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## RUNNYMEDE REVISITED

JOHN S. GRIMES\*

The entourage of President Franklin D. Roosevelt coined the phrase "New Deal" as though the proposed reshuffling of wealth at the close of the "Great Depression" was a new development in social progress. It was, however, merely another step in a movement of periodic realignments of wealth.

Gold, like petroleum, is a fugitive mineral that floats to the top strata. But when it becomes too highly concentrated at the upper level, reformation of the social structure becomes inevitable.

To extend the analogy, discontent seethes in every social structure like lava in the bowels of a volcano until it finds an outlet. If society's rules permit, this discontent may gradually dissipate without turbulence, much as the magma placidly flows from rents in the cones of Kilauea or Mt. Aetna. But if the concentration of lava has crystallized in the throat of the mountain, internal pressures rise and create the violent explosions of Krakatoa and Tambora. Similarly, the frozen concentration of wealth in society's upper strata incites the violent social eruptions of Lenin, Mao Tse Tung and Castro.

The difference in the intensity of these volcanic phenomena parallels the dissimilarity in the expression of social discontent in England and elsewhere. The severity of the strife engendered by social discontent is to some degree commensurate with the particular society's methods of periodically realigning its wealth.<sup>1</sup>

The pattern of continental European society so permitted the freezing of property concentrations<sup>2</sup> as to bring about the French Revolution, the Peasants' War, the Jacquerie, the Spanish Civil War, the Mexican tumults of 1850-1870 and 1912-1932, the triumph of

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1. For example, no logical explanation has ever been advanced to enucleate why the descendants of immigrants from the North German fens evolved legal and governmental concepts that differed materially from those developed in other areas affected by the Teutonic migrations. Suffice it to say that ancestry was not determinative of the way a society controls the collection of wealth.

2. See Pock, *The Rule Against Perpetuities—A Comparison of Some Common-Law and Civil Law Jurisdictions*, 35 ST. JOHN'S L. REV. 62 (1960). By way of contrast, the Novel of Justinian [A.D. 555] had the effect of prohibiting perpetuities beyond the fourth generation. Nov. 159. See R. LEE, *ELEMENTS OF ROMAN LAW* (4th ed. 1956). In addition, the early Spanish-Mexican grants were originally only life estates which were gradually extended by successive generations.

Lenin and the Castro takeover of Cuba. One speaks with awed tones of Chile becoming the first society to seek Marxism through *peaceful* means.<sup>3</sup>

There never has been a violent social eruption in any country which has followed the pattern of the English common law. Social restructurizations have been gradual and marked only by minor skirmishes like Wat Tyler, the Chartist movement, the Whiskey Rebellion and the Eureka stockade. The Wars of the Roses and the English and American Civil Wars were dynastic struggles, not social conflicts.

The Anglo-American culture has not found it necessary to resort to such ultra-legal formulae as the bow string of the Middle East, the prussic acid of the Borgias or the rack of Pedro the Cruel to redistribute wealth. The doctrines of *escheat propter defectum sanguinis* or *attainder propter delictum tenetis* at least had the cloak of legality. Instead, the English law as it emerged from the early shadows of the *lex non scripta* evinced opposition to concentrations of property holding: "The law doth abhor a perpetuity."<sup>4</sup> This was cloaked with religious significance: "For perpetuities do befight against God."<sup>5</sup> Two factors motivated this opposition to entailments. A perpetual concept of ownership would have frozen land, and hence power, in private hands and thus strengthened an oligarchic society at the time a strong central state was struggling to emerge. In addition, "perpetuities" impeded the development of the mercantile middle class by taking property out of the "stream of commerce."

English history following the Conquest consists largely of a long struggle—legal, military and social—among governmental concepts of totalitarianism centered around the King, a baronial and religious oligarchy and an emerging republican bourgeoisie. The Anglo-American law of property is deeply stamped with the consequences of this struggle. Seldom has a legal historian failed to genuflect at the shrine of Magna Charta, that great charter of our liberties. A cynical eye would reflect that Runnymede represented a temporary triumph of the conservative barons, supported by the equally reactionary Dominicans seeking to

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3. One may speculate that the destruction of the Minoan culture in about 1500 B.C. and the decline of the Mayan confederation in the tenth century A.D. might have resulted from social struggles similar to those named. See 15 ENCYCLOPEDIA BRITANNICA *Maya Indians* at 120 (1963); A. EVANS, *THE PALACE OF MINOS* (1936); J. THOMPSON, *THE RISE AND FALL OF MAYA CIVILIZATION* (1956). It has also been speculated that the Minoan disaster was physical rather than social and resulted from the volcanic eruption of Thera. See R. HUTCHINSON, *PREHISTORIC CRETE* 300 (1963).

4. *Provost of Beverly's Case*, Y.B. Hil. 18 Edw. 3, f. 9 (1366).

5. *Chudleigh's Case*, 76 Eng. Rep. 270 (K.B. 1595).

establish an oligarchy such as ultimately developed in Germany, over the early liberals who were headed by the King and backed by the Franciscans and the Jewish bankers to whom King John had given shelter. After the crown had ultimately triumphed and had entered into conflict with the bourgeoisie, Coke and Hampton discovered Magna Charta as a fountain of liberty against the Stuarts, a premise which would have greatly surprised Stephen Langton.<sup>6</sup> Paine and Jefferson followed suit when facing the House of Hanover, and the writings of both exalted Magna Charta as the foundation of English liberties.

The English solution to the baronial threat was to limit, through law, concentered wealth. From early times, English jurisprudence placed restrictions upon perpetual private control of property, which limitations private power continuously sought to avoid. This confrontation has gone through three cycles of "entailment" of property to prevent its dissipation in family ownership. The first involved the "fee tail," which went through three stages. By the time of Salisbury Oath in 1085, the sovereign controlled virtually all the land, and hence most of the wealth, of England.<sup>7</sup> William the Conqueror's *nielle terre sans seignuer* grants to his tenants *in capite*, and consequently their subinfeudations, are propositioned to have been life estates defeasible upon misconduct.<sup>8</sup> Upon death of the ancestor, the heir was required to reenter. Such reentry could only be accomplished by payments of reliefs to the lord.<sup>9</sup> This practice was a deterrent to the establishment of a power base in the family.

But as the royal authority weakened under successive Plantagenets, *feofments et hereditibus suis* permitted fees entailed in the family line.<sup>10</sup> Littleton felt that the development of a warranty represented a successful legal effort to dissolve these "perpetuities;" the result was the fee simple.<sup>11</sup> Others view the alienable fee simple as a compromise for the

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6. Langton was suspended from his archbishopric by the Pope because he would not enforce the papal censures against the barons after the Magna Charta. See 2 W. HOOK, LIVES OF THE ARCHBISHOPS OF CANTERBURY (1884).

7. [T]enet terram illam de . . . domino Rege. 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 232 (2d reissued 1968). T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 523 (5th ed. 1965) [hereinafter cited as PLUCKNETT].

8. J. WILLIAMS, PRINCIPLES OF THE LAWS OF REAL PROPERTY 19 (6th American ed. 1886).

9. PLUCKNETT 524.

10. *Id.*; P. VINOGRADOFF, THE COLLECTED PAPERS OF PAUL VINOGRADOFF 57 (1928); R. GLANVILL, DE LEGIBUS ET CONSUETUDINIBUS REGNI ANGLIAE (G. Woodbine ed. 1932).

11. PLUCKNETT 529; BRACTON'S NOTE BOOK 1054 (F. Maitland ed. 1887).

introduction of primogeniture to fee tails.<sup>12</sup> Whatever the cause, the effect was that the fee simple became alienable and not subject to reversion following termination of the feoffee's descending line; thus, it no longer served to freeze wealth. The fee simple consequently deteriorated into an estate terminable by the *terre-tenant* but capable of revesting in the feoffor. *Quia Emptores Terrararum*<sup>13</sup> alleviated most of the latter phase, and the fee simple had ceased to be a perpetuity by the middle of the thirteenth century.

The restless barons were not content with this collapse of the entailment and were motivated by the disorders following the death of Henry II and the nascent power of creditors when John protected the Jews and the mercantile law recognized *De Mercatoribus*,<sup>14</sup> *De Stapulae*,<sup>15</sup> Acton Burnell<sup>16</sup> and the Writ of Elegit.<sup>17</sup> The entrenched wealth then invoked the second type of fee tail which was created by limitation to one and the heirs of his body. This limitation, which was intended to create an estate in the heirs of the descending line, soon went down before the argument of the "conditional fee." But the Compromise of the "Lawgiver," Edward I, restored the entailment perpetuity.<sup>18</sup>

Entailment and its offspring primogeniture rocked along without seriously endangering the body politic for nearly two hundred years. The frozen wealth situation was eased by the extension of attainder to fee tails,<sup>19</sup> the fine and common recovery and the helpful influence of the Black Death and similar mortal ills on escheat.

But in the United States, the English fee tail weakened since it still protected a class system distasteful to the liberals of the new American republic. Thomas Jefferson and the first "New Deal" spearheaded the successful fight in the Virginia House of Burgesses<sup>20</sup> that led to the ultimate demise of the fee tail in virtually all American jurisdictions.

While the fee tail was thus struggling with the common law, three other perpetuities areas were developing. Paralleling and ultimately succeeding the fee tail as the second entailment thrust was the attempt

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12. PLUCKNETT 527-30. Plucknett agrees with Sir Frederick Pollock that by Bracton's time the words *et hereditibus suis* no longer gave a feoffment in the family line. Both further agree that if there was indeed a change in prior law, it was brought about by the development of primogeniture.

13. 18 Edw. 1, c. 1 (1290).

14. 13 Edw. 1 (1285).

15. 27 Edw. 3, c. 9 (1353).

16. 11 Edw. 1 (1283).

17. 13 Edw. 1, c. 18 (1285).

18. *De Donis Conditionalibus*, 13 Edw. 1, c. 1 (1285).

19. 26 Hen. 8, c. 13, § 5 (1534); 4 & 5 Edw. 6, c. 1 (1551).

20. Acts of Virginia 7 (1776) (abolished the fee tail estate).

to encumber the fee simple, by conditions or covenants, with "restraints on alienation." To combat these restraints, the force of commerce on the law exacted the five major "perpetuities" rules—mortmain, restraints on alienation, remoteness of vesting, accumulations and over-long duration of private trusts—and the five minor rules—death in the lifetime of the testator, *Shelley's Case*, *Wild's Case*, worthier title and earliest possible vesting.

As commerce developed at the close of the Dark Ages, the state found it socially desirable to cause wealth to move in the stream of commerce. The common law rose to the issue of the second entailment scheme with its Rule Against Restraints on Alienation.

Once the fee simple had become capable of alienation, the right of the holder of the title to transfer it became inseparable from the fee and attempted permanent limitations thereon became abhorrent to the law. It is arguable that this Rule Against Restraints on Alienation was commercial and not political in its motif. It represented the thrust of the developing mercantile bourgeoisie toward becoming the predominant factor in society at the expense of the feudal aristocracy.

The perpetuities rules of mortmain rose out of the church-state conflict that paralleled the baron-state struggle. The two entwined when the Dominicans joined the barons at Runnymede. Indeed, it has been suggested that the King John-baron controversy was equally a Dominican-Franciscan dispute. Religious institutions in the medieval period had the authority to acquire and hold land, but possessed only a limited ability, and even less desire, to alienate it.<sup>21</sup>

The English crown struck at the potential religious danger to the state by inventing "mortmain." The English mortmain statutes<sup>22</sup> were intended to save the English body politic from a theocracy. It has been postulated that the "use" may have been developed as a religious counter-thrust to avoid the consequences of mortmain.<sup>23</sup> At all events, the use did permit religious institutions to build up sufficient wealth in England to furnish some inducement for the Statute of Uses. And, singularly, the suppression of the monasteries thus placed sufficient wealth in the

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21. In other countries, the acquisitive thrust of religious institutions and the lack of a mortmain concept contributed to a depressed rural economy which was finally alleviated in Mexico by two long periods of civil war and which still curses much of Latin America. Events in Mexico following the Juarez constitution of 1852 and the Madero reforms of 1912 are graphic illustrations of the portent to national security engendered by legally perpetuated concentrations of wealth in corporate persons.

22. 11 Hen. 3, c. 36 (1225); *De Viris Religiosis*, 7 Edw. 1 (1279); 13 Edw. 1, c. 23 (1285); 23 Hen. 8, c. 10 (1540); Mortmain and Charitable Uses Act of 1888, 51 & 52 Vict., as amended, Act of 1891, 60 & 61 Vict.

23. 2 F. POLLOCK & F. MAITLAND, *supra* note 7, at 237-39.

hands of the King to assure for the crown the support of powerful forces in England and to insure the success of the English Reformation.

By the latter part of the fifteenth century, after the fee tail had ceased to be an absolute perpetuity, aristocratic wealth in England, because of common recovery, fine and attainder, had lost most of the effectiveness of the shield of the entailment. The landed gentry thus found themselves without an adequate refuge against insolvency and attainder. Then the stress of the English Reformation and the growing stimulus of increased human wants through trade sparked a new type of relief, the conditional limitation over.<sup>24</sup> But the development of the contingent remainder<sup>25</sup> proved a lance broken by the doctrine of destructibility.<sup>26</sup> The upper class then evoked the protection of the use. As noted, the use itself may have been born as a scheme to avoid the mortmain statutes; but its usefulness to the layman became readily apparent. Its development was fostered by the Wars of the Roses. Its usefulness as a cover to hide wealth,<sup>27</sup> as well as a convenient method of transferring property, made it so popular that by the early part of the fifteenth century virtually all of the land of England was held to uses.<sup>28</sup>

The use as a refuge for both the barons and the church thus became a menace to the power of the state. The royal answer was the Statute of Uses.<sup>29</sup> However, entrenched wealth had found allies in the developing legal fraternity. Their ingenuity forged the very Statute of Uses into the sword and buckler of the springing and shifting use and the executory devise. *Pells v. Brown*<sup>30</sup> was the new Runnymede. This fostered the third stage of entailments through the development of the unbreakable family settlement, thus permitting the future interest to accomplish what *De Donis*<sup>31</sup> had failed to do.

The indestructible conditional limitation over created a menace that

24. T. LITTLETON, *TENURES IN ENGLISH* 646 (E. Wambaugh ed. 1903); see *Colthirst v. Bejushin*, 75 Eng. Rep. 33 (K.B. 1550). The increased stress upon the barons during this period was the result of the creation of new royal courts and the expansion of the King's prerogatives.

25. *Hele v. Hele*, 22 Eng. Rep. 831 (Ch. 1680); *Chudleigh's Case*, 76 Eng. Rep. 270 (K.B. 1595); R. PRESTON, *AN ESSAY IN A COURSE OF LECTURES ON ABSTRACTS OF TITLE* 128 (2d ed. 1823).

26. C. FEARNE, *CONTINGENT REMAINDERS* 286 (7th ed. 1820); J. WILLIAMS, *THE SEISIN OF THE FREEHOLD* 190, 191 (1878).

27. The preamble to the Statute of Uses, 27 Hen. 8, c. 10 (1536), discloses some of the problems surrounding the use. See also PLUCKNETT 583-86.

28. PLUCKNETT 580-87. See also E. COKE, *THE INSTITUTES OF THE LAWS OF ENGLAND* pt. 1 (1853).

29. 27 Hen. 8, c. 10 (1536).

30. 79 Eng. Rep. 504 (K.B. 1620).

31. Statute of Westminster II, 13 Edw. 1, c. 1 (1285).

the Rule Against Restraints on Alienation could not confront because the danger was political rather than commercial, as the uproar over the Duke of Norfolk and Peter Thellusson indicated.<sup>32</sup> But again the common law rose to the challenge, first by limiting the effectiveness of the indestructible use by *Purefoy v. Rogers*,<sup>33</sup> and then by developing the Rule Against Remoteness of Vesting. The Rule Against Restraints on Alienation operated only upon involuntary freezing of property. The Rule Against Remoteness of Vesting attacked the efforts of those who deliberately sought to establish a feudal domain. The Rule clearly surveyed the political danger arising from invulnerable power structures and placed a final terminus upon an indestructible concentration of property.

The approbation with which the newly conceived Rule Against Remoteness of Vesting was received is a phenomenon unique in the common law. As Gray noted in his comments on the *Duke of Norfolk's Case*,<sup>34</sup> the only issue which concerned the courts after this decision was the gradual judicial determination of the allowable duration of the postponement of vesting.<sup>35</sup> And though the American judges were often uncertain about the direction of thrust of the Rule, only one jurisdiction has ever doubted that it is part of the common law.<sup>36</sup> Even in those states which date their common law as of Fourth James I,<sup>37</sup> the Rule, which never was known in 1607, is accepted. And those states which relate their common law to 1776 accept the Rule as finally formulated by *In re Chardon*.<sup>38</sup> The final perpetuities attempt of Peter Thellusson<sup>39</sup> was thwarted by the Accumulations Act<sup>40</sup> which was much copied in the United States.

But these major and minor perpetuities rules could not of themselves suppress the seemingly eternal movement toward concentrations of wealth that Karl Marx sought to defeat with his "from each according to his ability, to each according to his need."<sup>41</sup> The same human impulses that sought to avoid taxes and creditors and to build up a power base

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32. It was estimated that the accumulations resulting from the consequences of Peter Thellusson's will would have given the ultimate beneficiary a bequest greater than the wealth of England. Fortunately, court costs and misadministration finally reduced the gift to a comparatively paltry sum.

33. 85 Eng. Rep. 1181 (K.B. 1670). The rule in *Purefoy v. Rogers* was followed in *Aldred v. Sylvester*, 184 Ind. 542, 111 N.E. 914 (1916).

34. 22 Eng. Rep. 931 (Ch. 1682).

35. J. GRAY, *THE RULE AGAINST PERPETUITIES* 163 (4th ed. 1942).

36. *Anderson v. Blixt*, 72 N.W.2d 799 (N.D. 1955).

37. Both Illinois and Indiana date their common law as of Fourth James I.

38. [1928] Ch. 464.

39. See note 32 *supra*.

40. 39 & 40 Geo. 3, c. 98 (1800).

41. See generally K. MARX, *CAPITAL* (F. Engels ed. 1906).



through locking up wealth influence persons of the twentieth century just as they did those of the thirteenth. And the spokesmen of the modern barons and bishops direct their attack upon the common law rules which restrain their efforts to exert sempiternal influence upon wealth. So, new power centers have arisen which require new royal controls. One of these new baronial groups was the private corporate sole, which came from the development of the business entity in the sixteenth century.

It is debatable whether the private, for-profit corporation was an outgrowth of the religious corporate sole or the borough charter.<sup>42</sup> The former was subject to control of the sovereign by mortmain. If the latter, then mortmain was never applicable. It is significant, however, that most general corporation statutes expressly grant the power to hold land.<sup>43</sup> And, in some states today, certain types of corporations, agricultural corporations, banks or insurance companies, still have a statutory mortmain.

The first general corporation acts, like most private legislatively granted charters, imposed limits on corporate durations. Gradually, these limits were extended until the corporation itself could become a perpetuity.

Mortmain, however, possibly because the established church had not been a menace for over two hundred years, was not welded on American jurisprudence. Mortmain, even if it had been applied by the courts to the private corporation, affected only real property holdings. So, without this mortmain control, the industrial revolution evolved into the corporate society. Corporate mergers and holding companies raise a threat of monopoly and control as fearsome to the public weal as was the Earl of Warwick.

But by the twentieth century there came a recognition of this development of dangers from the corporate trust. So, when the private corporation, as the offspring of the corporate sole, began to loom large in the American economy, the king found it necessary to take statutory action by "trust busting" that almost reached the extent of *Valor Ecclesiasticus* and the suppression of the monasteries.

Another power center arose out of the wreckage of the guilds. The king, for political reasons in the 1930's, fostered this new power center—the great labor unions—partially to counterbalance the corporate struc-

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42. See, e.g., 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 469-75 (S. Tucker ed. 1803).

43. ILL. ANN. STAT. ch. 32, § 157.5(d) (Smith-Hurd 1966); 23 IND. CODE art. 1, ch. 2, § 2(b)(4) (1971).

tures, just as the royal authority had looked to the merchant class for support against the barons. As the Franciscans and merchants in England stood beside the King against the Dominicans and the nobility, this royal sponsorship has enabled the labor organizations to attain wealth and political power to an extent only recently recognized by the royal authority as being dangerous to the state.<sup>44</sup>

The royal danger from religious sources which was opposed by mortmain and the suppression of the monasteries was not dead but merely sleeping. It has awakened today in the new scheme of the "charitable foundation." The twinges of conscience that led to gifts to the established church are recognizable today in the creation of such charitable groups. Avoidance of taxes leads to trusts to provide "fringe benefits" to employees. In addition, the private trust protects the spendthrift and avoids succession duties as did the fee tail. Finally, the age-old objection to debts and taxes has reversed the private perpetuities structure through the generation skipping trust.

The American early experience with the perpetuities rules was not mere acceptance, but increased strictness of application. Most of the major and minor perpetuities rules except mortmain were incorporated into our jurisprudence in forms even more severe than those of the common law. The early accord on the Rule Against Remoteness and the Rule Against Absolute Restraints on Alienation was followed by a series of statutes and even constitutional provisions, begun in Connecticut<sup>45</sup> and New York,<sup>46</sup> which, in some instances, shortened the period of the Rule. None of this legislation at first specifically recognized Remoteness of Vesting, but instead referred to "perpetuities" or "restraints on alienation." But decisions interpreting these statutes have had divergent opinions concerning the nature of the evil toward which the statutes were directed.

The early courts,<sup>47</sup> like the earlier lawmakers, approved the philosophy of the Rule Against Remoteness. These judges did not, however, always carefully analyze its separate place in the perpetuities armory and confused it with the older Rule Against Absolute Restraints on Alienation.<sup>48</sup> Some courts later recognized the distinction between the

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44. Labor-Management Relations Act (Taft-Hartley Act), 29 U.S.C. § 141 *et seq.* (1970).

45. CONN. GEN. STAT. ANN. § 45-95, 96 (1958). *See also* Abbot, *Leases and the Rule Against Perpetuities*, 27 YALE L.J. 878 (1918).

46. N.Y. ESTATES, POWERS AND TRUST LAW § 9-1.1 (McKinney 1967).

47. *In re Hargreaves*, 43 Ch. D. 401 (1890); *London & Southwestern Ry. Co. v. Gomm*, 20 Ch. D. 562 (1882).

48. *Graham v. Whitridge*, 99 Md. 248, 57 A. 609 (1904); *Lovering v. Worthington*, 106 Mass. 86 (1870).

two,<sup>49</sup> but the difference was given consideration only from the technical and not the theoretical viewpoint. The home of the bean and the cod, the family trust and the "wait and see" seems to have been one of the first states to recognize the Rule Against Remoteness in its classic form, anticipating even *Cadell v. Palmer*,<sup>50</sup> and distinguishing between restraints on alienation and remoteness of vesting.<sup>51</sup>

The unique, unquestioned acceptance of the Rule Against Remoteness of Vesting by the American courts points to the recognition of the major public policy against crystallization of private wealth and power. No court has ever had the temerity to question the wisdom of the Rule. And until the last decade, virtually the only legislative interference was to follow New York's example and fortify the Rule's defenses or to shorten the time involved.

This acceptance of the Rule in the early stages of American law parallels the legislative destruction of the last vestiges of the other entailment, the fee tail, and the early dislike of the spendthrift trust. All reflect the Jeffersonian-Jacksonian democratic philosophy. The quondam concept that anything approaching a perpetuity was somehow sacrilegious has never been recognized in America; however, the courts have not clearly recognized the political significance of the common law abhorrence of perpetuities. The English courts in the slow evolution of the Remoteness Rule did not give clear indication of its basic purpose. Their opinions apparently were not explicit enough to enable the "colonials" to understand the Rule's fundamental target—accumulations of wealth and power.

Two conflicting concepts have struggled for mastery in the progress of the Rule: 1) the commercial need for freedom of alienation and 2) the state obsession against accumulation of wealth and its consequent power. Both are reflected in the *Duke of Norfolk's Case*. *Jee v. Audley*,<sup>52</sup> with its rigid applications, would indicate a development of public policy.<sup>53</sup> But in the case of the will of the Swiss Jeweler,<sup>54</sup> when all England was aroused by the possibilities of accumulations, it remained for Parliament to face the political danger by creating a new perpetuities rule, the prohibition of improper accumulation.<sup>55</sup> American jurisdictions have done

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49. *E.g.*, *Matter of Wilcox*, 194 N.Y. 288, 87 N.E. 497 (1909). See also J. GRAY, *THE RULE AGAINST PERPETUITIES* §§ 1-4 (4th ed. 1942).

50. 6 Eng. Rep. 956 (H.L. 1833).

51. *Hawley v. Inhabitants of Northampton*, 8 Mass. 3 (1811).

52. 29 Eng. Rep. 1186 (Ch. 1787).

53. The court in *Jee v. Audley* considered only the remote contingencies that *might* have occurred following the death of the testator and ignored the actual events which transpired prior to trial of the case.

54. *Thellusson v. Woodford*, 31 Eng. Rep. 117 (Ch. 1799).

55. *Thellusson Act*, 39 & 40 Geo. 3, c. 98 (1800).

likewise.<sup>56</sup> The American courts and legislatures have shown a similar lethargy in failing to distinguish between the Rule Against Restraints on Alienation, which is primarily a rule affecting commercial interests,<sup>57</sup> and the Rule Against Remoteness of Vesting, which is based upon political concepts. Too often the courts and the statutes have fallen into the trap of upholding a limitation that was too remote in fact merely because all affected parties could terminate it by joining in an alienation.<sup>58</sup> Despite these misconceptions, the Rule Against Remoteness remained a viable weapon against accumulations of wealth and power that might menace the royal authority.<sup>59</sup>

After the middle of the nineteenth century, and as a part of the industrial development that required adequate financial backing, a dislike of perpetuities rules developed in this country. Earlier cases indicated an inclination on the part of the courts to extend the scope of the Rule Against Remoteness beyond mere property concepts. But with the change in social philosophy which followed the Civil War, there commenced a traceable change in attitude toward perpetuities. Wealth became an ideal, not a menace. Horatio Alger's heroes were not directed toward public service but instead became examples of material prosperity.

As a result of this shift in attitude, the benign smile the law had previously cast upon the Rule Against Remoteness came into eclipse during the twentieth century. There is even an inclination to ascribe the Rules Against Perpetuities to an outmoded feudal basis. But no court has yet had the temerity to repudiate the remoteness concept, and modern law has developed new institutions which largely avoid the Rule's impact. This dislike derives from the same forces that caused the development of the Rules in the first instance, concentrations of wealth and power and the removal of property from the stream of commerce.

Much of the judicial obfuscation was caused by the lack of historical explanation of the Rule. Certainly John Chipman Gray's story of the Rule's growth<sup>60</sup> did not fully illustrate the causes, economic or political. Its role as a social factor in guarding against private concentrations of wealth and power has been largely overlooked.

56. ALA. CODE tit. 47, §§ 16-18 (1958); MONT. REV. CODES ANN. §§ 67-406 to -407, -413 (1958).

57. *Eaton v. Miller*, 250 A.2d 220 (Me. 1969); *Standard Knitting Mills, Inc. v. Allen*, 221 Tenn. 90, 424 S.W.2d 796 (1967); *Kettler v. Atkinson*, 38 S.W.2d 557 (Tex. 1964).

58. *Dozier v. Troy Drive-In-Theatres, Inc.*, 265 Ala. 93, 89 So. 2d 537 (1956); *Duff-Norton Co. v. Hall*, 268 N.C. 275, 150 S.E.2d 425 (1966).

59. *In re Campbell's Estate*, 28 Cal. App. 2d 102, 82 P.2d 22 (1938); *First Camden Nat'l Bank & Trust Co. v. Collins*, 114 N.J. 59, 168 A. 225 (1933).

60. J. GRAY, *THE RULE AGAINST PERPETUITIES* 126 *et seq.* (4th ed. 1942).

Repeatedly, the dynastic basis of the Rule has been confused with the commercial concept of the Rule Against Restraints on Alienation. And there has even been an inclination to treat the Rules as an atavism relating back to the feudal concept. The Rule Against Remoteness, however, is rooted in the same public policy that fought against entailment; it is intended to defeat the oligarchic threat that *Pells v. Brown* engendered.

One phase of this formal movement against the Rule has been to limit its application to property interests only.<sup>61</sup> The cases which have dealt with the application of the Rule to facts not involving contingent future interests give pleasure to the legal scholars, but to few others. So, while options which may be exercised beyond the period of the Rule have been criticized by the courts, the more modern tendency has been to support them upon various grounds.<sup>62</sup> The point is made that an option creates no property rights but is contractual only.<sup>63</sup> Hence, the continuance of an option for a time not tied to the Rule or extending beyond the Rule is not, it is said, affected by the Rule.<sup>64</sup> And the rule of "reasonableness" has been applied to defend options indefinite in duration<sup>65</sup> as well as other indefinite time situations.<sup>66</sup> The argument that the Rule is applicable to the option itself and not the property which is its subject has also been made; the result is to treat the interest as vested in the optionee.<sup>67</sup>

In addition, there is strong aversion expressed to applying the Rule to other interests in property.<sup>68</sup> Thus, certain mineral<sup>69</sup> and timber<sup>70</sup>

61. Warner-Lambert Pharmaceutical Co. v. John J. Reynolds, Inc., 178 F. Supp. 655 (S.D.N.Y. 1959).

62. Rountree v. Richardson, 268 Ala. 448, 108 So. 2d 152 (1959).

63. First Nat'l Bank & Trust v. Purcell, 244 S.W.2d 458 (Ky. App. 1951).

64. Kingston v. Home Life Ins. Co., 11 Del. Ch. 258, 101 A. 898 (1917), *aff'd*, 11 Del. Ch. 428, 104 A. 25 (1918).

65. *E.g.*, Morning Star Mining Co. v. Bennett, 164 Ark. 244, 261 S.W. 639 (1924); Childs v. Sherman, 351 Mass. 450, 221 N.E.2d 748 (1966); Isen v. Giant Food, Inc., 295 F.2d 136 (D.C. Cir. 1961).

The "wait and see" doctrine was indirectly applied when an agreement to lease a building when erected was upheld. The court justified such result on the ground that the parties ratified the lease agreement when the lessor was permitted to assume possession. Cruz v. McGregor, 178 Cal. App. 2d 45, 2 Cal. Rptr. 727 (1960).

66. Gould v. Rite-Way Oil and Inv. Co., 143 Colo. 65, 351 P.2d 849 (1960); Childs v. Sherman, 351 Mass. 450, 221 N.E.2d 748 (1966); Mattern v. Herzog, 367 S.W.2d 312 (Tex. 1963). There is a presumption in New York that where vesting is contingent upon probate of a will, appointment of a fiduciary or distribution of an estate, such will occur within the time permitted by the Rule. N.Y. ESTATES, POWERS AND TRUST LAW § 9-1.3(d) (McKinney 1967).

67. Mattern v. Herzog, 367 S.W.2d 312 (Tex. 1963).

68. Priddel v. Shankie, 69 Cal. App. 2d 319, 159 P.2d 430 (1945).

69. Phillips Petroleum Co. v. Peterson, 218 F.2d 926 (10th Cir. 1954).

70. Carthnon v. Strams-Culber Lumber Co., 60 Fla. 313, 53 So. 738 (1910).

interests have been held to be outside the Rule; restrictive covenants<sup>71</sup> and equitable servitudes<sup>72</sup> have been excluded and the *cy pres* doctrine has been invoked to save an otherwise void private gift.<sup>73</sup>

The trend since the latter part of the nineteenth century has been toward a legal philosophy which declared that property rules, their purposes somewhat obscured by time, were objectionable merely because they were old. Hence, *Shelley's Case*, *Wild's Case* and the Doctrine of Worthier Title have largely passed from the American scene. Even the concepts of "death in the lifetime of the testator" and "earliest possible vesting" have often been treated with contempt. A majority of jurisdictions no longer fears a spendthrift trust. This distaste for things grounded in the past too often forgets that such rules may have had their origin in principles of public policy which have not entirely vanished. This attitude touched Remoteness of Vesting even before the advent of the generation skipping drive.

The Rule has also been successfully avoided by attacks based on the issue of contingency. Thus, "earliest possible vesting" operates to save interests otherwise void if contingent.<sup>74</sup> And the separation of conditions precedent from conditions subsequent preserves interests which can be treated as vested subject to divesting instead of contingent.<sup>75</sup>

The earlier cases would indicate that the Rule could not enter into the question of construction of an instrument.<sup>76</sup> Now there is authority that if an instrument is capable of two constructions, one of which would violate the Rule and the other not, the Rule may be disregarded so as to affirm and preserve the construction in favor of validity.<sup>77</sup> There is also a strong present tendency to avoid infectious disability and to separate valid from invalid limitations.<sup>78</sup> England reacted more slowly than

71. *Strong v. Shatto*, 45 Cal. App. 29, 187 P. 159 (1919); *Pierce v. St. Louis Trust Co.*, 311 Mo. 262, 278 S.W. 398 (1925).

72. *Council v. Sanderlin*, 183 N.C. 253, 111 S.E. 265 (1922).

73. *Moore v. Livingston*, 265 N.E.2d 251 (Ind. App. 1970). See also IDAHO CODE ANN. § 55-111 (1947); WASH. REV. CODE ANN. § 11.98.030 (1967); R. LYNN, *THE MODERN RULE AGAINST PERPETUITIES* 34-35 (1966); Quarles, *The Cy Pres Doctrine: Its Application to Cases Involving the Rule Against Perpetuities and Trusts for Accumulation*, 21 N.Y.U.L.Q. REV. 384 (1946); Browder, *Construction, Reformation, and the Rule Against Perpetuities*, 62 MICH. L. REV. 1 (1963).

74. An extreme example is *U.S. v. 15,883.55 Acres of Land*, 54 F. Supp. 849 (W.D. S.C. 1944).

75. *Hunt v. Carroll*, 157 S.W.2d 429 (Tex. Civ. App. 1941).

76. *In re Helme's Estate*, 95 N.J. Eq. 197, 123 A. 43 (1923); *Cattlin v. Brown*, 68 Eng. Rep. 1319 (1853); *Leake v. Robinson*, 35 Eng. Rep. 979 (1817).

77. *Continental Illinois Nat'l Bank & Trust v. Llewellyn*, 67 Ill. App. 2d 171, 214 N.E.2d 471 (1966); *Merchant's Nat'l Bank v. Curtis*, 98 N.H. 225, 97 A.2d 207 (1953); *In re Morrison's Will*, 25 N.Y.S.2d 408 (1941).

78. *Richards v. Stone*, 283 Mich. 485, 278 N.W. 657 (1938).

America to the antiquated fee tail and Lloyd George found it necessary to adopt "death duties" to break up the holdings of the great English families.

The "succession tax," another device to restrain the passage of wealth from one generation to another, was welcomed by the thirsty American government, particularly because of the financial strains of the Depression and World War II. But the impact of succession and income taxes is received with no better grace by the modern economic nobility than the royal prerogatives were by the feudal nobles. And to the rescue have come the paladins, the estate planners, inspired by their ladies fair, the corporate trustees. The modern entailment springs, strangely, from two of the evolvments of the Statute of Uses, the trust and the future interest. Thus, there arise the foundation and the generation skipping trust. But in the path of their development loom the perpetuities rules as developed in the United States. Particularly obstructive is the Rule Against Remoteness of Vesting with the time limitation it imposes upon the generation skip. So, it is not surprising that the Rule itself is now under attack.

The present major opposition to the perpetuities rules results from the post World War II impact of income and succession taxes. Cynically, the popularity of the private foundation stems as much from its tax shelter aspects as from its eleemosynary aspects. And the "fringe benefits" of labor union contracts have decided tax benefits also.

The generation skipping aspects of the family trust have been of major consequence in easing the pain of estate taxes as well as in providing the salutary effects of the eighteenth century family settlement. Most of the statutes that provided for a period of time shorter than the rule of *In re Chardon* have been changed to the common law period.

In the heyday of the Rule before the baronial forces launched their present attack, the period must have been definitely tied to lives in being, years in gross and gestations. Any other period of measurement, however short in probability, made the limitation over void. Late cases indicate a retreat from this fiat and the substitution of reasonableness of the uncertain period.<sup>79</sup>

These chinks in the Rule's armor have been further exploited in a number of fashions: statutory extension of the time permitted under the Rule, the "wait and see" doctrine, statutory exemption of certain legal situations from operation of the Rule, elimination of the effect of *Jee v.*

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79. Compare *Trautz v. Lemp*, 329 Mo. 580, 46 S.W.2d 135 (1932) with *Belfield v. Booth*, 63 Conn. 299, 27 A. 585 (1893).

*Audley* and opposition to extending the area of the Rule.

The "wait and see" doctrine, which is followed in a limited body of judicial and statutory authority, removes the *eo instanti* feature of invalidity and permits the issue to remain uncertain for the period of the Rule in hope that vesting will occur during the interim. Other statutes have exempted pension trusts, profit sharing income plans and retirement income programs from the Rule. Statutory amendments stretch the previously limited periods to the limit of the common law rule and even beyond.<sup>81</sup>

In some areas where there has not been "perpetuities" control of wealth, a noticeable movement toward dissolution of such concentrations is underway. In Mexico, of course, nationalization of foreign investments has been completed and the *ejido* system has to a considerable extent supplanted the *latafundia* created by the plantation and church owned land that had been created by an absence of perpetuities and mortmain control. Chile, with its *asentamiento* and its new Marxist movement, is endeavoring to follow the same course. Venezuela, with its *actio*, finds it is promoting *minifundia* by delivering titles to the resettled peasants. Bolivia and Peru are making motions toward following the same course. Brazil has feebly made similar gestures.

The direction of this movement is opposite from the trend in the United States. Here, the fact that mortmain has not been accepted as common law has opened a channel for the concentration of baronial wealth that is having definite social consequences. The similarity of investment programs of the great foundations and trusts is having a direct effect upon the securities market and hence upon the economy.

The latest triumph of the baronial champions came in Wisconsin. Continuing to ignore the different public policies behind the Rule Against Restraints on Alienation and the Rule Against Remoteness of Vesting, that state's legislature has apparently permitted a private trust to continue in perpetuity.<sup>82</sup> Wisconsin has thus returned in equity to the concept of entailment and now stands at A.D. 1290 and *De Donis*. It remains to be seen whether this generation skipping avoidance of income and estate taxes will find favor in other jurisdictions.

The royal wrath is not likely to be withheld from those infringements upon the sovereign's prerogatives epitomized by the Wisconsin statute. Mr. Justice Brandeis trumpeted that mere bigness is itself a

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80. ILL. ANN. STAT. ch. 48, §§ 39t-u (Smith-Hurd 1966); MD. ANN. CODE art. 93, §§ 11-102 (1957).

81. ME. REV. STAT. ANN. tit. 33, § 101 (1964).

82. WIS. STAT. ANN. §§ 230.15, .16 (1971).



danger; and the king is arming. The Federal Trade Commission and the Internal Revenue Service both act as a substitute for *De Viris Religiosis*<sup>83</sup> and the Thellusson Act. The 1969 Congress took steps to provide a substitute for the Thellusson Act as applicable to foundations and similar trusts. While the attempt of the king to terminate the estate tax advantage of generation skipping by the family trust was not completed in 1969, the limited response of the sovereign in the Congress will undoubtedly be accelerated. It is predicted that these baronial attempts to avoid the Rule Against Remoteness and create new entailments will have consequences ruinous to the efforts of the estate planners as well as to the foundation proponents. This time, no crossing of the Wash nor bowl of cherries will thwart the king's triumph.

The much vilified King John, whatever may have been his actual motivation, was supporting the public policy against crystallization of wealth that has been the pole star of the English common law and which conceived the Rule Against Remoteness of Vesting. The modern "estate planners" champion the reactionary forces whose success in other nations ultimately led to the tragedies of the Iron Curtain, Cuba, China and presently, on the west coast of South America.

Thus, the Internal Revenue Service, though its motif may be like that of the Plantagenets, the raising of royal revenues, is nevertheless, by regulating trust accumulations, assisting in the preservation of the social structure long found desirable in Anglo-American society.

The present situation resembles that of the early nineteenth century. The English courts in the *Thellusson* case did not comprehend a public danger in accumulations sufficient to induce them to develop a new perpetuities rule against accumulations. But the King and Parliament, realizing the peril, responded with the Thellusson Act.

Today, the force of the estate planners and the power of private and public trusts and foundations have blunted the judicial thrust against perpetuities. The concept of "too long duration of trust," public or private, has not received wide acceptance. It remains, therefore, for the king, along with his faithful champion the Internal Revenue Service, to join with the Congress and, by administrative and legislative action, to create further checks upon the amassing of wealth both in public and private hands.

The legal historian will recognize that it is fallacious to treat the Rule Against Remoteness of Vesting or indeed any of the "perpetuities" rules as legal atavisms spawned by a feudal age. All represent the re-

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83. 7 Edw. 1 (1279).

sistance of any organized society to the attempts of pressure groups at creating a Polish Oligarchical state.

The medieval combine of private interests, the barons, corporate groups and the religious institutions, today blossom into the estate planners and the "non-profit" trusts. Perpetuities are as essential to the latter as they were to the former. Likewise, the dangers to the sovereign are as real as they were in 1213. The perpetuities rules, therefore, are still a vital part of social controls. As has repeatedly happened, the perpetuity controls already developed may not be sufficient to counter the ingenuity of the baronial lawyers and, as before, new legislative controls are indicated.