treat the surviving spouse as a life in being, even if it turns out that that person was unborn at the inception of the instrument? The statute seems to say so. But even if it does, no great harm would be done, for the cases in which this situation might arise are extremely rare. But it would appear that the recommendation of the English Report on this point does not go so far.

As to section 15, it would appear that a draftsman, by the use of section 5, could create a possibility of reverter or right of entry which would last for eighty years. In my opinion that is too long. Most American statutes which have limited the duration of possibilities of reverter and rights of entry have fixed a maximum period of from thirty to fifty years. Moreover, most American statutes apply only a period of years in gross, and do not provide for an alternative of lives in being and twenty-one years.[8] That is believed to be desirable in that, under such a statute, it is unnecessary to find out about the termination of lives in being before deciding whether the future interest is at an end; and thus some uncertainties in the determination of land titles would be removed. But it is undoubtedly desirable to limit the duration of these interests to some fixed period.

In conclusion, I believe the Law Reform Act of 1962 is one of the most significant and comprehensive statutes of its kind in existence. And even though its "wait and see" provisions were to be held to add nothing to the law (which is unlikely), an excellent perpetuities statute would remain.

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8 A Massachusetts statute originally provided for alternative periods. See Mass. Acts, 1954, c. 641, s. 3; but by Mass. Acts, 1961, c. 448, the alternative period of lives in being and twenty-one years was deleted, leaving only a period of thirty years.

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