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Inconvenience and the Rule for Perpetuities

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"INCONVENIENCE" AND THE RULE FOR PERPETUITIES

GEORGE L. HASKINS*

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I. INTRODUCTION

In recent years, so much attention has been directed towards reforming the common law Rule Against Perpetuities, and so much inaccurate history has been dredged up to justify its alleged policies, that it seems appropriate to try to summarize aspects of its early history and justification for what light may be shed on efforts to reform it. For years, judges and scholars have pointed to the mischiefs that could be created not only by the "dead hand" but by unforeseen applications of the Rule, so that the brilliant and often seductive solutions suggested by the late W. Barton Leach and others have been warmly embraced.¹ The Rule's "reign of terror" has been dramatized by situations ranging from the magic gravel pit to fertile octogenarians.² Among the most popular of suggested reforms has been the so-called "wait-and-see" rule—i.e., wait and see whether the available time of lives in being and twenty-one years will in fact, rather than by possibility, violate the Rule. That approach was enunciated by the Pennsylvania Legislature in 1947,³ and it has gained increasing plaudits and support. It now seems to

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have received the approval of the second Restatement of Property, even though most of the reporters have apparently forsaken their earlier explanations of the origin and development of the Rule as a result of a recent study of what Lord Nottingham probably had in mind when he first formulated the Rule in the 1680's.\(^5\)

This essay is not directly concerned with the wait-and-see rule as such, even though it has been part of the battleground of reform proposals since 1959 when the late Professor Philip Mechem offered a devastating commentary on its numerous supporters.\(^6\) Although the current revision of the Restatement recognizes, at least implicitly, the error of its earlier rationalization, most of the reporters evidently regard the wait-and-see rule as advantageous and desirable.\(^7\) Others have suggested a variety of different reforms\(^8\) in their attempts to justify a policy of preventing property from being tied up for too long a period by the hands of long-dead testators and settlors. Yet few have recognized how well the old common law worked, and why, even in situations not envisaged three hundred years ago.

A number of current proposals for reform are summarized in a recent article in the *Law Quarterly Review*.\(^9\) Useful as that article is in emphasizing the benefits of certainty and predictability inherent in the old common law Rule in contrast with recent proposals, it seems not to take into account what Lord Nottingham was trying to do: to avoid inconvenience rather than to enunciate a fixed and formalized rule. It is to summarize his efforts and, by inference, to support the efficacy of the old Rule which, as it devel-

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oped, was tied to family settlements, that this essay has been prepared. Although a good deal of what follows draws upon the present author's earlier and extended study, its purpose is less to repeat than to emphasize the circumstances under which the Rule was first enunciated, explain why it was thought necessary, and appraise the prudent flexibility that it was then intended to have in its application.

The oft-told and generally accepted tale of how the Rule Against Perpetuities came about is simple, but obviously too simple. In 1620, the Court of King's Bench unexpectedly declared in *Pells v. Brown*\(^\text{11}\) that executory interests were indestructible. Theretofore, and as recently as 1618,\(^\text{12}\) it had been assumed that they were as destructible as contingent remainders, at least by fine or recovery.\(^\text{13}\) A strong dissent by Judge Doderidge declared that the decision in *Pells* would lead to "a mischievous kind of perpetuity which could not by any means be destroyed,"\(^\text{14}\) and scarcely sixty years later, in 1681, Lord Nottingham announced in his decision in *The Duke of Norfolk's Case*\(^\text{15}\) that an interest which could not take effect within at least one life in being was void as a perpetuity.\(^\text{16}\) Although Lord Nottingham's decision was reversed in 1683,\(^\text{17}\) it was subsequently reaffirmed by the House of Lords in 1685\(^\text{18}\) and later became the foundation of the modern Rule.

This over-simplified explanation of the origins of the Rule disregards numerous factors, including notably the varying opinions of seventeenth century judges as to whether the decision in *Pells v. Brown* was in fact law because it was in direct contradiction to *Child v. Baylie*,\(^\text{19}\) decided two years earlier.\(^\text{20}\) Moreover, what was a perpetuity became an issue that plagued the judges until Lord Nottingham resolved it in terms of "inconvenience."

Of equal importance has been the predilection of modern writers to read back into an earlier time modern social and economic ideas without evaluating their historical applicability. Thus it is written: "Ever since... [the Rule] first emerged in the *Duke of Norfolk's Case*, it has been declared to be a rule in furtherance of the alienability of property."\(^\text{21}\) According to this view, a rule favoring alienability was necessary by the end of the seventeenth century because "perpetuities" impeded the development of the mer-

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15. 3 Ch. Cas. 1, 22 Eng. Rep. 931 (1681).
18. [1685] 3 Ch. Cas. 53.
cantile middle class by taking property out of the "stream of commerce."22 In a society that has been portrayed as changing from a feudal to a capitalist order, the creation of a new rule restricting a landowner's ability to tie up his lands would be perceived, not surprisingly, as proof of such a transaction. Land, the source of all wealth in a pre-capitalist society, had to be made more marketable. Once the major restraints on alienation were removed, successful men would rise and the incompetent would fall, regardless of the efforts or the prominence of their ancestors. This perception of the Rule as promoting a laissez-faire system is articulated in the first Restatement of Property: "It is obvious that limitations unalterably effective over a long period of time would hamper the normal operation of the competitive struggle. Persons less fit, less keen in the social struggle, might be thereby enabled to retain property disproportionate to their skills in the competitive struggle."23

The traditional explanation of the Rule's origins is contradicted, however, by several compelling factors and is therefore ripe for re-examination. Obviously, the modern common law rule, which states that an interest in property is void unless it will necessarily vest, if at all, within a life in being and twenty-one years,24 limits a testator's or grantor's ability to control the future ownership of his land or other property. The rule that was first announced by Lord Nottingham in The Duke of Norfolk's Case had a different purpose. Then, in fact, it was called a rule of perpetuities, not a rule against perpetuities. The Duke of Norfolk's Case was a clarification of ancient contradictory assumptions, decisions, and uncertainties with respect to how long interests in land might last. Moreover, the decision was not simply the resolution of an arcane point of property law; the case marked the climax of a long struggle between the conveyancers, who wanted more freedom for the landed classes to control their estates, and the royal judges who had stood firm against those efforts for centuries. The conclusion seems inescapable that the conveyancers and their clients, not the judges, were the ultimate victors.

This conclusion, which is contrary to traditional assumptions about the origins and purposes of the Rule, is suggested by three related inquiries. First, there is the question of interpreting the economic, social, and political forces at work in seventeenth century England. A generation ago it was fashionable to view this period as dominated by a rising middle class, wedded to capitalist ideas such as free alienability of property. Now, however, a new climate of opinion has emerged, and an increasing number of historians have accepted the theory that the dominant ethos of the seventeenth

23. 4 RESTATEMENT OF PROPERTY, Introductory Note, at 2132 (1944).
24. The definitive modern version of the Rule was formulated by John Chipman Gray, the high priest of the Rule Against Perpetuities: "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." J. Gray, supra note 13, § 201, at 197.
century was that prevailing in a landed class generally hostile to mercantile or capitalist ideas. Such a class might be expected to take a jaundiced view of the free alienability favored by eager merchants and city buyers. Second, an examination of the law existing before the new Rule was adopted reveals that the Rule did not limit a testator's or grantor's options but rather afforded him greater flexibility by enhancing his ability to control future ownership of his property. Third, the facts of The Duke of Norfolk's Case reveal the problems that faced a great landowner before he had the Rule to rely on and how the Rule alleviated those problems. An examination of these three lines of inquiry leads to a rejection of the traditional theory set forth by the classic authorities.

II. SEVENTEENTH CENTURY ENGLAND

The traditional theory about the origins of the Rule Against Perpetuities was virtually unassailable a generation ago because it fitted nicely with the accepted historical interpretation of seventeenth century England, which was largely influenced by Marxist views. The Marxist interpretation of the social struggle of the 1640's was championed by R. H. Tawney, a distinguished Socialist historian who was among those instrumental in developing a new social and economic historiography in Great Britain. According to Tawney, the Revolution in 1642 represented the triumph of the emerging middle class's newer capitalist values over the older feudal structure. Tawney saw the gentry as a rural middle class rising against the increasingly decrepit feudal ruling class of the aristocracy, and thus the gentry, although a landed class, was given an unwarranted capitalist hue. The gentry's religion was Protestant, their political instincts were parliamentary, and their economic views were mercantile or capitalist. These words are, of course, only labels, but they serve to depict the Marxist perception of a class that might be expected to include in its list of reforms a rule that would tie the hands of great landed lords, who sought to protect their estates from economic misfortunes that were overtaking them as a class. When the triumph of this bourgeois gentry came, capitalist values

25. The Marxist analysis was itself a reaction to the Whig interpretation of seventeenth century English history, which had emphasized the advancement of political and religious liberty. Typical examples of Whig historiography include T. Macaulay, The History of England from the Accession of James the Second (1879); G. Trevelyan, British History in the Nineteenth Century, 1782-1901 (1922); G. Trevelyan, The Two Party System in English Political History (1926).


triumphed as well. Given the favor that this historical interpretation enjoyed twenty-five years ago, the Rule, born in the early 1680's, explained itself. The traditional theory of the Rule's origins matched and, therefore, had to be correct.

Unfortunately, the traditional theory no longer fits. The Marxist interpretation was flawed from the outset and was soon under attack. The first assault came in 1953, when H. R. Trevor-Roper argued with great force that the gentry was, in fact, a declining class of small landowners driven to revolution by economic reverses and the sullen resentment of an increasingly dominant court. Trevor-Roper's view was ultimately too extravagant to be maintained, but it did illustrate the weakness of Tawney's approach. A more persuasive argument was put forward by J. H. Hexter in 1961. Hexter was convincing on two points that were devastating to the effort to describe the seventeenth century as a period of capitalist triumph. First, he suggested that there was nothing unusual about the movement of members of the middle or trading classes into the landed class: "From the fourteenth century comes that classical example of the rise of the middle class, the de la Poles who went from trade at Hull to the Earldom of Suffolk in two generations." Pointing to the Pastons, Caxtons, and Chaucers, Hexter concluded: "And so back through the centuries, as far as the record will take us, we find the rising middle class making its way out to the land, buying estates from aristocrats too unlucky or thriftless to hold them." The newly triumphant class of the seventeenth century was nothing new. When new men did replace the old, they were generally replacing the grandsons of men who had themselves been new.

Second, and more important, Hexter rejected the idea that the gentry, however long they had been on the land, could be considered as anything other than a landed class. The seventeenth century merchants who bought land were diverting capital into an investment that promised no better than a five percent return. Had they left their money in the city, they could have been assured of a ten percent return. These individuals were willing to accept a lesser income because they coveted the prestige that went with land. The new men were more interested in behaving like landed gentle-

28. Tawney initially swept many before him, and many an article was devoted to the influence the gentry had on politics, economics, and law. See, e.g., Stone, The Anatomy of the Elizabethan Aristocracy, 18 ECON. HIST. REV. 1 (1948); Thorne, Tudor Social Transformation and Legal Change, 26 N.Y.U. L. REV. 10 (1951).
32. Id.
33. Id. at 96.
men than in earning the kind of profit that would lure a true capitalist. The landed gentleman remained the ideal to which all propertied classes aspired. The newly landed class was, on the whole, no more nouveau riche than the aristocrats that Tawney would have us believe were their rivals.

Conrad Russell, another distinguished historian, has described the difficulties faced by those who differentiated the landed gentry from the landed aristocracy:

In economic terms, both had the same relationship to the means of production: they lived off the profits of landownership . . . . [B]y any test which can be devised they must be regarded as being of the same class. There is no justification for describing gentlemen as "middle class." The term "middle class," and even more the term "bourgeois," are urban ones, and are very hard to fit into the class structure of rural England, in which people were either gentlemen or not gentlemen.34

If the rising class was neither particularly new nor particularly capitalist, the basis for the traditional view of the Rule's origins becomes even more doubtful. To this doubt must now be added two additional factors.

First, the work of the economic historians has not gone for naught. By the early years of the seventeenth century the landed classes, regardless of the values to which they aspired, were clearly undergoing considerable and continuing economic upheaval. Whether rising or falling as individuals, the members of the landed class as a whole were increasing in numbers. Lawrence Stone has estimated a threefold increase between 1540 and 1640: "The number of peers rose from 60 to 160; baronets and knights from 500 to 1,400; esquires from perhaps 800 to 3,000; and armigerous gentry from perhaps 5,000 to 15,000."35 The growth of the landed classes, coupled with the availability of land that resulted from the confiscation of the monasteries and the frequent sale of crown lands to finance foreign adventures, resulted in a highly speculative land market. The market peaked between 1615 and 1620,36 but the activity is illustrative of the economic insecurity of the entire period. Stone concluded that "[a] landed aristocracy has rarely had it so bad."37

The crux of both Stone's and Hexter's analyses is that the landed families were having great difficulty in holding on to their estates. The instability of the families themselves is reflected by the fact that of the sixty-three noble families existing in 1559, only one-third had lasted without total or partial failure of succession on the eve of the civil war in 1641.38 Those

36. Id. at 73.
38. Id. at 79.
families that did not suffer from too few children often had too many, and
daughters were particularly unwelcome in light of the increasing expenses
of marriage. Stone points to the failure of landed fathers to provide for
their families as one of the reasons for the insecurity associated with the
troubled land market. In addition, "legal obstacles to breaking entails and
selling land were exceptionally weak, and moral objections to the dismem-
berment of the family patrimony exceptionally feeble." The second considera-
tion that must be evaluated is the date of the Rule itself. Although the great debate over the gentry has concentrated on
the economic instability of the pre-civil war period, the Rule Against Perpe-
tuities was propounded in 1681, well after the Cromwellian revolution. The
political mood of this later period was distinctly conservative. After the
restoration of Charles II to the throne in 1660, the landed classes entered a
period of relative stability and confidence. There was still considerable
political turmoil, but the dominant sentiment was Tory. The Tory phi-

39. Id. at 81.
40. Id. at 94. Hexter, relying on an earlier work of Stone's, described the moral
decline of one seventeenth century family:
Consider the sad case of Toby Palavicino. He inherited one of the most
magnificent landed fortunes in Cambridgeshire. His rake's progress from
the time he came into his own to the time he lay "in the Fleet for debts"
took sixteen years, but then Toby was handicapped. His prudent father
had laid an entail on the estate, and Toby was put to all the bother of
getting an Act of Parliament passed to break it. Had it not been for this
tiresome hindrance, he might have made it to jail several years sooner.

J. Hexter, The Myth of the Middle Class in Tudor England, supra note 30, at 93. The
Palavicino case is an interesting one because the prudent father who sought to use
the entail to tie up his property was not an heir of an established family but a self-
made Elizabethan financier and alum trade monopolist who had finally ascended
into the landed class. His urban, mercantile background did not carry with it any
loathing of entails; quite the contrary, rather than seeking a device to enhance the
alienability of his land, Palavicino Sr., like any great landowner, sought to save his
vast wealth from the irresponsibility of a reckless son. It is not clear why an act of
Parliament was required to break the entail, which normally could be barred by a
recovery, unless the property was in trust and the trustees could not join without a
breach of trust. See generally L. Stone, An Elizabethan: Sir Horatio
Palavicino (1956).

41. The reigns of Charles II and James II, lasting jointly from 1660 until 1689,
were in fact noted for considerable political debate and for the development of a
two party system. The Whig Party, generally tied to the older parliamentary tradition of
Cromwell's Roundheads, was an amalgam of dissenting religious groups,
political liberals, merchant interests, and out of favor courtiers. See generally J.
century, was Royalist, strongly Anglican, and landed. See generally K. Feiling, A
History of the Tory Party 1640-1714 (1924). For a good general work on the
political, and non-political, conflicts of the period, see D. Ogg, England in the
Reign of Charles II (2d ed. 1956).

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losophy was pro-monarchy, but the King's cause was not its sole or even its pre-eminent guiding star. The Tory's first loyalty was to the Church of England, and the political crises of the Restoration Parliament were generally the result of royal efforts to tamper with the established religion. In addition, the Tory was generally a landed gentleman, with little love for merchants, the city of London, or capitalism. Even the Marxist historians have never attempted to depict these men as capitalists. Yet the liberal ideas which the Marxist-oriented historians sought to ascribe to a rising middle class were in fact tied to the makers of the Revolution of 1642, who were predominantly members of dissenting religious sects and held more liberal political views. The Tories of the post-revolutionary period were the reaction to the Cromwellian revolution, and one of these men, a prosperous Kent landowner, the Earl of Nottingham, first enunciated the Rule Against Perpetuities.

The Rule therefore seems to be the work not of incipient capitalists but of landed gentlemen anxious to preserve the positions of their families in a society that had recently passed through a turbulent period. If this explanation of the Rule's origins is correct, the question remains why the landed gentry should want a rule against perpetuities. Would they not prefer a rule that might give a landed gentleman a little more freedom to tie up land? Clearly they would, and that is precisely what Lord Nottingham gave them in *The Duke of Norfolk's Case*.

III. THE LAW BEFORE 1681

The importance of land in the history of England and English law continued to grow from the Middle Ages until at least the end of the eighteenth century. In the beginning, land was the basis of economic subsistence, wealth, family solidarity, social status, and, above all, security. Feudal doctrine prescribed that land should be held of an overlord, and ultimately of the king, so that rules with respect to its transfer and descent tended to reflect policies of the crown embodied in the common law of the king's courts. It fell to the royal courts to formulate rules that sought to balance the conflicting interests and desires of the king and of his powerful landed subjects, who had a strong and ingrained sense of what they should

42. Modern historians have persuasively demonstrated that Tory opinion was separable from Royalist opinion, and that it was the Tory majority in the House of Commons that rejected royal attempts at religious toleration, first in 1660-1661, and then more decisively in 1673. Tory hostility to Catholicism led to the temporary decline of the party in the wake of the Popish Plot hysteria and to a momentary majority for the Whigs in 1679-1681. In light of the Tory hostility to toleration of either Catholicism or dissenting Protestantism, the effort of James II to tolerate both groups resulted, not surprisingly, in the overthrow of the Stuarts. For the best discussion of the Tory point of view, see D. Witcombe, *CHARLES II AND THE CAVALIER HOUSE OF COMMONS 1663-1674* (1966).

be permitted to do with, and how they might dispose of, their land and property rights. The rules that restrained the landowners, however, were rigid and sometimes complex. Occasionally they required modification, as by the Statute De Donis,\textsuperscript{44} which created the fee tail in 1285.

Although the royal judges often declared that land should be freely alienable, alienability was limited by a recognized calculus of estates that had evolved well before the end of the reign of Edward I in 1307. By the end of the thirteenth century, a man could typically convey freehold land in the form of a life estate, a fee tail, or a fee simple. Also, a grantor might retain the underlying seisin and future right to repossess but convey the possession of the land for a term of years gratis or for a stated rent. Within this calculus, however, there were restrictions on the conditions a man could impose on the grantee of his land. Some of these restrictions resulted from incapacities of thought connected with the elusive concept of seisin,\textsuperscript{45} while others resulted from royal policies hostile to the accumulation of large estates which, as the basis for private armies, might threaten the power of the king.\textsuperscript{46} Paradoxically, the first major challenge to the free alienability of land came when the Statute De Donis created a new estate that was in the beginning not truly alienable, the fee tail. The fee tail became unbarrable and could be conveyed by one in possession for his life only; then it would pass in any event successively to the family of the original grantee, generation after generation, until the lines ran out. The statutory unbarrable fee tail replaced the fee simple conditional,\textsuperscript{47} and it lasted for nearly two centuries, despite grave dissatisfactions and attempts to circumvent it. Increasingly during those years the problem became the practical one of marketability: a grantee might take land in good faith, believing it to be freely alienable as a fee simple, only to discover subsequently that it had been entailed several generations back, that the lineal descendents of a prior

\textsuperscript{44} Statute De Donis Conditionalibus, 13 Edw., ch. 1 (1285).

\textsuperscript{45} See text accompanying note 56 infra.

\textsuperscript{46} The protection of the king’s interests played a major role in the development of a rule against perpetuities. The greatest danger faced by many medieval kings was the over-mighty subject and the preservation in perpetuity of a single family’s financial base in land and men that might raise up a power capable of challenging the Crown itself. The king’s own financial interests were at stake as well. A perpetuity kept land out of the market and discouraged trade, thus limiting the king’s revenues and taxes on the one hand and diminishing productivity on the other. 5 R. Powell, THE LAW OF REAL PROPERTY ¶ 759(1) (1971). More important, a real perpetuity—which prevented or seriously curtailed alienation—would deprive the king of the feudal incidents that were so vital to the royal treasury. This was Bacon’s argument against perpetuities in Chudleigh’s Case, 1 Co. 120a, 76 Eng. Rep. 270 (1595).

\textsuperscript{47} The courts had declared the fee simple conditional to be freely alienable after the birth of issue. 1 RESTATEMENT OF PROPERTY § 70 (1936). The process by which the fee tail became unbarrable is described in 3 W. Holdsworth, A HISTORY OF ENGLISH LAW 115-18 (1935).
grantee had died out, and that now a valid claim might be asserted by the heirs of the reversioner or remainderman under the original grant. Apparently, so much of the land in England had been tied up in entails of this sort that it became unsafe to take a conveyance lest one lose it in this manner. The judges solved this problem in *Taltarum's Case* through a judicially recognized fiction which permitted a tenant in tail to break the entail, together with ensuing remainders and reversionary interests, thereby giving, fee simple. 48

Through the device of the common recovery the fee tail became freely alienable by the person in possession, and that person could effectively convey an estate in fee simple absolute. 51

Under the Tudors, landowners and their increasingly imaginative conveyancers were persistent in their efforts to establish long-lasting settlements of land, often by attempting variations on the basic fee tail. One such effort was the attempt to resurrect the unbarrable fee tail by adding a condition to the effect that any attempt to break the fee tail would immediately terminate the estate of the person attempting the disentailment. These conveyances were held invalid in several decisions in the early seventeenth century as repugnant to the fee tail; they were even described as perpetuities because, if given effect, the fee tail might then last forever—a continuity whose existence belonged only to God. Another example of the effort to circumvent the vulnerability of the fee tail was the creation of an equivalent to the estate tail in a long term for years. Unfortunately for the landowners, the courts struck down this device at an early date, declaring that a term for years could not be entailed and that the first taker became the owner of the entire term. 53

At about the time that *Taltarum's Case* dealt a blow to the fee tail as a

48. See 1 Restatement of Property Appendix (1936) (dower rights).

49. 12 Edw. IV 19, pl 25 (1472). Ingenious lawyers had earlier discovered other methods of evading *De Donis* in certain situations. See 3 W. Holdsworth, supra note 47, at 118-20.

50. For a concise explanation of the procedure of the common recovery, see A. Casner & W. Leach, *Cases and Text on Property* 256 n.13 (2d ed. 1969).

51. *Taltarum's Case* is important because, just as the mortmain acts of the time of Edward I sought to keep the Church from accumulating large areas of land, the development of the common recovery was similarly inspired by the growing concentration of great estates in the hands of powerful families. After *Taltarum's Case*, the fee tail could in theory last forever in the heirs of the owner to whom it was sold or given, but at any time the current owner might suffer a common recovery and thereby transfer the land back into the mainstream of commerce.


53. Sanders v. Cornish, Cro. Car. 230, 79 Eng. Rep. 801 (1631). By the end of the sixteenth century the conveyancers, spurred on by their worried landed employers, sought to create unbarrable entails through a clause of cesser. Gray notes an interesting contemporary reaction to this sort of perpetuity that has been attributed to Lord Bacon:

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device for tying up land, a second major threat to ready marketability arose. Assisted by the new types of estates made possible by the Statute of Uses in 1535, conveyancers had also begun to tie up land through contingent remainders. Conveyances of successive interests to living persons—characteristically, vested remainders or reversions following estates for life or in fee tail—were countenanced in the middle ages. Six hundred years ago, these basic future interests, which took effect whenever and however the immediately preceding estate ended and had no other condition, were viewed as present interests with enjoyment postponed.

It was otherwise with remainders granted on a contingency to an unascertained person. Contingent remainders were indeed future interests, but the law gave them scant recognition until the sixteenth century, for it was not perceived how an owner could be seised of such a freehold interest if he were unknown or if a condition were attached to his taking it. From this conception there developed two related rules, fortified by such other considerations as the strong preference for alienability. It became law that a contingent remainder in realty, unless in trust and hence equitable, was subject to destruction if the condition attached to it had not been satisfied at the termination of the preceding or “supporting” freehold estate, typically a life estate. Even though the condition might subsequently be met or the

There is started up a device called perpetuity; which is an entail with an addition of a proviso conditional tied to his estates, not to put away the land from the next heir; and, if he do, to forfeit his own estate. Which perpetuities, if they should stand, would bring in all the former inconveniences of entailis that were cut off . . . .

J. Gray, supra note 13, § 141.2 (quoting 7 Bacon’s Works 491 (Spedding ed. 1859)). The courts were not fooled, however, and Professor Yale has suggested that they had disposed of this threat by Coke’s time. 1 Lord Nottingham’s Chancery Cases lxxiv (D. Yale ed. 1957). See Mary Portington’s Case, 10 Co. 35a, 77 Eng. Rep. 976 (1614); Corbet’s Case, 1 Co. 83b, 21 Eng. Rep. 985 (1599).

Notwithstanding the legal thrust and counterthrust that surrounded the fee tail, the landowners were aware that the law was doing their work. If many a landed gentleman wished to guard against the mismanagement of a foolish heir, most of them also realized that a genuine perpetuity posed the danger of depriving a family of economic flexibility in selling land when changing economic circumstances required re-investment or ready cash. The worries created by the spectre of a genuine perpetuity, such as an unbarrable entail, are reflected in a bill brought in the House of Commons in 1597 which found that such perpetuities engender discorde in all families where they light and drawe the whole kindred into faction, but doe also make Children disobedient and parents unnatural . . . . [M]any purchasers are often and usually defrauded by such . . . [perpetuities] and the owners of inheritance of landes restrayned from rysingse money by sales or from exchanginge Lands for lands uppon any occasion whatsoever . . . .


55. See J. Gray, supra note 13, §§ 134-135.
grantee might later be identified, the common law refused to tolerate a gap in seisin. This reasoning required what has been referred to as natural destructibility.\(^5\) Only those holding an estate for life, in fee tail, or fee simple, could be seised. The rule had evolved from the practicalities of the feudal system, which demanded that someone should always be seised or “sitting upon” the land to be responsible for feudal dues. But the reasons for the rule had become encysted in the tissues of judicial thought, and, aided by conceptions favorable to freer alienability, the rule was relentlessly applied. Conveyancers who hoped that an equitable contingent remainder, transformed by the Statute of Uses into a corresponding legal estate, would be indestructible were dismayed to find the judges deciding that those remainders were equally subject to destruction.\(^5\) Similarly, after the Statute of Uses the same pressures in favor of alienability, supported by convictions as to the fragility of non-vested remainders, permitted contingent remainders to be destroyed by a conveyance from a life tenant to the owner of the next vested estate, usually the reversioner. This squeezed out the intervening contingent remainder if the condition had not yet been met. The process, known as merger, is referred to as artificial destructibility.\(^5\)

To be safe from the common law rules that continued to emphasize the anachronistic concept of seisin, a seventeenth century landowner might convey land to trustees in such a way that the Statute of Uses would not transform the equitable interest into a corresponding legal estate. This could be done, for example, by conveying the interest with active duties. Seisin would be in the trustees, and the gaps in seisin, fatal at law, were immaterial in equity insofar as the equitable contingent remainder was concerned. Apparently, however, landowners were reluctant to give up the legal ownership of property and transfer it to trustees, for they then would lack the power to break the trust and sell the property, either to profit from a rising market or to meet current financial needs. Nevertheless, the trust device was there, and it continued to be a potential threat to free alienability of land insofar as the two rules of destructibility were concerned. As will appear, conveyancers in the seventeenth century turned to the use of terms for years, which allowed their clients to retain the basic seisin and yet create future interests—whether absolutely or, more usually, in trust—within a term for years.

By the early seventeenth century the struggle for free alienability had met with considerable success.\(^5\) Destructibility of fees tail by common re-

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56. See, e.g., White v. Summers, [1908] 2 Ch. 256.
57. See Chudleigh’s Case, 1 Co. 120a, 76 Eng. Rep. 270 (1595).
59. Other evidence of legal rules favoring free alienability can be found in the articulation of a rule recognized in 1225 in D’Arundel’s Case, reprinted in 3 BRACHTON’S NOTE BOOK, case 1054 (F. Maitland ed. 1887), and canonized in Shelley’s Case, 1 Co. 93b, 76 Eng. Rep. 206 (1581). The Rule in Shelley’s Case prescribed that in certain situations a conveyance to a grantee for life and then to his
covery and of legal contingent remainders by merger and failure to vest had become so effective a weapon that it was fast becoming a rule against perpetuities itself, particularly because certain of the new types of legal executory interests made possible by the Statute of Uses were considered destructible as contingent remainders.60 But quite unexpectedly, in 1620, the Court of King’s Bench re-emphasized in Pells v. Brown61 that there was a generic and not merely a verbal distinction between executory interests and contingent remainders. The court held that an executory interest had been created and could not be destroyed, despite a dissenting judge’s strongly worded prediction that the decision would lead to a “mischievous kind of perpetuity.”62 It should be emphasized that for these purposes the word perpetuity connoted an inconvenient fettering of property in the sense that the interest created in a grantee might be inalienable for too long a time.63

The result of Pells v. Brown was truly revolutionary, and it gave the conveyancers much more flexibility to control the future ownership of land than they had possessed since Tallarn’s Case. The dissenting judge, Doderidge, may have overstated his position with respect to perpetuities, perhaps because he thought any abandonment of the principle of destructibility of future interests, whether by common recovery or by merger and failure to vest, was a surrender to the concept of a perpetuity. Yet the grantor in Pells had not tied up his land perpetually. He had limited a grantee’s power to dispose of the land on two conditions, either of which would necessarily be satisfied within the life or lives of two named living persons, both within the same generation in the family.

Paralleling the development that culminated in Pells v. Brown was another that climaxed in Manning’s Case64 in 1609. Before Manning’s Case was decided, the owner of a term for years who attempted to divide the term into a life estate in one person and what appeared to be a remainder in another would find that the remainder was void. The conception of freehold estates and the dignity that lay behind that conception was, roughly speaking, that a life estate engulfed a term for years; therefore, the effect of the pre-1609 view was that the life tenant owned the entire term, and after

60. See J. Gray, supra note 13, § 159. Devices for tying up land had not been disposed of altogether, however. The use of trusts was possible, although this could require transfer of the seizin as well. After the Statute of Uses it was possible as well to create contingent remainders after a term of years, but they were recognized only as springing executory interests.

62. Id. at 592, 79 Eng. Rep. at 506.
64. 8 Co. 94b, 77 Eng. Rep. 618 (1609).
his death, he might provide for the disposition of whatever remained of the term. A grantor was thus not permitted to fetter alienability even within a term for years.

In Manning's Case the judges of the Court of Common Pleas considered whether Edward Manning could leave an interest in a fifty-year term to his wife, Mary, and then to Matthew Manning. They decided that the life tenant did have a complete interest in the term under the traditional analysis, but it was subject to the condition that upon Mary's death Matthew's interest was not a void remainder but a valid executory interest. Even though Manning's Case involved a leasehold interest in a term for years, a chattel real rather than real property, conveyancers seized on the decision as providing a method of tying up their clients' land. A freehold owner might theoretically create a 500-year term in one person with succeeding indestructible executory interests in others in such a manner as to fetter the land until the full expiration of 500 years. In fact, so long a term was very unusual; the commonplace grant seems to have been a term that would last for the lives of several named individuals and shift successively as executory interests on conditions operative at the deaths of one or more of those persons.65

Gray has pointed out66 in his review of decisions concerning perpetuities in the eighty years preceding The Duke of Norfolk's Case that with two exceptions67 all the decisions relating to the growth of the Rule Against Perpetuities involved terms for years and not freehold estates. Hence, the conveyancers' chosen arena became one in which they had greater apparent ability to tie up land. This was their "out" after Pells v. Brown.

Several reasons may be advanced for the increasing use of terms for years rather than freehold estates by conveyancers as a technique of estate planning. First, considerable doubt persisted as to the soundness of Pells v. Brown—not only among conveyancers but among the judges. The case was a sudden and unexpected departure from pre-existing law, which had considered executory interests to be as freely destructible as contingent remainders.68 To hold that an executory interest could not be barred by a recovery "went down with the Judges like chopped hay."69 Chief Justice Treby noted that "these executory devises had not been long countenanced when the Judges repented them; and if it were to be done again, it would never prevail."70 After Manning's Case, executory interests within a term for

65. See generally J. Gray, supra note 13, §§ 161-168.
66. Id. § 160.
68. See J. Gray, supra note 13, § 121.7.
70. Id. at 287, 88 Eng. Rep. at 1326.
years would not be destructible\textsuperscript{71} or even void, and clearly were not destructible by analogy to freehold estates since in the case of a term the seisin lay with the remainder or the reversioner.

A second possible reason for the growing use of terms and future interests within them may relate to the fact that the reversioner who created the term usually retained the fee in himself, as well as the title deeds, which enabled him to sell or mortgage the basic title subject to the outstanding possessory rights of the owners of the term.

In \textit{The Duke of Norfolk’s Case}, Sir Orlando Bridgman used the device of a term for years followed by an indestructible executory interest when he drafted the trust indenture to dispose of the barony of Grostock. Bridgman undoubtedly used this method with a certain degree of confidence, born of his experience as a conveyancer and the sturdiness of the precedents that followed \textit{Manning’s Case}, even though he had invented, at about the same time, the so-called trust to preserve contingent remainders. Bridgman would have been somewhat surprised, had he lived, at the extent to which a seemingly straightforward trust instrument was expanded into one of the truly important cases of English legal history.

\textbf{IV. THE DUKE OF NORFOLK’S CASE}

As previously noted, the judges of the king’s courts had been fighting against perpetuities long before the first enunciation of a rule of perpetuities in \textit{The Duke of Norfolk’s Case}. The principal weapons they had at hand were the destructibility of fees tail by the common recovery and of contingent remainders by merger and failure to vest. The early seventeenth century had produced decisions that seriously weakened the effectiveness of these weapons, principally the decision in \textit{Pells v. Brown} and subsequent cases which held that executory interests were indestructible. Not only were these decisions unpopular with many of the judges,\textsuperscript{72} they caused considerable confusion in the legal profession concerning the state of the law.\textsuperscript{73} By 1681, both conveyancers and judges were unhappy with the law as it then

\textsuperscript{71} For a discussion of \textit{Manning’s Case}, see text accompanying notes 64-65 supra. See also J. Gray, supra note 13, § 152.

\textsuperscript{72} \textit{Pells v. Brown} and \textit{Manning’s Case} were obviously the two most troublesome precedents. Other decisions are cited in J. Gray, supra note 13, §§ 121.7, 161-168.

\textsuperscript{73} In \textit{Snowe v. Cuttler}, 1 Lev. 135, 83 Eng. Rep. 335 (1664), the judges seem to have been in great doubt, yet they did agree that an executory devise “may well be allowed to take place within the compass of a life, but not after a dying without issue, for that would make a perpetuity.” \textit{Id.} at 136, 83 Eng. Rep. at 336. One of the judges stated that “if an ordinary contingency . . . may determine within one life, or such time, it’s good.” 2 Keb. at 300, 84 Eng. Rep. at 187. It is not clear from the report whether dying without issue was intended to mean definite failure of issue, which should not have presented a perpetuity problem under the old law, or indefinite failure, which would have presented a perpetuity under the law before \textit{The Duke of Norfolk’s Case}.  
https://scholarship.law.missouri.edu/mlr/vol48/iss2/7
stood, and both groups found in the 1647 trust indentures of the Earl of Arundel a case that seemed certain to resolve the question that divided them: the definition of what constituted a perpetuity.

Briefly the case was this. The Earl of Arundel and Surrey created two trust indentures that were to provide for his family and, more particularly, to guard against the consequences of the insanity of his eldest son, Thomas.74 After reserving life estates to himself for life and then to his widow, the Earl gave the named trustees a term of 200 years, followed by remainders to his younger children. Under the trust the term, or more practically the income derived from the barony of Grostock, was to go to the Earl’s second son, Henry, and his issue during the life of the eldest son, Thomas; but if Thomas should die without leaving issue in the lifetime of Henry and if, further, Henry should become the Earl by inheritance, Henry was to have no further rights to the rents and profits, which were then to go to the third son, Charles. These, in simplest form, were the limitations of the trust: an absolute equitable interest in the term in Henry75 followed by what Lord Nottingham called a springing executory interest in Charles, conditioned on the happening of two events which would have to occur within Charles’s life if he were to take anything.76

When in due course Henry succeeded to the Earldom and became Duke of Norfolk, he suffered a common recovery in an effort to terminate his brother Charles’s interest. Charles then brought a bill in Chancery to demand the benefit of the term because the specified conditions to his taking had been fulfilled. The new Duke resisted the claim on the ground that the gift to Charles was in the nature of a perpetuity and hence void. This was the issue presented to Lord Chancellor Nottingham to decide: was the gift to Charles a perpetuity? If so, Henry could lawfully retain the interest in the barony of Grostock given him by his father’s trust, because the gift to Charles was void.

The issue that divided the judges in this case was not whether perpetu-

74. The contingency of the insane Thomas having issue, which troubled the Earl of Arundel, posed no problem for his second son: at the death of his father, Henry arranged to have his elder brother locked up in Padua under circumstances where he was certain not to have an heir. Henry did provide one benefit for his unfortunate sibling. He secured a special act of Parliament restoring to the Howards the family title of “Duke of Norfolk” which had been lost a few generations earlier. Thomas thus became a titled prisoner, and at his death his brother Henry became Duke of Norfolk. Barry, The Duke of Norfolk’s Case, 23 VA. L. REV. 538, 543-45 (1937).

75. There could be no fee tail in a term. Although the first limitation to Henry and the male heirs of his body may have been an attempt to create the equivalent of a fee tail male in personal property, Henry took an absolute interest and Charles a succeeding executory interest.

76. There were successive contingent remainders to other younger brothers, which need not concern us here, and which were in any event held invalid by both Lord Nottingham and the common law judges. See Barry, supra note 74, at 546-47.
ities should be allowed, but what perpetuities were, or more exactly, whether this case presented a perpetuity. On one side it could be argued that the contingency upon which the disposition of the property turned was certain to happen within a short period of time, so it was foolish to refer to the gift as a perpetuity. On the other side, it might be argued that the type of interest created should be found destructible, since otherwise the all-important preference for free alienability would be compromised. This second argument, the traditional approach to perpetuities, convinced the common law judges whom Lord Chancellor Nottingham consulted. But the first argument convinced the Chancellor. It supplied ground for his decision and, in addition, became the basis for the modern Rule Against Perpetuities. Nevertheless, the argument between the two perceptions of what constituted a perpetuity runs through the entire case.

Charles's claim was a sympathetic one, particularly in light of the obvious intent of his father, but most of the lower court judges who first heard the case in 1677 thought that Charles's interest was void. Any effort to link the opinions of the various judges, prior to and during 1681, with their economic and political views is difficult. All of them were landed gentlemen from prominent families. The issue therefore seems to have been approached less from a political than from a legal and practical standpoint. When the case finally came before the Chancellor in 1681, he was so conscious of its importance that he called the three chief judges of the common law courts to advise him. They, too, were landed gentry, but all three opposed his position that Charles's interest was valid.

The uncertainty that beclouded the opinions of the judges as to what constituted a perpetuity is evidenced by the opposition of the three common law judges in The Duke of Norfolk's Case to Lord Nottingham's decision, and by the fact that before Nottingham was finally affirmed by the House of Lords in 1685, he was reversed in 1683. The unsettled state of the law prevailing in the decades before 1681, and the misunderstanding and inconsistencies of the judges' thinking, are perhaps best illustrated by the separate opinions of the three common law judges whom Lord Nottingham asked to be associated with him in The Duke of Norfolk's Case. As stated, all three disagreed with him on various grounds, with varying degrees of competence and understanding.

All three of these reliable Tory judges were unwilling to allow Charles to take under the trust indentures because they would not abandon ancient ideas about destructibility. Lord North, Chief Justice of the Court of Common Pleas, said little, and seems to have understood even less. But Sir Francis Pemberton of the Court of King's Bench, and Sir William Montagu, Lord Chief Baron of the Court of Exchequer, clearly saw the

77. The importance of the case cannot be overstated. Nottingham noted that "there are so many Short-hand Writers, that nothing can pass from us here, but it is presently made publick." 3 Ch. Cas. at 38, 22 Eng. Rep. at 954.

78. Id. at 20, 22 Eng. Rep. at 943 (opinion of Lord Chief Justice North).
issue. They were being asked to abandon the principle of destructibility by common recovery, one of the traditional checks on perpetuities, and they were unwilling to do so. Montagu was the most direct: "[I]f such Limitations over were permitted, it would create Perpetuities, which the Law doth abhor." Two strong precedents, Sanders v. Cornish and Child v. Baylie, had rejected limitations turning on a "meer Contingency." Moreover, according to Montagu, the precedents pointing the other way were simply wrong. Montagu argued that Pells v. Brown had been controverted by Jay v. Jay where, he said, the judge did "confess Pell and Brown's Case to be adjudged quite contrary to what he argued, yet he tells you, that the Judges did find such Inconveniences arisen upon it." Accept Pells, argued Montagu, and the ancient legal policy against the tying up of land had to be abandoned:

Admit that Case to be good Law, where will you stop, if you admit the Limitation of a Term after an Estate-tail, where shall it end? For if after one, it may as well be after two; and if after two, then as well after twenty; for it may be said, if he die within twenty Years without Issue, and so if within 100, and there will be no End; and so a Perpetuity will follow. Pemberton agreed with Montagu, although he would have allowed these particular limitations if created by two separate terms. He too was conscious of the earlier successes of the conveyancers, and was especially eloquent in his reaction to Manning's Case:

It was not foreseen nor thought, when that Judgment was given, what would be the Consequence when once there was an Allowance of the Limitation of a Term after the Death of a Person; presently it was discerned, there was the same Reason for after twenty Mens Lives as after one; and so then it was held and agreed, that so long as the Limitation exceeded not Lives in Being at the Creation of the Estate, it should extend so far. . . . and now if this be admitted, no Man can foresee what an ill Effect such an ill Allowance might have there, might such Limitations come in as would incumber Estates and mightily entangle Lands.

If there is a central theme to the three judges' dissents, it seems to stem from the case of Child v. Baylie, first decided in 1618. The case is impor-

79. Id. at 17, 22 Eng. Rep. at 941 (opinion of Baron Montagu).
82. 3 Ch. Cas. at 18, 22 Eng. Rep. at 941 (opinion of Baron Montagu).
84. 3 Ch. Cas. at 19, 22 Eng. Rep. at 942 (opinion of Baron Montagu).
85. Id. at 19, 22 Eng. Rep. at 942-43 (opinion of Baron Montagu).
86. Id. at 23, 22 Eng. Rep. at 945 (opinion of Lord Chief Justice Pemberton).
87. Id. at 25, 22 Eng. Rep. at 946 (opinion of Lord Chief Justice Pemberton).
tant because of its similarity to the interests created by the 1647 trust indenture of the Duke of Norfolk. In *Child v. Baylie*, a term of years was bequeathed to $X$, but if $X$ died without issue living at his death, then the term was to go to $Y$. Referring to the ghost of perpetuities, the Court of King’s Bench decided that $Y$’s interest was void, despite the fact that it would necessarily take effect within $X$’s life. When the case later came before the Exchequer Chamber in 1623, the judges held, with one strong dissent, that the gift was no different from the entailing of a term, which was void as a perpetuity. $Y$’s interest again was held void. Only the strong bias against perpetuities or ignorance of the law could have produced this result in the face of counsel’s argument that the devise was not a fee tail since the second interest was to take effect upon the death of $X$ with no living issue.

*Child v. Baylie* was the authority, despite many contrary decisions which succeeded it, for judges who wished to hew to the line favoring maximum alienability and hence maximum destructibility. This was the position of the three dissenting judges. They did not prevail because Lord Chancellor Nottingham, who had the only vote that counted, found the conveyancers’ logic more convincing.

Few better examples of the late seventeenth century Tory can be found than Heneage Finch, Earl of Nottingham and father of the Rule Against Perpetuities. He came from a family of solid Kent gentry, whose senior branch had bought its way into the peerage during the inflation of honors under the early Stuarts. Heneage, a son of the cadet branch of the family, married the daughter of a London merchant, Elizabeth Harvey. During the Restoration he sat in Parliament, first for Canterbury and then for Oxford University. Both seats were reliably Tory, and Finch’s devotion to Anglicanism won him the title of “outstanding Churchman of the Convention” from Sir Keith Feiling, the Tory Party’s historian.89 Finch’s political positions were in keeping with his party’s reputation. He generally supported the Royal Court but was swept up in the anti-Catholic enthusiasm of the Popish Plot.80 In 1680 he sentenced Lord Stafford, the aging uncle of Henry and Charles Howard, to death for his alleged role in the plot. Nottingham’s staunch Anglicanism had earlier led him to oppose the King in the crisis year of 1673, when Charles sought to win religious toleration for those who were not members of the Church of England.91 By 1681,

89. K. Feiling, supra note 41, at 103.
91. Daniel, the Earl’s son, clearly opposed toleration. Id. at 9. According to Campbell, Nottingham himself once offended Charles II by referring to the “Royal Coup” of 1673 in a speech to the Commons. 4 J. Campbell, Lives of the Chancellors of England 254 (1857). The year 1673 was crucial in English politics, because royal initiatives in religion, foreign policy, and finance were all opposed by the Tory-dominated Parliament. Charles II’s initiatives ultimately failed, and he
the newly made Earl of Nottingham was in failing health. He was no longer fully trusted by the Crown, which was demanding more complete obedience from its partisans. In sum, Nottingham's political career reflected classic Tory values, with his first loyalty always to the Church, not the King.

Some space has been devoted to discussing Nottingham's political views, and briefly those of his colleagues, not because they were determinative of the case but rather to illustrate how far removed they were from the bourgeois or liberal views that were thought to have inspired the Rule Against Perpetuities. If any values were reflected in Nottingham's thinking, they were almost certainly those of the landed gentry party to which he belonged. Accordingly, his opinion in The Duke of Norfolk's Case reflects a balanced but generally tolerant attitude towards the efforts of conveyancers. Nottingham did refer to certain types of conveyances that he would be unwilling to countenance because they tended in the direction of a perpetuity, but he saw that the old rule against contingent remainders had been bypassed long since by the conveyancers and approved by the judges. This had been prompted, he suggested, by "the Nature of Things, and the Necessity of Commerce." These were the very reasons that might have been offered for allowing the common recovery and holding Charles's interest to have been destroyed. Nottingham, however, was perhaps more sympathetic with the problems faced by a landowner with an heir who was non compos mentis than he was with the abstract necessity to keep property alienable. Naturally Nottingham relied heavily on Pells v. Brown, and he rejected Child v. Baylie as a case "that never had any Resolution like it before nor since." In answer to the fears of the other judges, he refused to tell them where he would draw the line, saying only that a line would be drawn when it was needed: "They will perhaps say, where will you stop, if not at Child and Bayly's Case? Where? why everywhere, where there is not any Inconvenience, any Danger of a Perpetuity."

The definitions found in The Duke of Norfolk's Case are instructive, for they reflect the thinking of Pells v. Brown and Manning's Case as to what constituted a perpetuity, and why and when it would be countenanced. An interest in a term for years or in a freehold estate was, according to the

was forced to turn to the Earl of Danby, who controlled the House through a reliably Tory policy. See D. Witcombe, supra note 42, at 166-72.

92. There is one notable exception to Finch's generally Tory views. His vote in favor of Irish agricultural imports disgusted his copartisans and was clearly against the economic interest of the gentry.

93. 3 Ch. Cas. at 28-29, 22 Eng. Rep. at 948.

94. Id. at 31, 22 Eng. Rep. at 950.

95. Id. at 35, 22 Eng. Rep. at 952.

96. Id. at 36, 22 Eng. Rep. at 953. Not surprisingly, a reading of so direct an opinion has led at least one writer to conclude that "the Duke of Norfolk's Case was not a restraint on executory interests but an extension." Bordwell, Alienability and Perpetuities VI, 25 IOWA L. REV. 707, 722 (1940).
Chancellor, not a perpetuity if the interest conveyed would not last too long, and the test of "too long" became whatever was inconveniently long. Lord Nottingham noted with approval the decision in *Pells v. Brown* where the fee simple was cut short by an executory interest in the lifetime of a living person; such a "Fee upon a Fee" was clearly permissible.\(^{97}\) Another case cited in Nottingham's opinion was *Cotton v. Heath*,\(^{98}\) which involved an eighteen-year term to \(A\) followed by a remainder to \(B\) for life, remainder to the first issue of \(B\) for life. The Chancellor stated that "this Contingent upon a Contingent was allowed to be good, because it would wear out in a short Time."\(^{99}\) *Wood v. Sanders*,\(^{100}\) decided in 1669, was also cited with approval by Nottingham because the case involved a contingency that would take effect within two lives in being. Nottingham applauded *Wood v. Sanders*, which was decided by Sir Orlando Bridgman himself, and the Earl referred to Bridgman with "great Reverance and Veneration for his Learning and Integrity."\(^{101}\)

Lord Nottingham evidently wished to permit some tying up of land by the dead hand and was willing to concede that the law should allow control of the future ownership of land for at least one lifetime, and probably two. What evolved from his decision, however, was not a rule for perpetuities but a rule of perpetuities. Admittedly, Charles's interest in the term for years was not destructible, but neither should it be void, because his interest would "wear itself out" in a single lifetime. Lord Nottingham's resolution of the perpetuities problem was the kind of decision that would please Tory landowners of the 1680's. These landowners did not want complete destructibility, which could ruin the family estate in a generation. They did want freedom to transfer land, but they also wanted some means of protecting the family from lunatics, wastrels, gamblers, and the like by maintaining some degree of control over the future disposition of the land. Lord Nottingham provided them with a compromise between complete alienability and the power to tie up land perpetually. Nottingham's successors were to give even more power to the dead hand, so that in the end conveyancers and their clients prevailed.

What the Chancellor did was consistent with the thinking behind *Manning's Case*, which had held valid certain future interests in terms for years, and, more importantly, with the logic of *Pells v. Brown*, which had upheld the indestructibility of executory interests. Nottingham, in effect, affirmed *Pells v. Brown*, although he did not say so explicitly. He thereby laid to rest the doubts that judges had nourished about the case for sixty years. The dissent by Doderidge in *Pells* had reflected the deep-seated conviction that, unless executory interests continued to be freely destructible, freedom of

\(^{97}\) 3 Ch. Cas. at 36, 22 Eng. Rep. at 953.
\(^{100}\) 1 Ch. Cas. 131, 22 Eng. Rep. 728 (1669).
\(^{101}\) 3 Ch. Cas. at 36, 22 Eng. Rep. at 953.
alienation would be curtailed and mischievous perpetuities would be encouraged. The underlying principle of Doderidge’s dissent led many judges to repent of the decision and even to favor its reversal. What Nottingham did in relying on *Pells v. Brown* was to underscore the fact that the indestructible executory interest involved in that decision would necessarily take effect within the life of a single person, namely the brother of the first named grantee. Nottingham viewed Charles’s executory interest in *The Duke of Norfolk’s Case* in a similar light: Charles’s interest would take effect, if at all, within Thomas’s lifetime, and hence there existed no perpetuity.

The decision in *Pells v. Brown* probably did require the eventual formulation of the Rule Against Perpetuities, as has often been asserted.102 Ironically, *Pells* provided Lord Nottingham with a very strong precedent for formulating, in its initial form, the essence of a rule that depends on a measuring life. The Chancellor’s definition of a perpetuity as an interest that might exceed the duration of some measuring life was but a small step from the modern definition of a perpetuity as an interest that will not necessarily take effect within a life or lives in being and twenty-one years. The judges of succeeding decades were to formulate the Rule in its modern form, but Lord Nottingham effectively took the first step in holding Charles’s interest valid. Three respectable Tory judges had found the danger of a perpetuity in *The Duke of Norfolk’s Case*, but the Earl of Nottingham saw it differently. The dead hand of the Earl of Arundel needed more room and, aided by Heneage Finch and Sir Orlando Bridgman, it reached back into the world of the living. A great family had to be protected from the control of a lunatic. “It was Prudence in the Earl to take care.”103

V. CONCLUSION

It would be too extravagant to state unequivocally that the Earl of Nottingham’s decision in *The Duke of Norfolk’s Case* was influenced in whole, or even in part, by his perception of the interests of the landed ruling class to which he belonged. The Earl did speak of inconvenience as a test for perpetuities, and he praised the prudence of Sir Orlando Bridgman, one of the greatest ornaments of his profession. These are sentiments that one might expect from a landed gentleman familiar with the need to protect estates, but they can not be said to prove Nottingham’s motive for deciding as he did. More probably, the Chancellor saw himself as a rationalizer of the confused law of estates and future interests, producing a result that fulfilled a need of the law rather than the interest of any given class. Moreover, the interests of the law and of the landed class were not entirely clear. The common law judges, North, Pemberton, and Montagu, were landed gentry of prominent families. Yet they saw in the Earl of Arundel’s trust the spectre of perpetuity, which they opposed as inimical to both their class

103. 3 Ch. Cas. at 36, 22 Eng. Rep. at 953.
and the law. It is perhaps enough to say that time proved Nottingham right. No truly permanent perpetuity haunted the land, and the gentry prospered in the eighteenth century.

If the motivation of the Rule's creator, or that of its opponents, may never be entirely clear, it can at least be suggested that the reasons for the Rule are not as simple as has been believed. The test of a "life in being," and later a "life in being and twenty-one years," was ultimately a compromise, as any limit on the power of a draftsman must be. Compromises generally emerge when an existing structure yields to a rising force. The existing legal structure of the seventeenth century was not one of unchecked perpetuities but a rigid, already weakened system in which future interests could be found destructible or void and present owners were often comparatively free to break their parents' wills. The rising force of seventeenth century England was not a new capitalist ethic that demanded an end to perpetuities but a spirit of tolerance for the needs of an increasingly dominant landed class that desperately needed more room to maneuver in order to secure its own future. The Rule meant that what had once been considered a perpetuity was one no longer. In this sense the new Rule was a clear victory for the dead hand, not for free alienability. The rule served the fathers, not the sons, and if it did not attempt to make lawful a whole panoply of perpetuities, it did at least allow most that were needed.