

The Modern Law of Perpetuities

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Preface

This book is intended to deal with the Law of Perpetuities in its modern context; that is to say, the Law of Perpetuities following the era of reform which was instigated in the 1950s largely through the influence of Walter Barton Leach. It seemed to me that the subject needed to be looked at from the present-day stance rather than as a subject of continual development from the days of Lord Nottingham; to be looked at, as it were, from the front end. For the introduction of Wait and See does create a new era, one which is best understood by an examination of the way in which it operates as a system, rather than as an appendage to the common law rule. I hope that this book will show that, once the decision has been made to apply Wait and See, the old order disappears. The question now is how to operate Wait and See.

The book attempts to do two things; and I hope that these two objectives are not incompatible. Firstly, it attempts to deal in detail with the Law of Perpetuities as it exists in England today; secondly, accepting the limitations of the Act of 1964, it attempts to show how a system of Wait and See ought to work. Taking the second point first, I have to confess that I have the misfortune to find myself in disagreement with a number of leading scholars in the field. I know that some of the material will appear heretical at first reading. All that I ask is that the critics will examine the logic of the argument before pronouncing a verdict upon it. I have the misfortune also to find inadequate most of the statutes which have enacted Wait and See. I have examined all those of which I am aware, and I have tabulated them in Appendix D, and given illustrations by reprinting some of their provisions. The latest one, of the state of Florida, which came into effect on January 1, 1979, shows that the basic mistake is still being made of enacting Wait and See without saying who are the measuring lives. The Wait and See principle needs to be thought out with all its ramifications. I do not find that any existing statute complies with what I suggest as basic essentials of a Wait and See system. Accordingly, I have offered in Appendix E what I suggest as the right Wait and See statute.

But primarily I have attempted to explain the present Law on Perpetuities. Chapter 1 deals, in elementary form, with some basic questions. Chapters 2 and 3, on the common law rule, explain the basic concepts governing the operation of that rule. No attempt is made to cover every detail, for, as will be seen from Chapter 4, the significance of the common law rule was greatly reduced by the Act of 1964; and indeed is irrelevant except for a few peripheral situations. Chapter 4 will show why the common law rule should have been discarded in 1964 in favour of Wait and See. The Act is

examined in detail in Chapters 5 and 6; Accumulations in Chapter 7; and Variation of Trusts in Chapter 8. Chapter 9 considers a number of policy questions and alternative methods of reform.

The reader is asked to forgive some repetitions. They appear partly because I have tried to make each Chapter self-contained and partly because I did not feel convinced that some of the basic questions, discussed in Chapter 1, would be established firmly enough to carry the critical reader through the book. If Chapter 1 is convincing, the repetition of the argument should be ignored.

This book has been a task which, in competition for time with other commitments, has occupied a number of years. But the delay has provided an opportunity to test out the thesis by inviting comment from a number of learned friends whose views I much respect, and none, though critical when first approached, has dissuaded me from putting forward the views contained in the book. Such friends in England, the Commonwealth and in the United States are too numerous to mention. But I want to give special thanks to David Niddrie, my research assistant at the University of San Diego, who not only read through and commented on the manuscript, but also did the basic research on the Commonwealth and American statutes. Marian Forney helped with the proofs while attending the University of San Diego Summer School in Oxford. Much of the preliminary secretarial work was done by Rose Wicks of King's College, London; a clean copy was excellently typed at New York Law School by Kirsten Russell; and the final details typed at the University of San Diego Law School by Becky Anderson. I am most grateful also for the generous provision to me of library facilities at the Bodleian Library, and the libraries of the law schools of the University of San Diego, New York University, and New York Law School. Finally, I owe a special message of thanks for his encouragement and critical help to my friend and colleague, Edward Burn. He has worked with me and sustained me throughout. He bears no responsibility for any specific words in the book, but he must share some responsibility in the sense that, without his continued encouragement, it would never have been completed.

The publishers have provided the Tables of Cases and Statutes; while I prepared the Index. I would like to thank them both for being patient over the delays, and also for their advice and co-operation at all times.

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May 1979

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