

Book Review: The Modern Law of Perpetuities, by R. H. Maudsley

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Book Review

THE MODERN LAW OF PERPETUITIES. By R. H. MAUDSLEY. London: Butterworths. 1979. Pp. 271.

The rule against perpetuities is not everybody's favourite subject, but it has inspired some remarkably fine legal writing in the last one hundred years. The treatises of John Chipman Gray and Lewis Simes, the periodical writings of W. Barton Leach, and the work produced by Professor Leach and Dr. J. H. C. Morris are among the modern classics of legal literature. It is, perhaps, a little strange that so much exceptional talent and energy should have been devoted to such a grotesque topic. One suspects that the complexities and absurdities of the rule in its judge-made form were such that only those with an unusual capacity for clear thinking and precise expression could possibly enjoy the task of attempting to explain it. Whether or not that is correct, this latest addition to the literature on perpetuities is firmly in the tradition established by its predecessors.

Professor Maudsley's objectives were to explain the operation of the rule against perpetuities in England after the *Perpetuities and Accumulations Act, 1964*, and to consider in some depth both the general implications of an adoption of the "wait-and-see" principle and its relationship with the common-law rule. Although his main concern is with the present state of English law, extensive references are made to the perpetuities statutes in force in other jurisdictions. There is also an appendix which tabulates the various approaches reflected in the legislation, and a draft model statute is provided.

In jurisdictions that retain the common-law rule, the whole book must be considered essential reading for those concerned with law reform. Some parts of the discussion of the present English law are relevant to the interpretation of *The Perpetuities Act*¹ of Ontario, and the general discussion of "wait-and-see" is likely to be of particular interest to lawyers and students who have attempted to understand our legislation.

It would be an injustice to Professor Maudsley to attempt to summarize his vigorous treatment of the policy issues raised by the rule against perpetuities in its old and new forms. Generally, he argues for an acceptance of the following propositions: (i) the law must impose some restrictions on a donor's power to control the destination of his property in the future; (ii) the existing perpetuity period is too long, but experience suggests that attempts to replace it with another period are unlikely to be successful; (iii) the common-law rule is inadequate; (iv) a system under which interests that vest inside the perpetuity period are valid and those which vest outside the per-

¹ R.S.O. 1970, c. 343.

petuity period are not is likely to provide the best solution; (v) an exercise of a *cy-pres* jurisdiction to modify an instrument when it is clear that interests will not vest within the period is better than an automatic resulting trust to the settlor or testator; and (vi) when implementing the "wait-and-see" principle by legislation, it is essential to "get it right."

In Ontario it seems clear that the legislation enacted in 1966 reflects the first, third and fourth of these propositions. The second may not have been accepted, but in most respects the perpetuity period remains the same. The fifth proposition is not reflected in the Act. Its addition might well be an improvement but one of minor significance.

It is Professor Maudsley's final proposition—and what it means for him—that raises more important questions about the adequacy of our legislation. For the author, an efficient implementation of "wait-and-see" requires a precise method of determining the measuring lives; a provision for the disposition of income while "waiting and seeing"; a provision for splitting class gifts so as to validate the interests of those members of the class who satisfy the conditions for vesting within the period and to exclude all others; and, finally, the complete abolition of the common-law rule. When judged in the light of these requirements, Ontario's legislation arguably falls short only with respect to the first. That, however, is a requirement on which Professor Maudsley justifiably places great weight.

The need for a precise statutory test for determining lives in being was demonstrated by Professor Allan in *Perpetuities: Who are Lives in Being?*² It is surprising to find that the question is still regarded as controversial in England and that Allan's reasoning may have the support of only a minority. It is of course probable that, in the absence of statutory criteria for determining measuring lives, the courts would ultimately come up with a solution that would reflect the general kind of causal connection between a life in being and the vesting of a contingent interest that could be found at common law in cases where the rule against perpetuities was not infringed. There is no logical reason why this could not be done, but it is clear that it would involve a difficult and almost inevitably protracted exercise in judicial legislation. The problem would be to define the nature of the causal connection. An attempt was made to do this in *The Perpetuities Act*:

- 6(1) [T]he perpetuity period shall be measured in the same way as if this act has not been passed, but, in measuring that period by including a life in being when the interest was created, no life shall be included other than that of any person whose life, at the time the interest was created, limits or is a relevant factor that limits in some way the period within which the conditions for vesting of the interest may occur.
- (2) A life that is a relevant factor in limiting the time for vesting of any part of a gift to a class shall be a relevant life in relation to the entire class.³

The difficulty in applying the formula arises in the first place from the ambiguity inherent in the word "limits." If, as seems likely, the word was not

² (1965), 81 L.Q. Rev. 106.

³ R.S.O. 1970, c. 343, s. 6.

intended to have its technical meaning in property law but was used in the sense of "restricts," the notion of a life limiting the period within which the conditions for vesting of the interest may occur is still by no means self-explanatory. Consider, for example, a gift to the grandchildren of A who shall attain the age of 30 years. So enduring is the influence of the old rule that anyone who has had any familiarity with it might well be tempted, for no logical reason, to state that A must have been intended to be a life in being. In what sense does A's life limit the period? If he has no children at the date of the gift, his subsequent death will terminate the period and that, presumably, would be sufficient to make him a life in being in such a case. If he has children at the date of the gift, only his ability to have further children can affect the size of the class and the period within which vesting may occur. If his life is a relevant factor that limits the period, it must be because his death removes one possible way in which the period might have been extended. It must be doubted whether this would seem to be a reasonable interpretation of the statute if one did not have in the back of one's mind a recollection that, in testing the validity of gifts at common law, one was frequently asking whether the gift would necessarily vest within twenty-one years of the death of a parent or a grandparent.

If it is difficult to determine whether, or at least to explain why, A is a life in being in the above case, it is impossible to obtain any clear guidance from the words of the statute on the question of whether A's wife is or is not a life in being for the purpose of the disposition, provided that she is not infertile at that time. Similar questions arise with respect to the spouses of A's children. There is even more difficulty in applying the definition to gifts to individuals as distinct from class gifts. Fortunately, such gifts are no longer common.

It would seem likely that section 6 would not satisfy Professor Maudsley's requirement of a precise statutory test for determining lives in being. The practical importance of the statute's deficiencies in this respect will depend to some extent on the attitude that the courts adopt towards its construction. With one *caveat*, the practical difficulties should not be great or of frequent recurrence if it is remembered that the statute is essentially remedial in nature: that its primary purpose was to save gifts that would otherwise fail. The *caveat* is that, contrary to the view that appears to be preferred by Professor Maudsley, it would seem highly desirable that practitioners in Ontario should remember the old law and continue to draft wills and *inter vivos* instruments as if it were still in force. If this is done, the main function of the statute will be to save gifts in cases where the lawyer has slipped up, and there seems no reason to believe that the legislation will be inadequate to deal with the great majority of such cases. If, however, future generations of the profession draft wills with the "wait-and-see" principle in mind, difficulties will inevitably arise in determining the perpetuity period. It is important to recognize that the responsibility for determining the period will be that of the trustees and that the actual length of the period in terms of years may not be apparent for a considerable time after the instrument comes into effect. If the trustees make a mistake in determining the lives in being, they may select the wrong period. This, in turn, may cause them to misapply

the class-exclusion rules in section 8 and, in some cases, the "unborn-widow" principle in section 9.

The comments in the immediately preceding paragraphs are not, of course, intended as criticisms of Professor Maudsley's suggestions. Rather, they bear out his insistence that it is necessary to have a precise statutory test for determining lives in being. Given the lack of precision in section 6 of Ontario's statute, both legal and practical difficulties are likely to arise if the "wait-and-see" principle is allowed to have a significant influence on the drafting of trust instruments in this province.

It was mentioned above that Professor Maudsley's work should be regarded as essential reading in jurisdictions that are considering reform of the common-law rule. Of the different methods by which this might be done, he argues strongly, and generally very convincingly, for the adoption of "wait-and-see." With regard to the argument that the common-law rule permitted the validity or invalidity of a gift to be determined once and for all at the date of its creation and that in this respect it had the advantage of certainty, he adopts the response of Leach and Tudor that at common law it was always necessary to "wait and see" whether a valid gift did, in fact, vest.

With a valid gift, we Wait and See. Why not Wait and See with void gifts too? Then, if the beneficiary vests in time, he will take in either case; if he does not, the person entitled in default will take in either case. The period of waiting is the same. Why should not the result be the same?⁴

The point may be slightly overstated. In each case the maximum period of waiting may be the same, but what one will be "waiting to see" will not be the same, and the differences will impose an additional practical burden on the trustee and the lawyers who advise him. As was mentioned above, the actual length of the perpetuity period may not be determined for many years after the instrument comes into operation. When the last life in being dies, it may be necessary to exclude members of the class of beneficiaries or to continue to "wait and see." If the effect of the class-exclusion rules is not immediately noticed, income may well be paid to a beneficiary who is no longer entitled to it. The practical difficulties may be very significant for professional trustees. Before the introduction of "wait-and-see," the possibility that the trustee would overlook the fact that an interest had vested or had ceased to exist was not particularly great. If he did overlook the fact, there would be a good chance that the beneficiary or other person entitled to the property would remind him. The possibility that a corporate trustee acting as such with respect to many different trusts will overlook the death of a life in being, or the arrival of the moment for class exclusion, regarding one such trust would seem to be significantly greater. Only time will tell how these problems will be handled in practice in different jurisdictions; but, as in Ontario they are aggravated by the inadequate definition of measuring lives, their existence underlines the desirability that draftsmen in this province should keep within the requirements of the unreformed rule.

⁴ Maudsley, *The Modern Law of Perpetuities* (London: Butterworths, 1979) at 84.

Although the terms of Ontario's legislation and those of the English statute are different in several respects, there are parts of Professor Maudsley's discussion of the latter that have some relevance to the position in Ontario. These aspects include the application of age reduction to class gifts, the judicial discretion that may arise where presumptions of fertility have proved to be unreliable, and the treatment of powers of appointment and of determinable and conditional interests. With respect to the first of these matters, Professor Maudsley prefers the construction of section 4(1) of the English Act, which reduces the ages of members of a class independently of each other. Those law teachers in Ontario who believe that section 8(1) of our statute requires age reduction for the entire class will be chastened to discover that their interpretation is "impossible."⁵ The words of the two provisions are not identical, but the differences seem unlikely to have great significance.

Despite his advocacy of the abolition of the common-law rule, Professor Maudsley was forced by the form of the English legislation to discuss the old law. This is done clearly and crisply, without the copious citation of authorities from different jurisdictions to be found in Morris and Leach, but in more than adequate detail for a student. There seems little doubt that the book will become the standard work in English law schools, and it will be of interest and value in any jurisdiction that has legislation modelled on the English Act or which is contemplating amending legislation of any form. It is in no way to denigrate Professor Maudsley's scholarship or his achievement if, for the reasons already given, it is to be hoped that his enthusiastic advocacy of "wait-and-see" is not shared by members of the legal profession in Ontario who practise in the area of wills and trusts. It may well be that the law must impose some restrictions on a donor's ability to tie up his property into the future. The old rule was important in the twentieth century, not because it reflected a policy that conflicted with the wishes of many donors, but because its recognition of bizarre and unlikely possibilities of vesting outside the period invalidated gifts that could in no sense be regarded as repugnant to that policy. For every case in which the effect of the rule was noticed, one suspects that there may have been many more in which the invalidity of dispositions either went unnoticed or was ignored. Although the legislation in Ontario does not satisfy Professor Maudsley's criteria for a perfect "wait-and-see" statute, it will continue to prove adequate if the draftsmen of wills and trust instruments attempt to stay within the old rule. If this is done then, as a practical matter, comparatively few gifts are likely to fail on the ground of perpetuity in the future, and the rule will lose much of its horrible fascination.

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⁵ *Id.* at 142.

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