

## COMMENT

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### NUTSHELLS AND PERPETUITIES

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TO ONE trained in the manufacture of sermons such a text as the title of this article would afford points of departure for a long series of addresses. First, of course, he might develop the implicit suggestion that the nutshell is a hard protective covering designed to conceal from the consuming public the tender and delicious product of the processes of nature. Thus viewed, the putting of perpetuities into a nutshell is merely the self-protective action of the legal profession, designed to guard one of the gems of the legal treasury from the profane gaze and desecrating hands so that it may be handled only with due ritual by its accredited priests. Second, he might dwell upon the devastating thought that nutshells are the dry and useless accompaniment of what has real value and that perpetuities are perhaps an aspect of the law of similar aridity and hence deserve the casting into the fire which awaits most nutshells of this world. Not to prolong unduly this examination of the logical and inexhaustible mental processes of an ecclesiastical mind, it is certain that sooner or later, the idea would emerge that the nutshell is the thoughtful provision of an all-wise Nature to permit the nourishing kernel to mature and to reach the place where it can truly perform its ultimate function for the good of the human race in a state of perfect preservation, and of maximum utility. Thus viewed, the putting of perpetuities into a nutshell is an act of God-like kindness to the human race and to those who, despite arguments to the contrary, are still a part of that race, the lawyers, and the students of the law. It is this last aspect of our text which the author proposes to examine herein for the determination of its percentage of truth.

This problem has two present and pressing importances. During the past fifteen years there have been movements in Alabama, Delaware, Michigan, New York, North Dakota, Ohio and Wisconsin to state the rule against perpetuities in statutory form or to change the existing statutory form of that rule. Every statute which deals with any aspect of this rule is, to a greater or less extent, a proposed "nutshell" into which the rule, or some aspect thereof, is sought to be put. In the second place the American Law Institute hopes to restate the law of perpetuities, if funds for that endeavor become available. Here again something having resemblances to a "nutshell" is projected. It is true that a restatement can be more elastic than a statute, but the fact remains that a relatively brief verbal embodiment of this body of law is contemplated.

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Thus for the guidance of possible new statutory movements in this field and for the direction of our mental processes concerning the restatement of this branch of the law, it is useful to stop and to contemplate what wisdom for the future can be garnered from the record of the past.

The articles published in the *Iowa Law Review* by Professor Percy Bordwell during 1937, 1938 and 1939 on "Alienability and Perpetuities" furnish a most excellent historical background for our present problem. The rule against perpetuities has a host of cousins in the modern law and an ancestry readily traceable for at least three-quarters of a millennium. As far back as the end of the twelfth century began the desire to establish and to promote the alienability of land—then the only important form of wealth. Springing, perhaps, from a desire to mollify the harsh consequences of primogeniture, aided certainly by the willingness of the King's Courts to keep within limits the dynastic impulses of the English nobility and landed gentry, encouraged by the swing of the pendulum of public favor away from the institution of feudalism, this movement for the alienability of land gained new adherents and took on new forms during the passage of the centuries. The establishing of the freedom of alienation by an owner in fee simple without the consent of his heir, the evolution of the English estate in fee simple conditional, the development of the "recovery" as a device permitting the effective alienation of an estate in fee tail, the Rule in Shelley's Case, the somewhat similar doctrines applicable to limitations in favor of the "heirs" of a grantor or devisor, the rules invalidating attempted restraints upon the alienability of a fee simple, the restrictions upon gifts in mortmain or to charitable corporations, the doctrines of destructibility—all these—are offshoots of the same main stem as our modern rule against perpetuities. Throughout the century and a half in which the English courts evolved the rule against perpetuities, there was no uncertainty in their utterances as to its purpose; it was a rule designed to eliminate the "inconveniences" attributable to long-lasting interruptions in the alienability of land. This origin and background of our present rule must never be obscured or lost sight of in our efforts to state the present rule in succinct form. Else we shall risk the disconcerting experience of seeing our nutshell burst to provide Lebensraum for some offshoot of the ancient ancestry of the kernel which we thought we had safely confined.

By a long series of decisions this rule of social policy took on increasing definiteness of form; the elements of the permissible period became increasingly defined in terms of "multiple lives," a minority and a period of twenty-one years in gross; the types of limitations within the condemnation of the rule became more and more susceptible of generalized description. Throughout all this process, the value of the common law method of development was demonstrated. The decision of case after case as it arose left unfixd the outer limits, the ultimate inclusiveness, of the rule, and thus gave room for judicial statesmanship in the shaping of the rule to changing conditions. This adaptability

of our law to new problems of society as they arise is a quality of the common law which must be jealously safeguarded when we begin to play with brittle or unyielding nutshells.

The first outstanding effort to put perpetuities into a nutshell was made by the framers of the New York Revised Statutes of 1830. There is little basis for doubt that these gentlemen intended the Real Property Law, as they drafted it, to embody substantially a restatement of the theretofore existing common law, making only one important change therein, namely, the shortening of the permissible period to one measured in most cases by two lives only but permitting an additional minority in a strictly defined and rather uncommon type of limitation. The alienability of land had been infringed most frequently in the English experience by limitations which suspended the power of alienation by creating future interests in favor of persons not ascertainable until some future date. A section of their new statute, couched in terms of forbidding a "suspension of the power of alienation," was inserted to cover this large body of known authority. But the Revisers were fully aware that, in this Section alone, they had failed to restate the complete prior experience of England and of New York. There remained the type of case illustrated by the *Duke of Norfolk's Case*<sup>1</sup> and by *Long v. Blackall*<sup>2</sup> in England and by a fair number of early New York decisions, in which an executory interest had been limited on an uncertain future event to a definite and presently ascertainable person. Such a limitation in no way "suspended the absolute power of alienation," since the owner of the present estate could join with the owner of the executory interest in a conveyance effective to transfer complete ownership of the affected land. But this did not eliminate the undesirability of allowing such a limitation. The contingency of the executory interest and the indestructibility of this contingent interest by any act of the owner of the possessory estate in the land, combined to cause a "fettering of the alienability of the affected land." The two parties had *power* to alien it but their co-operative joining in such a conveyance was made improbable because of the conflict between their interests. The prohibition of such an indestructible executory interest had been a part of the English law and of the law of New York prior to 1830. The Revisers sought to embody this aspect of the rule against perpetuities in that section of their statute which provided: "A fee may be limited on a fee, upon a contingency, which, if it should occur, must happen within the period prescribed in this article."

The difficulties engendered by this statute need no elaboration to anyone who has been sufficiently interested to read this article to this point. The effects, direct and indirect, of its shortening of the permissible period have been much commented upon. Less observed, but no less important, have been the uncertainties injected into the law of New York by virtue of the statute's

<sup>1</sup> 3 Ch. Cas. 1, 53, 22 Eng. Rep. 931, 963 (Ch. 1685).

<sup>2</sup> 7 T.R. 100, 101 Eng. Rep. 875 (K.B. 1797).

expression partially in terms of "suspension of the power of alienation," and partially in terms of "remoteness of vesting." These uncertainties have led to the unqualified sustaining of options to purchase annexed to a fee, and to the extension of the rule as to shifting future interests laid down in *Matter of Wilcox*<sup>3</sup> to springing future interests in *Walker v. Marcellus & Otisco R. Co.*<sup>4</sup> Just how far "remote future interests" are to be held invalid in New York is still an unsettled question with two lines of authority severally persuading to opposite conclusions.

The restatement product of the Revisers of 1830 has exerted an influence far beyond the confines of the State of New York. In at least ten other states this attempted nutshell still contributes sharp edges for the injury of the unsuspecting public. These states are Arizona, California, Idaho, Indiana, Michigan, Minnesota, Montana, North Dakota, Oklahoma and South Dakota. Two others, Alabama and Wisconsin, have largely eliminated for the future those troubles which at earlier times they invited by borrowings of this statutory embodiment of the rule from New York.

A little more than half a century after the formulation of the New York statute, John Chipman Gray published his great book on the Rule Against Perpetuities. This book did so much to replace chaos by clarity that it has earned a deserved reputation. Few passages from any American textwriter have been so much quoted as that compact "nutshell" formulation of the rule made by Mr. Gray. Changed slightly in wording from the first edition, it has remained constant in form since 1906: "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." Like the drab bulb of a Madonna lily, this formulation conceals alike the ancestry of its content and the manifold complexities (and beauties) of that which, under the gentle ministrations of one of the initiate, can be unfolded from within its bounds. By it the profession has been misled to believe that the rule now concerns, and in the past did concern, only remoteness of vesting. By it the profession has been persuaded to stake altogether too much upon the elusive distinctions between "vestedness" and "contingency" and to minimize, if not to disregard, equally important variations in degrees of "vestedness." The formulation is useful to one who already knows the whole field well. But does such a one need it for any purpose? To him, however, who is a postulant in this field, who begins with little knowledge but wishes to increase his store, this formulation can be more of a snare than a guide. It is uninformative and thus resembles most nutshells. Its compactness facilitates its quotation torn from the context of its author's exposition and thus makes likely errors in its application which its author would have been foremost in disapproving.

During the past five years new efforts have been made to put the rule against perpetuities into a nutshell. In 1935 the Law Revision Commission

<sup>3</sup> 194 N.Y. 288, 87 N.E. 497 (1909).

<sup>4</sup> 226 N.Y. 347, 123 N.E. 736 (1919).

of the State of New York employed the writer and Professor Horace E. White-side to study the statutes of New York upon this subject and to prepare a revision which would more clearly embody the existing law of that state upon this topic. After careful work extending over some months a draft bill was prepared, was approved by the Law Revision Commission,<sup>5</sup> was introduced into the Legislature and there died in the due course of legislative juggling. A caution is necessary concerning this venture. The writer believed (and still believes) this draft to have been a good statute *for New York*, but it was consciously drafted to meet the special problems and decisions of that one state, and no one is surer than this writer that this proposed statute would have been an undesirable form of statute for countrywide adoption. But it would appear that few beyond the drafters of this statute thought well of it even for the State of New York.

A year or two later the American Law Institute requested Professor Lewis M. Simes of the University of Michigan to supervise the drafting of a proposed ideal statute on the subject of perpetuities. The difficulties of this task proved to be very great. Many of us sat about the table with Professor Simes for a considerable number of days, debating what *was* the law, what *should be* the law and how we could phrase our final conclusions in the succinct wording of a statute and still keep it crystal clear. Much progress had been made when the Institute, for reasons chiefly, if not wholly, unrelated to the possibility of the task, decided to go no further with its projected statute on the subject.

The writer's experience in these two attempts to put the rule into a statutory nutshell has left him with the firm conviction that, in the three-quarters of the United States as yet unsullied by a statutory embodiment of the rule against perpetuities, the needs of the future will be best served by carefully avoiding the enactment of any comprehensive statute on the subject. This position is in no way inconsistent with the high desirability of clarifying and modifying the quite abominable statutes which already exist in some of the remaining states.

The most recent manufacturer of an attempted nutshell for the rule has been Professor W. Barton Leach of Harvard University. In the *Harvard Law Review* for February, 1938, he wrote thirty-three pages under the title "Perpetuities in a Nutshell." This article took the form of a series of propositions with some forty-six accompanying illustrations. Thus it was modeled somewhat upon the Restatements of the Law, heretofore prepared under the auspices of the American Law Institute. This is particularly significant because of the long-announced desire of the Institute to complete its Restatement of the Law of Property by the production of a fourth volume dealing with the Social Restrictions upon the Creation of Property Interests. Professor Leach's article thus gives a living demonstration of the possibilities and dangers of the restatement method in this field of law. His efforts will afford invaluable aid to

<sup>5</sup> N.Y. Legis. Doc. No. 65H (1936).

the restatement of this branch of the law if that restatement is hereafter undertaken.

In the first place it is clearly apparent that clarification of the law in this field is more possible of attainment by the restatement method than by the route of statutory enactment. A rule of law which embodies a fundamental social policy is certain to touch life and the behavior of lawyers at many points. These points of incidence require separate exposition and need abundant illustration if they are to become clear to the average busy lawyer or judge required to operate momentarily within this field. A statute is not a medium appropriate for the accomplishment of this task. In the opinion of this writer the most serious criticism of the Leach nutshell is its failure to go sufficiently into detail so as to show the routine practitioner how his case should be decided under the stated rules. Indeed it is his belief that this necessity for detail is so great that the effort to attain a "nutshell" is an effort to attain the impossible. Compactness, compatible with the appellation "nutshell," can produce a product understandable and perhaps helpful to one already expert in the field, but is impossible in any work which is to be truly useful as a guide to the profession as a whole. A book entitled "French Made Easy" is alluring to one anxious to avoid the drudgery of French verbs, but has seldom opened up for anyone the profound depths of the French language and literature. Sometimes the user of such a book has full certainty that he knows all he needs to know. Sometimes he is correct, but this can only be true when his needs are slight, involving no more than the outermost periphery of that which is available and which must be known to those really expert in the field.

Still another caution for one who attempts restatement in this field is to be found in the experience of Mr. Leach. Obviously no one jurisdiction has decisions upon every proposition which is to be dealt with in this broad field. The common restatement practice in such a situation is to search for the two, three, four, or ten jurisdictions which have passed upon the point, and to assume that the consensus of these decisions embodies the probable decision in those jurisdictions where the question has not yet arisen. The position thus derived becomes the rule of the restatement upon the point. Mr. Leach reluctantly followed this procedure in connection with the rule laid down in England in *Leake v. Robinson*<sup>6</sup> that a gift to a class wholly fails if the class is not certain to lose its ability to increase in membership within the permissible period of the rule. He points out: ". . . As is too often the case with regard to problems of future interests, the English cases have been followed in the United States where the issue has arisen without independent examination of the question involved." In the *Harvard Law Review* for June, 1938, Mr. Leach developed his disagreement with the rule which he had formulated in February. In this later article he shows that the rule objected to had been followed in

<sup>6</sup> 2 Mer. 363 (Ch. 1817).

England some sixty times, and had been accepted as the basis for decision in at least nine American states. Nevertheless he urges the acceptance of a different rule in the thirty-nine American states which have not thus far taken a definite position. Whether one agrees with Mr. Leach on this specific question or not, his experience and arguments present a fundamental problem which must be faced and dealt with many times in any restatement of the law in this field. It will not be enough to find a particular point passed upon by the courts of one, two, or even of nine states. Statement of a rule thus derived as the "American law" without careful examination of its conformity to the underlying policy of this rule, might well serve to crystallize and to perpetuate the errors of a few states, in the law of many more states whose judges will have been derelict only in believing that they could safely rely upon the restatement given to them for their guidance.

Lastly Mr. Leach's experience drives home the importance of having available in any restatement of this field a careful exposition of the underlying policy of this rule. Only thus can there be laid a sound foundation for such a rejection of existing court decisions as he argues for in connection with the class gift rule of *Leake v. Robinson*. Only thus can such a restatement provide an adequate basis for the future growth and adaptations in this field to those new problems which are certain to arise and which will not have been specifically covered in any restatement, however thorough.

To bring together the synthetic moral of this tale is not difficult. Perpetuities do not furnish a kernel which invites a statutory envelope. The effort thus to confine this body of law in a few sentences has been made in enough different states during the past centuries and with sufficiently bad results to justify much hesitance in another attempt at its statutory embodiment except where the local bar is found ready to improve the details of an already existent statute. Furthermore, the subject matter of perpetuities has so many facets, touches life in so many different ways, and has so large an ingredient of policy, that the effort to put it into a nutshell of any type is of necessity doomed to failure. Any formulation of this body of law is likely to lack utility almost in direct proportion as it increases its stress upon brevity.

What then can be said of the proposed restatement of this part of the law of property? Surely it is a field in which lawyers and judges realize their need for guidance. Quite as surely it is one in which American decisions need re-examination in order to determine first, how much of the English common law has in fact been used as the basis for actual decisions in this country, and second, how much of this use embodies slavish copying rather than considered judgments as to the adaptability of the English precedents to the conditions of the present day. Since these are tasks performable by no existing agency except the Restatement, the task must be performed by the Institute or go unperformed.

It must be remembered that Harry Bigelow, before he attained the Deanship from which he has but recently retired, was charged with the leadership in the Restatement of the Law of Property. To that task he brought an ability to express simply, ideas which mature judgment showed to be simple; a facility in clarifying difficult problems where a semblance of simplicity would have been delusive; a willingness to search for and to weigh the authorities, old and new alike, without preconceptions. These qualities, if brought to bear in an attempt to restate the law of perpetuities, can produce, not the unattainable "nutshell" for this body of law, but what will be better than a "nutshell," namely, a container worthy of its content, true to its ancestry, illuminating to those among us who seek guidance.