The Rule Against Perpetuities--A Comparison of Some Common-Law and Civil Law Jurisdictions

Max A. Pock
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ROMAN jurists of the classical period viewed ownership as an absolute power of control and disposition over objects. This power was concentrated either in a single person, which was the usual case, or in several persons who exercised it contemporaneously. Legal theory in the many modern derivates of the Roman law—embraced in that somewhat loose term civil law—has adopted that concept wholeheartedly, and, as a consequence, has placed a similar emphasis upon the doctrine of absolute, undivided, and concentrated ownership.

Free and untrammeled alienability is, of course, the key feature of such absolute power, and the concept of terminable and successive ownership developed by the common law seems entirely incompatible with it. To the person trained in the common law, who is accustomed to dividing his property in two ways—in terms of quantity and in terms of time—such simplicity of approach may seem indeed remarkable because it dispenses entirely with the technical and often so troublesome future interest.

Yet, this simplicity is only too deceptive. Practical necessity induced the Roman legal system as well as its modern derivates to recognize the element of time as a second dimension in their law of property, and to admit that sev-

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1 This unitary and absolute concept is generally recognized as a juristic fiction which, however, still permeates much of the legal thinking of civil lawyers who treat ownership, and the many public and private law restrictions with which the exercise of ownership is fraught, as separate concepts which, therefore, do not interfere with one another. See EHRLICH, SOZIOLOGIE DES RECHTES 81 (1913).
eral persons may not only share ownership concurrently, but may also have successive property interests in an object. The perfect symmetry of the civil law as a system of well-organized, consistent, abstract legal norms reveals itself, at least in this context, as an illusion which is maintained by subsuming the rules pertaining to successive ownership, to perpetuities, and to restraints upon alienation under a topic where the common-law lawyer least expects to find them—under the law of decedents' estates. Thus the civilian in some small way is guilty of the same sin of which he accuses his common-law colleague so readily: putting rules of law into airtight little compartments and pretending that, once safely tucked away, they cease to interact upon one another.

It is a fact that the Roman lawyer was able, without much ingenuity, to create perpetuities that would have delighted the resourceful English conveyancer in times past. The civil lawyer was able to follow his mentor's footsteps, and it was only recently that his ability to create perpetuities was curtailed.

**Historical Outline of the Roman Law Against Perpetuities**

There is little indication that the Roman law either before or after what we refer to as the classical period attached as much significance to the abstract doctrine of concentrated ownership as did the jurists of the classical period and of the period following the reception of the Roman law into the Continental legal systems. In fact, some of the institutions of the republic bear a striking resemblance to our freehold tenures. The tenancy at will (*precario rogans*), the perpetual tenancy (*emphyteuta*),\(^2\) and the tenancy of municipal lands (*ager vectigalis*),\(^3\) created most peculiar relationships that are quite incompatible with the classical concept of undivided ownership. The tenant held from the true owner, but he was much more than a mere lessee. The remedies of

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\(^2\) Buckland, *Roman Law* 223 (2d ed. 1932).  
\(^3\) *Id.* at 275.
the owner and of the tenant differed only in form and little in effectiveness. The owner recovered his land and protected it in a real action; the tenant, by praetorian edict. But the effect was similar. It seems, in fact, that the whole notion of concentrated ownership as an absolute power of disposition may have been the result of a rather artificial abstraction: the person entitled to the real action was designated as the absolute owner as though the person entitled to the praetorian edict did not exist. Thus the strived-for simplicity was achieved at least in form.4

As was to be expected, the need to establish successive property interests in particular objects made itself felt at a very early date. Soon it was common practice for testators to devise their estates to an heir (heres) with instructions (fideicommissum) to pass it on to a third person either upon the heir’s death or upon the happening of some other event. The formal law of succession took little notice of this practice of the “living law” until one L. Corbelius Lentulus, proconsul in Africa, put Augustus “on the spot” by charging him with several fideicommissa. The Princeps was not in a position to breach the trust and ordered that the fideicommissa be carried out.5 This was a powerful precedent. Soon afterwards Augustus found himself compelled to establish an extraordinary writ (extraordinaria cognitio) in favor of the fideicommissum. He appointed the highest magistrates whom he had inherited from the republic—the consuls and later the praetor—to hear actiones ex fideicommissio, as these remedies were called.6

Thus the “trustee” (fiduciarius) could now be compelled to carry out the “trust.” In classical law the fideicommissum created several successive owners with absolute powers of alienation, who were merely bound not to exercise these

4 Buckland & McNair, Roman Law and Common Law 82 (2d ed. 1952).
5 Schulz, Principles of Roman Law 182 (1956); Muirhead, Roman Law 173 (1937).
6 Schulz, Roman Legal Science 111 (1946); Sohm, Institutes § 115, at 597 (2d ed. 1901); Jolowicz, Historical Introduction to the Study of Roman Law 406 (1952).
powers. In contrast to the cumbersome ritualism of the Roman will and the Roman legacy, the *fideicommissum* was, at least in the early period, completely devoid of formal requirements. It could be created in writing or by parol—there was no need for witnesses and no interdict against the use of a foreign language.

Perhaps one of the principal reasons for the introduction of the *fideicommissum*, or fideicommissary substitution, as it is now called, was the desire to appoint beneficiaries who could not take as heirs under the formal law of succession. Typical examples for such a case were the foreign wife of a Roman citizen, or the children resulting from marriages with foreigners. But the reason for the survival and widespread use of the fideicommissary substitution after the restrictions of the formal law had been removed, was the inherent possibility to create future interests in favor of unascertained persons (*incertae personae*). This was a marked advantage over the formal law of succession which allowed only the appointment of persons in being or at least *in utero* at the date of the death of the testator. Fideicommissary substitutions became the perfect device for family settlements. A great number of perpetuities were created. The famous will of Damasius (108 A.D.), reconstructed from fragments of an inscription on marble, may serve as an example: that fine family-conscious Roman gentleman devised his estate to a *fiduciarius* with a direction that it remain with his descendants perennially and in perpetuity. Emperor Hadrian found it necessary to decree that substitutions could no longer be made in favor of *personae incertae*. Justinian removed that prohibition again, probably with a view to encourage the creation of perpetuities in favor of the Church. But when it became evident that the national wealth was not always channeled ultimately into charitable undertakings, Justinian,

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7 Buckland & McNair, *op. cit. supra* note 4, at 82.
8 Sohm, *Institutes* § 115, at 597 (2d ed. 1901); Jolowicz, *op. cit. supra* note 6, at 423.
in his Novel 159 (555 A.D.), decreed that substitutions must not be made beyond the fourth generation. As we shall see, that Four Generations Rule has become the law of South Africa and other parts of the world that are within the orbit of the Roman Dutch law, and has been received into the other derivates of the Roman law with some modifications and restrictions.\textsuperscript{12}

**FIDEICOMMISSARY SUBSTITUTIONS UNDER THE CORPUS IURIS**

In order to facilitate an understanding of the various changes to which fideicommissary substitutions have been submitted by modern civil law systems, it is necessary to outline in simple terms the legal relationships created by the *fideicommissum* during the reign of Justinian. It was at that time that the institution had reached the last stage in its maturing process before passing, in one form or another, into the Roman law derivates. A historical tracing of each step of its development can therefore be dispensed with.

A simple transaction will suffice as an example of the legal effect of a substitution under the Corpus Iuris:

*T* to *A*, absolute ownership for *A*'s life, then upon *A*'s death to *B* absolute ownership for 10 years, then to *B*'s oldest son *C*. The following rules apply:

1. *A*, *B*, and *C* need not be heirs, they need only be legatees; it follows that either the whole estate or only a quota thereof, or even single objects, could be made subject to substitutions.\textsuperscript{13}

2. Property vests in the beneficiary *eo instanti* upon the happening of the event upon which his interest is conditioned (death, lapse of time).\textsuperscript{14}

3. *A* may not alienate the property. If he disposes of it he may only grant a defeasible title. *B*, after the condition

\textsuperscript{12}Lee, An Introduction to Roman Dutch Law 384 (5th ed. 1953).
\textsuperscript{13}Buckland, A Manual of Roman Private Law 210-22 (1925).
\textsuperscript{14}Buckland, Roman Law 359 (2d ed. 1932).
of his entitlement has occurred, has a right in rem even as against bona fide purchasers from $A$.\textsuperscript{15}

4. The limitation to $B$ is conditioned upon his surviving $A$. If he fails to survive $A$, then $A$ becomes the full owner of the property. $C$ cannot take it because $B$, the person burdened with the *fideicommissum*, is nonexistent. However, the testator may provide that in case $B$ cannot take, $X$ should take by direct substitution for $B$. Such explicit clause in the will would preserve $C$'s interest, \textit{i.e.}, it would prevent the collapse of the whole pyramid of fideicommissary substitutions upon one link, one person, failing to become entitled to take.\textsuperscript{16}

As we shall see, the Roman substitution was not at all like the trust, despite its superficial resemblance to that common-law institution. It was rather like the old grant to uses. One might say, in common-law parlance, that the *fiduciarius* was the owner in fee, subject to an executory limitation over to another.\textsuperscript{17}

THE EUROPEAN FAMILY SETTLEMENT—A PECULIAR BLENDING OF SUBSTITUTIONS AND FEUDAL NOTIONS

Before the era of the great codifications in the 19th century, and even much later in some countries, a good deal of land was tied up in continental Europe by family settlements.\textsuperscript{18} Nevertheless, the family settlement did not play as important a part in France, Germany, or Austria as it did in England. The reason for this difference is found, partially at least, in the existence of some peculiar legal institutions which produced a social atmosphere that was not at all favorable to the entail; a quick \textit{excursus} into this otherwise irrelevant field is perhaps warranted here. France and Germany, to pick only two of the many countries adhering to similar policies, have always tended to favor the testator's family when balancing the conflicting interests of

\textsuperscript{15} Id. at 363.
\textsuperscript{16} Lee, \textit{An Introduction to Roman Dutch Law} 382 (5th ed. 1953).
\textsuperscript{17} Id. at 380.
\textsuperscript{18} Amos & Walton, \textit{Introduction to French Law} § 102, at 332 (1935).
the testator and of his family in the disposition and control over the estate. A French testator finds his property divided into a part over which he may freely dispose \((\text{la quotité disponible})\) and a part which is more or less reserved for certain relatives \((\text{la réserve héréditaire})\). His disposable share may easily shrink to one-fourth of the estate in case he has more than two legitimate or adopted children. An added peculiarity of this institution is that its restriction extends, in some measure, to the testator's power to make gifts \(\text{inter vivos}\).\(^{19}\)

The German compulsory distributive share \((\text{Pflichtteil})\)\(^{20}\) is based on a similar policy. It restricts the power of disposition in favor of certain agnates, descendants, and in contrast to the French \(\text{réserve}\), even in favor of the spouse. This may, with the exception of provisions for the spouse, shock the American lawyer because it nullifies or at least diminishes the power of free testamentary disposition. The English lawyer is perhaps less shocked, since he has lived, for almost two decades now already, with the English Family Provisions Act,\(^{21}\) which empowers courts, in their discretion, to allow a certain class of "dependents" surviving the testator to share in the net estate under certain circumstances.

The family settlement was based on the Roman \(\text{fideicommissum quod familiae relinquitur}\), a species of the ordinary fideicommissary substitution which bound all takers to leave the estate to a designated member of the testator's family. Continental lawyers blended it with feudal notions so that family settlements could only be established by a limited number of aristocratic families, and special laws limited to particular families were in vogue \((\text{Haus-Gesetze})\).\(^{22}\) Transactions under these special laws were roughly like this: Blackacre was settled upon a member of the family and

\(^{19}\) Id. at 339, § 105.


\(^{21}\) 15 & 16 Geo. 6 & 1 Eliz. 2, c. 64, § 152 (1952), amending 1 & 2 Geo. 6 (1938).

\(^{22}\) Gierke, 1 Grundzüge des Deutschen Privatrechtes in Holtzendorff-Kohlens Enzyklopädie § 72 (7th ed.).
made subject to some form of entailed succession, primogeniture being preferred as a general rule.\textsuperscript{23}

The land was thereby made indivisible, inalienable, exempt from executions and hypothecation.\textsuperscript{24} In great portions of Europe, land was therefore virtually unobtainable. It is not surprising, then, that the family settlement had come to symbolize the economic power of the aristocracy and that, as a consequence thereof, it was forced to yield to the iron broom of the French revolution. Napoleon's \textit{Code Civile} prohibited all forms of substitutions (with minor exceptions as we shall see) in order to make absolutely certain that the old aristocratic settlement would not stage a return disguised as an innocuous fideicommissary substitution.\textsuperscript{25} Other codifications were equally based on this policy of suppression of the economic power of the landed aristocracy—the later ones were also founded upon the ideas of economic liberalism which saw in free alienability of land the only assurance that it would find its way into the hands of the fittest. However, the German Civil Code of 1896 (effective 1900), which fell into this latter category, did not want to compromise the feelings of the ruling families and left it up to the separate sovereignties to retain or to abolish the family settlements (\textit{Familienfideikommiss}).\textsuperscript{26}

The Weimar constitution of 1919 finally tackled the problem by ordering the dissolution of all family settlements,\textsuperscript{27} and when actual dissolution was delayed it was, ironically enough, the Hitler regime which gave a belated \textit{coup de grâce} to the institution which had been swept away by the great slogans of the French revolution a hundred and fifty years before.\textsuperscript{28} Family settlements were also abolished in Switzer-
land, but a "grandfather clause" saved many individual settlements from extinction.

**ANALYSIS OF THE POLICY AND THE FUNCTIONS OF THE RULE AGAINST PERPETUITIES**

English reforms of the law of property, culminating in the Law of Property Act of 1925, have succeeded in resolving in some measure the old conflict between two socially justifiable desires:

1. The desire of the owner of property to endow designated successive members of his family or a charity, thus determining the fate of his estate and bringing about some degree of inalienability of the property which it includes.

2. The social desirability of keeping land (as well as other objects of property) freely marketable. According to the Law of Property Act it is now possible to fix the descent of property within the limits of the rule against perpetuities, and at the same time to assure relatively free alienability. This is done by providing that property may be preserved in value, but not in specie.

The rule against perpetuities was designed, so it is often maintained, to prevent the creation of certain contingent interests, and not to prevent the inalienability which may attach to property that is affected with such contingent interests. The very term "rule against perpetuities" has fallen into disfavor and has yielded to the more clumsy designation "rule against the remoteness of vesting" because it was felt that the latter expressed more accurately the functional nature of the rule. Various persuasive examples are adduced as evidence for the nonconcern of the rule with the question of alienability; prominent among them is the gift to charity and then over to another charity upon a condition precedent which may happen after the period of the rule has expired. Since such gifts, although they may take property out of...

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30 Lawson, Real Property 140 (1958).
circulation for a very long time, are not inimical to the rule, the only explanation for their permissibility must be that the rule is not intended to strike against inalienability as such.

Whatever the original purpose, English property law reforms have clearly demonstrated that the rule has a dual effect, if not a dual purpose. This bifurcation can be seen by observing the effects of the rule upon two totally different ends that may be accomplished through the creation of contingent interests: 1. A testator may wish to fix the fate of an estate by determining that designated persons, e.g., his great-grandchildren, are to get a specific interest in it. His main concern may not be that they get Blackacre, but that they get something of value which represents the economic significance of Blackacre. 2. A testator may want Blackacre to remain in the family at all costs; in other words, he may want to determine not only that his property is to descend upon certain beneficiaries, but that it is to descend in specie. The rule against perpetuities strikes out against both alternatives, although they are conceptually different.

In order to compare or to contrast the common law and the civil law system it is therefore necessary not only to find a civil law institution which takes the place of the rule against perpetuities but to analyze it in terms of the two-pronged effect of the rule at common law by posing two questions: 1. To what extent does the rule permit or prohibit testators to designate ultimate recipients of interests in their estate? 2. To what extent does it permit or prohibit restraints upon alienation?

THE RULE AGAINST PERPETUITIES AS LIMITING THE POWER TO DESIGNATE BENEFICIARIES

Let us summarize briefly the rules pertaining at common law, with which the reader is fully conversant already. The rule against perpetuities at common law was expressed in that famous sentence by John Chipman Gray, "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
This twenty-one year period is generally extended by one or two periods of gestation. This is not a modification of the concept, it is rather an assumption already inherent in it that a person in utero is a life in being. The rigidity of the period has been relaxed by legislation in England: the Law of Property Act provides that the gift can be saved if twenty-one can be substituted for any other age specified in the gift. This means that a testator who, out of ignorance of the law and from a belief that a person of twenty-one is not fully capable of handling his own affairs, has stipulated some other period, e.g., twenty-five years, does not find that his intentions have been thwarted by the rule. This solution, to some lawyers, may seem better than the harsh rule followed by courts in the United States, which causes such gifts to fail and thereby creates intestate property. The rule is not explicit on the number of measuring lives that are available to a testator. It seems, however, that this omission has not caused much trouble except for some isolated cases. The guide in both England and the United States seems to be: is the death of every person in the group reasonably ascertainable in a court?

The suggestion has also been made that the rigidity of the rule should be relaxed in other ways. Absurdities such as the fertile octogenarian could well be eliminated if the rule were to receive not a prospective but a retrospective application. Such "wait and see rule," as it is popularly called, has in fact been adopted in two states, Pennsylvania and Massachusetts. It is safe to say that it has been accorded little applause, though opinions are divided on its efficacy. Professor Simes, for example, feels that it creates

31 SIMES & SMITH, FUTURE INTERESTS § 1222 (2d ed. 1956).
32 Id. § 1216.
33 LAWSON, REAL PROPERTY 140 (1958).
34 SIMES & SMITH, op. cit. supra note 31, § 1228.
35 LAWSON, op. cit. supra note 33, at 139; SIMES & SMITH, op. cit. supra note 31, § 1223.
36 PA. STAT. ANN. tit. 20, § 301.4 (1950).
confusion by tying up interests which would otherwise be perfectly alienable.\textsuperscript{38}

The rule does not strike against gifts to charities with gifts over to other charities upon the occurrence of an event which lies beyond the twenty-one year period.\textsuperscript{39} This, as we have seen, furnishes the chief support for the proposition that the rule is not primarily concerned with alienability.\textsuperscript{40}

After this cursory summation it is now necessary to examine the civil law rule against perpetuities in more detail.

The Romans moved from an unlimited power to create future interests to the Four Generation Rule.\textsuperscript{41} Post-glossators doctored Justinian's Novel 159 and made it more liberal by allowing the testator to exclude its operation altogether by insertion of sufficiently definite provisions in his will to the contrary. They also liberalized the rule by construing it to mean that the count should begin with the first fideicommissary, and not with the fiduciary; this lengthened the period by another generation. In this form the rule entered the law of South Africa,\textsuperscript{42} the law of Malta,\textsuperscript{43} and other areas within the influence of the Roman Dutch law. Although the period during which vesting could be suspended seems to us unusually long, certain of the hardships which we might expect to result from property being tied up for such a long time could be alleviated by a relief procedure, which can be outlined as follows: 1. all ascertained beneficiaries who are \textit{sui juris} may extinguish the substitution by sale or other arrangement; 2. courts are empowered to discharge property from the burden which attaches to it, to authorize an exchange, or an incumbrance upon special ap-

\textsuperscript{39} Simes & Smith, \textit{Future Interests} § 1280 (2d ed. 1956).
\textsuperscript{40} Since the purpose of this article is the survey in the broadest possible terms the fundamental features of the common and civil law systems pertaining to the rule against perpetuities, no mention is made of the statutory changes that have been undertaken in the various states, be they declaratory or amendatory of the common-law rule (e.g., "two-donee" statutes, statutes restricting the suspension of the power of alienation, etc.).
\textsuperscript{41} Lee, \textit{Elements of Roman Law} 241 (3d ed. 1952).
\textsuperscript{42} Lee, \textit{An Introduction to Roman Dutch Law} 384 (5th ed. 1953).
\textsuperscript{43} Strickland v. Strickland, [1908] A.C. 551 (Malta).
plication whenever minors and unborn beneficiaries are involved. However, since this power is qualified by the maxim that courts shall not change testamentary dispositions, it is generally exercised only upon the most compelling reasons. In this respect it is not unlike the power, be it statutory, or at common law, which is inherent in the courts of most of the jurisdictions in the United States to order a judicial sale of property affected with a future interest, and to impress a trust upon the proceeds in favor of all the beneficiaries.

In Germany, future interests may only be created, as we have seen, in respect to the estate minus the compulsory shares in favor of certain members of the family. German law, unlike the Roman Dutch law, does not limit the number of substitutions which can be made. But the same result is achieved by the imposition of a time limit within which all interests of contingent remaindermen must vest or fail. That period is thirty years after the death of the testator. It is subject to two important exceptions: 1. If the right of the ultimate beneficiary is conditioned upon some special event in the lives of the fiduciary or the fideicommissary, who are both in being or at least in utero at the death of the testator, such event may occur after the thirty year period has expired. In other words, the period is suspended whenever measuring lives in being are available. Example: T to A to B, and then to C upon B's death. If both A and B are lives in being, the condition of C's entitlement (B's death) may occur after the expiration of the thirty year period. 2. If the ultimate beneficiaries are either brothers or sisters of the fiduciary or the fideicommissary, the condition of their entitlement may also occur after the thirty year period. This is an extension of the first exception, because it provides that the final beneficiary may take from someone

45 Simes & Smith, Future Interests § 1946 (2d ed. 1956).
46 Id. §§ 1941, 1943.
47 B.G.B. § 2109.
48 Id. § 2109, abs. 1, ziff. 1.
49 Id. § 2109, abs. 1, ziff. 2.
who was not a life in being at the date of the testator's death. Example: T to A to B, then to the sister of B upon B's death—A must be a life in being, B may be a *persona incerta*. This means that the ultimate vesting may, under particularly fortuitous circumstances, be extended to about a hundred years. There is, as pointed out above, no limitation upon the number of fideicommissaries that may be appointed (*Nacherbeneinsetzung*), but they must all be lives in being; if they are not, then their interests must vest within the thirty year period, unless they fall within the two exceptions.\(^5\) If either the fiduciary or the fideicommissary or both are "juristic persons" (i.e., corporations, foundations, etc.) and the right of the ultimate beneficiary is conditioned upon some event in the lives of the fiduciary or the fideicommissary, such event must take place not more than thirty years after the death of the testator.\(^5\) The rationale is, of course, that the last event in one's life is one's death, and that the time of vesting can therefore only be suspended for the life of a human being. This practical limitation would be meaningless with "juristic persons" which enjoy perpetual succession.

Austria limits the number of substitutions that can be made without limiting the time within which the interests must vest in the *incerta persona*. In the case of real property only one substitution can be made; in the case of personalty two are permissible.\(^5\) Switzerland provides only for a single substitution in all cases.\(^5\) France prohibits all substitutions except for two narrow exceptions (*substitutions permises*)\(^5\) which allow a single substitution in favor of particular relatives: 1. "A father or mother may give the whole or part of the property which the law permits to be freely disposed of, to one or more of their children for life, subject to a proviso that it shall revert to such child's or children's child

\(^{50}\) ENNECERUS-KIPP-WOLFF, 5 *LEHRBUCH DES BÜRGERLICHEN RECHTES* 438, § 114 (1955).
\(^{51}\) B.G.B. § 2109, abs. 2.
\(^{52}\) ÖSTERREICHISCHES ALLGEMEINES BÜRGERLICHES GESETZBUCH [henceforth cited as A.B.G.B.] §§ 611, 612.
\(^{53}\) Z.G.B. § 448(2).
\(^{54}\) CODE CIVIL c.c. 896.
or children; but the property cannot be tied up further."

2. "When a person dies without leaving any children, then he may make a gift, either by donation inter vivos or by will, of the whole or part of the property, of which he has the free disposal, in favor of one or more of his brothers and sisters, subject to a proviso that it is to revert to the children born, or to be born, to such beneficiaries; but the property cannot be tied up further."

There is another exception which belongs to the law of contracts but deserves to be mentioned here because it enables a grantor, under certain circumstances, to create a direct right of action in an unascertained person against a grantee of property who has stipulated to turn it over to that unascertained person upon the happening of a certain event (stipulatio pour autrui). Although such stipulations may not always be upheld (the code itself provides no specific answer), there is at least one reported case of a permissible perpetuity which could not be created in common-law countries: A French bishop gave money to a town, for the endowment of religious education, with the proviso that the money should go to the donor's successor in the bishopric if the town should ever decide to adopt secular education. The court decided in favor of the episcopal successor and not the bishop's own heirs.

Italy has adopted the French solution (Sostituzione Fideicommissaria), but a special arrangement was added for the appointment of charities as fideicommissaries.

To summarize: the civil law rules against perpetuities utilize one or more of the following mechanical devices in order to prevent the creation of certain contingent interests—a period of time during which the interest must vest, a limitation upon the number of substitutions that may be created, and a restriction on the class of persons in whose favor a substitution may be limited.

55 Code Civil cc. 1048.
56 Code Civil cc. 1049.
57 Code Civil cc. 1121.
59 Codice Civile cc. 693.
60 Ente Pubblico Codice Civile art. 11.
The Rule Against Perpetuities as Limiting Restraints Upon Alienation

English reform legislation culminating in the Law of Property Act of 1925 has made land almost freely alienable. Only two of the common-law estates were retained; all other estates were turned into equitable interests. A landowner who wishes to settle land upon his family may still do so, within the limits of the rule against perpetuities, but he finds that he has created—*nolens volens*—a trust for the members of his family whom he wanted to endow with a legal estate.61 The legal estate is transformed by operation of law into a trust fund which may be invested and reinvested. Thus England was able to allow a testator to provide for his family according to his own plan, and at the same time to make land an almost freely marketable commodity.

The only estates retained were the fee simple and the term of years absolute. This was only logical, since the fee simple is the very foundation of property, and the term of years serves a particular economic purpose which would be thwarted if it were turned into a trust fund by operation of law—"a tenant cannot plough a trust fund."62

In the United States, land affected with a future interest is inalienable in principle. There is, however, an exception, which was first recognized in *Bofil v. Fisher*, 1850,63 establishing that courts of equity have an inherent power to order a judicial sale and to establish a trust of the proceeds in favor of all beneficiaries. But, since the law will not change the form of a man's property without cogent reasons, this power has been exercised only sparingly. Some states do not recognize it at all, others have adopted it by statute and, occasionally, have even extended the scope of its applicability.64

In England, the problem is the exact opposite of the one just described. The question there is not whether the land

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61 *Lawson, Real Property* 83 (1958).
63 3 Richardson's Equity 1, 55 Am. Dec. 627 (S.C. 1850); *Simes & Smith, Future Interests* §1943 (2d ed. 1956).
64 *Simes, Public Policy and the Dead Hand* 43 (1955).
can be sold or improved upon application of the determined beneficiaries, but whether a trustee who is willing to sell can be stopped by the beneficiaries from doing so. The trustee may in fact be prevented from varying the investment by a court upon special application, but only upon compelling reasons.\textsuperscript{65}

Since property is no longer taken out of circulation by the creation of future interests in England, it is appropriate to ask whether the rule against perpetuities has not been deprived of its meaning there. The answer given is no, but the theories upon which the validity and, consequently, the retention of the rule are based, though interlacing, are basically different.

They deserve to be mentioned briefly here: 1. The rule is a compromise between the desires of the dead and the demands of the living. An owner of property should be allowed to designate the beneficiaries of his estate, but this power should not be absolute—in other words, this is the English version of the policy against the dead hand. 2. The rule makes land more perfectly alienable than it is while it is affected by a future interest, since the testator, even under the Law of Property Act, may hamper actual alienation by stipulating that certain persons have to consent to alienation. Also, a court may, upon application, delay or even prevent alienation. This theory merely asserts that alienability has not yet been fully achieved, and the rule must therefore be retained. 3. The rule destroys trusts, or acts as a restraint upon their creation. Whether the property in the trust fund is alienable or not matters little here. The significant thing is that the trustee is generally limited in the types of investments he may make; he cannot invest in risk capital. The proponents of this view are particularly worried about the balance between trust and risk capital and its profound influence upon the growth of an economy.\textsuperscript{66}

\textsuperscript{65} Lawson, Real Property 115 (1958).
\textsuperscript{66} Id. at 144. In the United States the availability of risk capital was certainly the cause for unsurpassed industrial growth. See generally Heilbroner, The Worldly Philosophers chs. 3, 8, 9 (1953).
One may not agree with either the English or the American approach to the problem of alienability of land affected with a future interest, but one must admit that both solutions are certain and relatively predictable. The civil law systems, on the other hand, present a hopeless muddle. The codes themselves do not furnish specific answers, and the status of the property while affected with a future interest must be ascertained from somewhat conflicting legal writings. It is here that the ideal concept of absolute ownership breaks down completely: on the one hand the fiduciary is proclaimed as an absolute owner, on the other, his power of alienation is limited by the duty to turn the property over to the fideicommissary upon the expiration of his ownership.

Germany seems to have the most specific regulation of the fiduciary's rights and duties in her code. He is not treated as a mere usufructuary, which was his legal status in the former Law of Prussia (*Preussisches Landrecht*). He may sell the entire estate, except for interests in land (*Grundstueckrechte*), and the proceeds assume the place of the property sold. He cannot make gifts from the estate without obtaining the consent of the fideicommissary (*Nacherbe*). While the code limits only those dispositions which would tend to frustrate the rights of the fideicommissary (*Anwartschaftsrechte*), there are more practical regulations which prevent the fiduciary from exercising powers as an owner: the land registry office is compelled of its own motion to enter upon the land register (*Grundbuch*) the fact that the rights of the owner of record are limited by a substitution. In Austria there is but one provision which purports to define the legal position of the fiduciary: "... the fiduciary has a limited ownership with the rights and duties of a usufructuary" which indicates that his rights are more limited than under German law. Switzerland does not de-

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67 ENNECERUS-KIPE-WOLFF, 5 LEHRBUCH DES BUERGERLICHEN RECHTES § 114 (1955).
68 B.G.B. § 2111.
69 B.G.B. § 2113(2).
70 B.G.B. § 2113(1); GRUNDBUCHSGESTZ § 52.
71 A.B.G.B. § 613.
fine the powers of a fiduciary in her code; in legal theory he is often analogized to the usufructuary. The Roman Dutch law seems to limit the power of alienation like the Corpus Iuris. This is particularly evident in the rule that substitutions can be created impliedly by specifying that certain property should not be sold by the beneficiary. In France the fiduciary (grevé de substitution) cannot create real burdens upon the property nor can he alienate it.

It may be concluded that the position of civil law systems on the question of alienability of property affected with a future interest is no more liberal than the position of American law, and that it is far removed from the concept of free alienability imparted by the English Law of Property Act. In spite of the practice to analogize the fiduciary to a usufructuary, the concept that he is an absolute owner limited in time suggests that at least in theory he is possessed of a limited power of alienation until his successor’s title matures. Yet this power seems to have no more practical value than the power of a trustee to dispose of property in derogation of the trust instrument.

DIFFERENCES BETWEEN THE USUFRUCTUARY AND THE FIDUCIARY UNRELATED TO POWERS OF ALIENATION

The principal distinction between the interests of the usufructuary and of the fiduciary is that the former has no title which may ever ripen into full ownership. After the usufruct expires, the reversion is in the donor, or more accurately in the person who established the usufruct. On the other hand, if the limitation to the fideicommissary fails, the fiduciary’s title becomes absolute; the reversion is not in the donor, but in the fiduciary’s heirs and assigns. This is cer-
tainly the rule in the Roman Dutch law and in French law.\footnote{Amos & Walton, op. cit. supra note 75, at 129.} German and Austrian law have similar but more complex provisions on that point; they draw distinctions between the various conditions or events upon which the fideicommissary's rights depend. Thus, if the event is certain to happen (\textit{Befristung}), such as the death of the fiduciary, the rights of the fideicommissary will devolve upon his heirs and assigns despite the fact that he has not survived the event.\footnote{B.G.B. § 2108(2) (Ger.); A.B.G.B. § 615, abs. 2 (Aust.).} But if the event is not certain to happen, as for example the marriage of the fideicommissary, his passing of an examination, or selecting a certain profession, and the fideicommissary in fact fails to bring about its happening, then the fiduciary's limited ownership ripens into absolute ownership.\footnote{B.G.B. § 2108(2) in conjunction with § 2074; A.B.G.B. §§ 705, 704, 703.}

There are, of course, many other differences which vary considerably from country to country proving the heterogeneity of the civil law, and incidentally, the inaccuracy of the term civil law which is so often construed as applying to a body of legal systems which exhibit great uniformity. In France, to use but a few of many examples, the fiduciary is less limited than the usufructuary in regard to waste.\footnote{Amos & Walton, op. cit. supra note 75, at 129.} In Germany he enjoys a much wider latitude with regard to powers of administration and disposition. He is only liable for that “care which he usually exercises in his own affairs,”\footnote{B.G.B. § 2131.} while the usufructuary is held to a higher objective standard of care.

The difference between the trust and the substitution deserves brief mention here. It is of such fundamental nature that the civilian often wonders why common-law lawyers describe the latter as “testamentary trusts” or “land trusts”; in the law of trusts the legal and equitable ownership are divided and are exercised contemporaneously. In the law of substitutions we find only legal interests which are successive
but not contemporaneous—they constitute entirely separate successive ownerships. The second interest becomes effective as soon as the first one terminates. It is here that the concept of concentrated, undivided, and absolute ownership of the Roman law is at its best; it will not allow the parallelism of legal and beneficial ownership.83

CONCLUSION

The creation of future interests, perhaps with the exception of the jurisdictions within the orbit of the Roman Dutch law, plays only a minor role in civil law countries. This is attributable in some measure to a deeply engrained social policy which allots compulsory shares out of the estates of decedents to members of their families. The existence of such “obligatory state-imposed estate plans” which, though not all-embracing, may extend to considerable portions of an estate, is not conducive to the creation of future interests.

Restrictions upon substitutions—the civil law “rule against perpetuities”—are generally more severe than their common-law counterparts; they restrict the number of such interests that can be created, they narrow the class of persons to whom they may be limited, and they may impose a period of time beyond which “vesting” may not be suspended.

The fiduciary is conceptually treated differently from an owner of an estate affected with a future interest at common law. The civil law treats his interest as full and absolute ownership and not merely as a limited estate; yet, at the same time, it maintains that he may only exercise his powers as owner in such a manner as not to interfere with the future enjoyment of the fideicommissary—the “owner” of the future interest. This somewhat contradictory attitude serves to eliminate the differences between the civil law and the common-law rule and constitutes another inroad upon the

83 Lee, op. cit. supra note 74, at 374. See generally Bolgar, Why No Trusts in the Civil Law, 2 Am. J. Comp. L. 204 (1953).
pure concept of absolute ownership of the Roman law. Although, as we have seen, future interests and the application of the rule against perpetuities are less significant in civil law than in common-law countries, it is important to note that both legal systems have, through legal norms differing in theoretical bases and positive content, arrived at similar institutions in order to meet similar needs. This may prove again that, if we define "law" as the social order which governs man's conduct in society, rather than as positive and formal legal rules, we find that the "laws" of the civilized countries exhibit considerable similarities. 84

84 See Ehrlich, The Sociology of Law, 36 Harv. L. Rev. 130 (1922).