University of Pennsylvania Law Review

FOUNDED 1852

Formerly
American Law Register

VOLUME 103

APRIL, 1955

No. 6

THE POLICY AGAINST PERPETUITIES*

Lewis M. Simes †

DEAD HAND V. ALIENABILITY

In the halls of University College, University of London, prominently displayed within a glass case, are the bones of the great legal philosopher, Jeremy Bentham. The skeleton is clad in the garments which the great man wore in life. A wax replica of his head is substituted for his skull. His bony fingers grasp the walking stick, which he called "Dapple." On the glass case is a typewritten extract from his will, stating that the testator desired to have his preserved figure, on certain occasions, placed in a chair at gatherings of his friends and disciples, for the purpose of commemorating his philosophy. It is said that this direction is still observed at banquets in his honor. I know of no more vivid illustration of the influence of the dead hand. One can picture that extraordinary scene in which the skeleton of a man, dead for over a century, sits at the head of the board. Literally the hand of the dead presides.

When the subject matter of dead hand control is not philosophic ideas, but property, much less bizarre devices are employed. The testator, by the terms of his will, uses the trust, the condition, the special limitation, and the future interest. By these means, he seeks to impose his wishes upon the property of future generations.

But our legal system, having recognized all these devices of remote control, also provides a whole arsenal of rules, designed to strike

* This Article, with minor modifications, constitutes the second and third of the Thomas M. Cooley, lectures, delivered at the University of Michigan in February, 1955, on the general topic "Public Policy and the Dead Hand." Publication herein is by courtesy of the University of Michigan Law School. The series of five lectures will later be published in book form by the University of Michigan Press.

† Mechem Professor of Law, University of Michigan Law School.

down unwanted creations of the dead hand. There are rules against direct restraints on alienation, against conditions in restraint of marriage, against conditions and limitations generally contrary to public policy. There are other rules restricting the duration of honorary trusts and trusts for accumulation.

By far the most important of these rules, however, is that which restricts the creation of contingent future interests. It is the Rule against Perpetuities. The public policy back of this rule is the subject of this Article. No better shorthand statement of it has ever been made than the single sentence of John Chipman Gray, which is familiar to every law student: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."¹

I.

What public policy actuates this rule? If we are to content ourselves with the terse and sometimes superficial pronouncements on the subject scattered through the books, the policy of the Rule has never been in doubt. Ever since it first emerged in the *Duke of Norfolk's Case*, it has been declared to be a rule in furtherance of the alienability of property. In giving his opinion in that case, Lord Chancellor Nottingham made this classic observation: "A perpetuity is the settlement of an estate or an interest in tail, with such remainders expectant upon it, as are in no sort in the power of the tenant in tail to dock by any recovery or assignment, but such remainders must continue as perpetual clogs upon the estate . . . and they are against the reason and policy of the law, and therefore not to be endured."² While a perpetuity can no longer be described as an unbarrable estate tail, the policy against "perpetual clogs upon the estate" is just as much an epitome of the reason for the Rule against Perpetuities as it was when Lord Nottingham handed down his famous opinion. Indeed, we can go centuries back of that decision and find at the very core of English law what Maitland referred to as a "strong bias in favor of alienability."³

As a rule this policy in favor of alienability is taken to be axiomatic; and until the nineteenth century we are not told just why alienability is an end of the law. Perhaps the most explicit explanation in the English cases is found in *In Re Hollis' Hospital*,⁴ decided in 1899.

1. GRAY, THE RULE AGAINST PERPETUITIES 191 (4th ed. 1942).

2. 3 Ch. Cas. 1, 31 (1677, 1682); 3 Ch. Cas. 53 (1685).

3. 2 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW 18, 19 (2d ed. 1911).

4. 2 Ch. 540, 553 (1899).

In that case, Justice Byrne, discussing the application of the Rule to a right of entry, observed: "The answer appears to me to be that the principle was that restraints of trade are contrary to public policy and that is the principle still. . . ." It is significant that he cited the *Nordenfelt* case,⁵ a leading English decision concerning contracts in restraint of trade.

The evils which the Rule against Perpetuities is designed to avoid are portrayed in vivid fashion by Jarman in the first edition of his treatise on wills. He says: "The necessity of imposing some restraint on the power of protracting the acquisition of the absolute interest in, or dominion over property, will be obvious, if we consider, for a moment, what would be the state of a community in which a considerable portion of the land and capital was locked up. That free and active circulation of property, which is one of the springs as well as the consequences of commerce, would be obstructed; the improvement of land checked; its acquisition rendered difficult; the capital of the country gradually withdrawn from trade; and the incentives to exertion in every branch of industry diminished. Indeed, such a state of things would be utterly inconsistent with national prosperity. . . ." ⁶

A similar rationale is indicated in the following statement by William David Lewis, one of the earliest English writers on the law of perpetuity: "The political necessity that conferred on the owners of property the absolute right to dispose of the whole or a portion of the whole or a portion of it at their pleasure, would then forbid their exercise of that power, in a manner fatal to its enjoyment in all future time, or prejudicial to the general interests of society. But prejudicial the exercise of that right, assuredly, is, when the property which an individual may have amassed by successful industry, or have acquired by fortune, thereby becomes (as it were) a stagnant possession, and, for all purposes of the commonwealth, useless. A miserly disposition, in this case, withdraws from free circulation and, therefore, renders worse than valueless, property which without the protection of the state and its municipal laws, could not have been obtained, or if obtained, preserved." ⁷

John Chipman Gray expressed the same idea in more terse phrase thus: "The system of rules disallowing restraints on alienation and the Rule against Perpetuities are the two modes adopted by the Common Law for forwarding the circulation of property which it is its policy to promote." ⁸

5. *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.*, [1894] A.C. 535.

6. See JARMAN, WILLS *219.

7. Lewis, *Perpetuities* in 52 LAW LIBRARY 48 *et seq.*

8. GRAY, THE RULE AGAINST PERPETUITIES 4 (4th ed. 1942).

The essence of these statements amounts to this: the Rule against Perpetuities furthers alienability; if it were not for this Rule, property would be unproductive and society would have less income.

But why should a future interest make property inalienable, and why does inalienability make property unproductive? In answering these questions we must recall that the Rule against Perpetuities developed as a rule restricting future interests in specific land. Viewed thus, the rationale of the Rule is not difficult to perceive. In order to make a profit from land, one must have a type of ownership which insures enjoyment forever or for a fixed and determinable period of time. People who purchase land, whether for profit or for their own use and enjoyment, are not likely to buy unless they can secure either a fee simple absolute or a lease for a fixed term of years.

In order to get the picture of the early nineteenth-century English court applying the Rule against Perpetuities, let us consider a few situations which admittedly are not typical of present day future interests. Suppose *A* devises agricultural land to *B* in fee simple, but upon the condition that, if all *B*'s sons should die under the age of thirty years, then the farm is to go to such of the testator's issue as are then living. Here, were it not for the Rule against Perpetuities, *B* would have a defeasible fee simple, and there would be a contingent limitation in favor of the unascertained, and perhaps unborn, issue of the testator. It is true, *B* can farm the land and make a profit. But suppose he does not care to do so, or is a poor farmer and unable to make farming pay. Then he will want to sell his interest to some one who can make it productive. If *B* has only a defeasible fee simple, then, so far as the rules of law are concerned, his interest is alienable. The difficulty is that no one will buy it. If *B*'s interest will terminate on an uncertain event, namely, the death of the last of his sons under the age of thirty years, the property is effectively removed from commerce. It is true, if *B*'s prospective purchaser could also acquire the contingent future interest limited to the issue of the testator, he doubtless would buy. But the persons who will have this interest are unascertained or unborn, and it is, therefore, inalienable. Thus, the Rule against Perpetuities strikes down the future interest in favor of the testator's issue, and the fee simple in *B* is thereby made absolute.

The same result would be reached if, instead of containing a limitation over to the issue of the testator, the will read as follows: to *B* in fee simple, but if all of *B*'s sons die under the age of thirty years, then to *C* in fee simple. Here, it is true, *C*, the owner of the future interest is in being and ascertained. It would be possible for him to join with *B*, the possessory owner, in creating a fee simple absolute or

in directly alienating. If this were done, there would be no obstacle, either practical or legal, to the alienability of the property. The difficulty is that *B* and *C* are not likely to get together. Since the interest of one is to terminate and the other to begin on an uncertain event, they will not readily agree on the valuation of their respective interests. *B* will insist that it is very unlikely that all of his sons will die under the age of thirty, and that, therefore, he should have most of the purchase price. *C*, on the other hand, will contend that it is quite probable that the condition will happen, and that he, therefore, should have the lion's share of the consideration. The result would be that the land will remain inalienable and unimproved. This result is prevented by the operation of the Rule against Perpetuities. The limitation to *C* is void under the Rule, and, thus, *B* has a fee simple absolute.

It may be argued that this whole idea of a rule to encourage marketability in a free market sounds much like economic doctrines of free enterprise which have been advanced since the days of Adam Smith, but which, at the present time, are looked upon with a good deal of skepticism by those who favor a managed economy. But the issue is vastly different. It is nothing less than free marketability versus restrictions imposed by an erratic testator, not free enterprise versus governmental regulation. Indeed, if testamentary restrictions are to be analogized to legislation, they are in the nature of special legislation, written by the dead hand, applicable only to particular persons and property, and as unchanging as the ancient laws of the Medes and Persians.

Before passing to a consideration of present day applications of the productivity doctrine, I should like to turn aside for a moment for the purpose of referring to the controversy which was waged nearly a half a century ago between John Chipman Gray and other property experts on the question whether the Rule against Perpetuities is a rule against remoteness of vesting or a rule prohibiting the suspension of the power of alienation.⁹ That controversy, I venture to assert, did not concern primarily the public policy back of the Rule. It was a question of what *is* the Rule. Gray never doubted that the policy back of the Rule was, as he put it, "for forwarding the circulation of property." He merely contended that the cases could not be explained by saying that the Rule is violated only if there is no group of ascertainable, living persons who can convey in fee simple absolute. Stated in that way, his contention was perfectly correct. Otherwise, the Rule would today invalidate only future interests in unborn and unascertained persons. For in

9. GRAY, *THE RULE AGAINST PERPETUITIES* c.7 (4th ed. 1942); 2 REEVES, *REAL PROPERTY* 1263 (1909); Fraser, *The Rationale of the Rule Against Perpetuities*, 6 MINN. L. REV. 560 (1922).

all other cases a group of persons could be found who could convey. But the position Gray took was not clear English law until the decision in the case of *In re Hargreaves*, in 1890.¹⁰ In the meantime, in the New York legislation of 1828, followed in a number of states, the test of a legal power of alienation was made the essence of the Rule.¹¹ In New York it took some rather bold, but doubtless beneficial, judicial legislation to get around this notion.¹² In other states which have followed the New York legislation, the Rule came to be solely a rule against the suspension of the absolute power of alienation.¹³ So far as the common law is concerned, Dean Fraser, in his celebrated article "The Rationale of the Rule against Perpetuities"¹⁴ which appeared in 1922, finally reconciled the difference between the tilting Sancho Panzas of the law of future interests. He showed that the Rule can be violated even though a group of persons can be found who would be able to convey in fee simple absolute; but that, if one person has the immediate power to convey in fee simple absolute, and terminate all future interests, then the Rule is not violated. Stated in another way, his conclusion, which has been almost universally accepted ever since it was announced, is to the effect that the Rule is a rule against remoteness of vesting, as Gray said; but the policy of the rule is to make property freely alienable, and, therefore, if one person can alone alienate freely, the policy of the Rule is unaffected. On the other hand, if it is necessary to secure the agreement of two or more persons having distinct interests before alienation in fee simple absolute is possible, then, as a practical matter, the property may still be removed from commerce and the Rule violated.

II.

Now, if the policy of the Rule against Perpetuities is to make property productive, just how far is this policy advanced in the application of the Rule today? Is property still taken out of commerce by remote contingent future interests? *I believe it is no exaggeration to say that, at the present time, due to changes both in the nature of capital investments and in the law, the proposition that contingent future interests make property unproductive is rarely true in the United States and almost never true in England.* I should like to discuss at some length my reasons for this belief.

10. 43 Ch. D. 401.

11. See, in general, SIMES, HANDBOOK ON THE LAW OF FUTURE INTERESTS c. 25 (1951).

12. See *Matter of Wilcox*, 194 N.Y. 288, 87 N.E. 497 (1909); *Walker v. Marcellus & O.L. Ry.*, 226 N.Y. 347, 123 N.E. 736 (1919).

13. See SIMES, HANDBOOK ON THE LAW OF FUTURE INTERESTS 434, 435 (1951).

14. 6 MINN. L. REV. 560.

In the first place, the future interest with which the Rule against Perpetuities is concerned is nearly always an equitable interest in a trust. The modern trust instrument, if well drawn, will contain broad powers of sale and reinvestment. While the beneficiary who has an equitable estate subject to a future interest may have difficulty in selling his property, that does not make it unproductive. As a practical matter, the trustee will have an absolute legal estate which he can sell, and will be empowered to reinvest the proceeds. While at one time in the history of the law, in the absence of express authorization in the trust instrument, the trustee's powers of reinvestment were extremely limited, today the rapidly extending "prudent man rule" gives the trustee a wide field of selection in making trust investments productive.

Moreover, not only is the trustee empowered by the terms of any well-drawn trust instrument to sell and reinvest in productive property; the law requires him to do so. One of the duties imposed by law upon trustees is to use reasonable care in making the trust property productive.¹⁵

Suppose, however, that the trust instrument is not well drawn, and no express powers of alienation are given to the trustee. Still the trust property is not necessarily taken out of commerce. The law recognizes that, when circumstances change in a manner unforeseen by the settlor, the trustee may secure permission of the court to sell. The principle is stated by the American Law Institute as follows:

"The court will direct or permit the trustee to deviate from a term of the trust if owing to circumstances not known to the settlor and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purposes of the trust; and in such case, if necessary to carry out the purposes of the trust, the court may direct or permit the trustee to do acts which are not authorized or are forbidden by the terms of the trust."¹⁶

It is true, this doctrine does not take care of all defectively drawn instruments. The mere fact that a sale is desirable is not enough to justify an order of the court permitting it. Unforeseen circumstances must have arisen or it must appear extremely inexpedient to carry out the settlor's directions. Nevertheless, as a practical matter, the application of this doctrine will permit a sale in most cases in which the trust estate would otherwise be unproductive.

Statutes in several states¹⁷ have gone even farther in permitting the trustee to sell and reinvest in the absence of a power to do so ex-

15. RESTATEMENT, TRUSTS § 181 (1935).

16. RESTATEMENT, TRUSTS § 167 (1935).

17. See 3 BOGERT, TRUSTS AND TRUSTEES pt. 2, § 743 (1946).

pressed in the trust instrument. Thus the Pennsylvania Fiduciaries Act of 1949 allows a trustee to sell on court order whenever the court shall find that such sale is for the best interests of the trust.¹⁸ The English Trustee Act of 1925 contains the following provision: "Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure, or other transaction, is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose. . . ." ¹⁹

Of course, it must be recognized that, so far as the common law is concerned, it is perfectly clear that the existence of a power in a trustee to sell and reinvest does not take the case out of the Rule against Perpetuities. Though courts have rarely discussed the proposition except in connection with statutory rules against perpetuities,²⁰ when they have done so, they have generally dismissed the matter without adequate rationalization.²¹

There is a second reason why future interests do not make property unproductive. Not only is there commonly a power of sale in a trustee where future interests arise in American family settlements; the subject matter of the trust is commonly corporate shares and government or corporate bonds. In the case of corporate shares, the economic value is neither in the interest owned by the beneficiary of the trust, nor is it in the shares in the hands of the trustees. It is the property of the corporation. Certainly that is freely alienable. In-

18. PA. STAT. ANN. tit. 20, § 320.963 (1950).

19. 15 & 16 GEO. 5, c. 19, § 57.

20. But see the discussion in *Edgerly v. Barker*, 66 N.H. 434, 31 Atl. 900 (1891). See, also, the note by Mr. Justice Holmes in 4 KENT, COMMENTARIES *283 (12th ed., Holmes, 1896), where the editor recognizes that the Rule against Perpetuities should apply to an equitable interest in a fund.

In general, as to the application of a statutory Rule against Perpetuities, where a trustee has a power of sale, see *Hawley v. James*, 5 Paige 318, 444, 445 (N.Y. Ch. 1835), *Becker v. Chester*, 115 Wis. 90, 91 N.W. 87 (1902); Dwight, *Powers of Sale as Affecting Restraints on Alienation*, 7 COL. L. REV. 589 (1907).

21. Thus Justice Champlin in *Palms v. Palms*, 68 Mich. 355, 386, 36 N.W. 419, 441 (1888), discussing the Michigan statutory rule, said: "There would be but little use in statute or common law restrictions against perpetuities, and the tying up of estates to await the happening of future events, if they can be avoided by merely clothing the trustees with power of sale, but subjecting the proceeds to the trusts declared, and by this simple device such postponement of the vesting of contingent interests be validated." But compare the following statement by Morse, J., in the same case: "The trustees can be constantly buying and selling, changing daily, if they see fit, the nature and character of the property intrusted to their care. The avenues of trade and business are open to them, as open as they would be to the natural heirs, provided no will had been made, except the property, if the trust is fulfilled, cannot be squandered foolishly, spent in riotous living, or thrown broadcast upon the street for passers-by to pick up." *Id.* at 366, 36 N.W. at 432.

deed, the corporate directors are under a duty to make a profit for the stockholders, if they are able to do so, which is but another way of saying that they must make the property of the corporation productive. Likewise, as to corporate bonds, they represent money of the trust which has been loaned to a corporation and which is being used to produce income. As to government bonds, similarly, they represent money loaned to the government which is being used for the benefit of the public and is being put into circulation.

There is, moreover, a third situation where, according to American law, the existence of future interests does not render property unproductive. Let us assume the somewhat unusual case where the trust device is not used, and legal future interests in land are created. *A* devises a particular piece of land to *B* for life, remainder to *B*'s issue who survive him, in fee simple. Beginning with the case of *Bofil v. Fisher*,²² decided in 1850, the American courts have developed a doctrine to this effect: where land is affected with a future interest, a court of equity has power to order a sale and to set up a trust in the proceeds, when this is necessary for the preservation of all interests in the land.

Suppose, in the case just stated, the land is unproductive and is about to be sold for taxes. If the life tenant were to erect income-producing buildings on the property, it would become a profitable investment. But no fund was provided by the testator, who created the present and future interests, to accomplish this purpose. In that situation, the court can order a sale of the land, the proceeds to be held in trust subject to the same present and future beneficial interests as were originally created as legal interests in the land.²³ Thus, a trustee appointed by the court will invest the proceeds of the sale in income-producing property, and it will no longer be unproductive. Of course, this remedy is a narrow one. A sale will not be ordered merely because interested parties desire it. There must be a situation approaching necessity. Moreover, in some states the courts have refused to recognize the doctrine. In others, however, statutes have been enacted giving even more liberal powers of sale than have the courts.²⁴

In England, the alienability of property affected with future interests is assured, to an even greater extent than in America, by that important body of property legislation which was enacted in 1925. There were six major enactments, among which are the Law of Property Act,²⁵ the Settled Land Act,²⁶ and the Trustee Act.²⁷ I have al-

22. 3 Rich. Eq. 1 (S.C. 1850).

23. See SIMES, HANDBOOK ON THE LAW OF FUTURE INTERESTS § 43 (1951).

24. See 1 AMERICAN LAW OF PROPERTY § 4.99 (Casner ed. 1952).

25. 15 & 16 GEO. 5, c. 20.

26. 15 & 16 GEO. 5, c. 18.

27. 15 & 16 GEO. 5, c. 19.

ready called attention to the provision in the Trustee Act which permits the court to order a sale.

But the most revolutionary provisions concern the liquidity of land, and are found in the Law of Property Act and the Settled Land Act. American students of property law have long been aware that these statutes accomplished many major reforms, such as the abolition of the Rule in Shelley's Case, the abolition of the Statute of Uses, the amendment of the Rule against Perpetuities and the reduction in the number of permissible legal estates. But I am inclined to think that few persons in this country have realized that *the very essence of this legislation is that there is always some person who can market the land.*

To begin with, the only legal estates in land which this legislation permits are the fee simple absolute and the term of years absolute. As a practical matter, of course, these are the only interests which are readily alienable. All other estates and future interests are equitable. Provisions for the family may be accomplished either by a "trust for sale" or by a "settlement." According to the statutes, the trust for sale exists only if the trustees are required to sell and convert the land into personalty. This is ordinarily indicated by the express terms of the trust. In all other cases where future interests are involved in the family provisions, or, as the statute puts it, where there are successive interests, the transaction is described as a settlement. If there is a settlement, there is always some person, usually the life tenant, who has the power to sell in fee simple.

Suppose an attempt is made to create legal life estates, as was possible before the statute went into effect. For example, *A* devises a farm to *B* for life, remainder to *C* in fee simple. The net effect of the statute is that *B* has the fee simple in trust for himself and for *C*, even though no trust was intended. *B* has, also, the power to convey in fee simple absolute. When he sells, the proceeds are held on trust for himself and *C*. Suppose the prospective purchaser knows about the equitable future interests. Still he is not bound by them. The person who has the power to convey, called in the statute the "estate owner," is said to be able to make an "overreaching" conveyance. Thus equitable interests do not impair a vendee's title, according to what English conveyancers describe as the "curtain principle." If there is a trust for sale, rather than a settlement, the trustees have much the same power to make an overreaching conveyance which the estate owner would commonly have in the land settlement. Though the conveyance by the estate owner or trustee-for-sale does not overreach every conceivable interest, the exceptions are few. Indeed, for all practical purposes, we may reach this conclusion: in England, when

property is affected with a future interest, there is, in nearly all cases, some person who can sell absolutely and in fee simple.

It will be observed that a remarkable compromise has been effected between the desire to tie up property in the family and the policy of free alienability. The old strict settlement, with its life estates and remainders in tail, can still be used in England. But if the life tenant has no ability or inclination to make the land productive, it will not lie idle. He can have it sold, and thereupon a fund will be substituted for the land. If no provision for trustees has been made in the settlement, trustees can be appointed by the court who will be competent to invest the proceeds of the sale and make them productive. Indeed, since 1925, future interests in England have become, actually or potentially, future interests in a fund which can always be productively invested.

The final reason why, in modern times, contingent future interests are consistent with alienability and productivity of property is to be found in the trend toward the welfare state. In a totalitarian state, regardless of the organization of property interests, problems of future interests and the Rule against Perpetuities are necessarily unimportant or entirely nonexistent. While even Russia has retained many of the forms and processes of private ownership, property rights are all subject to the arbitrary action of the state. If private property is tied up or is not sufficiently productive, no Rule against Perpetuities or other rule of law is needed to remedy the situation. The state simply confiscates the property and puts it to a more productive use.

Even in democracies, to the extent that the state can and does take over property and put it to a use which is socially desirable, problems of productivity and the Rule against Perpetuities become unimportant. Thus, suppose land needed as a site for a municipal water plant has been tied up with a whole series of contingent future interests. Even in America, the existence of these interests would not prevent a municipal corporation from taking the land under its powers of eminent domain and appropriating it for this purpose. The land would thus be made immediately productive, in spite of the future interests. Indeed, we must inevitably conclude that, to the extent that property can be taken for a public purpose *and is likely to be so taken*, no harm is done by taking it out of commerce.

However, the probability that any given piece of property will be taken by eminent domain proceedings is indeed slight. Moreover, constitutional provisions require that it be taken for a public purpose. Yet most productive uses to which land and other things are likely to be put are classed in this country as private purposes. It is true,

we have a line of cases recognizing the constitutionality of eminent domain proceedings for slum clearance and similar purposes, even though a sale to private persons for redevelopment is a part of the plan.²⁸ This, however, is a situation calling for special treatment. And even here, the courts are not unanimous in sustaining the constitutionality of such a taking.

Attention perhaps should be directed, in passing, to a Mississippi case,²⁹ decided some eighteen years ago, which determined that a municipality could acquire land, construct a factory on it for the manufacture of cotton goods and lease the property to a private corporation. However, the circumstances were unusual. The state was still in the throes of the depression, and the factory was justified as a means of removing unemployment and advancing the agricultural and industrial welfare of the state. Moreover, the precise question involved was not whether land should be taken for the purpose of a factory, but whether the taxing power was being employed for a public purpose when it was used to raise funds for a cotton factory. This case probably goes to the outside limit of what could be called a public purpose. And certainly one is forced to conclude that there is no general doctrine in the United States to the effect that making land productive for private industry is *per se* a public purpose.

In England, however, recent legislation appears to have gone almost that far. I refer to the English Town and Country Planning Act of 1947.³⁰ It provided for local planning authorities to make plans for the development of the land of England and Wales. These authorities were to make new surveys and to revise their plans every five years. No new development of a substantial character was permitted without the approval of the local planning board. When permission was given for a new development and the new use increased the value of the land, a tax or development charge, as it was called, was imposed. This tax was in the amount of 100% of the increase in value. The effect of this legislation was that the value of all uses of land, other than present uses, would become the property of the government. In substance, the owner who desired a new development and secured permission to make it was required to buy the value of the new use from the government. In order to compensate land owners, at least in part, for this confiscation of the value of new uses, a fund of £300,000,000 was set up to be distributed to those who suffered losses in the value of their lands by reason of this confiscation. As it turned out, the development

28. See cases collected in 101 U. OF PA. L. REV. 411-13 (1952); 39 VA. L. REV. 236-39 (1953).

29. *Albritton v. City of Winona*, 181 Miss. 75, 178 So. 799 (1938).

30. 10 & 11 GEO. 6, c. 51.

charge was too extreme even for the pattern of British socialism, and that aspect of the Act was repealed in 1953.³¹

It is not, however, the freezing of present uses of land, nor the confiscation of the value of future uses, which directly concerns the question we are here considering. Rather it is the broad power given to planning authorities to change the uses of land and to encourage its development by private business along more productive, or socially more desirable, lines. Apparently this aspect of the Town and Country Planning Act has been accepted without much protest. Not only do planning authorities have extensive powers to make plans, but also to acquire land by compulsory proceedings in furtherance of their development plans. The language of the statute is in part as follows: "For the purposes of this section, a development plan may define as an area of comprehensive development any area which in the opinion of the local planning authority should be developed or re-developed as a whole, for any one or more of the following purposes, that is to say for the purpose of dealing satisfactorily with extensive war damage or conditions of bad layout or obsolete development, or for the purpose of providing for the relocation of population or industry or the replacement of open space in the course of the development or redevelopment of any other area, or for any other purpose specified in the plan;" The language of the statute also specifies that the plan "may in particular . . . designate as land subject to compulsory acquisition by the appropriate local authority any land comprised in an area defined by the plan as an area of comprehensive development . . . or any land contiguous or adjacent to such area" and "any other land which in the opinion of the planning authority ought to be subject to compulsory acquisition for the purpose of securing its use in the manner proposed by the plan."³² Another section of the Act provides that the Central Land Board may acquire land by compulsory process, "for the purpose of disposing of it for development."³³ It appears also that the application for compulsory process may be made by anyone interested in acquiring the land for the development in question. Thus it would seem that the Town and Country Planning Act of 1947 goes as far as this: if a more profitable use of land is practicable and such use is approved as a part of a development plan, then the land can be acquired by a governmental board and turned over to an individual or private corporation for such use.

31. 1 & 2 ELIZ. 2, c. 16.

32. 10 & 11 GEO. 6, c. 51, § 5.

33. 10 & 11 GEO. 6, c. 51, § 43. But it would seem that the Central Land Board would no longer have this power of acquiring land. See 1 & 2 ELIZ. 2, c. 16, § 3, and *Earl Fitzwilliam's Wentworth Estates Co. v. Minister of Housing*, [1952] A.C. 362.

An extreme illustration of the manner in which these provisions of the Act can operate is found in the case of *Hanily v. Minister of Local Government and Planning*,³⁴ decided in 1952. The owner of certain land in question offered it for sale to a corporation which desired to purchase it for use as a factory for metal work. The price asked was £2,000. The corporation refused to pay this amount, and, unknown to the owner, secured from the local planning authority permission to use the land for its factory. The corporation then applied to the Central Land Board to secure the purchase of the land by that organization. The land was valued at its existing use value, which was much below the price asked by the owner, and the corporation refused to pay more than £450 for it. Since the owner would not sell at that price, a compulsory purchase order was secured from the Central Land Board so that, as a result, the land was acquired apparently for £450. In the meantime the owner, who had no knowledge of the proceeding for compulsory purchase, had been offered £1,750 by another firm for the use of the land as a site for a joinery workshop. On a motion by the owner to quash the compulsory purchase order, the Queen's Bench Division held the order valid.

So far as I know, no future interests were involved in the title to this land. But obviously the result would have been the same if future interests existed. The land would doubtless have been taken for use as a factory site, and the purchase price held on trust, just as the future interests had been, and invested for the benefit of all persons having interests in the land. Thus it would seem that, in England, any person who can put land to a more productive use and can convince the local planning authority that such use is desirable, can acquire the land for that use regardless of the existence of contingent future interests.

In conclusion, I think we can go so far as to assert that, under conditions of modern society, whether in England or America, nearly all future interests are, or may become, future interests in a trust fund, which may be invested and reinvested. Nearly two decades ago, C. Reinold Noyes, in his book *The Institution of Property*,³⁵ influenced no doubt by the brilliant study of the corporation by Berle and Means,³⁶ suggested the idea that modern property is an interest in a fund. He used, as illustrations, the trust, the decedent's estate and the corporation. But being an economist and not a lawyer, he overlooked developments in English law and in the American law of future interests.

34. [1952] 1 All E.R. 1293 (Q.B. Div.).

35. NOYES, *THE INSTITUTION OF PROPERTY* (1936).

36. BERLE & MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1933).

Doubtless he spoke better than he knew. Of course, in the United States, when no trusts, corporate stock or future interests are involved, the fund theory of property is little short of fantastic. But if we are dealing with future interests, we are generally dealing with actual or potential interests in a revolving fund. If this is true, and to the extent that this is true, the argument in favor of the Rule against Perpetuities, to the effect that it prevents property from becoming unproductive, falls to the ground.

To recapitulate, this is because: first, in America, future interests are nearly always equitable interests in trusts, and the trustee in most cases will have, either by the terms of the trust or by law, a power to sell and reinvest; second, if the future interests are in corporate stocks or in corporate or government bonds, the corporation will make the property productive, or the governmental authority will use the borrowed capital for social benefit; third, in England, under the legislation of 1925, any family arrangement involving future interests in land is necessarily a trust, involving a power in some person to sell a legal fee simple and reinvest the proceeds productively; fourth, by the weight of authority in America, if there are legal future interests in land affected with a future interest and an emergency has arisen whereby the property is likely to be lost because it is unproductive, the court can order a sale of the land and a productive investment of the proceeds by a trustee; and, fifth, under the English Town and Country Planning Act of 1947, land which is unproductive, even though affected with future interests, can be taken by compulsory process and put to a productive private use in accordance with a development plan.

In short, if, as judges have sometimes thought, alienability to secure productivity is the sole purpose of the Rule against Perpetuities, then we have reached a point where the Rule should be completely abolished. Although many students and not a few lawyers, who have struggled unsuccessfully with the higher mathematics of future interests, might be persuaded to advocate such a change, just as the small schoolboy is said proverbially to hope that the schoolhouse will burn down, I would not join them in this movement for reform. While the Rule against Perpetuities, for the reasons I have given, is not quite as significant from an economic standpoint as is sometimes supposed, there is still a policy to be conserved by it.

DEAD HAND V. LIVING HAND

I.

In this section of the Article I should like to propose an answer to the following question: If alienability for purposes of productivity is not

the justification of the modern Rule against Perpetuities, then what is the public policy which justifies it?

Before suggesting what I believe to be the true answer, I should like to take a moment to mention two other explanations of the Rule which are sometimes made. First, it is said that the Rule is designed to prevent an undue concentration of wealth in the hands of a few. Professor Leach has indicated that the Rule is intended to remove the "threat to the public welfare from family dynasties built either on great landed estates or on great capital wealth."³⁷ But, as he points out, that threat is rather effectively removed by our income and estate taxes. I am disposed to agree with him. Indeed, I feel that undue concentration of wealth is an evil which can best be combatted by tax legislation, rather than by perpetuity rules.

A second reason sometimes given for the Rule is as follows: it is socially undesirable for some members of society to have assured incomes and be protected from the economic struggle for existence; the principle of survival of the fittest should apply, so that those who are unable to maintain themselves in the economic struggle should not survive. The American Law Institute, without giving its blessing to this particular rationale, states it as follows: "It is obvious that limitations unalterably effective over a long period of time would hamper the normal operation of the competitive struggle. Persons less fit, less keen in the social struggle, might be thereby enabled to retain property disproportionate to their skills in the competitive struggle."³⁸ Several answers may be made to this argument. The Rule against Perpetuities does permit economic provision for the unfit for one generation, indeed for one generation and during the minority of the next. It would seem almost as bad to permit this sort of thing for the first generation as for succeeding generations. If it be answered that there is a social objection to the continuation of a line of weaklings, the answer is that a restriction on the tying up of property does not eliminate that objection. Modern society, with its elaborate welfare ma-

37. "Graduated estate and income taxes have largely eliminated any threat to the public welfare from family dynasties built either on great landed estates or on great capital wealth." *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721, 727 (1952).

"It [the Rule against Perpetuities] should be a check on vain, capricious action by wealthy empire builders." Leach & Tudor, *The Common Law Rule Against Perpetuities* in 6 AMERICAN LAW OF PROPERTY 43 (Casner ed. 1952).

38. RESTATEMENT, PROPERTY 2132 (1944).

"The tendency of restriction is to say that there is no objection to an individual receiving a large fortune by way of gift provided he has unfettered control of it. The theory of restriction is that the recipient should be made to take a 'sporting chance' on his ability to keep it, without depending upon the prerogative of the dead. Responsibility develops both manhood and citizenship." Wilson, C.J., in *Congdon v. Congdon*, 160 Minn. 343, 363-64, 200 N.W. 76, 83 (1924).

chinery, is not organized on a theory of survival of the fittest, but of survival of the weak. Moreover, if human experience means anything, we may well conclude that the progeny of weaklings are likely to be more numerous in a state of poverty than in a state of wealth.

Thus I believe that neither of these explanations for the Rule is adequate. There are in my opinion, however, two other bases for the social policy of the Rule, the force of which can scarcely be denied.

First, the Rule against Perpetuities strikes a fair balance between the desires of members of the present generation, and similar desires of succeeding generations, to do what they wish with the property which they enjoy. It is almost axiomatic that one of the most common human wants is the desire to distribute one's property at death without restriction in whatever manner he desires. Indeed, we can go farther and say that there is a policy in favor of permitting people to create future interests by will, as well as present interests, because that also accords with human desires. The difficulty here is that, if we give free rein to the desires of one generation to create future interests, the members of succeeding generations will receive the property in a restricted state. They will thus be unable to create all the future interests they wish. Perhaps, they may not even be able to devise it at all. Hence, to come most nearly to satisfying the desires of peoples of all generations, we must strike a fair balance between unrestricted testamentary disposition of property by the present generation and unrestricted disposition by future generations. In a sense this is a policy of alienability, but it is not alienability for productivity. It is alienability to enable people to do what they please at death with the property which they enjoy in life. As Kohler says in his treatise on the philosophy of law: "The far-reaching hand of a testator who would enforce his will in distant future generations destroys the liberty of other individuals, and presumes to make rules for distant times."³⁹

But, in my opinion, a second and even more important reason for the Rule is this: it is socially desirable that the wealth of the world be controlled by its living members and not by the dead. I know of no better statement of that doctrine than the language of Thomas Jefferson, contained in a letter to James Madison, when he said: "The earth belongs always to the living generation. They may manage it then, and what proceeds from it, as they please, during their usufruct."⁴⁰ Sidgwick, in his *Elements of Politics*, also discusses the problem in

39. 12 MODERN LEGAL PHILOSOPHY SERIES 205-06 (1914).

40. 5 WRITINGS OF THOMAS JEFFERSON 121 (Ford ed. 1895). The letter was written September 6, 1789.

For another letter of Jefferson to like effect, see 1 ELY, PROPERTY AND CONTRACT IN THEIR RELATION TO THE DISTRIBUTION OF WEALTH 466 (1914).

the following words: ". . . it rather follows from the fundamental assumption of individualism, that any such posthumous restraint on the use of bequeathed wealth will tend to make it less useful to the living, as it will interfere with their freedom in dealing with it. Individualism, in short, is in a dilemma. . . . Of this difficulty there is, I think, no general theoretical solution: it can only be reduced by some practical compromise."⁴¹

Just how does a contingent equitable interest in a trust result in the control of property by the dead and not the living?

First, even though an equitable future interest in an alienable trust fund is involved, the trustee cannot invest the fund as freely as a person who owns it beneficially. Modern business economists have frequently pointed out the great value of risk investments to further social and economic advancement. We need someone to invest in the manufacture of jet airplanes, in machinery operated by atomic energy and in scores of other things which in the long run may lead to a higher and better civilization. Yet the trustee cannot risk trust funds in such investments. At one time, indeed, the trustee was limited pretty much to government securities and first mortgages; and it is still true that, in some states, in the absence of a provision in the trust instrument, he can invest only in bonds and mortgages. In many jurisdictions, however, the so-called "prudent man rule" of trust investments is in force;⁴² but this refers to the conduct of a prudent man in investing the funds of another entrusted to him, not his own funds. It means seasoned investments. For it is an axiom of trust investment that the trustee is not to speculate or take substantial risks. His duty to preserve the fund is paramount to his duty to make it productive.⁴³

Second, dead-hand control means that the trust fund affected with equitable future interests can never be used for anything but capital investments. To use the terminology of the economist, it cannot be used to purchase consumers' goods. That this is not always an economic calamity, I am fully aware. For, of course, we must recognize

41. *ELEMENTS OF POLITICS* (1891), quoted in WIGMORE & KOCOUREK, *RATIONAL BASIS OF LEGAL INSTITUTIONS* 449, 450 (1923).

A similar idea is expressed in HOBHOUSE, *THE DEAD HAND* 90, 91 (1880): "I have endeavoured to trace out the causes of this singular phenomenon . . . ; have contended that the positive law . . . should be altered, and that the management of property should be resumed by those who alone can either manage or enjoy it, viz., the existing generation of men; endeavouring to express my doctrine in this simple formula—that Property is not the Property of the Dead but of the Living."

42. As to the "prudent man rule," see *RESTATEMENT, TRUSTS* § 227 and comment *f* (1935).

In general, as to restrictions on investments by trustees, see 3 *BOGERT, TRUSTS AND TRUSTEES* pt. 2, c. 30 (1946).

43. *RESTATEMENT, TRUSTS* § 227, comment *e* (1935).

that, at least according to the orthodox economist, society advances by accumulating capital. But I also realize that there are times when society benefits by spending and when expenditures should be made out of capital for consumers' goods. In time of economic depression, or of individual misfortune, it may be socially undesirable to freeze too much of the world's wealth in the form of capital. The Rule against Perpetuities tends to prevent a long continued freezing of capital.

Some years ago, Mr. Edward Clark Lukens, of the Philadelphia Bar, writing in the *American Bar Association Journal*, expressed this idea as follows: "There are times when money is really needed, and the distinction between principal and income has to go by the board. No sensible person approves of habitually living beyond one's income, but there are occasions when the spending of principal is the higher wisdom, perhaps the decenter course. Shall a man define the line between principal and income when his wife or child is ill? . . . It is a bad thing for a man to be fixed so that he cannot become either richer or poorer." ⁴⁴

Furthermore, there is another undesirable effect of a contingent future interest which a power of sale in a trustee does not mitigate, namely, that the character of the condition can control human conduct. This result is most apparent in cases where land is given for some particular purpose and no trust is involved. Thus, property may be conveyed to the X Church, provided that, if the tenets of a particular creed are not taught on the premises, then the land shall go to Y and his heirs. Were it not for the Rule against Perpetuities which strikes down Y's executory interest and makes the conveyance to the X Church absolute,⁴⁵ the dead hand could perpetually exercise pressure by means of the condition to compel instruction in an outworn creed. While conditions to enforce particular conduct are rare in the field of private trusts, they occasionally are found. Suppose that a will provides that the beneficial interest in a trust is to shift at some remote future time to a second beneficiary on condition that the existing beneficiary should ever smoke tobacco, or that the beneficiary for the time being should fail to wear silk stockings in public, or that the beneficiary for the time being ever become a citizen of England. Doubtless such conditions might at one time, and within certain social groups, have seemed reasonable. But as the world moves and society changes, their enforcement becomes little short of absurd. It is true, some of them may

44. *Trust Estates and Character*, 18 A.B.A.J. 137, 139 (1932).

45. Of course, as is later pointed out, much the same thing can be accomplished by the use of the possibility of reverter or right of entry, because these interests are not within the Rule against Perpetuities. But some restrictive rule should be applied to them also. See text at pages 736-37 *infra*.

be struck down by another doctrine of the common law, namely, that conditions against public policy are void. But it seems desirable, also, to strike them down without reference to any affirmative determination of the bad policy of the particular condition, if they are performable at too remote a future time. Here also, the Rule against Perpetuities serves a useful purpose.

II.

Having explained what I believe to be the true rationale of the Rule against Perpetuities, and shown that some such rule is a social and economic necessity, I should like to direct attention to this question: Is the Rule satisfactory? If not, what aspects of it are objectionable? In recent articles, published on both sides of the Atlantic,⁴⁶ Professor Leach has excoriated the Rule in no uncertain terms, referring to its operation as a reign of terror and a slaughter of the innocents. One might even be disposed to deduce from his discussion that he would not be unhappy if the Rule were abolished, for he personifies it as an old lady who "must learn to sit by the fire and confine her activity to a few words of wise advice." On the other hand, strangely enough, when he discusses possibilities of reverter and rights of entry, to which the Rule is not applicable in the United States, he advocates restrictive legislation. May it not be that, if the restrictive force of the Rule against Perpetuities were removed from executory interests, they would be used in objectionable ways to tie up property, just as possibilities of reverter and rights of entry now are? And is not the desirability of the Rule against Perpetuities determined not so much by what people do under it as by what they refrain from doing because it is in force? I agree with most of Professor Leach's criticisms of the workings of the Rule. But I do not think that the hard cases which he discusses are of sufficiently frequent occurrence to cause us to overturn the fundamental bases of the Rule.

In criticising the Rule, I should like to discuss six aspects of it, which seem to include about all that is its essence.

First, in considering the validity of a contingency, the Rule deals with what might possibly happen, not what would probably happen. It must be certain that the contingency will happen within the period of the Rule. Thus draftsmen sometimes unwittingly violate the Rule because it is so improbable that the contingency will occur after the period of lives in being and twenty-one years that the possible violation is overlooked. Most of the "awful examples" cited by writers on

46. *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721 (1952); *Perpetuities: Staying the Slaughter of the Innocents*, 68 L.Q. REV. 35 (1952).

this subject are of this kind. Thus there is the devise limited on the contingency "when my debts are paid" or "when my will is probated" or "when my estate is distributed," which, if the language is construed to constitute a condition precedent, may not happen within the period of the Rule. Yet probably it never occurred to the mind of the draftsmen that the happening of this event could be postponed for lives in being and twenty-one years.

Then there are the cases where it is highly probable that a given person or group of persons may be the measuring lives in being, yet there is a remote possibility, or at least a possibility in contemplation of law, that the person in question may be unborn and cannot be regarded as the life in being for the purpose of satisfying the Rule. Thus, where a testator devises to those of his grandchildren who are living at the death of his son's widow, and no particular widow is named, there is a possibility that the widow may be a person born after the testator's death. In that case the gift to the surviving children would be void, because the widow cannot be regarded as the measuring life in being. Then there is the case of the devise to the grandchildren of a named person who is of an advanced age at the testator's death. If it is certain that the named person will have no more children after the testator's death, then his children are the lives in being, and the gift to the grandchildren is good. But we are confronted with a corollary to the Rule against Perpetuities to the effect that, for purposes of this Rule, every human being is conclusively presumed to be capable of having issue as long as he lives. Hence, we cannot say that there will be no afterborn children, and the devise to the grandchildren may be held void.

It is clear that something should be done about these situations. Not many wills are upset by reason of the applications of the Rule which I have described; but in each generation a few cases arise in which limitations are held void on this account.

The second aspect of the Rule which has been criticised is this: in applying the Rule, the validity of an interest is determined as of the time of its creation. In the case of a will, this time is, in practically all cases, the death of the testator. This aspect of the Rule is, of course, closely linked to the one we have already considered. It is nearly always because of this doctrine that contingencies which are likely to happen soon are sometimes held void. Thus, when a testator devises property on the condition precedent of probate of his estate, this devise is void only because, at the time of the testator's death, it is possible that this event may not happen within lives in being and twenty-one years.

Yet I venture to assert that this aspect of the Rule is unobjectionable. It is of the essence of the Rule against Perpetuities that we must be certain whether an interest is valid or void. This is why a conclusive presumption of capacity to have issue is applied, although sometimes it is contrary to fact. This is why a determinable period of lives in being and twenty-one years is fixed, and not a vague rule of reasonableness. This is why the court will not split a contingency unless the testator has expressly done so.⁴⁷ There is a social policy involved in determining the validity of an interest at an early date; and the Rule against Perpetuities is grounded on that policy.

Moreover, this aspect of the Rule against Perpetuities is not unique in the legal system. Illegality or invalidity of a will or deed under rules of law is almost invariably determined at the inception of the instrument, whether the Rule against Perpetuities or some other rule of policy is involved.

The exception to the doctrine requiring the determination of validity at the time the will or deed takes effect, which is recognized when limitations are created by a power of appointment,⁴⁸ is entirely consistent with the general policy of the law. The exercise of the power is really the inception of the interest, and therefore facts existing as of that time can necessarily be considered.

The third essential of the Rule is this: it totally invalidates any future interest which violates it. Here I feel much can be done in mitigation of its harshness. Why, after all, should the future interest always be struck down in its entirety? Would it not be better, in many cases, to rewrite it as the testator would probably have done had he known of its invalidity? Thus, suppose a testator makes a bequest to such of his grandchildren as attain the age of thirty years? Would it not be better to rewrite the will so that it reads "to such of my grandchildren as attain the age of twenty-one years," rather than to hold the bequest void?

The fourth essential aspect of the Rule is that it applies only to contingent, but not to vested, interests. Yet the concept of vesting as used in this connection is definitely feudal. When we say that a vested interest is not subject to the Rule, we refer to a vesting in interest, not vesting in possession. Now, whatever may have been the law in feudal times, it is clear that, today, a vested future interest may just as effectively take property out of commerce and prevent its conversion into consumers' goods as a contingent interest in an ascertained person.

47. 4 RESTATEMENT, PROPERTY § 376, comment *f* and illustration 3 (1944).

48. *Id.* §§ 391, 392.

Suppose land is devised on trust for *A* for life, and then for such of the children of *A* as survive him for their lives, and then to distribute to the testator's heirs, determined as of the time of the testator's death. This is all valid. It is true, all of *A*'s children who survive him may be born after the testator's death. And the ultimate fee simple will not take effect in possession in the testator's heirs until the death of these children. Yet the life estates in the children will vest, from a feudal standpoint, as soon as *A* dies, and the future interest in the testator's heirs is vested at the moment it is created. From the standpoint of marketability, no one is likely to buy the life estates. Practically, the property is tied up, not for lives in being plus twenty-one years, but for a life in being plus the lives of persons unborn when the testator dies.

Not only does this mean that the period during which the property is tied up is extended beyond the period of the Rule. It also means that, in determining the validity of an interest under the Rule, we must resolve the difficult and baffling question: Is the interest vested or contingent? I doubt whether any other question in the law of estates has caused so much litigation as the question of the vested or contingent character of the interest. If all the decisions on this matter were laid end to end, I know not how many times around the globe they would extend. Of course, I realize that there is a fundamental distinction between an interest subject to a condition precedent, and one which is vested subject to a condition subsequent; and this can never be eliminated from any mature legal system. All I am saying is that, for purposes of the policy of the Rule against Perpetuities, the distinction is of little significance and rests on the feudal notions of a bygone age.

The fifth essential relates to the period of the Rule. Is the period, namely lives in being and twenty-one years, open to criticism? Here, too, the Rule was determined by aspects of the feudal law of estates which are now largely obsolete. Historically, the courts determined this period as that during which an estate tail could be unbarrable. Despite its medieval origin, however, the period of the Rule would seem still to be a workable and practical one. Regarding the Rule as a fair compromise between the desires of the normal testator to create future interests and the desires of members of future generations to control the property which they enjoy, we may ask this question: What period will take care of the normal desires of the testator who makes a family settlement by way of testamentary trust? The answer is clear enough. It is lives in being and twenty-one years. The testator may well desire to give life estates to his wife and children; he may also

wish to provide for unborn grandchildren during their minority. Some argument might be made in favor of making the period after the life estates twenty-five or thirty years, since testators often feel that a devisee who is only twenty-one years of age is hardly mature enough to handle the corpus of an estate. If a limitation to unborn persons at an age over twenty-one rendered the interest totally void, as it now does, much could be said in favor of extending the period to take care of this variety of limitation. But if a *cy pres* modification of such interests were recognized, in the manner I shall later suggest, then the present period would seem to be reasonably satisfactory for family dispositions.

Moreover, it goes without saying that there should be a fixed period of time, whether any minority is involved or not. Many years ago a good deal was written about the error of the courts in adding the twenty-one year period in gross to the time limit of the Rule. It was said that logically this should have been an actual minority, since the theory on which the Rule was originally worked out was that property should not be inalienable longer than the period during which an estate tail might be unbarrable. Gray, writing in an age when historical arguments were all-powerful, was inclined to say that the Rule should have been "lives in being and an actual minority," not "lives in being and twenty-one years."⁴⁹ The New York Revisers of 1828, influenced by Humphreys' English treatise⁵⁰ also, produced a statutory Rule against Perpetuities which omitted any period in gross.⁵¹ Over a century of experience with that legislation is convincing proof of the unsoundness of that omission. There are many instances where a contingent future interest is created in which the contingency is bound to happen a short time after the creating instrument takes effect, and yet no lives in being are involved. A testator, out of excessive caution, may assume that a period of from two to five years will be necessary to put his estate in shape to be distributed; and therefore he inserts a condition precedent that devisees must be ascertained at the end of that period after his death. One of the most common instances of the short period prior to vesting, where no measuring lives are involved, is found in the option to purchase land. If there were no period in gross, it would be necessary to limit the option however brief its duration might be, by the period of some life in being.

49. GRAY, THE RULE AGAINST PERPETUITIES §§ 187, 188 (4th ed. 1942).

50. See 3 N.Y. REV. STAT. 572 (2d ed. 1836), in which Humphreys' treatise, OBSERVATIONS ON THE ACTUAL STATE OF THE ENGLISH LAWS OF REAL PROPERTY: THE OUTLINE OF A CODE (1826), is cited with approval in the Revisers' Notes.

51. 1 N.Y. REV. STAT. pt. II, c. 1, tit. II, art. 1, §§ 15, 16 (1829).

The sixth and last aspect of the Rule against Perpetuities deserving of critical comment involves certain exceptions to the Rule. Possibilities of reverter and rights of entry are not within it. This again appears to be of purely feudal origin. In England, the Rule has, nevertheless, been applied to both these interests,⁵² but American courts have refused to do so. The absurdity of this exception is evident when we consider that, by two inter vivos transactions, a person can sometimes accomplish exactly the same result as he would in an executory interest which the Rule strikes down. Suppose *X* conveys land to *A* and his heirs, but if it ever ceases to be used for residence purposes, then to *B* and his heirs. The executory interest in *B* is obviously bad under the Rule. But *X* can first convey the land to *A* and his heirs so long as the land is used for residence purposes. Then one moment later he can transfer his possibility of reverter to *B* and his heirs. Even though the possibility of reverter is held to be inalienable in the particular jurisdiction, he can still accomplish this result by a conveyance of the possibility of reverter with warranties. Indeed, according to a recent Massachusetts decision,⁵³ this same thing can be accomplished by will. The testator, it is there held, can create the possibility of reverter by a specific devise, and then devise the possibility of reverter in the residuary clause. Without doubt, the Rule against Perpetuities, or some similar restrictive rule, should be applied to possibilities of reverter and rights of entry.

III.

Having determined the rationale of the Rule against Perpetuities, and criticized its practical operation in the light of that rationale, I should like now to consider the question: What should be done about it? It is, I think, obvious that nothing short of legislative action can adapt the Rule to the requirements of modern society. The limitations of judicial action prevent adequate reform by judicial decision. On the other hand, I believe it would be unwise and even futile to attempt to wipe the slate clean and start with a new rule to restrict the tying up of property.

In the United States there is a long history of attempts to substitute another type of rule for the Rule against Perpetuities. And if anything can be deduced from that history, it is this: all attempts

52. *In re Da Costa*, [1912] 1 Ch. 337; *In re Hollis' Hospital*, [1899] 2 Ch. 540; *Hopper v. Corporation of Liverpool*, 88 Sol. Jour. 213 (1944). But see *In re Chardon*, [1928] 1 Ch. 464. The Rule has been made applicable by statute to rights of entry for breach of condition. See 15 Geo. 5, c. 20, § 4(3) (1925).

53. *Brown v. Independent Baptist Church of Woburn*, 325 Mass. 645, 91 N.E.2d 922 (1950).

to substitute a new rule have proved to be unsatisfactory. This has been true of the New York two-lives rule,⁵⁴ the Connecticut statute limiting donees to persons in being and their immediate issue and descendants,⁵⁵ and the Mississippi "two donee" statute.⁵⁶ I do not think there is any way in which the property institutions of a civilized country can be completely wiped out and a new set of institutions established at one stroke of the legislative pen. Basic property doctrines are like the leopard's spots and the stripes on the tiger. They can only change by the slow processes of evolution.

While it would appear to be futile to write a new Rule against Perpetuities, history demonstrates that amendments to the existing Rule can be quite successful. Thus, the English statute with reference to class gifts to persons at an age over twenty-one,⁵⁷ and the American statutes exempting equitable interests in pension trusts from the Rule⁵⁸ are strong evidence of this conclusion. How then shall we amend the Rule by legislation?

I do not think the solution lies in what Professor Leach has felicitously described as the "wait and see" doctrine. This doctrine has recently been recognized by legislation in Pennsylvania⁵⁹ and Massachusetts,⁶⁰ and is believed by some to be supported by two recent decisions, one in Massachusetts⁶¹ and one in New Hampshire.⁶² In its extreme form, it means that we wait until the contingency happens before determining the validity of the interest, and that we make this determination in the light of facts then existing.⁶³ The language of the Pennsylvania statute is: "measured by actual rather than possible events." The effect of this doctrine in an unrestricted form is to make it impracticable to determine who are the lives in being. The Massachusetts statute does not go that far. In effect, it provides for the

54. N.Y. REAL PROP. LAW § 42; N.Y. PERS. PROP. LAW § 11.

55. CONN. GEN. STAT. § 2952 (1888), repealed by Conn. Pub. Acts c. 249 (1895). Substantially the same statute was enacted in Ohio and in Wyoming and was repealed in each jurisdiction. See SIMES, HANDBOOK OF FUTURE INTERESTS 413 (1951).

56. See MISS. REV. CODE c. 36, § 1, art. 3, repealed by MISS. CODE § 2117 (1930).

57. 15 GEO. 5, c. 20, § 163 (1925).

58. See, e.g., Mass. Acts 1946, c. 287.

59. 1 Pa. Laws 1947, No. 39, § 4(b).

60. Mass. Acts 1954, c. 641, § 1.

61. *Sears v. Coolidge*, 329 Mass. 340, 108 N.E.2d 563 (1952).

62. *Merchants Nat. Bank v. Curtis*, 98 N.H. 225, 97 A.2d 207 (1953).

63. For discussions of the "wait and see" doctrine, see the articles of Professor Leach cited in note 46 *supra*, and also the following: 6 AMERICAN LAW OF PROPERTY 40, 99 (Casner ed. 1952); Tudor, *Absolute Certainty of Vesting under the Rule Against Perpetuities—a Self-Discredited Relic*, 34 B.U.L. REV. 129 (1954); Leach, *Perpetuities Legislation, Massachusetts Style*, 67 HARV. L. REV. 1349 (1954); Newhall, *Doctrine of the "Second Look"*, 92 TRUSTS & ESTATES 13 (1953); Brégy, *A Defense of Pennsylvania's Statute on Perpetuities*, 23 TEMP. L.Q. 313 (1950); Phipps, *The Pennsylvania Experiment in Perpetuities*, 23 TEMP. L.Q. 20 (1949).

determination of the validity of the future interest at the end of the life estate. As I have already stated my objections to the "wait and see" doctrine in the pages of the *Michigan Law Review*,⁶⁴ I shall not elaborate them now. Suffice it to say, it relegates contingent future interests to a state of legal limbo for a period of lives in being and even longer, during which they would neither be valid nor void. Its effect is to tie up interests which eventually may be held to be valid and indefeasible, and to increase the average period during which property is tied up. In short, it proposes to repeal the basic element of certainty and predictability, which is at the very heart of the Rule against Perpetuities.

I propose the following legislative changes.

First, there should be a rule of construction to this effect: if there is a possibility of invalidity under the Rule, the court should construe the language of the will to effectuate as nearly as possible what the testator would have intended at the time of his death had he then known that the application of the Rule might make all or a part of the will invalid. Thus the court would take into consideration not only facts existing at the time of the testator's death, but also the desire of the testator to avoid invalidity under the Rule. For example, suppose a testator devises his estate to the children of his niece X for their lives, and then to their children. At the time the will is made, X is thirty years old. But at the testator's death X is sixty years old and has several children. Under the construction rule proposed, we will have no difficulty in construing "children of X" to mean "children of X living at the testator's death." Thus the gift to the grandchildren of X is valid. Indeed such a rule of construction would seem to take care of the problem of invalidity due to the legal presumption of capacity to have issue. Perhaps a few courts might be persuaded to go as far as I have suggested without any statute, but without doubt a statutory statement of the Rule would be advantageous.

However, construction of the will is only the first step. It will not solve most of the difficulties. In addition, I propose, as the basic remedy for the defects of the Rule, the development of a kind of *cy pres* doctrine for these future interests which fall under the ban of the Rule. The operation of *cy pres* in modifying the terms of a charitable trust, where the directions of the settlor are illegal, impossible or impracticable, is well known.

Nor has the doctrine been limited exclusively to charities. In *Edgerly v. Barker*,⁶⁵ the well known case in which, contrary to the

64. *Is the Rule Against Perpetuities Doomed? The "Wait and See" Doctrine*, 52 MICH. L. REV. 179 (1953).

65. 66 N.H. 434, 31 Atl. 900 (1891).

weight of authority, the court modified a gift to testator's grandchildren at age forty, making it read, at age twenty-one, Justice Doe stated the *cy pres* doctrine which he applied in these words:

"If a will cannot be conformed to the law unless devised property vests sooner than the testator intended, the inquiry may be whether his intent as to the time of vesting is qualified by his intent that the devisees shall have the property and that the devise shall be carried into effect *cy pres*. The construction that gives to A an estate which the testator gives to A's children is far from the intent on that subject; but if it is as near as possible, it may accord with the intent on the subject of approximation."⁶⁶

Indeed, there is one situation in which a *cy pres* doctrine has been applied in England to give some effect to limitations which would otherwise be void under the Rule against Perpetuities. In almost every period of Anglo-American law, some one has tried unsuccessfully to tie up property perpetually in the family by the following device. Land is devised to testator's son, A, for life, and then to the oldest son of A for life, and then to the oldest son of such son for life, and so on *ad infinitum*. If we apply the Rule against Perpetuities to this limitation in the manner in which it is usually applied, the life estate to A's son would be good. If A's eldest son were not in being at testator's death, then all life estates after that of such son would be void. But that is not the way in which the English court solved the problem. It was held that, if A's son had been given a fee tail, it would come more nearly effectuating A's intent, and, therefore, the limitations were held to create a fee tail in A's son by the application of the *cy pres* doctrine.⁶⁷ Indeed, the same solution to the problem of an unending series of life estates is recognized in an early decision in New York⁶⁸ and another in Michigan.⁶⁹

Now if a court can rewrite void future interests in such cases, why may it not do so in other cases where the future interests would otherwise be void? Herein lies the hope of successfully reforming the Rule against Perpetuities. I claim no originality for this suggestion. It was proposed some years ago in an article in the *New York University Law Quarterly Review* by Judge Quarles.⁷⁰ More recently, Professor Leach proposed it in his articles to which I have heretofore re-

66. *Id.* at 448, 31 Atl. at 902.

67. *Humberston v. Humberston*, 1 Peere Wms. 332 (1716).

68. *Jackson ex dem. Nicoll v. Brown*, 13 Wend. 437 (N.Y. 1835).

69. *St. Amour v. Rivard*, 2 Mich. 294 (1852). The court refused to apply the *cy pres* doctrine; but this may have been because Michigan did not recognize fee tail estates.

70. *The Cy Pres Doctrine: Its Application to Cases Involving the Rule Against Perpetuities and Trusts for Accumulation*, 21 N.Y.U.L.Q. Rev. 385 (1946).

ferred.⁷¹ Indeed, the *cy pres* approach is already embodied in two varieties of legislation now on the statute books. There is the provision in the English Law of Property Act ⁷² to the effect that, if there is a gift to persons conditioned on their attaining an age over twenty-one, which is in violation of the Rule against Perpetuities, but which would be valid if the named age were twenty-one, then the age shall be deemed to be twenty-one. A statute to the same effect was enacted in Massachusetts last year.⁷³ There are also statutes in a few states ⁷⁴ which restrict the duration of rights of entry and possibilities of reverter to a fixed period of years. But, if they are limited for a greater period, the future interests are not void; they are in effect merely rewritten with the maximum period which the law permits substituted.

Thus, I propose that several statutes, or sections of a statute, be enacted to take care of specific problems which have actually arisen with respect to the Rule against Perpetuities. There would be a provision, like the English and Massachusetts statutes which I have mentioned, dealing with limitations to persons who attain an age over twenty-one. There would also be a section providing for the so-called administrative contingency case. In effect it would provide that, where property is given on the condition precedent "when my will is probated," or "when my estate is settled," or "when my debts are paid," or a like condition is stated, and no period of time within which the condition is to happen is stated, then the will or other instrument shall be deemed to be on the condition that the will be probated within twenty-one years, or the estate be settled within twenty-one years, or debts paid within twenty-one years.

In the case where a testator leaves an estate to persons who survive the widow of a named person, and there is danger that the devise might be invalidated because the widow might not be a person in being at the testator's death, the following is suggested. Where a limitation is made to persons to be ascertained on the death of a widow of a named person, and no particular person is indicated as such widow, and the limitation would otherwise be void under the Rule against Perpetuities, then the gift shall be subject to the additional condition that, either the widow be a person in being at the testator's death, or that she die within twenty-one years after the testator's death. Thus, suppose testator devises his estate to his son, X, for life, and then to such widow as the

71. See note 46 *supra*.

72. 15 GEO. 5, c. 20, § 163 (1925).

73. Mass. Acts 1954, c. 641, § 2.

74. See, e.g., FLA. STAT. ANN. § 689.18 (Cum. Supp. 1954); ILL. ANN. STAT. c. 30, § 37(e) (Cum. Supp. 1954); MASS. ANN. LAWS c. 184, § 23 (1933), Mass. Acts 1954, c. 641, § 3; MINN. STAT. ANN. § 500.20(2) (West 1947); R.I. Acts 1953, c. 3213.

son shall leave surviving him for her life, and then to such of their children as survive the widow. Under the legislation proposed this would be rewritten so that the devise to the children surviving the widow would be on condition that the widow be a person in being at the testator's death, or that she die within twenty-one years after testator's death. In this way the limitations would, in practically every case, be saved from invalidity.

It is possible that, in addition to the specific provisions which have been outlined, there should be a blanket clause to the effect that, in all other cases where a future interest violates the Rule against Perpetuities, the court shall have power to remould the limitations so as to accomplish the testator's purpose *cy pres*. Against this it can be urged that a blanket rule would necessitate litigation in all such cases before the interested parties could determine the effect of the will. Moreover, it would mean that the judge might rewrite the will in a manner which would be entirely unpredictable. Doubtless, many lawyers would prefer to limit the courts to specific rules for revising the will, so that it can be determined in advance what will be done with it. It is my conclusion that no blanket *cy pres* provision should be included in perpetuity legislation, but that, as new situations arise which appear to be sufficiently common to call for a rule, other specific statutes dealing with them should be enacted.

It may be urged that rewriting limitations according to *cy pres* rules, or inserting additional contingencies to save them, is but another way of applying the "wait and see" doctrine. But further scrutiny will disclose that this is not the case. By rewriting the will *cy pres*, one or two additional contingencies are inserted; but the will is rewritten as of the time of the testator's death, and the terms of the modification are at once known. According to the "wait and see" doctrine, the conditions are, in effect, written in only when the event happens; and until then, their number is infinite. Or stated in another way, the revision of the will *cy pres* involves a kind of splitting of contingencies. But contingencies are split as of the time of the testator's death, and their terms are known. According to the "wait and see" doctrine, we wait until the condition happens, and then split contingencies in a manner which may have been entirely unpredictable up to that time.

The possibility of reverter and right of entry for breach of condition should probably have separate legislative treatment. It is true, we could do as English courts have done and simply apply the common law Rule to them. But they rarely are found in family settlements, and lives in being are almost never involved. Hence, to apply the com-

mon law Rule, would mean that the condition must occur within twenty-one years. That may well be regarded as too short a time.

On the other hand, it may be said that, if you permit a longer period for possibilities of reverter and rights of entry, you should do the same for all contingent limitations in which no measuring lives in being can be found. Logically this is true. This might result in a period of lives in being and twenty-one years, or, in the alternative, a longer period in gross, say thirty years. But to establish alternative periods in all situations would seem to complicate still further an already complicated rule, besides weighting our reform program with an amendment which no legislature is likely to accept.

On the whole, it seems best to establish a separate limiting rule for possibilities of reverter and rights of entry, as a few states have already done.⁷⁵ The recent Massachusetts statute on this subject could well serve as a model.⁷⁶ It provides that, where a fee simple determinable in land, or a fee simple subject to a right of entry for condition broken in land, is created, and the contingency stated does not occur within thirty years, then the fee simple becomes absolute. As has already been pointed out, this is really the *cy pres* approach, since the future interests are not held void, but are rewritten with an additional condition that the contingency must occur within thirty years. The Massachusetts statute also provides that, if the contingency must occur, if at all, within the period of the Rule against Perpetuities, it is good.

And now I wish to make one final suggestion concerning legislative reform of the Rule. I make it with a good deal of doubt and uncertainty, because it involves a rather basic change. It is this: Instead of the requirement that a future interest must vest in interest within the period of the Rule, should we require that it vest in possession or enjoyment within that period? This, of course, would mean nothing less than that the Rule would apply to vested as well as contingent future interests. There would necessarily be some exceptions to the Rule. Thus, a vested reversion or remainder subject to a lease for years should be valid regardless of the period of time which might elapse before it takes effect in possession. Moreover, problems would arise, particularly when trust estates are involved, as to what is vesting in enjoyment. Thus, suppose a testator sets up a trust to pay the income to his children for their lives and then to distribute the corpus equally among his grandchildren, it being expressly provided that

75. See note 74 *supra*.

76. Mass. Acts 1954, c. 641, § 3. Since this statute is stated in terms of modifying the qualified fee simple, rather than the future interest following it, its application results in modifying executory interests dependent on determinable fees, as well as possibilities of reverter. This inclusion seems desirable.

the share of any grandchild in the corpus is to be withheld until he attains the age of twenty-five or sooner dies, and he is to receive only the net income until that time. Clearly the estate vests in interest in the grandchildren when they are born. And it would seem that it vests in enjoyment when their parents die, thus making it valid under the revision of the Rule here suggested. However, suppose the grandchildren are to receive only so much of the income as the trustee determines is needed for maintenance, but it appears that all the income will be necessary for this purpose. Can we say that the interest has vested in enjoyment?

If the Rule were to be modified as I have suggested, then Gray's formula would be changed to read as follows: no interest is good unless it must vest, if at all, in possession, or in enjoyment of the net income, not later than twenty-one years after some life in being at the creation of the interest. I am not sure that we should go that far. It is true, we would eliminate one more threat to alienability, and would avoid much litigation on the question whether an interest is vested or contingent. But we would also doubtless develop uncertainties at other points. Perhaps it might be better merely to provide that, for purposes of the Rule against Perpetuities, a future interest limited to take effect in possession or enjoyment on the termination of a life estate is to be treated as contingent.

In conclusion, if legislative changes such as I have proposed are to be made, this should not be done in haste. Careful study and deliberation should precede any enactment; and, after the substance is determined, skilled draftsmanship should be employed to translate ideas into the form of effective statutory language.

Nor would I hold out the hope to the lawyer, who is confused and harassed by the intricacies of the Rule against Perpetuities, that his path will always be made simple. The reason why the application of the Rule is complex is because we have in the Anglo-American legal system a law of future interests.

But though we cannot eliminate all the intricacies of the Rule, we can prevent it from being a series of traps for the inexperienced and the unlearned. If society has determined that a fair balance between the testamentary power of this generation and of the next is to permit the present generation to tie up property for lives in being and twenty-one years, then we should not defeat that determination by a harsh or ultra-technical application of a mechanical rule. Where dead-hand control has sound social justification, it should not be evaded by the higher mathematics of estates, nor by the scholastic reasoning of the Middle Ages.