

Reviews

Perpetuities: The New Empire

The Modern Rule Against Perpetuities. By *Robert J. Lynn*. Indianapolis: The Bobbs-Merrill Co. 1966. Pp. xix, 223. \$10.50.

I. The Establishment and Decline of the Empire

Most empires, as history readers know, have a way of putting up a strong front for a considerable time after decay has set in. This observation conveniently fits the empire called the Rule against Perpetuities. The Rule began three centuries ago by laying claim to a vague, undefined territory. "Where will you stop . . . ?" asked Lord Nottingham of himself in the *Duke of Norfolk's Case*.¹ "I will tell you where I will stop: I will stop where-ever any visible Inconvenience doth appear . . .," he replied. The Rule then grew in a manner typical of the common law, by judges finding inconvenience here and no inconvenience there, invoking for support, often imprecisely, a host of policies, taboos, and doctrines. In the late nineteenth century John Chipman Gray put an end to this disorganized rationality by staking out the limits of the Rule in one sentence: "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."² By virtue of his erudition, his rigorous logic, his dogmatic style, and his position as the first great teacher of property law at Harvard, Gray became enthroned as not just the leading authority on the Rule but as *the* authority. He changed the republic into an empire ruled by himself.

Some English scholars regarded Gray as a usurper and resented the deference paid to him by English courts. Among these was Charles Sweet, himself an authority on property law. Said Sweet of Gray's method of reducing complexity to apparent simplicity:

[I]n their systematic treatises on the English law of real property, American lawyers seem to treat it as if it were a collection of rules drawn up by one legislator at one time, and therefore capable of

1. 3 Ch. Cas. 1, 49, 22 Eng. Rep. 931, 960 (1682).

2. J. GRAY, *THE RULE AGAINST PERPETUITIES* § 201 (4th ed. R. Gray ed. 1942) (J. C. Gray published the first edition in 1886). This sentence, like $E = MC^2$, was the pinnacle atop a very complex and interrelated theoretical edifice which Gray took some four hundred pages in his first edition to explain.

being classified under leading principles. In the attempt to subject the law of real property to this painful process, 'something has to break' (to use one of Gray's Americanisms), and any anomalies which suffer fracture are thrown away as useless. This brutal way of treating the English law of real property commends itself to our modern judges, for it saves a good deal of trouble, but it would have scandalized the conveyancers of the last generation.³

When Sweet's numerous articles failed to arrest the growing influence of Gray, Sweet attempted to cut Gray down to size by damning him as a heretic:

The fact that Mr. Gray holds heretical views on an important question of English real property law does not seem to be generally known, for the tendency of our judges is to regard him as orthodox, if not infallible. Thus in *Re Hollis' Hospital* ([1899] 2 Ch. 540) Byrne J. preferred the opinion of Mr. Gray to that of Mr. Challis on a question of real property law . . . ; and in *Re Ashforth* ([1905] 1 Ch. 535) Farwell L.J. . . . said that the opinion of Mr. Joshua Williams—to the effect that a legal contingent remainder cannot be void for remoteness—had been 'displaced' by Mr. Gray. If this is so, Mr. Gray has also 'displaced' the opinion of Mr. Fearne, the Real Property Commissioners, Mr. Preston, Mr. Charles Butler, Lord St. Leonards, Mr. Burton, Mr. Leake, and Mr. Challis, all of whom held the same view as Mr. Joshua Williams. This is a remarkable achievement⁴

And a remarkable achievement it was indeed. In spite of Sweet's protests, Gray became the fountainhead of authority in England and—despite the later lamentations of Professor Richard Powell⁵—in America.

In the last 25 years two men have led effective assaults on the Rule, one indirectly, the other directly. The first significant tumult was excited by Professor Myres McDougal of Yale, who shook property scholars out of their mindless worship of orthodoxy. With one brilliant stroke, McDougal in 1942 eviscerated the volume of the Restatement of Property that dealt with future interests.⁶ At the same time, in the same

3. Sweet, *John Chipman Gray*, 31 L.Q. REV. 338, 339 (1915).

4. Sweet, *Limitations of Land to Unborn Generations*, 29 L.Q. REV. 304 n.2 (1913).

5. Because "vested" as used in most other contexts is an inaccurate word to describe what interests are valid under the Rule, and because the word "vested" conceals the important social policy underlying the Rule, Professor Powell believes the Rule should be formulated as a rule against specific fetherings of property found socially inconvenient. His position is cogently stated at 5 R. POWELL, *THE LAW OF REAL PROPERTY* ¶ 767 (1962), and is adopted by 4 RESTATEMENT OF PROPERTY §§ 370-382 (1944).

6. McDougal, *Future Interests Restated: Tradition Versus Clarification and Reform*, 55 HARV. L. REV. 1077 (1942).

article, he presented the most exacting, scientific, and comprehensive framework ever formulated for the analysis of future interests problems. Among other things McDougal sought to free property law from conceptual congeries, such as "interest" and "vest", which conceal problems by lumping together problems, facts, policies, doctrines, and judicial response. His outraged indignation at the failure of judges and scholars to examine the policy bases for doctrines has had a notable impact on books and articles in the property field since 1948, the year McDougal and Haber published their provocative casebook.⁷ No one has contributed more to professional introspection.

Soon after McDougal brought some fresh air into property law, Professor W. Barton Leach began in earnest his attack upon the Rule against Perpetuities in its orthodox form. Successor by mesne investitures to Gray's property chair at Harvard, Leach himself tells what motivated him:

I had been *teaching* perpetuities since 1929; but two circumstances arising in the year 1952 compelled me to *think* about the subject—a novel and refreshing experience. First, in an unguarded moment I undertook, with Mr. Owen Tudor, to write the Part in *Am. L. Prop.* on the common-law Rule, and it hardly seemed appropriate just to condense Gray. Second, I spent a sabbatical term lecturing on the subject at Oxford; and I had to say something which would keep the students awake and in attendance, for at Oxford all lectures are optional and the examination system is such that the lecturer must cajole his class into attendance without the American-type knout of bad marks if they do not.⁸

With an acid wit both lethal and therapeutic, Leach heaped scorn on such hobgoblins of orthodoxy as the fertile octogenarian, the unborn widow, the magic gravel pit, the fertile decedent, and the precocious toddler (Leach joyfully supplied the names). He then embraced the wait-and-see and cy pres doctrines, which he believed would exorcize these apparitions.⁹ In so doing, if I may return to my original metaphor, Leach has played Constantine to Gray's Augustus. These doctrines will undoubtedly have as corrosive an impact on the Rule as Gibbon thought Christianity had on the Romans.

7. M. MCDUGAL & D. HABER, *PROPERTY, WEALTH, LAND: ALLOCATION, PLANNING & DEVELOPMENT* (1948).

8. W. LEACH & J. LOGAN, *CASES ON FUTURE INTERESTS AND ESTATE PLANNING* 835 (1961).

9. Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 *HARV. L. REV.* 721 (1952).

II. The Modern Rule Against Perpetuities

Now comes Professor Robert Lynn with an account of the empire after Leach called *The Modern Rule Against Perpetuities*.¹⁰ Lynn's purposes are basically two: (1) to deconsecrate Gray's Rule by a careful, critical examination of how the Rule has been applied or avoided in modern decisions; (2) to analyze the reforms of the Rule that have been adopted in one-quarter of the states as well as in England and the Commonwealth countries, and to provide the courts with guides to decision under the doctrines of wait-and-see and cy pres.

Lynn does not purport to make any new earth-shaking theoretical contribution. Nor does he suggest any new methods of reform or any ways to reunite the distinguished perpetuity scholars who have had deep disagreements about reform. The book is significant because—or, if you prefer, in spite—of its limited scope. The two tasks Lynn undertook badly needed doing, for reasons subsequently noted.

A. Lynn's Realistic Examination of Orthodox Doctrine

Lynn's first objective is accomplished with a deft and sagacious analysis which makes his book especially rewarding in a field where the cases are notable for their obscure jargon and ostensible obeisance to the past. Each generation is saddled with—one might even say enslaved by—the language of preceding generations. This makes it very difficult to determine what is actually happening in perpetuities cases. Using orthodox analysis, and giving traditional justifications, courts exclude many factors which one would ordinarily assume to affect the result. Yet orthodoxy has given us a semblance of order. It has done this by devising a conceptual system and making it pervasive, so that values and conditions that cannot be standardized and programmed are disregarded; by adjusting function to concepts rather than by adjusting concepts to function; by treating concepts as having a uniform meaning rather than being regulated by pragmatic prudence and policies; and by developing a closed system of high-level abstractions to allot resources, which we are assured is the only right method and is omnicompetent. In so doing, orthodoxy has made sound empirical analysis of the cases exceedingly difficult.

10. Lynn notes that history buffs may be confused by the title. R. LYNN, *THE MODERN RULE AGAINST PERPETUITIES* 194 n.82 (1966) [hereinafter cited as LYNN]. Gray's Rule used to be called the modern Rule against Perpetuities to distinguish it from the rule of *Whitby v. Mitchell*, which was known as the old Rule against Perpetuities. To Lynn, however, Gray's is the old Rule.

Fortunately, Professor Lynn does not regard the cases as impenetrable. He does not bring to them the orthodox set, nor is he mesmerized by the formal rightness of orthodox doctrine or deceived by its words. He perceives that the meaning of such protean concepts as “interest” and “vest” is not unchanging and that the interrelations of these concepts and the ongoing process of decision-making are as complex and various as the texture of life itself. According to Lynn the meaning is made up by judges as they go along in a continuous series of existential judgmental acts:

The fact is that the Rule Against Perpetuities lacks the definitive qualities popularly attributed to it. The Rule is never anything more than a point of departure. The rules of construction are in some respects as potent a weapon in the hands of the courts as the Rule itself, for the fate of many a dispositive instrument has hinged upon construction: the court may accord to the Rule Against Perpetuities only passing reference and use it to administer the *coup de grâce*.¹¹

Thus, in Lynn’s view, Gray’s statement of the Rule, with its 400-page explanation, is an incomplete, though enormously useful, Baedeker in a land charted case by case.

1. *Functional Equivalents Dissected*

Two fascinating chapters Lynn devotes to the classification of interests.¹² According to orthodox doctrine, classification of interests is indispensable to proper application of the Rule against Perpetuities. The orthodox process moves this way: Words of the instrument ———→ classified and labeled ———→ produce result.

The first classification problem Lynn examines is the dichotomy between (a) “possibilities of reverter” and “rights of entry” and (b) “contingent executory interests.”¹³ The former interests are exempt from the Rule; contingent executory interests are subject to it. This insidious distinction leads to conclusions that cannot be justified rationally and, not unexpectedly, to strange judicial contortions to avoid the conclusions compelled by doctrine. The resulting picture is so wondrously bizarre, and so completely unbelievable to anyone not familiar with future interests, that it needs to be sketched here.

11. LYNN 201.

12. *Id.* ch. 3, *The Classification of Interests*; ch. 11, *The Mirage of Classification: Proof in Recent Cases*.

13. LYNN 22-29.

Case 1. *T* devises two acres to the Board of Education so long as used for school purposes, and upon cessation of school use the two acres are to revert to *T*'s heirs. The devise is entirely valid. The Board has a fee simple determinable. *T*'s heirs have a possibility of reverter exempt from the Rule.

If the transfer of the two acres is by deed rather than by devise, the grantor's heirs have an executory interest ("*nemo est haeres viventis*"). This violates the Rule and is void. The grantor now has a possibility of reverter which by a second piece of paper (deed, declaration of trust, or will) he may transfer to his heirs.¹⁴

Case 2. *T* devises two acres to the Board of Education so long as used for school purposes, and upon cessation of school use the two acres are to revert to *B* and his heirs. The Board has a fee simple determinable. The gift to *B* is an executory interest and is void under the Rule. *T*'s heirs have a possibility of reverter.¹⁵

If the gift to *B* is made in a separate residuary clause, the gift to *B* is valid as the transfer of a possibility of reverter.¹⁶ Since a possibility of reverter can be created only in the transferor (if by deed) or in his heirs (if by will), to make this result consistent with orthodox doctrine we must assume the clause creating the fee simple determinable and the residuary clause are operative at two different times. The first clause creates the possibility of reverter in the transferor; a moment passes; the subsequent residuary clause transfers the possibility of reverter to *B*.¹⁷ However, if the gift to *B* is made in a *codicil* rather than in a residuary clause, the will and codicil have been treated as one piece of paper operative at one time; the gift to *B* is an executory interest and is void.¹⁸

If the transfer of the two acres is by deed rather than by devise, and two pieces of paper are used, the gift to *B* is valid. One court has even held two pieces of paper are not necessary; two sentences on one piece of paper are sufficient to create a reversionary interest and transfer it to a transferee.¹⁹ Here again, this result is consistent

14. *McCrary School Dist. v. Brogden*, 231 Ark. 664, 333 S.W.2d 246 (1960); *Fletcher v. Ferrill*, 216 Ark. 583, 227 S.W.2d 448 (1950).

15. *Institution for Savings v. Home for Aged Women*, 244 Mass. 583, 139 N.E. 301 (1923).

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

17. L. SIMES & A. SMITH, *THE LAW OF FUTURE INTERESTS* § 1241 (2d ed. 1956) put it trenchantly: "This is in effect assuming that the testator died twice."

18. *In Re Estate of Pruner*, 400 Pa. 629, 162 A.2d 626 (1960).

19. *Brown v. Terra Bella Irrigation District*, 51 Cal. 2d 33, 330 P.2d 775 (1958).

with orthodox doctrine only if we assume the second sentence is operative a moment of time after the first sentence is operative.²⁰

Case 3. *T* devises two acres to the Board of Education, but if the land ceases to be used for school purposes *T*'s heirs shall have a right to re-enter. The Board has a fee simple subject to condition subsequent. *T*'s heirs have a right of entry exempt from the Rule.

If the transfer of the two acres is by deed rather than by devise, the grantor's heirs have an executory interest which violates the Rule. The Board of Education then has a fee simple absolute.²¹

Case 4. *T* devises two acres to the Board of Education, but if the land ceases to be used for school purposes *B* and his heirs shall have a right to re-enter. The gift to *B* is an executory interest and is void under the Rule. The Board of Education has a fee simple absolute.²² If, however, the gift to *B* is not made in the same sentence but is made in a subsequent clause in the will, the clauses have been treated as operating at different and successive moments of time; hence the gift to *B* is the transfer of a right of entry and is valid.²³

Case 5. *O* conveys two acres to the Board of Education for \$100, but if the land ceases to be used for school purposes, *O*, his heirs, or assigns may repay the purchase price and demand a reconveyance of the property. It has been held that *O* has an option, not a right of entry, which option violates the Rule.²⁴ It has also been held to the contrary: that *O* has a valid right of entry, not an option.²⁵ If *O* has

20. Controversies arising from giving a time sequence to purely conceptual events have an ancient history. The great *scintilla juris* controversy raged in England for three hundred years before Parliament settled the matter in 1860. The issue was whether a feoffee to uses had seisin for any amount of time before seisin was taken by the Statute of Uses and transferred to the *cestui que use*. See 7 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 137-41 (1925).

Another momentous dispute arose with the invention of simultaneous seisin to protect the purchase money mortgagee from dower, liens, and other prior claims against the mortgagor. "The idea is that title shot into the grantee and out of him again into the purchase money mortgagee so fleetingly—*quasi uno flatu*, in one breath, as it were—that no other interest had time to fasten itself to it." G. OSBORNE, HANDBOOK ON THE LAW OF MORTGAGES 557 (1951).

Giving a time sequence to conceptual events also bases the rule that an express forfeiture restraint against involuntary alienation will be given effect. As soon as a creditor executes his judgment on the debtor's interest the interest ceases *eo instanti* and the creditor has nothing. See J. DUKEMINIER, PERPETUITIES LAW IN ACTION 136 (1962).

21. *Edward John Noble Hosp. v. Board of Foreign Missions*, 13 Misc. 2d 918, 176 N.Y.S.2d 157 (1958).

22. *McGaughey v. Spencer County Bd. of Educ.*, 285 Ky. 769, 149 S.W.2d 519 (1941).

23. *Knowles v. South County Hosp.*, 87 R.I. 303, 140 A.2d 499 (1958).

24. *Bates v. Bates*, 314 Ky. 789, 236 S.W.2d 943 (1950); *Gange v. Hayes*, 193 Ore. 51, 237 P.2d 196 (1951). Why should *O*'s interest violate policy if he has to repay the purchase price in order to retake the premises and not violate policy if he may re-enter free of charge?

25. *Dozier v. Troy Drive-In Theatres, Inc.*, 265 Ala. 93, 89 So. 2d 537 (1956).

the right to demand reconveyance free of charge upon breach of the condition, it has been held that *O* has a covenant not subject to the Rule against Perpetuities.²⁶

The results in the above cases follow from the application, or avoidance, of three rules: (1) The label of an interest is controlled by the words of the instrument; (2) The label is also controlled by who the person is in whom the interest is initially created; if the interest is created in the grantor or in testator's heirs, a possibility of reverter or right of entry is created; if the interest is created in someone else, an executory interest is created; (3) The label controls the result. Possibilities of reverter and rights of entry are exempt from the Rule. Executory interests and options are subject to it.

Professor Lynn examines cases falling within the fact patterns of *Cases 1, 2, 3, and 4*. (Unfortunately, he does not compare cases on options to repurchase.) From this he concludes the obvious: answers to perpetuities questions in these cases are not predictable by orthodox doctrine.²⁷ How, then, are cases decided? I shall examine Lynn's answer to this question at a later point.

The major failing of the book in treating possibilities of reverters, rights of entry, and executory interests is that Professor Lynn does not offer any satisfactory way out of the maze. As a matter of policy, the future interests in *Cases 1, 2, 3, and 4* should be treated alike. They would be treated alike if the classification of interests were irrelevant to result. The only sure way to accomplish this is to subject possibilities of reverter and rights of entry to the Rule against Perpetuities. This has been done in England, and it may be a satisfactory method of dealing with the problem where the wait-and-see doctrine is also adopted. However, there has been strong objection in this country to subjecting possibilities of reverter and rights of entry to the Rule. First, lives-in-being-plus-21-years has no functional relation to an appropriate time limitation on forfeiture interests respecting the use of land. Second, for the title searcher a fixed period of duration is preferable.²⁸ Third, some possibilities of reverter and rights of entry—such as those used in oil, gas, or mineral leases and those relating to transmission, transportation, or highway purposes—should not be cut off by the Rule.

26. Cf. *Greco v. Meadow River Coal & Land Co.*, 145 W. Va. 153, 113 S.E.2d 79 (1960).

27. For another examination of this area, which comes to the same conclusion, see Chaffin, *Reverters, Rights of Entry, and Executory Interests: Semantic Confusion and the Tying Up Of Land*, 31 *FORD. L. REV.* 303 (1962).

28. See Webster, *The Quest for Clear Land Titles—Whither Possibilities of Reverter and Rights of Entry?*, 42 *N.C.L. REV.* 807, 813-15 (1964).

Modern American reform statutes have rejected the English approach. They usually have terminated possibilities of reverter and rights of entry after a fixed period, such as 30 years. However, the fixed-period approach preserves the importance of classification, and hence the opportunity for lawyers or judges to effect a result by manipulating labels. Professor Lynn believes the Kentucky statute abolishes the importance of classification and makes equivalent the possibility of reverter, the right of entry, and the contingent executory interest following a fee.²⁹ Inasmuch as I drafted that statute I should like to accept the bouquet. But I cannot. The difficulty is this: Some executory interests are functional equivalents of possibilities of reverter and rights of entry (*Cases 1 through 4* above). These interests should be subject to the same rule limiting duration, whether it be the Rule against Perpetuities or a fixed period rule or a rule terminating these interests on equitable grounds. However, not all executory interests are the functional equivalents of possibilities of reverter and rights of entry. Some executory interests are the functional equivalents of vested remainders.³⁰ And some executory interests are the functional equivalents of contingent remainders. Thus:

Case 6. *T* devises two acres to *A* and his heirs, but if *A* dies without issue him surviving then to *B* and his heirs. *A* has a fee simple subject to a shifting executory interest in *B*. The devise is wholly valid under the Rule against Perpetuities.

Case 7. *T* devises two acres to *A* for life, remainder to *A*'s issue him surviving, but if *A* dies without issue him surviving then to *B* and his heirs. *A* has a life estate, his issue have a contingent remainder, and *B* has an alternative contingent remainder. The devise is wholly valid under the Rule against Perpetuities.

B's executory interest in *Case 6* surely should be subject to the same rule as *B*'s contingent remainder in *Case 7*. That rule is presently the Rule against Perpetuities.

If two rules with different time periods are involved, the problem is how to divide up executory interests into (a) those that are functional equivalents of possibilities of reverter and rights of entry (and subject to a fixed-period rule) and (b) those that are functional equivalents of remainders (and subject to the Rule against Perpetuities). Professor Lynn does not meet this issue, and the Kentucky statute, in my judg-

29. LYNN 25-26, 54 n.47.

30. See p. 168 *infra*.

ment, does not resolve the problem in a wholly satisfactory manner. The best way to resolve it, if a fixed-period rule is applied to possibilities of reverter and rights of entry, appears to be this: use a 21-year period for possibilities of reverter and rights of entry and couple this with either (1) a general wait-and-see doctrine in perpetuities law or (2) a general cy pres doctrine. Under either approach the practical result would be that all of the future interests in *Cases 1, 2, 3, 4, and 5* would be subject to a 21-year limitation. Under the causal-relation test of wait-and-see there would be no measuring lives for the executory interests and options.³¹ Therefore they would be limited to 21 years. Under cy pres the court could reform the executory interests and options by validating them for 21 years.

2. *A Canard Interred*

Before venturing into the second classification problem, that of vested vs. contingent, Lynn buries the canard—slain long ago³² but not yet interred—that an executory interest cannot vest in interest before it vests in possession. He proposes “[a] more workable statement . . . : A contingent executory interest must be so created that it will become possessory or be transformed into a vested remainder or a vested estate, if at all, not later than twenty-one years after some life in being at the creation of the interest.”³³ By “vested estate” he means an interest not supported by a preceding life estate or term of years that (a) is not presently possessory and (b) will certainly become possessory in the future; for example, “\$10,000 to *B*, now age two, payable with accumulated income when *B* reaches 25.” This interest in *B*, which cannot be easily fitted into any of the categories of future interests authorized by orthodox doctrine, is christened “vested estate” by Professor Lynn, and thus may be born a new future interest.

3. *Into the Quagmire of Vesting*

The major classification problem which Lynn examines is the vested-contingent dichotomy. The orthodox definitions of “vested” and “contingent,” which are used to classify an infinite number of dispositions, bring to mind the words of T. S. Eliot in “Burnt Norton”:

31. See J. DUKEMINIER, *supra* note 20, at 88.

32. See L. SIMES & A. SMITH, *supra* note 17, § 1236; Dukeminier, *Contingent Remainders and Executory Interests: A Requiem for the Distinction*, 43 MINN. L. REV. 13, 23 (1958).

33. LYNN 27 (emphasis added).

Words strain,
Crack and sometimes break, under the burden,
Under the tension, slip, slide, perish,
Decay with imprecision, will not stay in place,
Will not stay still.³⁴

“Vest” is a notorious word of many meanings. At common law it became a wanton word because judges and scholars engaged in a type of spurious reasoning aptly described many years ago by that renowned fallacy-hunter, Walter Wheeler Cook: “The tendency to assume that a word which appears in two or more rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against.”³⁵

It has been said by a great many property scholars, and by some believed, that “vested” takes its meaning solely from the words of the dispositive instrument. The purposes of the rule in which “vested” appeared were ignored. Those who have taken this view have assumed that the fact that judicial decisions on their face purport to resort to a vested-contingent dichotomy for solution is evidence of a profound connection between classification of an interest and judicial response.

In the twentieth century this view has been strongly challenged, first by Albert M. Kales of Northwestern³⁶ and more recently by Myres McDougal of Yale.³⁷ Kales and McDougal thought the belief that the dispositive language alone is important to be an illusion. They explained that, however artificial and disassociated from policy the rules might appear, at least some of the judges some of the time have been much concerned with policy. When these judges said the result followed from the classification of the interest as “vested,” when “vested” became a key term in the litany of justification, the word necessarily took on a meaning that was responsive to the practical problem and the applicable policies. To reconcile reality and the belief that the dispositive words controlled the classification of an interest as “vested” or “contingent,” the judges drew hair-splitting distinctions in language, many of which only a casuist could follow. For almost every

34. T. S. ELIOT, *Burnt Norton*, in *FOUR QUARTETS* pt. 3, at 7 (1943).

35. W. COOK, *LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 159 (1942).

36. A. KALES, *ESTATES, FUTURE INTERESTS AND ILLEGAL CONDITIONS AND RESTRAINTS IN ILLINOIS* (1920). Lynn says this book was “misnamed” and Kales’ influence “limited.” LYNN 20.

37. McDougal taught that the terms “vested” and “contingent” are “but verbal counters which officials use in a great variety of contexts to effect a preferred distribution of values.” M. MCDUGAL & D. HABER, *supra* note 7, at 309.

rule of construction its opposite grew up. The criteria for classification were phrased in vague and tautologous terms ("condition precedent" was perhaps the most important). It was a poor judge indeed who could not knead the rules of classification and construction to a desired result. Thus—Kales and McDougal taught—a great house of illusion and deception was built behind a facade (dispositive language) erected upon a logical fault (ignoring purpose of classification). Within it, for the past several centuries, judges distributed wealth, advancing justifications which may or may not have compelled the decisions.

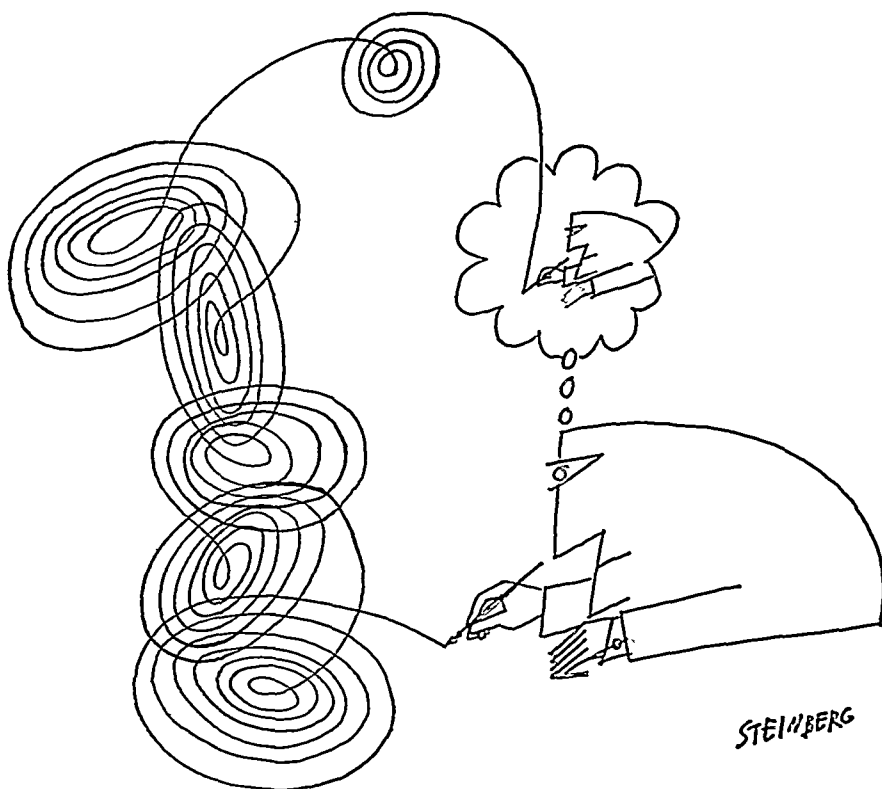
Whatever view is taken of the usefulness of the vested-contingent dichotomy and the attendant rules of construction, one essential fact must be borne in mind. The dichotomy, with its attendant definitions, in the final analysis can never yield answers whose words are rooted in any more substantial reality than other words; whether judges are moved by the closed and labyrinthine loops of language is a hypothesis that can never be absolutely proven. The truth or falsity of the dichotomy can never be demonstrated because all the current ways to divide interests into "vested" or "contingent" categories are tautological. The definitions include as part of the facts the very judicial behavior that the definitions purport to predict. Consider, for example, the now classic definitions of vested remainders found in Gray's treatise. Section 970 provides:

A vested remainder is defined as a future estate which *takes effect* as a present estate immediately upon the expiration of the preceding estate or estates as originally limited, and *is ready* at every moment during its continuance to come into possession whenever and however the preceding estates determine. That is to say, a vested remainder is a future estate that is subject to *no condition precedent* except the termination of the preceding estate.³⁸

Note that the italicized words can be given meaning only by referring to the action of a court declaring the remainder "takes effect," "is ready," and is subject to "no condition precedent." Gray's definition was perfectly, but unwittingly, depicted in a recent drawing by Steinberg, which appears on the opposite page.

Different definitions appear in the *Restatement of Property*, but they are as tautologous as Gray's. A remainder is vested subject to complete defeasance, says the *Restatement*, when "it is possible to

38. GRAY, *supra* note 2, at § 970 (emphasis added).



Drawing by Steinberg; © 1965 the New Yorker Magazine, Inc.

point to a person and to say that such a person would take, if all interests including a prior right to a present interest should now end.”³⁹ The phrase, when “it is possible to point to a person,” does not reveal *who* does the pointing. Nor does it specify *under what circumstances* the judge or the lawyer, or whoever does the pointing, *points and says*, “such person would take.”

In Professor Lynn’s analysis of the vested-contingent dichotomy, the influence of Kales and McDougal is evident. Lynn confirms their theory that results are not always reached by first classifying interests as vested or contingent. He concludes that recent cases “demonstrate that classification of interests is not an invariable step in solving a perpetuities question.”⁴⁰ He finds that the cases fall roughly into six types or categories: (1) cases exhibiting “relative familiarity with doc-

39. 2 RESTATEMENT OF PROPERTY § 157, comment *p* at 554 (1936).

40. LYNN 157.

trinal niceties and consequent ease in application of technicality"; (2) cases where "classification of future interests is attempted along orthodox lines and is achieved with little or no difficulty *but in which an alternative classification is permissible*"; (3) cases where "classification is attempted along orthodox lines and is not achieved"; (4) cases where "*partial* classification of interests is attempted along orthodox lines and is achieved with little or no difficulty"; (5) cases where "classification of interests is not attempted"; and (6) cases where "orthodox doctrine is rejected."⁴¹

In each category Lynn takes representative cases and examines them in some detail. Because traditional doctrine offers so many doors in and out, it is often difficult to determine whether, and to what extent, the doctrine is really influencing the judges or whether the judges are manipulating the doctrine. The best one can do in examining the cases is to bring to each a sensitive mind, free of predilections, and an experience born of reading hundreds of cases in the field. Lynn does this. He presents us with a *mélange* of judicial attitudes and skills in classifying interests. There are many fine judges who, without discarding the orthodox mythology, appear to be unmythological. There are others who demonstrate again the truth of F. C. S. Schiller's remark: "Nothing has a greater hold on the human mind than nonsense fortified with technicalities." There are, unhappily, only a few judges who explicitly recognize the tautologous nature of orthodox doctrine, reject it on that ground, and attempt an honest statement of the factors that move decision.

Lynn does not collect all the cases of the last two or three decades and place them in one or the other of these categories. His cases are merely representative. We are not given any statistics that would permit us to say, for example, that 40 per cent of the judges are skilled in their use of doctrine or that in 30 per cent of the cases the doctrine apparently compelled the result. Such statistics might be useful but the time and effort required to amass them by an experienced perpetuities hand would be a frivolous use of scholarship, considering how few perpetuities experts there are and what needs to be done in the way of policy examination and reform. Professor Lynn has proven nothing statistically, but he has greatly increased our insight into the variety of ways doctrine is used, misused, and not used in the perpetuities field.

41. LYNN 157-64.

4. *Lynn's Raid on the Inarticulate*

Contemporary scholars agree with Lynn that many judges today do not feel bound by traditional property law classifications. However, few scholars attempt to explain how modern cases *are* decided. Lynn himself concedes that this is a difficult question:

That modern courts in perpetuities cases are abandoning the categories of future interests is to a fair degree demonstrable. That they are assimilating functional equivalents can also be shown. Courts treat contingent remainders, contingent executory interests, possibilities of reverter, and rights of entry for condition broken as interchangeable. The elusive line between contingent and vested remainders is disappearing altogether. But how judges decide cases in the absence of classification is not at all clear.⁴²

Nonetheless, after a brief speculation as to what moves courts, he offers this answer:

The heart of the matter is whether or not the donor has violated the spirit of the Rule Against Perpetuities, and modern courts, like Lord Nottingham in the *Duke of Norfolk's Case*, sense that.⁴³

The *spirit* of the Rule? I cannot follow Professor Lynn to this conclusion. What spirit—and what medium—has control of the seance? The evidence which he presents does not show that judges or scholars are in agreement about what constitutes the proper spirit. On what side does the spirit descend in the following controversies: Should the Rule be against inalienability of specific assets or against tying up a quantum of wealth in trust, against practical inalienability or absolute inalienability, against remote vesting in possession or remote vesting in interest, against any possibility of remote vesting or any probability of same?

Professor Lynn's use of a "spirit" standard to describe modern decisions would not be so disturbing if there were some general agreement about what that "spirit" is. But there is not. Take the recent Tennessee case of *Sands v. Fly*,⁴⁴ which flabbergasted orthodox analysts and so confused the editors of A.L.R.2d that they annotated the case with a note that has nothing whatever to do with any issue involved in the case.⁴⁵ (One of the true touches of Dada in the opinion is that

42. LYNN 28-29.

43. LYNN 32.

44. 200 Tenn. 414, 292 S.W.2d 706 (1956) (discussed in LYNN at 159-61).

45. Annot., 57 A.L.R.2d 188, 197 (1958).

the presently living remaindermen have, in the court's view, survived the yet unborn life tenants!) Professor Lynn says, "*Sands* reaches an acceptable result without careful analysis of the ultimate interests."⁴⁶ Acceptable by what standard—the spirit of the Rule?

In *Sands* the court upheld what it called "a very unjust will" whereby the testatrix devised land to her only son (age 44) for his life, then to her grandchildren for their lives, then in fee simple *upon the death of her own grandchildren* to her nieces and nephews then living, with substitutional gifts to the issue of the nieces and nephews or to the surviving nieces and nephews or their issue. The son and the guardian ad litem of the presently living grandchildren (ages 8, 7, 5, and 3) attacked the will. The nieces and nephews refused to defend it. And since the executor also assailed the will as void, an administrator ad litem had to be appointed to defend it. Saying that all interests would timely vest in interest or fail, the court permitted the land to be tied up for the lives of the testatrix's grandchildren, some of whom were possibly not in being. Moreover, upon the death of the grandchildren the land was to be taken from testatrix's descendants and transferred to persons who would surely be "laughing heirs." If the result in this case is acceptable to Professor Lynn, it is hard to understand what he means by "spirit."⁴⁷

I fear "spirit" is a *deus ex machina* which Lynn has constructed to help us avoid facing up to some hard, intractable facts. First, too many perpetuities decisions are devoid of policy considerations, are filled with empty verbalisms and references to tautological doctrine, and apparently are resolved by "the cantilena of lawyers."⁴⁸ Lynn occasionally notes these facts: "Courts are affected by . . . the eminence of the authority gaining their attention";⁴⁹ "Some courts in handling the

46. LYNN 161.

47. Professor Trautman, in discussing this case, said, "Survivorship of the last child that Son may have seems to be the essential condition precedent of any recognizable economic interest in the property on the part of the alternate takers and this is the very kind of dead hand projection which the policy of the rule seeks to prevent." Trautman, *Wills, Trusts and Estates—1957 Tennessee Survey*, 10 VAND. L. REV. 1238, 1245-46 (1957). The *American Law of Property* says of the case: "It would appear the gift can only have been sustained on the basis that there was a separate divesting gift to the issue of the named persons [a basis not referred to in the opinion]." 6 AMERICAN LAW OF PROPERTY § 24.27, at 86 n.4 (Supp. 1962). The case is criticized on policy as well as doctrinal grounds in Note, 45 Ky. L.J. 704 (1957).

48. Gray saw this years ago. "A serious objection to the continuance of the old doctrines of real property in the jurisprudence of to-day is that . . . the judges . . . are in danger of being unduly governed by 'the cantilena of lawyers.'" GRAY, *supra* note 2, at § 782.

Leach and Logan have included in their casebook a delightful "cantilena" case entitled *Case Study: Advocacy Technique in the Rockies*. W. LEACH & J. LOGAN, *supra* note 8, at 710.

49. LYNN 31.

Rule show a remarkable lack of competence.”⁵⁰ Second, and here is the heart of the matter, what Professor Lynn undertook—a realistic description of the decision-making process involving the Rule against Perpetuities—cannot be done. Professor Lynn is an extremely well-qualified researcher in this field, where he has been working for more than fifteen years. Insofar as the book demonstrates that Lynn cannot accurately and precisely describe the factors that move decision, and must resort to a “spirit” to explain decisions, the book demonstrates to my satisfaction that such description is impossible. I think it is impossible even if one uses as systematic and comprehensive an analytical framework as Myres McDougal has proposed⁵¹ and has available the financial resources of the Ford Foundation and the intellectual resources of the entire clan of American property professors (not to mention the assistance of a dozen or so psychiatrists). There are a number of reasons for the practical limits to comprehensive description:

- (1) The lack of truly comprehensive information. Judicial opinions do not give comprehensive information about possibly relevant factors, including the characteristics of the claimants, the expertise of the judges, and the quality and techniques of advocacy.
- (2) The inability to construct a satisfactory method for evaluating all the variables in the decision-making process in a particular case.
- (3) The openness of any usable system of variables, which is always in a state of discovery and redefinition.
- (4) The costliness of comprehensive analysis.
- (5) The inability to discover the policies of the community on which all can agree.
- (6) The inability to assay the honesty of opinions, when orthodox doctrine can be used to reach opposite results.

From Lynn’s study this conclusion seems irresistible: So long as the Rule against Perpetuities remains in its present form, whether or not modified by wait-and-see or cy pres, our ability to describe or predict decisions comprehensively and accurately will have insurmountable practical limitations.

50. LYNN 201.

51. MCDUGAL, *supra* note 6.

B. *Lynn's Description of Reform Acts*

The second major objective of Professor Lynn is to describe reform of the Rule, both judicial and statutory, which has taken place since 1947. As Lynn points out, most of this reform is attributable to the work of Professor Leach.⁵² Leach has influenced the courts in three ways. First, his classic article, *Perpetuities in a Nutshell*,⁵³ is the most lucid and enjoyable introduction to the Rule. This and his later articles illuminate a dry, technical subject with a lively, piquant style. Most law students of the 30's, 40's, and 50's—now judges and legislators and leading practitioners—remember Leach as the only person who wrote anything comprehensible about the Rule. Second, his flood of persuasive articles⁵⁴ advocating reform has dislodged lawyers from unquestioning acceptance of the old Rule and has created a ground receptive to the seeds of reform. Third, Leach's stamp of approval on wait-and-see and cy pres has made these doctrines more acceptable to the courts. Where courts have been unwilling to adopt these doctrines without legislative action, they have at least begun to construe instruments so as to avoid violation of the Rule and to abandon Gray's "remorseless" application.

Leach has also vigorously pushed legislative changes, which have been adopted in various forms in many jurisdictions. Wait-and-see statutes have been enacted in England,⁵⁵ Western Australia,⁵⁶ Ontario,⁵⁷ and Pennsylvania.⁵⁸ Wait-and-see and cy pres statutes have been en-

52. LYNN 193. "If one person can be credited with tempering Gray's Rule, that person is Leach."

53. 51 HARV. L. REV. 638 (1938). The article was updated in Leach, *Perpetuities: The Nutshell Revisited*, 78 HARV. L. REV. 973 (1965).

54. Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721 (1952); Leach, *Perpetuities: Staying the Slaughter of the Innocents*, 68 L.Q. REV. 35 (1952); Leach, *Perpetuities Legislation, Massachusetts Style*, 67 HARV. L. REV. 1349 (1954); Leach, *An Act Modifying and Clarifying the Rule Against Perpetuities*, 39 MASS. L.Q., Oct., 1954 at 15; Leach, *Perpetuities Reform by Legislation*, 70 L.Q. REV. 478 (1954); Leach, *Perpetuities Legislation: Hail, Pennsylvania!*, 108 U. PA. L. REV. 1124 (1960); Leach, *Perpetuities in Real Estate: Legislative Reform*, 6 PRAC. LAW, DEC., 1960, at 36; Leach, *Perpetuities in Real Estate: Let's Get the Rule on the Rails*, ABA PROC. REAL PROP. PROB. & TR. LAW, pt. II, 20 (1960); Leach, *Perpetuities: New Absurdity, Judicial and Statutory Correctives*, 73 HARV. L. REV. 1318 (1960); Leach, *Perpetuities in the Atomic Age: the Sperm Bank and the Fertile Decedent*, 48 A.B.A.J. 942 (1962); Leach, *Perpetuities: Cy Pres on the March*, 17 VAND. L. REV. 1381 (1964); Leach, *Perpetuities: What Legislatures, Courts and Practitioners Can Do About the Follies of the Rule*, 13 U. KAN. L. REV. 351 (1965). See also W. B. LEACH & O. TUDOR, *THE RULE AGAINST PERPETUITIES* (1957); J. MORRIS & W. B. LEACH, *THE RULE AGAINST PERPETUITIES* (2d ed. 1962).

55. Perpetuities and Accumulations Act 1964, c. 55, § 3.

56. Law Reform (Property, Perpetuities, and Succession) Act, 11 Eliz. 2, No. 83, § 7 (W. Austral. 1962).

57. Bill 131, 27th Legis., 4th Sess., § 6 (Ont. 1966).

58. PA. ANN. STAT. tit. 20, §§ 301.4-5 (Purdon 1950).

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acted in New Zealand,⁵⁹ Kentucky,⁶⁰ Ohio,⁶¹ Vermont,⁶² and Washington.⁶³ Limited wait-and-see and cy pres statutes exist in Connecticut,⁶⁴ Maine,⁶⁵ Maryland,⁶⁶ and Massachusetts.⁶⁷ Cy pres statutes exist in California,⁶⁸ Missouri,⁶⁹ and possibly in Idaho.⁷⁰ A limited cy pres statute exists in New York.⁷¹

In discussing reform Lynn carefully avoids the heated, and sometimes acrimonious, language that has characterized the battle for perpetuities reform. He is neither in the reformers' camp nor in the non-reformers' camp. He sees clearly that the perpetuities experts currently are debating not policy but pragmatics. How can perpetuities reform be achieved without making the Rule more complicated, unpredictable, and troublesome than it already is?⁷² The great difficulty with the wait-and-see doctrine is how to select the measuring lives.⁷³ The fearsome aspect of cy pres is that it apparently gives the court unfettered discretion to remake a will.⁷⁴ Both these reforms preserve the vested-contingent dichotomy, laden with the verbal baggage of centuries.⁷⁵ The recent California legislation that exempts trusts from the Rule against Perpetuities if they can be terminated by the beneficiaries is replete with hidden tax problems and raises the prospect of perpetuities policy enforcement by the federal Internal Revenue Commissioner.⁷⁶

59. Perpetuities Act, 13 Eliz. 2, No. 47 (N.Z. 1964).

60. KY. REV. STAT. ANN. § 381.216 (Baldwin 1963).

61. Senate Bill No. 13, effective October 24, 1967.

62. VT. ANN. STAT. tit. 27, § 501 (1967).

63. WASH. REV. CODE ANN. §§ 11.98.010-.030 (1967) (applicable to trusts only).

64. CONN. GEN. STAT. REV. §§ 45-95 to -96 (1958).

65. ME. REV. STAT. ANN. tit. 33, §§ 101, 102 (1964).

66. MD. ANN. CODE art. 16, § 197A (Michie 1966).

67. MASS. LAWS ANN. ch. 184A, §§ 1, 2 (1955).

68. CAL. CIVIL CODE § 715.5 (West Supp. 1966).

69. MO. ANN. STAT. § 442.555 (Vernon Supp. 1966).

70. IDAHO CODE ANN. § 55-111 (1957) (applicable to trusts only).

71. N.Y. PERS. PROP. LAW § 11-a (McKinney 1962); N.Y. REAL PROP. LAW § 42-b (McKinney Supp. 1967).

72. *The Perpetuity Legislation Handbook* (3d ed. 1967), prepared by the Committee on Rules Against Perpetuities, ABA Sec. of Real Property, Probate and Trust Law, contains an excellent summary of the merits and defects of the various reforms and a useful collection of reform legislation.

73. See the illuminating debate between Morris & Wade, *Perpetuities Reform at Last*, 80 L.Q. REV. 486, 495-508 (1964) and Allan, *Perpetuities: Who Are the Lives in Being?*, 81 L.Q. REV. 106 (1965).

74. Professor Olin Browder contends that the discretion under cy pres is little different from the familiar discretion courts have in construing instruments, and that the proper reformation will usually be suggested by the scheme of the donor. Browder, *Construction, Reformation and the Rule Against Perpetuities*, 62 MICH. L. REV. 1 (1963).

75. See Schuyler, *Should the Rule Against Perpetuities Discard Its Vest?* (pts. 1-2), 56 MICH. L. REV. 683, 887 (1958).

76. See Dukeminier, *Perpetuities Revision in California: Perpetual Trusts Permitted*, 55 CALIF. L. REV. 678 (1967).

Professor Lynn recognizes that every reform alternative has merits and defects. His book is valuable because, instead of merely pointing out the problems, he suggests sensible constructions to cure the defects. Lynn's approach is to "read the perpetuities reform statutes whenever possible as statements of policy, and . . . [to] stretch them, if necessary, to their outermost limits in order to achieve . . . defensible results."⁷⁷ In a chapter called "The Decline and Fall of Fantastic Possibilities,"⁷⁸ he undertakes to apply wait-and-see and cy pres to most of the absurd cases arising under the old Rule. He deals with the fertile octogenarian,⁷⁹ the unborn widow, the administrative contingency, the precocious toddler,⁸⁰ the fertile decedent,⁸¹ and the fortuitous adoption. His exegesis of wait-and-see and cy pres is careful and penetrating. No court operating under one of these statutes could fail to benefit from Professor Lynn's clear and logical exposition of his preferred solutions.

III. Conclusion

So admirable a study as *The Modern Rule Against Perpetuities* deserve a second volume suggesting where we ought to go from here. With accelerating change in American society the "modern" Rule may be completely out of date in another generation or so. As a result of the different kinds of reform statutes, governing only within the enacting jurisdiction, the old unified empire of the Rule has fallen apart. Even if the unity of the old Rule was purely verbal and illusory in reality, as Lynn believes, the modern Rule makes no pretense even to verbal cohesiveness. Will the present trend toward diversity continue and the great empire built by John Chipman Gray be divided into many satrapies ruled by provincial panjandrums? Or will the unifying force of technology bring on one ruler speaking a language foreign to

77. LYNN 4.

78. LYNN 57-88.

79. The Los Angeles Times, Dec. 10, 1966, § 1, at 17, col. 1, carried a story of a fertile *centenarian* (man becomes father at age 109).

80. Newspaper stories of precocious pre-teens are continually appearing. See, e.g., The Japan Times (Tokyo), Feb. 23, 1964, at 2, col. 7 (11-year-old Colombian girl gives birth); Los Angeles Times, Mar. 19, 1964, § 1, at 2, col. 8 (11-year-old African girl gives birth); Los Angeles Times, Feb. 13, 1964, at 3, col. 7 (10-year-old Chicago girl gives birth and, according to the obstetrician, "seemed confused by the experience").

81. Lynn deals only with sperm banks. LYNN 66-67. He assumes that only a male can have a child conceived after his death. "Human ova banks comparable to sperm banks may be within the range of reality," recently reported Dr. James L. Burks of the University of Chicago. Dr. Burks foresees "using sperm from a sterile woman's husband to fertilize, in vitro, frozen and thawed ova from another woman, and then transplanting the resulting embryo into the sterile wife's uterus." Medical World News, Mar. 5, 1965, at 34-35. A child born as a result of such process would not, of course, bear any genetic resemblance to the foster mother who gave birth to him.

Gray? Congress, which could enact tax laws conferring benefits for conformity to a national standard, might be a unifying force.⁸² It seems likely that the tax laws will be changed to take care of perpetual trusts—which are possible now in California, Idaho, and Wisconsin—once such trusts become widespread.⁸³ Instead of amending the Internal Revenue Code to account for each state's perpetuities law, which would cause headaches for everyone, perhaps Congress should give a tax incentive for conformity to a Congressional rule against perpetuities. We have been too mesmerized by the tumult of local reform movements to give this possibility the hard thought it deserves.

JESSE DUKEMINIER, JR.†

The Lawyers. By *Martin Mayer*. New York: Harper and Row, 1967. Pp. xvii, 586. \$8.95.

Now entertain conjecture of a time, and see a young man in Louisville, four years out of law school, hep to the rules of civil procedure, a friend of a judge's clerk—at this moment newly returned from lunch after a satisfying morning spent helping a local haberdasher collect from a customer for a suit with two pairs of pants. The young lawyer is picking his teeth and contemplating a newspaper when into his office walks his sister's husband's niece, looking like hell with a bandaged jaw and a black eye and two fingers in a cast. It seems that five nights before, her young man, who travels, was in town with the company car (which is registered in Ohio), and the two of them went across the river to Indiana for a party. Around midnight, on their way back, their car collided with an Indiana jalopy that three boys had "borrowed" from a "friend". The young man was unharmed, and the boys were only shaken up, but the young lady was thrown from the car when the door on her side sprung open. She has just got out of the hospital; she may lose her job as a ticket-seller for a movie house; and plastic surgery may be required before other young men take her to parties in Indiana. The lawyer, as her uncle's wife's brother and a licensed attorney, signs her up, gives

82. Federal law was the primary force behind the recent emergence of a uniform income accumulation period. The federal income tax advantages of a trust where the trustee has power to accumulate income resulted in the repeal of almost all state statutes that restricted the accumulation of income to a period shorter than lives in being plus twenty-one years. See 6 AMERICAN LAW OF PROPERTY §§ 25.101-118 (A. J. Casner ed. 1952, Supp. 1962); 5 R. POWELL, REAL PROPERTY ¶¶ 833-35 (1956).

83. See Dukeminier, *supra* note 76.

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her assurances he does not entirely feel, and wishes her Godspeed.
What does he do next?

The publisher's blurb describes *The Lawyers* as "a wide-ranging, often anecdotal report on the law and its practitioners." It is in fact a somewhat uneven tome, containing several brilliant descriptive passages and generally illuminating accounts of what the author has seen and heard, as well as some tiring stretches of turgid prose. Let this be stressed at the outset, however, since it is easier to find fault than to praise constructively: the task Mr. Mayer set himself is overwhelming, if not impossible. But his is nonetheless an important book that cannot be treated lightly or condescendingly, least of all ignored. For more than five years the author, one of the most acute observers of the American scene, lived this book day and night. It is a labor of love, for both his parents are lawyers, and there is a high seriousness, almost a moral tone, in its attempt to avoid the glib and the flashy. That the attempt occasionally fails does not matter.

The description, at its best, is superb. With marvelous accuracy Mayer is able to make a series of significant points and tell a good story at the same time. In two pages, for example, he sketches a portrait of Professor Jaeger of Georgetown Law School, describes how most American law schools have been teaching since Langdell, exhibits the habits of thought that are most prized in top law schools, and notes their prejudices against evening schools. That brief vignette is, in effect, a magnificent summary statement of how a good law school makes tough lawyers out of liberal arts graduates, mere laymen.

It is hard for an author who is dealing with a big subject on a grand scale to avoid the temptation to make the subject even bigger, the scale even grander. Mayer succumbs. The book is not only about lawyers of various shapes and sizes; it tries to deal with The Law itself—head-on. And of course it is all but impossible to observe anything that is as all-embracing as life, and then to put it all down on paper in an orderly fashion even when the writer has the sharpness and the wit, the sheer intelligence and the humanity, of a Martin Mayer. Even he admits that "startling little is known systematically about the real world of the lawyer, and even less is known about the purposes the society wishes the lawyer to serve in the latter half of the twentieth century." Who, one might ask, is any reviewer to berate the author for failing to reach the stars? In spite of some shortcomings, this book does convey a sense of the complex relationships between the various realms of the lawyer and the universe that is the United States.

It would be both easy and cheap to brand Mr. Mayer "just a jour-

nalist,” with all that that phrase implies—just as easy as it is to think of someone who has earned an LL.B. or passed a bar examination as a lawyer pure and simple, with everyone else regarded as a non-lawyer. (As Mayer points out, in form at least, once a lawyer, always a lawyer, since admission to the practice of law is good for life unless specifically revoked. And non-lawyers find themselves in the uncomfortable part of the court room if they poach on the lawyer’s territory.) It is, of course, the aim of every professional group to define as many visible differences as possible between itself and the outside world.

Nevertheless, it is plain that Mayer knows far more about the law than most lawyers, even though he has not spent the requisite three years at the gates of Valhalla. In fact, it is doubtful whether the book would be any different if he happened to have the magic letters after his name (LL.B. or J.D.?). certainly, no one should attack the book on the grounds that its author is an outsider.

In fact, as David Riesman, a great admirer of this book, points out in a letter to the reviewer, the very fact that Mayer is not a “licensed practising attorney” may have its advantages: he takes nothing for granted and he follows no standard orthodoxies. For example, one would not expect a lawyer to write with such zest about the various legal indexing and reporting services, which are a part of the world as he knows it; and perhaps not belonging to the guild gives the author the freedom to exhibit feeling and emotion.

Lawyers and journalists do have one thing in common: they are, if anyone is, the last generalists of our society, willing to grapple with any problem and confident that there is little material that they cannot get a sense of, if not master. This can strike the outsider as cockiness. It was Edward Levi, now Provost of the University of Chicago, who stated, “We have substituted the law for the classics,” and, as Mayer reports, such men as Charles Reich of Yale and (it would seem) the whole faculty of the University of Southern California Law School sense a fragmented society’s desperate need for a profession that is not narrowly specialized. There is an obvious empathy in the book for the lawyer “who can pull together all the expertise and tie up a program.” I wonder whether, on the other hand, a lawyer reading Mayer will understand or approve of the desire, almost the obsession, to get the picture big and to get it whole. (There are, of course, several lawyers with the same passion; we need more.)

“If the laws could speak for themselves,” George Savile, Marquis of Halifax, opined almost three hundred years ago, “they would complain of the lawyers in the first place.” On the one hand, we all mouth pious

platitudes about living under the law; and whenever problems arise, legislatures are apt to pass a bill. On the other hand, as the author points out, "public opinion polls invariably show that people who have had occasion to be represented by a lawyer think less well of the profession than people who have never hired legal services." Mayer steers a skillful course between shallow exposé of the seamy side of the law and pious rehearsal of the words of Gilbert and Sullivan:

The Law is the true embodiment
Of everything that's excellent.
It has no kind of fault or flaw.

He calls the shots as he sees them without debunking what is of value. In fact, one finishes the book with a renewed conviction that, when all is said and done, the rule of law, however imperfect, does tend to civilize behavior and force it into more rational patterns in a schizophrenic and cruel world.

Mr. Mayer handles myth with considerable adroitness. The rhetoric of the profession would have us believe that the lawyer, a servant of the court, is concerned with overall justice and the public interest. To some extent, of course, he is; but the book shows how most frequently he is representing neither his own interests nor those of the society as a whole, but rather those of his client. "He is on a mission for someone else . . . he is an advocate; his function is to see the possible resolution of a controversy in terms of a client's best interests." But this basic contradiction poses societal problems that are hinted at rather than discussed. And with all the thought that went into this book, there are still some generalizations that are tantalizing—or plain annoying—because they are unexplored and unsubstantiated; one never knows whether they are genuinely illuminating or trite. "Law requires punishment . . . law is a public profession . . . one man's rights are no more and no less than other men's duties to him." Such broad statements have value only in a carefully reasoned context that I sometimes found thin or could not find at all. One cannot quite read this book with the lawyer's assumptions that every word counts and that one argument inevitably and inexorably leads to the next.

In areas where mythology and truth come close together, Mayer is in his element. The chapter on the Supreme Court, for example, gives a superb account of the role and place of that body in contemporary American life—but why call that particular chapter "unscientific" when the style and organization are the same as the rest of the book? Some of those lawyers who pride themselves on being hardened realists

will, no doubt, be offended by the emotion of the book's final pages, in which Mayer describes the Warren Court and the Chief Justice himself as the main hope for America's future as a civilized nation; I was moved. It is encouraging to find someone who can be hard-nosed and show genuine feeling at the same time.

His heart, then, as well as his head, is usually in the right place. But he can be silly too. Consider, for example, the following piece of foolishness: "Congratulating itself on its fairness and its grasp of modern psychiatric evidence, the legal system within a few years will probably be sending drunks not to jails, where they would be held, cursed occasionally, fed and released, but to jails called hospitals where they will be held, cursed occasionally, fed and released—after they have been forcibly subjected to whatever fads for the treatment of alcoholics are currently bemusing the medical profession." Surely Martin Mayer is perceptive and compassionate enough to know that experimental forms of treatment, however unscientific, are more likely to help alcoholics than forms that are brutal and/or inappropriate.

The Lawyers is certainly not a compendium of statistics, but the author includes enough ballpark numbers for the reader to get his bearings. "There are," we are told, "300,000 lawyers in the United States—one for every 250 of the labor force. No other nation has anything like so many lawyers, either in absolute numbers or in proportion to population." There is a sense of how different they all are, and how labor is divided, but little discussion of why America has so many more lawyers than, say, Japan or France or South America, or why lawyers in this country handle matters that would be handled by some other profession elsewhere. And as Mayer points out, "nearly one-half the nation's practitioners have their offices in cities and towns with under 200,000 population, while fewer than 40% work in cities with a population of 500,000 or more." Why have these proportions remained the same for over a decade?

As one might expect, this huge mass of lawyers leaves enormous paper trails: "as against the roughly thirty thousand reported appellate decisions each year in the United States, the English *Law Reports* offer only three hundred. . . . Each year produces about fifty thousand pages of new statute law from Congress and the state legislatures." Arthur Baer once remarked that if you laid all our laws end to end, there would be no end. To what extent, I wonder, does the sheer number of lawyers support—or generate—the peculiarly American notion that passing another law will solve any problem that may arise? Or do we have a chicken and egg situation here?

In the preface, Mayer writes:

During the course of more than five years on this job, I have come to feel that one can on occasion thoroughly understand how a lawyer thinks about a given situation and still believe there are more productive ways to think about it—indeed, there are areas of human experience where lawyerlike habits of mind positively inhibit understanding of what is actually happening.

Even the most elitist editor of the *Harvard Law Review* or the *Yale Law Journal* might agree in theory, but I was a little disappointed that, once the gauntlet had been thrown down, I could not find a for-instance that satisfied. Occasionally, in this book, Mr. Mayer simply bit off more than he could chew. When he took a look at the schools in the late fifties, he told us what he saw, vividly and shrewdly; his points were made through sharp descriptions, and he managed to avoid philosophical tangles. In *The Lawyers*, however, he yielded to temptation. He was, as he put it, "in the big leagues," and he was swept into the vortex instead of making controlled forays from the sidelines. Perhaps his publisher should have done a little more editing.

The Lawyers, then, misses being a great book, but there is no doubt in my mind that it has a lot to teach both lawyers and non-lawyers. At its best, it is genuinely and provocatively illuminating; at its worst it contains some rambling pages that lead nowhere in particular. As with any book that deals with such an enormous range of topics, its value to the reader depends somewhat on what he is able to bring to it in the first place, since the author is not quite clear whom he is addressing—layman or initiate, small-town realtor or Supreme Court Justice.

I hope that there will, one day, be a second edition, perhaps a little shorter than this one, with more of the crispness that I remember from *The Schools*. And I hope also that Mr. Mayer can spend some time travelling outside the United States, and include some thoughts of a comparative nature on what it is like to be a lawyer in one or two other societies.

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