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## Review of “The Rule Against Perpetuities,” By W. Barton Leach & Owen Tudor

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to be taken to mean that he should be committed to a hospital and released only when, thanks to shock therapy, other treatment, or sheer passage of time he is diagnosed as no longer "disturbed." If he is arrested for some minor sex offense and is called a "psychiatrically deviate personality" this is likely to be taken to mean something more than that he has problems and would benefit from psychotherapy. He may well be committed for an indeterminate period to a custodial institution whether or not it is in fact in a position to treat him. If an accused pleads irresponsibility and is called "neurotic" or "psychopathic" this is likely to be taken to mean that he should receive the maximum retributive sentence.

Dr. MacDonald is certainly aware that it is important for the psychiatrist who participates in the sanctioning process to look at his own value judgments and his own terminology in the light of their implications for the broader social scene. I wish he had made it more explicit in his book. In any event, the expanding knowledge of psychiatry and the increasing participation of psychiatrists in the formation of community policy can only serve to make community decisions more enlightened and more capable of realistic application.

RICHARD C. DONNELLY†

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THE RULE AGAINST PERPETUITIES. By W. Barton Leach and Owen Tudor. Boston: Little, Brown & Company, 1957. Pp. xiii, 265, 1957 Cumulative Supplement. \$10.00.

An addict of material on the rule against perpetuities who purchases any new treatise without looking beyond the cover is doomed to disappointment if he believes he has an entirely new work on the subject in this particular book. As is clearly stated on the title page this treatise is: "Reprinted from American Law of Property with Appendices on Perpetuities Reform by Statute Since 1947 and Cumulative Supplement Prepared by the Authors."

The American Law of Property<sup>1</sup> has been comprehensively reviewed by a large number of legal scholars including a former classmate of mine, Bertel M. Sparks, Professor of Law at New York University.<sup>2</sup> For this reason I would consider it merely "gilding the lily" if I were to undertake an extensive analysis of the textual portion of the work under review. However, there are certain parts of the text that should be called to the attention of those who may not be familiar with the parent work.

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1. 7 vols. Casner ed. (1952).

2. 28 N.Y.U.L. Rev. 1052 (1953).

The non-expert in the field of perpetuities will undoubtedly appreciate the cross-reference tables keying this book to Gray, Simes and the Restatement.<sup>3</sup> Reference to these tables will save the time of the researcher who is not content to rely on just one source of information.

A greater help to the practicing attorney who has not specialized in problems involving the rule against perpetuities is the inclusion of an advocate's check list.<sup>4</sup> This section has been divided into two parts: one division containing hints for those who wish to avoid a gift under the rule, another containing like help for the lawyer confronted with the task of sustaining such a gift. This material should be required reading for any draftsman who is faced with the problem of preparing a will or trust agreement containing an interest subject to the rule, although the preceding section<sup>5</sup> is specifically designed to provide a set of "rules" to be observed in that instance.

Of special interest to the serious student of perpetuities is the inclusion of the authors' analysis of the many facets of the rule. It is impossible to express complete agreement with every position taken, but it must be admitted that the exploration into the reasons underlying the views expressed is more than pure surface testing.

The arrangement of material is also to be commended. There are ten chapters with each chapter being subdivided into sections. If one is not thoroughly familiar with the topic, a study of the table of contents will give organization to the information he may possess, and if he is totally ignorant of the rule, reference to the table from time to time should clarify the information that is being gained by reading the text. *Caveat*: This may not be true of the first chapter which is intended as an introduction.

The appendices, five in number, deal with statutory reform of the rule. The first three are reprints from the Harvard Law Review, and the authors have indicated that a more extensive treatment of the fifth appendix is being prepared for publication. The other appendix consists of a copy of a memorandum submitted by Professor Leach to the Vermont legislature urging adoption of a "statutory reform" bill pending before that body.

Appendix I is the reprint of Professor Leach's "Perpetuities in Perspective: Ending the Rule's Reign of Terror."<sup>6</sup> In this article great ridicule is heaped on the present policy of testing the validity of an interest subject to the rule by what might have happened rather than by conditions as they actually exist at the time the controversy

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3. § 24.1 A.

4. § 24.8.

5. § 24.7.

6. 65 Harv. L. Rev. 721 (1952).

reaches the court. Conversely, praise is directed to the Supreme Court of Florida for testing validity of the interest by what did happen and to the Pennsylvania legislature for adopting, by statute, the Florida view.

Adopting the classification and terminology of his earlier article,<sup>7</sup> the author proceeds to demonstrate the absurdity of the "certainty" aspect of the rule as it applies to the "unborn widow," "administrative contingency" and "fertile octogenarian" cases. The force and sureness of the argument may lead one to believe that we are dealing with a one-sided question, but it must be noted that there is opposition in print.<sup>8</sup>

Appendix I suggests other deficiencies in the rule, and corrective legislation is outlined; the bulk of the latter advocating in various ways the so-called "wait and see" doctrine.

Appendix II is an analysis of perpetuity legislation in Massachusetts and Appendix III treats briefly of certain steps taken to reform the law in England.

If the reader is interested in Professor Leach's idea of exactly what is wrong with the rule against perpetuities, Appendix IV should supply the answer. In a memorandum to the Vermont legislature the two primary Leachian tenets are expressed in simple, but adequate, style. The first states that an interest should not be voided merely because it violates the rule; it should be reduced to a point where it does not violate, but yet closely approximates the intent of the creator of the interest. Thus, in a devise to X for life, remainder to such of X's children as reach the age of twenty-five years, the remainder to the children (where X has children after the death of the testator) would be reformed to pass the land to such of the children as reached the age of twenty-one. As X is the measuring life, X's youngest child would have to reach the age of twenty-one—if he ever did do—within the period of the rule, and the remainder would be valid. The second change would require the courts to apply the rule in view of what actually happens, and not in view of what might have happened. This is the controversial (at least according to Simes) "wait and see" doctrine. Applying it to the case above, the court would not reduce the testator's stated twenty-five year period unless the life tenant, X, actually had additional children. If X did not have children after the death of the testator, the children themselves may be taken as the measuring lives. As they will all reach the age of twenty-five—if they ever do so—within their own lives there is no violation of the rule.

Appendix V, summarized very briefly, raises the possibility of judi-

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7. Leach, *Perpetuities in a Nutshell*, 51 *Harv. L. Rev.* 638 (1938).

8. Simes, *Is the Rule Against Perpetuities Doomed? The "Wait and See" Doctrine*, 52 *Mich. L. Rev.* 179 (1953).

cial legislation to solve the problem. This may be a harsh condensation, but the main thought of the material advances the idea that the courts, in states where there is no legislative reform, may bring about their own revision of the rule against perpetuities by taking notice of the great body of legislative reform. Some authority is cited to show that the courts may and should do this. Will they do so? Even the authors admit that we will have to "wait and see."

One may have doubts as to the value of a book of this type. This is not to suggest that the material is inferior. The work is an excellent treatment of one of the more difficult phases of the law. However, the fact must be faced that it has not added anything new to the law relating to perpetuities. As the title page informs you: This is a reprint.

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CREATED EQUAL?: THE COMPLETE LINCOLN-DOUGLAS DEBATES OF 1858. Edited by Paul M. Angle. Chicago: University of Chicago Press, 1958. Pp. 422. \$7.50.

During the Faubus affair last autumn, editor-columnist David Lawrence came to the defence of "white supremacy" by quoting Abraham Lincoln. Well, that may not be quite fair: technically, Mr. Lawrence was using Lincoln as authority for the proposition that the Supreme Court is not the final interpreter of the Constitution. After all, had not the Court, in 1857, declared that slavery could not be prohibited in any territory of the United States,<sup>1</sup> and had not Lincoln four years later ignored this decision by asking: "Can Congress prohibit slavery in the territories?" and treating that question as unsettled?<sup>2</sup>

If Mr. Lawrence had perused the Lincoln-Douglas joint debates and individual campaign speeches of 1858, now put together in a handsome centennial edition edited by Paul Angle, he could have found more Lincolnian ammunition for his attack on judicial supremacy. Also, surprisingly, he could have discovered some language seeming to support "white supremacy." What about this, for instance: "I will say then that I am not, nor ever have been in favor of bringing about in any way the social and political equality of the white and black races, that I am not nor ever have been in favor of making voters or jurors of negroes, nor of qualifying them to hold office, nor to intermarry with white people; and I will say in addition to this that there is a physical difference between the white and black

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1. *Dred Scott v. Sandford*, 60 U.S. (19 Howard) 393 (1857).

2. Abraham Lincoln, First Inaugural Address, March 4, 1861.