II. Long-Term Options and the Rule Against Perpetuities †

William Berg, Jr.*

B. INAPPLICABILITY OF THE RULE TO LONG-TERM OPTIONS (continued)

The modern technical Rule against Perpetuities, "the rule against remoteness of vesting" as it is most commonly designated, seems ill-adapted to cope with community or social evils brought about by the use of long-term options to purchase land.

The technical Rule was not designed to regulate such options. It grew up chiefly in a branch of law relating to decedents' estates; its purpose was to limit the extent to which the "dead hand" could control the property interests of future generations. It was not intended to apply to modern commercial or business devices. In the preceding installment of this article we observed that other commercial arrangements, such as covenants to renew leases, corporate stock preemption options, long-term mortgages and long-term contracts, are not within the Rule. By analogy it would seem that the long-term option should be excluded from the operation of the Rule.

The majority of courts accept on faith the proposition that the Rule is aimed solely at destroying future interests that may not vest within the perpetuities period. Assuming, but not conceding, that this is the true purpose of the Rule, how should long-term land purchase options fare? In order to answer this question we must ascertain (1) what constitutes a future interest in land and (2) whether or not long options bring about future interests.

It is impossible to obtain a clear-cut definition of the term "interest in land." In the Restatement it denotes any one or all of the rights, privileges, powers or immunities a person has with respect to land. This is of little help in determining whether or not the holder of a long option has a future interest.

In the absence of a precise definition of the term "future interest," we must be content to grasp its meaning by comparing the optionee's

† The first installment of this article appeared in (1949) 37 CALIF. L. REV. 1.
* Professor of Law, University of Colorado.

1 "The phrase 'interest in land' is meaningless unless the total of the rights included therein is defined." Chapman v. Great Western Gypsum Co. (1932) 216 Cal. 420, 428, 14 P. (2d) 758, 761.

2 Restatement, Property § 5, comment c (1936).
interest with all of the jural relationships that constitute the principal future interests under the present state of the law. Such a comparison should enable us to decide whether the interest of the optionee is or is not substantially the same as the interest possessed by one who has any of the well-recognized future interests.

4. Does the Holder of a Long Option have a Future Interest in Land?

a. In General

The authorities generally catalogue the future interests in land under five principal headings: reversions, possibilities of reverter, rights of entry for breach of condition (powers of termination), remainders and executory interests.¹

Usually the optionee is a stranger to the title. In such case his interest does not resemble the reversion, possibility of reverter, nor the power of termination, because those interests can be created only in a grantor or the heirs of a devisor.² However, if by any stretch of the imagination the option holder’s interest could be regarded as akin to any one of these three interests, the problem of the applicability of the technical Rule would disappear. In the United States such future interests are not within the Rule.³

The interest of a land-purchase optionee cannot be compared favorably to the interest of one who has a remainder. It is generally conceded that a remainder is “an estate limited to take effect in post-

---

³ 2 Simms, op. cit. supra note 3, § 504 (reversions): id. § 507 (possibilities of reverter); id. § 506 (rights of entry); Restatement, Property § 372 (1944).

The absurdity of giving lip service to the technical Rule against Perpetuities becomes evident when we consider the remote possibility of reverter. The interest does not fail under the Rule because, to quote the Restatement, “Such interests existed long prior to the development of the rule against perpetuities; they had caused no inconveniences which aroused the ire of either the public or judiciary. Hence when the rule against perpetuities received its judicial moulding, it was so moulded as not to impinge on these traditionally accepted types of interests.” Restatement, Property 2169 (1944). Professor Gray states that possibilities of reverter are most satisfactorily supported, when attacked under the Rule, on the ground that they are vested interests. Gray, The Rule against Perpetuities § 113.3 (4th ed. 1942). Under the fundamental version of the Rule (that which has as its object the fostering of practical alienability), the remote possibility of reverter would fail because it would tend to make the land inalienable, in a practical sense, by the holder of the present estate.
session immediately after the expiration of a prior estate created at the same time and by the same instrument. The remainder does not cut off the prior estate, but becomes possessory only by virtue of the expiration of the particular estate. Any analogy that otherwise might exist between the interests of the option holder and the contingent remainderman disappears when we recall that an exercise of the option cuts off the interest of the optionor. The vested remainder need not concern us because that interest does not fall within the technical Rule, even though its enjoyment may not be realized until after the perpetuities period.

The executory interest is the remaining principal future interest with which to compare the interest of the optionee under the long option to purchase land. Executory interests arise out of executory devises in wills and through springing and shifting uses in deeds. They are held by persons other than those who create them (and other than the successors in interest of the creators) and operate in such manner as to cut off and terminate prior freehold estates.

The similarity in outward appearance between long options and executory limitations becomes quite close when the optionees' interests are compared to executory interests contingent as to the event alone. This surface similarity may have led courts and legal writers to the conclusion that long land purchase options give the optionees interests which are substantially the same as those possessed by holders of executory interests. However, full reliance upon mere appearances will lead to difficulties. Unless some logical basis can be found for differentiating between the interests brought about by long-term, as distinguished from short-term, options, it seems somewhat facetious to contend that the holder of a short-term option has no interest in the optioned land but that the holder of the long option has a remote nonvested future interest therein.

6 33 AM. JUR. 508 § 46. See 1 SIMES, op. cit. supra note 3, § 50; RESTATEMENT, PROPERTY § 156(1) (1936).
7 1 SIMES, op. cit. supra note 3, § 51.
8 GRAY, op. cit. supra note 5, § 205.
9 1 SIMES, op. cit. supra note 3, § 149: 19 AM. JUR. 555, § 95.
10 RESTATEMENT, PROPERTY §§ 158(1), 25(1) (a) (1936). Note the exception which upholds the executory interest after the determinable fee or fee simple conditional. See 1 SIMES, op. cit. supra note 3, § 154, n. 15.
11 In Woodall v. Bruen (1915) 76 W. Va. 193, 106, 85 S. E. 170, 171, the court stated that the vendor's long-term repurchase option "if valid, would amount to an executory limitation, giving him, his heirs and assigns a future, not present, estate in the land upon a contingency."
Viewed from the standpoint of the intention of the parties, it seems hardly consonant with reality to insist that the parties to a long land purchase option intend to create a future interest. Seldom are such options cast in the form of typical limitations of future interests, and almost never do the parties stipulate that the option gives the optionee an interest in land.

The absence of an intention to place a future interest in the optionee while the option remains unexercised is evidenced also by the fact that there is an important condition precedent to be fulfilled by the optionee before he accepts. That is, the optionee must tender payment or, where permitted by contract, must promise to pay the price of the optioned land. In any event, as optionee he is not under a legal duty to accept the option or to make payment.

It is regrettable that the courts, in applying the Rule to long options originating in "ordinary" contracts (that is, in instruments other than deeds or wills) and in leases, have never explained how they arrived at the conclusion that these options manifest the parties' intent to create limitations of future interests. The Restatement of Property does not resolve this troublesome problem. In its section relating to the applicability of the Rule to land purchase options other than those appendant to leases, it states that the Rule applies to the "limitation of an option" if the option may continue longer than the permitted period and "but for the rule against perpetuities" would create an interest in land. This leaves unsolved the matter of when and how the option contract fulfills the requirements essential to the limitation of a future interest.

Occasionally long-term options to purchase land appear in deeds or wills. It is possible to advance opposing views as to the nature of the interests of the optionees in these cases. On the one hand, stressing the contract aspect, it may be urged that they hold only contract interests, as do the holders of short options that originate in leases and in ordinary contracts. On the other hand, it might be claimed

---

12 Long options originating in contracts and in leases have been held void under the Rule in these cases:


13 *Restatement, Property* § 393 (1944).
that the mere presence of long options in documents that involve conveyances of land should warrant their being treated as anomalous types of future interests. Several of the reported cases dealing with long options in deeds or wills have treated the option holders as being possessed of contingent future interests in land that fall under the Rule.\textsuperscript{14}

It would seem, nevertheless, that these decisions overlook practical considerations in so holding. Just as in the case of an option originating in a lease or in an ordinary contract, the optionee is never bound to purchase the optioned land; the option is seldom framed in the formal language of an executory limitation; and the payment of the price, or the making of a promise to pay, is a condition precedent to acceptance of the option. In short, it would seem that the optionee acquires only a contract interest.

b. The Vendor's Repurchase Option

How should the vendor's repurchase option be classified? Should it be treated as a type of reversionary interest? A brief mention of this point was made in \textit{Woodall v. Bruen}, a case involving a repurchase option, wherein it was observed that a grantor who takes back a repurchase option covenant has "parted with all interest in land." The same decision also employed this language: "No analogy between a repurchase and an entry for condition broken is perceptible. In the former case, there is no condition, no possible forfeiture, and no possibility of a reverter or right of re-entry."\textsuperscript{16}

\textsuperscript{14}Option in gross contained in deed: Turner v. Peacock (1922) 153 Ga. 870, 113 S. E. 585 (option held void, but not technically within the Rule); West Virginia-Pittsburgh Coal Co. (W. Va. 1947) 42 S. E. (2d) 46 (option to purchase surface of coal lands); Barton v. Thaw (1914) 246 Pa. 348, 92 Atl. 312 (option to purchase fee contained in grant of underlying coal); In re Tyrrell's Estate [1907] 1 Ir. R. 292 (grantee's option to terminate perpetual rent charge). Cf. In re Garde Browne [1911] 1 Ir. R. 205 (fee farm lessee's option to reduce perpetual rent charge down to a peppercorn held valid).

Option in gross contained in will: Lilley's Estate (1922) 272 Pa. 143, 116 Atl. 392.

Grantor's reservation of option to purchase: Brown v. Mathis (1947) 201 Ga. 740, 41 S. E. (2d) 137 (reservation of right to remove sand at rate of ten cents per car); In re Donoughmore's Estate [1911] 1 Ir. R. 211 (option retained by grantor of 999 year rent charge to repurchase at any time).


\textsuperscript{15} (1915) 76 W. Va. 193, 196, 85 S. E. 170, 171.
c. Analysis of the Structure of Land-Purchase Options; When an Interest in Land arises

According to Professor Corbin, contract-options usually assume the form of unilateral contracts to “convey on condition,” wherein “the position of the option giver is almost identical with that of any one who has made a binding contract to convey.” He concedes that the option holder has no interest in the optioned land if the transaction amounts to a mere irrevocable offer to sell, but contends that the optionee should be held to have an interest in land, within the meaning of the Statute of Frauds, if the contract amounts to a conditional contract to convey. Note that there is no suggestion that in such case the optionee has an interest in land for all purposes. In cases involving the applicability of the Statute of Frauds to oral options, it is unnecessary to go to the extreme of regarding the optionee as the holder of an interest in land. Satisfactory results may be attained in those cases by applying the Statute to the oral contracts which arise upon the acceptance of such options.

When an option contract happens to be construed as a conditional contract to convey upon the part of the optionor, it is still quite apparent that the optionee does not stand in the reciprocal position of one who is bound under a conditional contract to purchase. The optionee is not bound in any manner. Professor Corbin does not contend that the optionee is entitled to specific performance prior to acceptance. Instead, he refers to the fact that only after a valid acceptance can it be said that there arises a new contract which entitles the optionee to the remedy of specific performance. Therefore, in so far as an analysis of the position of the optionee is concerned, it seems preferable to treat the option as a unilateral contract embodying an irrevocable offer to sell, and not as a conditional contract to sell and purchase.

Between inception and consummation there are three principal phases of the land-purchase option transaction. First, there is the phase in which the optionee has a contract, but not an interest in the land itself. Second, upon proper acceptance the transaction enters the

---

16 Corbin, *Option Contracts* (1914) 23 YALE L. J. 641. 650-655. Professor Corbin lists three types of conditions: (1) the optionee’s making payment; (2) his making a promise to pay; (3) his giving notice of election.


18 Corbin, *supra* note 16, at 656. “An option contract ... is a unilateral contract. The option giver is bound to convey, but the option holder is not bound to buy.” *Id.* at 661.
"contract of sale" phase. Finally, there is the terminal phase at which the consideration is paid and the optionee-vendee receives his conveyance.

In the first phase, the option contract, when reduced to its fundamental legal structure, possesses these elements: The optionor has given an offer to sell and has promised to keep the offer open for a designated period.\(^9\) The optionee has a right that the optionor shall keep the offer open in accordance with the contract and a right that the optionor shall not destroy the option by conveying the land to a bona fide purchaser; correlative to this right is the duty of the optionor not to convey to a bona fide purchaser during the life of the option.\(^20\) The right to a continuing offer to sell land, being irrevocable for the time designated, creates a power\(^21\) in the optionee to acquire, for the stipulated period, a bilateral contract for the purchase and sale of the optioned land upon complying with the terms of the option.\(^22\)

While the option remains unexercised, the rights of the optionee and the duties of the optionor pertain solely to the optionor's promise to keep the offer open and alive. Until the optionee elects to exercise his power, he is for all practical purposes a stranger to the land. "Though such an option to buy land is a contract, . . . it is a contract to buy only if the buyer chooses to do so. Accordingly, it will not make the buyer in any sense the equitable owner of the property until he exercises his right to buy."\(^23\) Since the optionee has a mere contract right, it would seem that his option, regardless of its potential duration, could not violate the technical Rule against Perpetuities.

The fact that the optionee has a power, the exercise of which may possibly prevent a sale of the land to persons other than the optionee, is important and, as we shall see later, necessitates the application of

---


\(^{20}\) Comment (1918) 28 YALE L. J. 65.

\(^{21}\) A power is defined as the "capacity of a person to change the legal status of another person." Goble, \textit{A Redefinition of Basic Legal Terms} (1935) 35 Col. L. Rev. 535, 540.

\(^{22}\) "In its broader meaning, a power may be described as the capacity to change legal relations." 1 SMITH \textit{op. cit. supra} note 3, § 243.

\(^{23}\) Under the Hohfeldian analysis the contract-option constitutes a power-liability relationship. Hohfeld, \textit{Fundamental Legal Conceptions} (1913) 23 YALE L. J. 16, 51.

\(^{24}\) "At any rate the option vests in the grantee the right or privilege of acquiring an interest in the land, and, when accepted, entitles him to call for specific performance." Smith v. Bangham (1909) 156 Cal. 359, 365, 104 Pac. 689, 692.

\(^{25}\) 1 WILLISTON, \textit{Contracts} § 61 n. 9 (rev. ed. 1936).
rules pertaining to restraints on alienation, as broadened to include option cases. The futility of the courts’ laborious efforts to bring the long option within the technical Rule by treating it as a future interest creating device should be quite apparent.

Acceptance of the option gives rise to a new and different contract—one pertaining to the sale and purchase of land. At this point, and for the first time in the option transaction, mutual rights and duties exist, and the remedy of specific performance becomes available to both parties. The transaction has now entered the “contract of sale” phase. We find justification for the existence of this new and short-lived contract when we reexamine elementary rules of contract law. Professor Williston tells us that courts “should interpret an offer as contemplating a bilateral rather than a unilateral contract” in order that both parties may be protected pending the beginning of performance. The contract-option, being an irrevocable offer of stated duration, should be interpreted in the same manner, especially in view of the business need for time in which to prepare essential papers and to examine title or procure title insurance. Thus, for practical business reasons the large majority of options are construed by the courts as not requiring an actual tender of the purchase price upon the optionee’s signifying his acceptance. Ordinarily it is enough that his unconditional acceptance be accompanied by a promise to pay the stipulated price. If, however, the contract-option happens to be of the unusual type in which it is clearly contemplated that the price be tendered at the time of the acceptance of the option, a mere promise to pay will not suffice.

When the option is accepted, there springs into existence that which Professor Radin would describe as a “demand-right” in favor of the optionee, and a “duty” on the part of the optionor. That is, the optionee (now vendee) has a “demand-right” to receive a conveyance of the optioned land, and the optionor (now vendor) has a duty to make such conveyance within a reasonable time. The contract being bilateral, we must also remember that the vendor has a

---

24 Note (1905) 18 Harv. L. Rev. 457. Professor Corbin criticises this analysis, but admits that the cases almost always construe this to be the result of the acceptance of the option. See Corbin, supra note 16, at 657, n. 36.

25 Strong v. Moore (1922) 105 Ore. 12, 207 Pac. 179.

26 1 Williston, op. cit. supra note 23, § 60, n. 1.

27 Mills v. Haywood (1877) 6 Ch. D. 196, 201.

28 Illustrative of this is the contract-option found in Winders v. Kenan (1913) 161 N. C. 628, 77 S. E. 687.

29 Radin, A Restatement of Hohfeld (1938) 51 Harv. L. Rev. 1141, 1163.
"demand-right" to receive payment of the agreed consideration for the conveyance, and the vendee has a duty to pay such consideration within a reasonable time.

Case law bears out this analysis. There is almost complete uniformity upon the proposition that an unconditional acceptance of the option brings about a new contract and a new status of the parties, and neither party can recede from the contract.\(^{30}\) It is only when the optionee has become a vendee by accepting the option that most courts are willing to concede that he has acquired an interest in land by virtue of the option.\(^{31}\) This interest is fully recognized and protected in equity, for upon acceptance of the option, equity, "regarding that as done which ought to be done," considers the optionee-vendee the new owner of the land, and it is the contract of sale resulting from the exercise of the option that is enforceable in equity.\(^{32}\) The few cases which hold that the vendee of a land purchase contract has no interest in the contracted land usually are cases involving actions at law that have been decided in this manner in order to avoid harsh results.\(^{33}\)

The courts have never been troubled over the possible application of the Rule against Perpetuities to land-purchase contracts. Nor should this matter perplex the courts, for it is clear that when one becomes the vendee of a land-purchase contract, he acquires thereby a vested equitable interest.\(^{34}\) The parties must perform the contract

---


For an excellent comparison of the jural relations arising under land-purchase contracts and land-option contracts, see Comment (1917) 26 Yale L. J. 783.

\(^{32}\) Rease v. Kittle (1904) 56 W. Va. 269, 49 S. E. 150; Walsh, Equity 417 (1930).

\(^{33}\) For a collection of such cases, see 66 C. J. 703, n. 37. Typical are the insurance cases holding that the contract to purchase the insured real property gives the vendee no interest therein, where a contrary holding would bring about a forfeiture of the policy. Compare Home Mutual Ins. Co. v. Tomkies & Co. (1902) 30 Tex. Civ. App. 404, 171 S. W. 812, with Budelman v. American Ins. Co. (1921) 297 Ill. 222, 130 N. E. 513.

\(^{34}\) In re Doyle's Estate [1907] 1 Ir. R. 204, 211.
within a reasonable time when no date of performance is specified.\textsuperscript{35} It is safe to conclude that a reasonable time in such case would be of shorter duration than twenty-one years.

d. Nature of Optionee's Interest: Judicial Interpretations

Heretofore there has been brief reference to the proposition that all options to purchase land, unless cast in such form as to display clearly the intent to create future interests in land, should be construed as contracts—to which the technical Rule has no application. The ensuing discussion will deal with what the law is, or purports to be, upon this subject.

Some cases have regarded optionees as possessed of vested interests in the optioned lands; others have held that he has no interest in such land; still others have stated that the holder of an unexercised option has a nonvested equitable future interest in the optioned land.

(1) Optionee as Holder of a Vested Interest

A few early English cases concluded that the holder of an unexercised option to purchase land has either a vested interest which will be divested in the event of a failure to exercise the option—"a conversion subject to a reconversion if the option is not exercised"—or an interest which vests from the time of the inception of the option by the fiction of relation back.\textsuperscript{37} These cases involved litigation over the right to the proceeds from the sale of optioned land where the option was accepted after the death of the optionor. They have been criticised in England\textsuperscript{38} and have been generally repudiated in America, although they are the source of the present minority view which considers the optionee as the holder of an interest in land prior to acceptance of the option.\textsuperscript{39} In England it was held eventually that the ac-

\textsuperscript{35} Where the contract says nothing about the time for conveyance, it must be made within a reasonable time after a demand. 55 Am. Jur. 744, n. 3. Where the time of conveyance is to be fixed by the purchaser's demand, the demand must be made within a reasonable time. Smith v. Bangham (1909) 156 Cal. 359, 363, 104 Pac. 689.

\textsuperscript{36} Pound, Progress of the Law (1920) 33 Harv. L. Rev. 813, 825, n. 59.


\textsuperscript{38} See Walshe, Equity 417-418, n. 7 (1930).

CEPTANCE of the option worked a conversion only as of the date of exercise of the option.\textsuperscript{40}

(2) Optionee as Holder of No Property Interest

The courts are almost uniform in holding that optionees, as optionees, acquire no interests in land by virtue of short-term options.\textsuperscript{41} It is difficult to perceive why land-purchase options should be regarded differently if they happen to be of the long-term variety. Surely the element of greater duration should not, in and of itself, have the effect of creating equitable future interests in favor of holders of long options.

Beyond a doubt those courts which have declared long options void upon the theory that they create nonvested future interests that violate the Rule have done so because they have regarded such devices as being in contravention of public policy. Rather than formulate new judge-made law which, for example, would permit most long options to endure for reasonable periods of time, most courts have preferred to commit two "wrongs" to make what is believed to be a "right." First, they have run rough-shod over the law of options by declaring that the unexercised long-term option creates a remote future interest in land. Second, they have tended to give the impression that the Rule is aimed solely at preventing remoteness of vesting. They have failed to stress that the Rule goes beyond this; that it is designed to destroy remote nonvested future interests because they tend to create suspensions of the practical power of alienation.

(3) Questionable View that Long-Term Options Constitute Limitations of Future Interests

The many decisions that strike down long-term options to purchase land usually rest upon the proposition that such options involve remote nonvested future interests. In none of these decisions do the courts try to explain why the short-term option to purchase land does not bring about a future interest. The confusion thus engendered is illustrated by two cases decided in the Supreme Judicial Court of Massachusetts. In 1908, in \textit{Thatcher v. Weston},\textsuperscript{42} it was held that the optionee under an option of eight months' duration acquired no interest in the optioned land prior to accepting the option. About twelve

\textsuperscript{40} \textit{In re Marlay} [1915] 2 Ch. 264; 1 \textit{Williams, Vendor and Purchaser} 509 (3d ed. 1922).

\textsuperscript{41} See cases cited infra notes 75 and 76.

\textsuperscript{42} (1908) 197 Mass. 143, 83 N. E. 360.
years later the case of *Eastman Marble Co. v. Vermont Marble Co.*

43 came before the same court. There, an option of twenty-five years’
duration, incorporated in a contract under seal extending to the heirs
and assigns of both contracting parties, was held void under the Rule.
The court observed that the option created an “equitable interest in
land” and an “absolute right to be exercised within 25 years” and
that the contract concerned a “right to specific performance.” Appear-
tly counsel for the loser contended that if the short-term option in

*Thatcher v. Weston*
gave the optionee no interest in land, there was
no good reason why the twenty-five year option in the

*Eastman Marble Co.*
case should do so. The court did not supply an answer to this
contention, but disposed of the problem summarily by stating that
the option in the earlier case was a “mere option to purchase” and a
“simple personal agreement,” whereas in the

*Eastman Marble Co.*
case it extended to the heirs and assigns of each party and was in-
cluded in a sealed contract which purported to create other important
property interests. The

*Eastman Marble Co.*
case affords an excellent
example of the willingness of most courts to find, accompanying the
long option, a special consequence—a future interest in the optionee
—in order that it may be brought within the technical Rule.

The notion that an unexercised option gives the optionee a future
interest in land seems to have sprung from a tendency to regard the
option as specifically enforceable in equity. For example, some years
ago in a Minnesota Law Review article it was said: “These options
are specifically enforceable in equity. Consequently they are in effect
executory equitable limitations of the property.”

44 Others have used
language of like import.

45 These writers have by-passed one highly
important step—the optionee’s acceptance of the option. Until an
option is accepted, the optionee acquires no equitable estate or inter-
est in the optioned land.

46

---

43 (1920) 236 Mass. 138, 128 N. E. 177.

44 Fraser, *The Rationale of the Rule against Perpetuities* (1922) 6 Minn. L. Rev. 560, 573.

45 "On the one hand, it has been recognized that the option in effect creates a future
interest contingent in character; where the option is unlimited in time, this future
interest seems to fall literally within the rule." Schnebly, *Restraints Upon the Alienation

"There is nothing inherently impossible in the view that an option to purchase is
both a contract and a grant of a future equitable interest." Scott, *Option of Purchase*
(1918) 38 Can. L. T. 242, 244.


(4) Nature of Optionee’s Interest: Case Law

In the United States the courts of only two jurisdictions—Pennsylvania 47 and Wisconsin 48—have decisions holding that the unexercised option gives the optionee an equitable interest in land. These decisions rest upon rather questionable authority, that of the Pennsylvania case of Kerr v. Day. 49 Later this case was said to have “strained to the utmost” the view concerning the optionee’s interest. 50

It is true that in the isolated and unusual case that which appears upon the surface to be no more than an ordinary land-purchase option, may, in connection with other facts, amount to a contract to sell and purchase land. 51 In that type of case the equitable ownership would be in the purchaser from the inception of the contract to purchase, 52 so there could be no question of the applicability of the Rule.

If a contract to sell and purchase land were so drafted as to make possible a conveyance to the purchaser at a future period in excess of twenty-one years from the inception of the contract (a highly improbable situation, of course), it might be contended that the Rule should be invoked because of the chances of a remote vesting of the legal title. This problem seems to have arisen in only one case of record, that of Skeen v. Clinchfield Coal Corp., 53 which involved a conditional contract to sell and purchase land at a fixed price. The condition precedent to the consummation of the contract was the manifestation by the vendor, his heirs or assigns, of a decision to “sell” the land to the vendee at some unspecified future time. The court sidestepped any

49 (1850) 14 Pa. 112. Kerr v. Day involved a law action of ejectment against the assignee of the optionee. The court’s decision that the unexercised option gave rise to an interest in land may have been inspired by a desire to protect the optionee against one who purchased the fee with knowledge of the option. There was no court of equity to which the optionee could have turned for relief, because at that time (about 1847) Pennsylvania had no separate courts of equity and no courts of general equity jurisdiction. See 1 Pomeroy, Equity Jurisprudence §§ 338-341 (5th ed. 1941).
50 Elder v. Robinson (1852) 19 Pa. 364.
51 Williams v. Lilley (1895) 67 Conn. 50, 34 Atl. 765, is illustrative. There, a ten-year lease of a portion of the premises gave the lessee an option to purchase the fee at any time during the term. The optionee covenanted to heat, maintain, and insure the entire premises, pay all the taxes, and to pay a rental of $3,000 per year if earned. In event that the option was exercised, the rental payments were to be deducted from the purchase price. Held: not an option, but a contract to purchase.
52 1 Tiffany, Real Property § 307 (3d ed. 1939).
53 (1923) 137 Va. 397, 119 S. E. 89.
discussion of the possibility that the vendee had equitable ownership of the land from the inception of the contract and was content to decide that the vendor possessed an option to sell, under which the vendee acquired an executory interest which failed because it was not certain to vest within the perpetuities period.

In numerous instances courts have declared that short-term options embodied in leases and in "ordinary" option contracts do not give rise to future interests. The following fact-situations are typical.

Right to Insurance Payments upon Fire Loss. Suppose the optioned land is damaged by fire and the optionee claims the benefit of fire insurance payments upon later exercising the option. A leading case upon the point is that of Strong v. Moore,\(^{54}\) decided by the Supreme Court of Oregon in 1922. In that case it was held that after the optioned premises had been damaged by fire, the optionee could not validly accept the option by simply making a tender of the option price less the amount of fire insurance paid to the optionor. The optionee's claim for specific performance was denied upon the basis of an insufficient tender. The Oregon court was careful to point out that the option gave the optionee neither a legal nor an equitable interest in the optioned premises and that not until the optionee had properly exercised his option would he become possessed of an interest in land. The decision therefore supports the proposition that the holder of an unexercised option has contract rights and not property rights with respect to the optioned land. The few cases which touch upon the same problem are in accord,\(^{55}\) and two cases which seem to assert a contrary view are distinguishable upon the facts.\(^{56}\)

Attachments and Executions upon Optioned Lands. Illustrative of the same principle are the reported cases dealing with attempts by creditors of the optionee to attach or levy execution upon optioned land during the life of the option. Assume that B is a land-purchase optionee and that C is his creditor. Suppose that C, while the option is unexercised, attaches or levies execution on the optioned land upon the theory that B has an interest in the land under his option. In Provident Life & Trust Co. v. Mills,\(^{57}\) a federal circuit court con-

---

\(^{54}\) (1922) 105 Ore. 12, 207 Pac. 179.


\(^{56}\) Williams v. Lilley (1895) 67 Conn. 50, 34 Atl. 765 (so-called "option" contract construed as equivalent to contract to sell and purchase); Peoples Street Ry. v. Spencer (1893) 156 Pa. 85, 27 Atl. 113 ("option" contract construed as purchase-money mortgage).

\(^{57}\) (C. C. D. Wash. 1899) 91 Fed. 435.
cluded that \( C \)'s levy on the land was a nullity. That the court clearly understood the nature of the parties' interests is evidenced by these words: "If the contract vests in the purchaser a right which may be vendible, and which may be sold under execution, the proceedings to make an execution sale must have reference to the contract, distinctly, and not to the real estate which the debtor has not acquired . . . the contract does not convey to Otis Sprague any interest in the property." 58 Two cases that have passed upon the same question are in accord. 59

The converse of the rule announced in the Provident Life & Trust Co. case applies when \( D \), a creditor of optionor \( A \), attaches or levies execution upon the optioned land while \( B \)’s option is pending. The courts have held that such process is valid. 60 They have reached this conclusion upon the theory that until the option is exercised the option holder has no interest in the land.

It should be noted, however, that the optionees in the cases just discussed possess rights that may constitute valuable assets. These should be subject to judicial sale as contract rights. In recognition of this, it has been held that an option holder’s interest may be pledged as collateral security for a loan. 61

**Brokers’ Oral Contracts to Procure Options: Statutes of Frauds.**

In some states brokers’ contracts to sell or purchase real estate for others on commission are by statute declared to be unenforceable unless in writing and subscribed by the party to be charged. 62 In a state having such legislation, may a broker recover his commission if he obtains a land-purchase option for his customer pursuant to a previous oral contract? The solution depends upon the effect attributed to the option. If the option gives the optionee an interest in land, it follows that the broker’s oral contract with his customer pertains to the purchase of an interest in land within the meaning of the statute, and the broker must go uncompensated. However, the few reported decisions upon the subject permit the broker to recover his commission pursuant to the oral contract, for they regard the contract to pro-

---

58 Id. at 442-443.

\textit{Options and Land-Contract Forfeiture Statutes.} Statutes in some states provide that whenever a vendee defaults in performing any of the conditions of a contract for the purchase of an interest in land, a vendor who desires to terminate the contract or declare a forfeiture must give written notice of that fact to the vendee.\footnote{Hopwood v. McCausland (1903) 120 Ia. 218, 94 N.W. 469; Womack v. Coleman (1904) 92 Minn. 328, 100 N.W. 9. Cf. Low v. Young (1912) 158 Ia. 15, 138 N.W. 828; Northern Mining Corp v. Cooke Mining Co. (C. C. A. 9th 1941) 123 F. (2d) 9; see Ballard v. Friedman (1922) 151 Minn. 493, 496, 187 N. W. 518, 519.} Must the optionor of land give such statutory notice to a defaulting optionee? It has been held that these statutes have no application to cases involving defaults under option contracts.\footnote{(1928) 38 Ga. App. 408, 144 S. E. 47.} Such decisions stress the fact that the option contract is not a contract for the sale and purchase of an interest in land.

\textit{Optionee's Inability to maintain Trespass Action.} In the case of \textit{Varn Turpentine Co. v. Allen} the optionor went upon the optioned land and removed timber without the optionee's permission. Not knowing of this fact, the optionee exercised the option and acquired title. Later, upon learning of the timber removal, the optionee-vendee brought a trespass action against the vendor. In affirming a judgment for the defendant, the Georgia Court of Appeals found that the unexercised option gave the optionee no interest in land, and that, without such an interest at the time of the removal, he had no basis for a trespass action even though he acquired title later.

\textit{Options and the Bankruptcy Act.} It has been held that an unexercised option to purchase land does not constitute an interest in land within the meaning of section 75 of the Federal Bankruptcy Act.\footnote{In re Engelbrecht (S. D. Ia. 1935) 10 F. Supp. 198; see In re Koloev (E. D. Wash. 1942) 46 F. Supp. 118.}

\textit{Devolution of Options upon Intestacy.} We have observed that the long option bears at least a surface similarity to the executory interest. Therefore, in our attempt to determine whether or not the holder of a long option to purchase land has a future interest, it will be helpful
to compare the manner in which executory interests and optionees' interests devolve upon intestacy in the United States.

Professor Simes states that "... executory interests, in land, descend in the same manner and to the same persons as possessory interests in land...." Thus, if \( A \), the holder of an executory interest in Blackacre, dies intestate, his interest will devolve upon his heirs. This substantiates the proposition that the executory interest in Blackacre is a true future interest in land. No longer is there weight to the contention that an executory devise, contingent only as to the event, is a mere expectancy.

On the other hand, if \( B \), the holder of a pending unexercised option to purchase Blackacre, dies intestate, his interest under the option, if not personal to him alone, will devolve in the same manner as do mere contract rights. The option will go to \( B \)'s personal representative as a contract interest, rather than to his heir as an interest in land.

**Options Appendant.** The optionee does not obtain a future interest in land by reason of the fact that his option is appendant to a lease. A clear exposition of the nature of the optionee's interest under the unexercised option appendant was given by Loring, J., in *Cornell-Andrews Smelting Co. v. Boston & P. R.R.* In that case the railroad company acquired certain land under eminent domain. It was held that the plaintiff lessee of the land was not entitled to recover compensation for the value of its unexercised land-purchase option appendant because under the Massachusetts statute only those who owned estates in land were entitled to compensation in eminent domain proceedings. In discussing the interest of the optionee, the

---

69 Barnitz's Lessee v. Casey, 7 Cranch 456 (U. S. 1813); Kean's Lessee v. Hoffecker, 2 Harr. 103 (Del. Ct. Errors and App. 1836); Ackless v. Seekright, Beecher's Breeze 76 (Ill. 1823); Hudson v. Leathers (1927) 141 S. C. 32, 139 S. E. 196; Restatement, Property § 164 (1936); see Blackstone v. Althouse (1917) 278 Ill. 481, 487, 116 N. E. 154, 156.
70 "An executory devise before coming into possession is never vested, but it is above the grade of a mere possibility and is regarded as a certain interest in the estate." Blackstone v. Althouse (1917) 278 Ill 481, 486, 116 N. E. 154, 156.

When the optionor dies during the pendency of the option, the land is subject to the dower right of his wife. Rockland-Rockport Lime Co. v. Leary (1911) 203 N. Y. 469, 97 N. E. 43.
72 (1911) 209 Mass. 298, 95 N. E. 887.
court said: "... although the insertion in a lease of an option giving to the lessee at his option a right to buy the fee adds to the value of the lessee's rights under the lease, it is no part of the lessee's estate in the land. ... The lessee's rights under such an option are rights which lie in contract and do not create in the lessee any estate in the land. Being rights which lie in contract, the lessee as the holder of such an option cannot bring a petition for damage done to the land..."

It is sometimes inferred that since a land-purchase option appendant is the type of covenant that runs with the lease, the option gives the optionee an interest in land. The Cornell-Andrews Co. decision, and others, point out that such a conclusion cannot be sustained.

Upon the basis of the foregoing decisions, it may be said that the great weight of authority in this country regards the short-term option as a device that brings about only contract interests, not property interests in the optionee. A host of miscellaneous decisions and dicta are in accord. There appears to be no good reason why the

---

73 Id. at 306-307, 95 N.E. at 890. That the contract right of the optionee would be protected was made clear by the court's statement that in equity the land is regarded as being converted into the money paid for the land, and that the optionee could at his election buy into the fund derived from such payment. Id. at 307, 95 N.E. at 890.


LONG-TERM OPTIONS

long-term option should receive a different interpretation in this respect.

Statutes of Frauds Cases. At this point there should be brief reference to one line of cases which, upon the surface, might appear to militate against the conclusion that the optionee acquires no interest in land by virtue of his option. The authorities in question are those which deal with legislation modeled after the fourth section of the English Statute of Frauds as it affects oral land-purchase options. For example, some statutes require "any contract for the sale of real estate" to be in writing and subscribed by the party to be charged before any action can be maintained thereon. Some courts have held that oral options to purchase land are unenforceable under such statutes upon the ground that options are contracts for the sale of real estate. The result of these decisions is entirely correct, but the reasoning employed by them is clearly wrong. The courts rendering these decisions have skipped over a very important consideration; they have overlooked the fact that the option itself, while unexercised, does not constitute a contract for the sale of lands or of an interest therein. The correct reasoning to be applied in such cases is found in Hilker v. Curdes, a case decided in the appellate court of Indiana. In discussing this question the court said: "But if an acceptance had been made, appellants would have had only a parol contract for the


77 29 CAR. II, c. 3, § 4: "... no action shall be brought ... to charge any person ... upon any contract or sale of lands ... or any interest in or concerning them ... unless the agreement ... or some memorandum or note thereof shall be in writing. ..."

78 IND. STAT. ANN. § 8363 (1934); KY. REV. STAT. § 371.010(6) (1944); MINN. STAT. § 513.04 (1941); TEX. STAT. art. 3995(4) (1936).

purchase of the land. Such a contract would not afford a basis for a decree of specific performance, as it would be within the statute of frauds. Thus, the oral option should be condemned in these cases, not because it gives rise to a contract for the sale of real estate, but upon the basis that its acceptance would create a contract of sale which would fall within the prohibition of the Statute of Frauds.

If the Statute of Frauds happens to be worded in substantially the same language as the fourth section of the original English Statute, there is no reason why the oral option to purchase land should not fall within the statute. An example of such legislation is found in a section of the Georgia Code which provides that "Any contract for sale of lands, or any interest in, or concerning them" must be in writing if the promisor is to be bound thereby. In the Georgia case of Neely v. Sheppard, the court expressly stated that the unexercised option to purchase gave rise to no interest in land, but that the oral option was within the Statute of Frauds because it did concern land.

e. The Powers Analogy

In an earlier portion of this article it was observed that the option to purchase land creates a power, which, if properly exercised, will enable the optionee to acquire the equitable ownership, and ultimately the absolute ownership, of the land described in the option. Does such power, when acquired by the holder of a long option, give him and his successors in interest a contingent future interest in the optioned land, which must fail under the technical Rule against Perpetuities?

A power with respect to land is an ability to change legal relations in land. Powers relative to land usually are listed under at least three headings: (1) Common Law powers; (2) Equitable powers; (3) Powers operating under the Statute of Uses and Statute of Wills. Tiffany lists statutory powers as a fourth type.

The power to effect a change in the ownership of another's land may arise in two ways: first, by acquiring such power through contract; and second, by having such power conferred upon one who has no estate in the appointive property, or who has an estate of less than

82 (1938) 185 Ga. 771, 196 S. E. 452.
83 1 Simx, op. cit. supra note 3, § 243; Restatement, Property § 3 (1936).
84 1 Simx, op. cit. supra note 3, § 245; 3 Tiffany, Real Property §§ 673, 676, 677 (3d ed. 1939).
85 3 Tiffany, op. cit. supra note 84, § 675.
absolute ownership therein.\textsuperscript{86} It is plain that long-term options to purchase land normally arise in the first manner.

At this point two matters become of importance. First, does the power possessed by the holder of a long option constitute a contingent interest in the optioned land which must fail under the Rule? Second, if such power does not constitute an interest in land, does it give rise to a future interest which is remote and void under the Rule?

As to the first problem, Professor Simes has stated: “From a purely analytical standpoint, it might be argued that any legal relation with respect to land or other things—such as a right, power, privilege, or immunity—should be considered as an interest in property. . . . It would seem that rather slight and unimportant legal relations with respect to land or chattels are not to be regarded as interests in property.”\textsuperscript{87}

Writers in recent years have suggested that the holder of a power of appointment or other dispositive power is possessed of an interest in land by virtue of the power, the theory being that the power is an interest in land.\textsuperscript{88} It has been suggested also that if the exercise of the power need not be postponed, the power amounts to a present interest in land.\textsuperscript{89} However, it seems to be the prevailing view that a power does not give the holder an estate or interest in the property which is subject thereto.\textsuperscript{90} Most of the cases wherein the point is discussed pertain to powers of appointment. Strong evidence that even the broadest of powers—the general power of appointment\textsuperscript{91}—does not constitute an interest in property and does not bring about such an interest to the donee is indicated by the fact that if the donee fails to appoint (there being no gift over in default of appointment), the "property not appointed passes to the donor or his estate."\textsuperscript{92} Also, at

\textsuperscript{86} Fouke, Powers and the Rule against Perpetuities (1916) 16 Col. L. Rev. 537.
\textsuperscript{87} 1 Simes, op. cit. supra note 3, at 463.
\textsuperscript{88} See Gray, op. cit. supra note 5, § 474.2; 2 Simes, op. cit. supra note 3, §§ 534, 535; Tiedman, Real Property §§ 403, 419 (3d ed. 1906); Simes, Book Review (1942) 55 Harv. L. Rev. 1398, 1400.
\textsuperscript{89} 2 Simes, op. cit. supra note 3, § 535; cf. Tiedman, op. cit. supra note 88, § 403.
\textsuperscript{90} See cases collected, 3 Tiffany, op. cit. supra note 84, § 672; 49 C. J. 1276, n. 20; 41 Am. Jur. 806, n. 12, 15. Accord, Restatement, Property §§ 326, comment a, 327, comment a (1940).
\textsuperscript{91} The donee of a general power of appointment acquires no interest in property by virtue of his unexercised power. Gilman v. Bell (1881) 99 Ill. 144; Ex parte Gilchrist (1886) 17 Q. B. D. 521.
\textsuperscript{92} Restatement, Property § 367(1) (1940). Cf. Id. 365(1), 365(3) as to ineffective appointments and the donee's manifestation of intent to assume full control of the property.
common law the creditors of the donee of a general power of appoint-
ment were unable to force him to appoint the property to them or for
their benefit.\footnote{1}

A special case in which the holder of a power is regarded as having
the equivalent of an interest in property is that involving the cestui
of a spendthrift trust who has been given a power to call for the corpus
at any time. This cestui cannot prevent his creditors from subjecting
the corpus to their claims.\footnote{4} Decisions announcing this rule are often
based upon the theory that such a broad power makes the cestui in
effect the absolute owner of the corpus,\footnote{5} but it would seem that in
reality they support the proposition that "a man must be just before
he is generous"—that it would be against public policy to tolerate
a device designed principally to defeat the claims of creditors.\footnote{6}

The foregoing observations concerning the law of powers supports,
by way of analogy, the conclusion that the power possessed by the
holder of a long option is not an interest in property. It must be con-
ceded, however, that if such power constituted a property interest in
the option holder, it would have to be treated as a contingent interest.
The promise to pay the price, or the tendering of the price, would be
a condition precedent to the exercise of the optionee's power. We
would have no assurance that this condition could be fulfilled at any
given time. Thus, considered as an interest in land, the optionee's
power, being contingent, would fail under the technical Rule.

If the optionee's power does not constitute an interest in land,
does it give him a contingent future interest which is void under the
Rule? In attempting to answer this question, we must recall that a
power is an ability to change legal relations and that the Rule applies
to the remote future interests appointed under a power, not to the
power itself.\footnote{7} If we should assume that the giving of a long option is
equivalent to the limitation of an executory interest in the optioned
land, and that a law similar to that relating to powers of appointment
should apply by analogy, we would have to conclude that the contin-
gent interest of the optionee would be void under the Rule.\footnote{8}

\footnotetext[1]{1} Simms, \textit{op. cit. supra} note 3, § 265, n. 14; 3 Tiffany, \textit{op. cit. supra} note 84, §
710, n. 87. The Restatement expresses the same view. Restatement, Property § 327
(1940).

\footnotetext[4]{4} Griswold, \textit{Spendthrift Trusts} § 447, n. 79 (1936).

\footnotetext[5]{5} Croom v. Ocala Plumbing Co. (1911) 62 Fla. 460, 57 So. 243.

\footnotetext[6]{6} Ullman v. Cameron (1906) 186 N.Y. 339, 78 N.E. 1074.

\footnotetext[7]{7} Lilley's Estate (1922) 272 Pa. 143, 116 Atl. 392, 397; see Gray, \textit{op. cit. supra}
note 5, § 474.1; Foulke, \textit{supra} note 86, at 539. Cf. Gray, \textit{op. cit. supra} note 5, § 474.2.

\footnotetext[8]{8} See Gray, \textit{op. cit. supra} note 5, § 515 (powers of appointment).
It is well established that where there is a general power to appoint by deed (either presently or within the perpetuities period), the remoteness of the appointment is to be determined as of the time of the exercise of the power. This is rationalized sometimes upon the theory that the donee is in a position tantamount to that of an absolute owner, and that upon exercising the power he is in effect appointing his own property.\footnote{99} This rule could also be based upon the theory that there is no possibility of a restraint on the power of alienation, since the donee has the ability to dispose of the appointive property in the same manner as though he were the absolute owner.\footnote{100}

Obviously it is impossible to solve the problem of the Rule's applicability to the long option by proceeding upon the theory that the power of the option holder is similar to that of the donee of a general power of appointment. The power acquired by the optionee, so long as it remains unexercised, does not elevate him to the position of one who has the unrestricted ability to acquire or dispose of the optioned property. As heretofore observed, the promise to pay, or the tender of payment, is a condition precedent to the exercise of the power. Therefore, it cannot be said that the optionee, as optionee, is the virtual owner of optioned land.

Powers of appointment and the powers held by optionees are so different in purpose and nature that there is little value in attempting to find similarities in their legal incidents. The power of appointment is a means employed by property owners to dispose of property to future beneficiaries in such manner as to cope with unpredictable changes in events and in the positions of beneficiaries.\footnote{101} Options to purchase are primarily business devices.

All that the optionee can be said to have is a power to acquire a contract for the purchase of the optioned land. The Rule against Perpetuities should be considered inapplicable inasmuch as the optionee's power does not bring about the limitation of a future interest. But long contract-options often tend to produce suspensions of the practical power to alienate the optioned land, and this may be socially undesirable. Therefore, some other means of regulating such options must be contrived.

\footnote{99} RESTATEMENT, PROPERTY § 391 (1944) ; GRAY, \textit{op. cit. supra} note 5, § 524; Foulke, \textit{supra} note 86, at 637, n. 69.

\footnote{100} See RESTATEMENT, PROPERTY § 373, comment c (1944).

\footnote{101} RESTATEMENT, PROPERTY 1803-1809 (1940).
C. CIRCUMSTANCES UNDER WHICH THE OPTION-PERPETUITIES PROBLEM CAN ARISE

Despite the abundance of case law which is almost uniform in holding that the short-term option to purchase land gives the optionee no property interest, and despite the difficulty of exhibiting any true distinction between the structures of the short-term and the long-term option, either in law or equity, the majority rule is that the holder of a long option has a remote nonvested future interest in property which is void under the technical Rule against Perpetuities. 1

The cases applying this majority rule usually state the Rule against Perpetuities in the language of Gray's well-known statement. 103

1. When the Problem can arise

If, by any possibility, the option holder or his successors in interest may exercise the option after the expiration of the perpetuities period, a problem concerning the applicability of the technical Rule will be presented. Thus, if a non-personal option may be exercised at any time within twenty-five years, or if it extends to the heirs, assigns or other successors of the optionee, or if it may be exercised by a corporation and its successors in interest, and it also appears that the option is not otherwise limited in duration so as not to exceed the perpetuities period, the courts will consider the perpetuities problem.

If long-term options to purchase land were always destructible at will by optionors, it might be urged that the technical Rule should be inapplicable. However, it would be futile to contend that long contract-options are destructible in this manner, for they are irrevocable. Furthermore, the contract-option, if exercised, can be enforced in equity against successors in interest of the landowner-optionor, unless the land has been acquired by a bona fide purchaser. 104

Consistency requires that this same perpetuities issue should be raised in cases wherein the option is appendant to a long-term lease of the land and is exercisable at any time during the term. In this country an option appendant is a covenant that runs in favor of the lessee's assignees 105 and binds successors in interest of the lessor. 106

102 See cases cited supra notes 12, 14.
103 See Gray, op. cit. supra note 5, § 201.
105 1 TIFFANY, op. cit. supra note 52, § 126, n. 82.
106 32 AM. JUR. 283, n. 17, 20.
2. When the Problem cannot arise

It is not a simple matter to state in concise terms just when an option in gross without specified time limit should be deemed a short-term option. Generally options in gross of unstated duration are regarded as short-term options (that is, of duration shorter than the perpetuities period) (1) when they must be exercised, if at all, within a period of a life or lives in being, and not thereafter, and (2) when they must be exercised, if at all, within a reasonable time after inception.

a. Duration based upon Lives in Being

When a land-purchase option contains an express provision permitting it to be exercised only during the lifetime of a named individual—such as the optionor or optionee—its duration is limited necessarily to the period of a life in being, thus precluding the possibility of the perpetuities problem. Options of this type are seldom used.

Another type of option in gross which falls within the “life in being” classification is the option which, by implication, can be exercised only during the lifetime of the optionee. An example of this is the option stipulating that payment shall be made, not in cash, but under some plan which includes a term of credit to the optionee. Occasionally it has been said that an option to buy upon credit is personal to the optionee and therefore nonassignable, but unless assignment is otherwise prohibited, there should be no objection to an assignment of the rights under such option during the lifetime of the optionee. Of course, an acceptance could be made by the assignee only in the event that he should tender the valid obligation of the original optionee, and an attempt by the assignee to effect an acceptance by a tender of his own personal obligation would be ineffective. The death of the optionee should preclude subsequent assignment of the option or, if previously assigned, should preclude its being accepted by

---


"In view of the provisions for installment payments in case the option was exercised and that no deed should be given until 60 per cent of the purchase price had been paid, it cannot be said the lessors intended, as to the option, to deal with anyone whom the lessees might select." Pritchard v. Kimball (1923) 190 Cal. 757, 764, 214 Pac. 863, 866.
the successor in interest of the original optionee. Professor Williston, relying upon the case of Pearson v. Millard, suggests that options of this type should be assignable if "cash is substituted for credit." The validity of this suggestion is doubtful, for it is conceivable that the optionor might prefer the original optionee's obligation (particularly if secured) rather than cash. One writer has expressed the thought that to force the optionor to take the assignee's tender of the full purchase price instead of the obligation of the original optionee is "too substantial an alteration of the optionor's contract." Thus, the option to purchase in which the optionee is to be extended credit upon acceptance must be accepted during the lifetime of the original optionee, if at all. Consequently, it presents no problem as to the applicability of the technical Rule against Perpetuities.

If an option to purchase land is personal to the optionee, the Rule is inapplicable. The option may be made personal either expressly or by implication. For example, if the option provides that it may be accepted by the optionee and "by no other person," its duration is limited to the span of life of the optionee, and it cannot be accepted by his assignee or successor in interest. Again, if the instrument containing the option (such as a lease of the optioned land) has a clause against assignment, and the option covenant is construed as being inseparable from the main contract, an attempted assignment of the option by the optionee is a nullity.

We may infer that an option to purchase land is personal to the optionee when the facts and circumstances surrounding the original transaction show that the contracting parties never contemplated that the benefits under the option should extend to anyone other than the


111 (1909) 150 N.C. 248, 63 S.E. 1053.

112 2 Williston, op. cit. supra note 110, § 415, n. 9.

113 Note (1928) 37 Yale L. J. 990.

114 Myers v. Stone (1905) 128 Ill. 10, 102 N.W. 507.

115 For a case in which a prohibition against subletting was held not to prevent an assignment of the option appendant, see Willenbrock v. Latulippe (1923) 125 Wash. 168, 215 Pac. 330. But cf. Rider v. Ford (1923) 1 Ch. 541. For a case in which an option to purchase for cash was held to be assignable apart from the lease, see Lewis v. Bollinger (1921) 115 Misc. 221, 187 N.Y. Supp. 563.

116 Behrens v. Cloudy (1908) 50 Wash. 400, 97 Pac. 450.
LONG-TERM OPTIONS

named optionee. By way of illustration, if there is a close family relationship between the optionor and optionee, and the option can be exercised upon the optionee's paying a nominal purchase price, it is reasonable to conclude that the option is personal to the optionee, within the contemplation of the parties. In the case of Dodd v. Rotterman, a mother who had conveyed land gratuitously to her daughter was given an option in writing, in which the daughter agreed to reconvey to the mother upon demand. The option did not purport to extend to the heirs, assigns, or successors in interest of the mother. The daughter died. The mother's demand for a reconveyance from the daughter's successors in interest was refused. The mother then brought suit for specific performance of the agreement to reconvey. The defense of the Rule against Perpetuities was interposed. The Supreme Court of Illinois observed that the option was personal to the mother and that her rights under it were non-assignable. Therefore, the Rule was held inapplicable inasmuch as the option would last no longer than the period of a life in being. A similar decision was handed down by the Indiana appellate court in the case of Weitzmann v. Weitzmann, wherein a testator by will gave his son a pre-emption option to purchase certain realty after the termination of the widow's life estate. The option named the son as optionee without mentioning the latter's heirs or assigns. In sustaining the validity of such testamentary option under the Rule against Perpetuities, the court observed that the option was "personal." Obviously the court meant that the option could not exceed the perpetuities period because it extended only to the son, and not to the son's successors in interest.

In addition there is a line of authority which we may designate as the "West Virginia doctrine," which stands for the proposition that an option which does not contain language indicating that the assigns or successors of the optionee are to obtain the benefits thereof is non-

117 (1928) 330 Ill. 362, 161 N. E. 756.
118 "From the character of the transaction, the relation of the parties, their circumstances and conduct at the time, the daughter's covenant must be construed as extending a personal privilege to the mother to resume her ownership of the farm whenever future circumstances might make it seem desirable to her to do so. This privilege was not assignable and would not descend to her heirs. The contract, therefore, did not violate the rule against perpetuities, because the right, being personal to Mrs. Evans, would terminate with her death." Id. at 369, 161 N. E. at 760. Accord: Restatement, Property § 393, comment b (1944).
assignable even though the option requires payment of the purchase price in cash.\textsuperscript{120} The courts following this doctrine have viewed the option as being no more assignable than an ordinary offer unsupported by consideration.\textsuperscript{121} It follows that the perpetuities question should not arise with respect to such options in jurisdictions which follow this exceptional doctrine.

b. \textit{Duration limited to Reasonable Period}

The second type of option which cannot violate the technical Rule is the option which must be exercised within a reasonable time after inception.

It should be mentioned, by way of preface to this phase of the discussion, that under the majority rule the ordinary option in gross to purchase land for cash is assignable regardless of the fact that it is not framed in such a manner as to extend expressly in favor of the heirs, assigns, or successors in interest of the optionee.\textsuperscript{122} This rule controls unless, of course, the option is expressly or impliedly made non-assignable, or personal to the original optionee. In view of the fact that such option is not certain to be exercised within the period of a life in being at the time of inception (that of the original optionor), must we conclude that it violates the Rule against Perpetuities? The answer is "no." Options without stated time limits which do not purport to extend expressly to the heirs, assigns, or other successors in interest of the original optionee are limited in duration to a reasonable length of time; what is "reasonable" depends upon the facts and surrounding circumstances of the particular transaction.\textsuperscript{123}


\textsuperscript{121} An ordinary offer made to one person cannot be accepted by another, regardless of the original offeree's purported assignment. 1 WILLISTON, \textit{op. cit. supra} note 23, § 80, n. 2.


\textsuperscript{123} Campbell v. Warnberg (1931) 133 Kan. 246, 299 Pac. 583; JAMES, \textit{OPTION CONTRACTS} § 222 (1916); CONNELL, \textit{supra} note 16, at 663, n. 70; Comment (1919) 29 \textit{Yale L. J.} 87, 89, n. 9. \textit{Cf.} Smith v. Bangham (1909) 156 Cal. 359, 104 Pac. 689 (conveyance
LONG-TERM OPTIONS

Thus, we find reported cases in which four months, ten months, one year, and four years after the execution of options in gross have been held unreasonable periods in which to exercise the particular options under consideration. In one case a delay of about five and one-half years in attempting to enforce an option in gross barred the optionee's rights therein under the doctrine of laches.

The preemption option which does not expressly run in favor of the heirs, assigns, or other successors in interest of the original optionee, and which expresses no definite time limit within which the optionee must accept after the optionor elects to sell, is governed by a comparable rule. The optionee must express his acceptance within a reasonable time after the optionor elects to offer the land for sale.

No case has been found which even suggests that an option in gross which does not extend expressly to the heirs, assigns, or other successors in interest of the named optionee could be exercised at a period in excess of twenty-one years from the date of the execution of the option. This verifies the suggestion of Professor Simes that a reasonable time within which to exercise such an option in gross would be much less than twenty-one years. That being the case, there is no practical reason for attempting to invoke the Rule against such options.

The cases have applied the technical Rule to the long option in gross which contains language to the effect that the "heirs," "executors," "assigns" or other successors in interest of the named optionee required to make a demand "on demand" after acceptance by optionee. Held: optionee required to make demand within a reasonable time.


Bauer v. Lumaghi Coal Co. (1904) 209 Ill. 316, 70 N. E. 634 (option to acquire a railroad right of way).


See 2 Simes, op. cit. supra note 3, § 512, n. 93.


tionee are entitled to accept the option, there being no other language which might otherwise indicate that its duration is in any way to be limited to a period of less than twenty-one years. Under such decisions the option cannot be regarded as lasting for a reasonable length of time, it being the view that technically, though perhaps not in reality, the parties have expressed an intent that the option should extend in duration for an indefinite period of time in excess of twenty-one years.

D. THE OPTION-PERPETUITIES PROBLEM IN THE COURTS

The student who attempts for the first time to analyze the cases pertaining to the validity of long-term options under the technical Rule against Perpetuities will soon find himself in a state of almost inextricable confusion. If he is unfortunate enough to have undertaken his research without first segregating the cases into the categories of options in gross, options appendant, and preemption options, he will be appalled to discover the following series of contradictory views: The long-term option to purchase land is void under the Rule against Perpetuities because it gives rise to a nonvested future interest (or its equivalent) which is not absolutely certain to vest within the perpetuities period. By no stretch of the imagination can it be considered as giving rise to an equitable interest in land which is presently vested. On the other hand, it does not violate the Rule since it gives the optionee a mere contract interest, not an interest in land. Such options are void because they constitute restraints upon alienation and tend to keep property out of commerce. They are void as against...
public policy. On the contrary they are valid because they do not suspend the absolute power of alienation, nor do they suspend the practical power of alienation if incorporated in long-term leases. But, since long-term covenants to renew leases are always upheld in the United States, consistency demands that long-term options be held valid if appendant to leases.

The unfortunate maze in which we find this particular branch of the law is attributable to several factors, the most outstanding of which is the failure of the courts to express, or perhaps to grasp, the true policy underlying the Rule today. This is evidenced by the willingness of the courts to speak of the Rule solely in terms of remoteness of vesting when they strike down long-term options. As a consequence, we are often led to believe that the sole aim, object, rationale and underlying policy of the Rule is that of prohibiting remoteness of vesting of future interests. The obvious effect of such decisions is to draw attention away from the fact that the Rule is designed, fundamentally and basically, to prevent those unreasonable forms of indirect suspensions of the power of alienation which are made possible by the creation of remote future interests. Another source of confusion lies in the fact that the courts persistently refuse to explain why they regard long-term options as giving rise to nonvested future interests in land, and yet generally regard short-term options as capable of creating no property interests in favor of option holders. A third perplexing factor is found in the tendency of the American decisions to uphold long-term options appendant to leases while striking down long-term options in gross. This becomes particularly disconcerting to the student of the subject when he recalls that in legal structure the long-term option appendant to a lease and the long-term option in gross are practically the same.

---


139 See cases collected in Berg, Long-Term Options and the Rule against Perpetuities (1949) 37 Calif. L. Rev. 1 at 18, n. 88, 90: Keogh v. Peck (1925) 316 Ill. 318, 334, 147 N. E. 266, 272.

140 The following cases appear to support the proposition that long-term options appendant do not suspend the practical power of alienation: Weber v. Texas Co. (C. C. A. 5th 1936) 83 F. (2d) 807. (preemption option to purchase a reserved 1/2 royalty interest at the market price); Hollander v. Central Metal Co. (1908) 100 Md. 131, 71 Atl. 442.


142 "It is difficult to perceive any substantial difference between a purchase-option covenant contained in a deed of lease and a similar covenant in other deeds of con-
Notwithstanding the absence of clear analysis in cases involving the perpetuities problem as applied to long-term options, it seems possible to reconcile most of the decisions if we approach the solution to the problem in the light of the fundamental version of the Rule. In making this analysis we may assume that the holder of a long-term option has a nonvested future interest in the optioned land. Let it be recalled, of course, that in the writer's opinion consistency requires that the long-term option be regarded as creating no interest in property in and of itself. With this in mind we may now examine the cases pertaining to the long-term option in gross.

1. The Long-Term Option in Gross and Suspension of the Practical Power of Alienation

The relationship between the price stipulated in the option and the current market price of the option land determines whether or not the option may cause a suspension of the practical power of alienation. If the option price is low as compared with today's market price of the land, the existence of the option will not constitute an appreciable obstacle to an alienation of the optioned land. A prospective purchaser need deal only with Optionee, who in turn can exercise his option, acquire title from Owner and convey to the new purchaser at a profit. Rarely would the option bring about a restraint on alienation under these circumstances.

But, if the price stipulated in the option is approximately the same as today's market price, or higher, the existence of the option tends to suspend the practical power of alienation. This suspension has a potential duration measured by the entire span of the option contract. One writer disagrees with this last conclusion, and asserts that even the option to purchase at a price that is very high "according to current quotations" does not tend to restrain alienation because a prospective purchaser need deal only with Optionee, who in turn can exercise his option, acquire title from Owner and convey to the new purchaser at a profit. Rarely would the option bring about a restraint on alienation under these circumstances.

1 Unless this has reference to the absolute power of alienation (which is never suspended by an option, regardless of its possible duration), such conclusion is not in accord with reality. An option in gross to purchase at a price higher than today's market has great potentialities for restraining alienation of Blackacre in the practical or  

Comment (1925) 35 Yale L. J. 213, 216-217.

143 Langduttg, Options to Purchase and the Rule against Perpetuities (1931) 17 Va. L. Rev. 461 at 469-470.
factual sense. A prospective purchaser, X, would desire, naturally, to pay no more than the prevailing market price for Blackacre. He would be reluctant to purchase from the owner in the usual course of events, because we can assume that the owner would advise the prospective purchaser concerning the optionee's right. X would foresee immediately that if the improvements should bring the total value of the land to a figure in excess of the option price, the optionee would find it profitable to exercise his option, thus depriving X of his land and causing him a loss to the extent that improvements bring the market value to a figure in excess of the option price.

In our hypothetical case is it absolutely certain that the land can be sold at its actual market value if the prospective purchaser deals only with the optionee? The answer is obvious. The optionee will not be so foolish as to exercise his option and suffer a loss by selling to the new purchaser at today's lower market price. The only alternative is to deal with the owner and to attempt to obtain a release of the option at a reasonable figure. But at this point the possibility of a true practical restraint upon the alienation of Blackacre becomes apparent. The optionee may see fit to demand an unreasonable price for his speculative option. This, in all probability, may cause the attempted alienation of Blackacre to fall through. This same restraint upon alienation will, upon further reflection, be found to have either a real or a potential existence in cases in which the option price is approximately the same as today's market price of the land. As in the previous illustration, it is clear that the optionee may not wish to give up the speculative value of his option for any sum other than an unreasonable amount, and the prospective purchaser will be reluctant to buy from the owner while the option is outstanding.

The law would be in a chaotic state with respect to this particular problem if current fluctuating market prices were to be the criteria for determining the validity of long-term options in gross. It must be conceded that the market price of land has ever-present potentialities for change. That being the case, it also follows that the long-term land-purchase option which expresses a fixed amount as the price to be paid upon its being exercised may possibly bring about a restraint upon the practical power of alienating the optioned land. Even though the option may not in its inception express an option price that is higher than the market price, there is always the danger that the

144 Professor Gray foresaw this danger. See Gray, op. cit. supra note 5, § 268.
market price will shift downward to a point at which it might be substantially lower than the option price.

Having previously assumed, but not conceded, that the long-term option to purchase land brings about a future interest in land in favor of the optionee, it now becomes apparent why practically all of the decisions involving long-term options in gross have held that such options violate the Rule against Perpetuities. In all probability these decisions applied, in effect, the "fundamental" version of the Rule—that which regards the Rule as one designed to strike down remote future interests that produce restraints on the practical power to alienate property. The final installment of this article, therefore, will analyze the option-perpetuities cases in the light of the fundamental Rule against Perpetuities.

(To be concluded)