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Long-Term Options and the Rule against Perpetuities--Part I

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**INTRODUCTION**

Some thirty-three years ago a law review commentator admonished his readers in this ominous fashion: “Before we pull the heavens down, let us sit and think a little.”¹ This warning was issued at the conclusion of a brief note dealing with the applicability of the Rule against Perpetuities to “unlimited”² options to purchase property. Since then the courts³ and legal scholars⁴ have devoted more than a “little” thinking to this particular subject, but it is debatable whether their efforts have led to a clear solution of this most vexatious problem.

It would be presumptuous for the author to suggest that he has discovered an analysis that will put the problem to rest. Such an achievement probably cannot be claimed until the meaning of the Rule against Perpetuities has been freed of the fog of obscurity which now surrounds it. But a brief study of the background of the “perpetuities” subject and of its principal present-day versions, in conjunction with a study of the structure and purposes of the long-term land-purchase option, may in an appreciable manner serve to chart a course for future handling of the problem. Such a study should dispel some of the confusion that permeates the cases wherein the problem has been considered in the past.

It is difficult to share what seems to have been the optimism of a Maryland Court of Appeals judge who once said, “The rule against

² Two options were under discussion. The first was a reserved perpetual option in gross, and the second a reserved 99 year option in gross. Both were held void in Woodall v. Bruen (1915) 76 W. Va. 193, 83 S. E. 170.
³ The cases will be listed in a later installment of this paper.
perpetuities is as clear and distinct as any other rule which has ever been declared by the courts . . . . no difference of opinion exists as to the terms of the rule." 5 Under the present state of the law it seems far wiser to adopt the humble attitude of another writer who observed, "The rule against perpetuities is one upon which the authorities refuse to come to any semblance of agreement as to its reason for existence." 6

Professor Gray was willing to isolate the modern Rule against Perpetuities and to assert that it is a rule directed only at the destruction of nonvested future interests which by any possibility might not vest within the permitted period of postponement. 7 He did concede, however, that it was one of two important systems adopted by the common law for furthering the alienability of property, the other rule being termed the "rule against restraints on alienation." 8 Modern experts prefer to point to Gray's "Rule against Perpetuities" (or the "rule against remoteness," as it is sometimes described 9) as one of several rules against perpetuities, all of which have as their ultimate aim the fostering of the alienability of property. 10 "Alienability," then, is the key word of the perpetuities concept, and it is believed that a brief sketch of the historical background of the subject will lend sup-


5 Thomas v. Gregg (1892) 76 Md. 169, 174, 24 Atl. 418, 419.
6 Langeluttig, supra note 4 at 461.
8 Id. § 2.1.
9 Id. § 2.
10 Professor Simes discusses the Rule against Perpetuities under the heading of "Indirect Restraints on Alienation." 2 Simes, The Law of Future Interests c. 30 (1936).

"Limitations which create perpetuities are invalid; a perpetuity arises from a serious, indirect restraint on alienation which may continue for more than a life or lives in being and twenty-one years after the creation of the interest involved; nonvested future interests and limitations which make private trusts indestructible are indirect restraints within the meaning of this rule." 2 Id. § 490.

"Restore to Perpetuities whatever concerns its rightful kingdom, the free alienability of property, and something intelligent rather than merely technical will result with regard to the many devices by which property is tied up." Bordwell, Alienability and Perpetuities VI (1940) 25 Iowa L. Rev. 707, 736.
port to the assertion that there were and still are several rules directed against perpetuities, these rules having been designed to prevent property from being rendered inalienable for periods which the law deemed excessive.

The history of the common law with respect to the ownership and transfer of property presents a most interesting picture of a contest between property owners, on the one hand, who desired to keep future ownership of their property within defined channels by using devices which tended to restrain or suspend the alienability thereof, and the courts, on the other hand, who sought to assure complete and free alienability of property. Out of this fascinating struggle evolved a series of rules designed by the courts to promote alienability.

A. ALIENABLEITY VERSUS PERPETUITY

In the early period of the common law, real property was not fully alienable as against heirs and overlords. Thus, a conveyance to "A and his heirs" at that time did not create in A what is now known as a fee simple. But about the year 1200 it was decided that in such case A could convey the fee in his own right, without consent of expectant heirs. This appears to be our first indication that the common law courts were willing to assist in fostering alienability of property.

With respect to the interests of overlords, we should recall that prior to 1290 alienation was effected either by substitution or subinfeudation. Both could harm the overlords, so it is probable that conveyance could not be made without their consent. However, this problem was resolved in 1290 by enactment of the statute Quia Emptores, under which subinfeudation was abolished and the owner of the fee simple acquired full power to alienate.

Soon a new restraint was put into operation. Gifts of the fee to "A and the heirs of his body," or the like, became numerous. Presumably, these gifts were designed to keep property within restricted lines of heirs. The king's courts promptly classified such settlements as conditional fees; that is, the courts concluded that if A had an heir born alive, he fulfilled the condition, and thereafter A could alienate a fee simple. This is another illustration of furtherance of alienability by the early common law courts.

11 3 Holdsworth, History of English Law 76 (3d ed. 1923).
12 Gray, op. cit. supra note 7, § 20.
13 18 Edw. I, c. 1 (1290).
14 2 Pollock and Maitland, History of English Law 16-17 (2d ed. 1898).
15 2 Id. 17.
But landowners who desired to keep their property in designated lines of succession had turned elsewhere for relief. In 1285 they succeeded in obtaining enactment of the statute *De Donis Conditionibus.* This made possible the "estate tail," and by a series of decisions it became settled that when a conveyance was made to "A and the heirs of his body," A could not convey a fee simple. Furthermore, the restraint extended to all heirs of the body in indefinite succession. It is interesting to note that the interest in the nature of the unbarrable entail was perhaps the first to be designated as a "perpetuity."  

The courts finally sanctioned a plan for destroying the entail. This was known as the common recovery. Basically, it was a combination of the doctrine of warranty and of a fictitious action, the legal effect of which was to enable the tenant in tail to convey a fee simple and to give the remaindermen and reversioners in tail a worthless judgment in exchange. *Talatarum's Case,* decided in 1472, is often referred to as the first court decision wherein the common recovery was given judicial sanction, but possibly the contrivance was given court approval as early as 1341.  

Those who still desired the equivalent of the unbarrable entail inserted cesser and forfeiture clauses which were to become effective in the event the tenant in tail should suffer a common recovery or otherwise try to bar the entail. But *Mildmay's Case,* and perhaps *Corbet's Case,* held these clauses void. Other comparable devices suffered a similar fate in the courts.  

The courts sensed no danger of perpetuities in contingent remainders because these interests were readily destructible. The contingent

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16 13 Edw. I, c. 1 (1285).  
17 2 Smiles, *op. cit.* supra note 10, § 479.  
18 The common recovery is described in 3 Holdsworth, *op. cit.* supra note 114, 118-119.  
19 (1472) Y. B. 4 Edw. IV, f. 19, pl. 25.  
22 (1606) 6 Co. 40a, 77 Eng. Rep. 311.  
23 (1599-1600) 1 Co. 83b, 76 Eng. Rep. 187.  
24 For example, Mary Portington's Case (1614) 10 Co. 35b, 77 Eng. Rep. 976 held invalid a devise which provided that upon any attempt to bar the entail, the lands should go over to the next tenant in tail in the same manner as though the present tenant had died without an heir of the body. The court made this revealing statement: "... these perpetuities were born under some unfortunate constellation; for ... in all the courts in Westminster, never had any judgment given for them, but many judgments given against them ... and from these fettered inheritances the freeholds of the subject are thereby set at liberty, according to their original freedom."
remainder required a particular estate of freehold for its support. It had to vest immediately upon termination of the particular estate or it failed. It was a simple matter to destroy a contingent remainder by the life tenant's tortious conveyance or by the surrender of his interest to the holder of a vested remainder created under the same instrument, by a forfeiture of the particular estate, or by a merger of the particular estate with a larger estate.

Professor Holdsworth tells us that the courts rigidly adhered to the rule that the contingent remainder must vest upon the termination of the precedent estate because they foresaw in contingent remainders the danger of the creation of perpetuities. Professor Radin regards the contingent remainder as comparable to the fee tail, in that both were devices employed to "found families and secure their economic position." He prefers the view that the royal courts' early objection to the contingent remainder was based upon the Crown's dislike of concentration of power in great families, rather than upon an economic theory against restrictions on alienation. But whatever motive the landlord had in creating the contingent remainder, he attempted to perfect his purpose through a future interest which was inalienable when created, and which he hoped would receive the protection of the royal courts.

The creation of contingent remainders in unending succession is now beyond possibility in England because of the operation of the rule of *Whitby v. Mitchell* and because legal contingent remainders are subject to the modern Rule against Perpetuities. In the United States it has been held that remote contingent remainders are within the Rule.

The modern Rule against Perpetuities, or the "rule against remoteness," as it is sometimes designated, owes its origin to the future interest known as the "executory interest." At the beginning of the

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26 Williams and Eastwood, *Real Property* 228 (1933).
27 7 Holdsworth, *op. cit. supra* note 21, at 105 n. 3, 195-196.
29 (1889) 42 Ch. D. 494, (1890) 44 Ch. D. 85.
30 *In re Ashforth* [1905] 1 Ch. 535.
31 2 Simes, *op. cit. supra* note 10, at 366 n. 47.
32 The executory interests are defined in Gray, *op. cit. supra* note 7, §§ 795-798, 800-801. The limitation by which an executory interest is created is known as the "executory limitation." Tiffany, *Real Property* § 247 (abr. ed. 1940).
seventeenth century it was established in two important cases\textsuperscript{38} that an executory interest was not destructible. In this connection it should be noted that the courts had ruled that no interest should be construed as an executory limitation if by any possibility it could be construed as a contingent remainder.\textsuperscript{34} We have seen that contingent remainders, being destructible, were not viewed as potential sources of perpetuities. But executory interests could not be construed as contingent remainders, so the courts perceived that if they did not formulate an all-inclusive rule to keep these new future interests within reasonable bounds, landowners would have the power to control the ownership, use, and disposition of their lands far into the future.

It was in 1682 that the English Court of Chancery, speaking through Lord Chancellor Nottingham in the famous \textit{Duke of Norfolk's Case},\textsuperscript{5} laid the foundation of what is known as the "modern" Rule against Perpetuities. The device there under consideration was an executory limitation contained in a trust. In brief, the settlement was this: Settlor conveyed to trustees for a term of 200 years for the benefit of Henry and the heirs male of his body. If settlor's son Thomas died without issue male in the lifetime of Henry, or if the earldom should descend upon Henry, then the land should go to Charles in tail for the balance of the term. The court upheld the executory interest in favor of Charles and laid down the principle that the validity of such executory interest depended upon the time within which it would vest. The ultimate permissible duration of the postponement of vesting was not determined, but it was decided that if the limitation was so framed that the future interest would have to vest, if at all, within the period of a life in being (i.e., a life used as the measure of the postponement of vesting), then the future interest was valid. The decision was upheld in the House of Lords.\textsuperscript{36}

By 1699 it had been decided in England that if the future interest was certain to vest within the period of several lives in being, it was valid.\textsuperscript{37} Later, any number of present lives reasonably capable of being traced could be used to measure the postponement of vesting.\textsuperscript{38} In 1736 a future interest which was certain to vest not later than at


\textsuperscript{34} 7 Holdsworth, \textit{op. cit. supra} note 21, at 126-128, 195.

\textsuperscript{35} (1682) 3 Ch. Cas. 1, 22 Eng. Rep. 931.

\textsuperscript{36} (1685) 3 Ch. Cas. 54, 22 Eng. Rep. 963.

\textsuperscript{37} Scatterwood v. Edge (1699) 1 Salk. 229, 91 Eng. Rep. 203.
the expiration of a life in being and the minority of the person who was to acquire the interest was held good. In Cadell v. Palmer a gross period of twenty-one years after the termination of lives in being was finally established as the maximum permissible period of postponement of vesting, except that periods of gestation have been added thereto. The modern Rule against Perpetuities is now most commonly stated in the form in which it was phrased by Professor 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 interest." Hereafter, a future interest which is not certain to vest within the period mentioned in this "modern" Rule will be designated as a "remote" interest.

It must be emphasized that the often quoted "modern" Rule amounts to the statement of mere rule, not reason. Much of the confusion surrounding the nature of the Rule against Perpetuities can be attributed to the fact that too much attention is focused upon the statement of this "modern Rule" and too little upon the fundamental reasons underlying all rules which are directed against perpetuities. Remoteness of vesting is, in and of itself, a mere neutral and rather meaningless factor. If a reason for condemning remote future interests can be discovered, then the "modern" Rule will become somewhat intelligible.

In commenting upon the Duke of Norfolk's Case Professor Holdsworth observed, "This case thus laid down the root principle of the modern rule against perpetuities—the validity of an executory interest depends upon the remoteness of the date at which it is limited to vest." This is typical of the tendency to place shadow before substance in applying the Rule against Perpetuities. The "root principle" of all rules directed against perpetuities—modern as well as old—is that property should not be rendered inalienable for an unreasonable

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39 Thellusson v. Woodford (1805) 11 Ves. 112, 32 Eng. Rep. 1030. The English courts have gone to the extreme by upholding a postponement of vesting measured by the lives of all the lineal descendants of Queen Victoria living at the testator's death. In re Villar [1928] Ch. 471, [1929] 1 Ch. 243. But a postponement measured by the lives of all persons living at the death of the testator was held void for uncertainty. In re Moore [1901] 1 Ch. 936.


42 2 SIME, op. cit. supra note 10, § 492.

43 GRAY, op. cit. supra note 7, § 201. For the Restatement's definition of the Rule see RESTATEMENT, PROPERTY § 370 (1944).

44 7 HOLDSWORTH, op. cit. supra note 21, at 225.
period of time. In all probability Professor Gray recognized this as the fundamental reason underlying his statement of the Rule, and in fairness to Professor Holdsworth it should be pointed out that he too considered the enhancement of alienability as the main objective of all rules directed at perpetuities.

The ultimate purposes which the Rule against Perpetuities seeks to accomplish are varied. The draftsmen of the Restatement of Property, in discussing the rationale of the Rule, lay emphasis upon these purposes: (1) preventing the current owner from prolonging control over the devolution and use of the property indefinitely into the future; (2) contributing to the “probable utilization of the wealth of society” by prohibiting remote future interests from incumbering present interests, thereby encouraging investment, development, and transfer of property; (3) serving to “keep property responsive to the meeting of the exigencies of its current owners” by preventing too great diminutions in the sale value of present interests. Professor Leach has stated that the Rule “seeks to prevent the stagnation of capital assets of the community in the hands of those who cannot or will not put them to their greatest social utility . . . .”

Whatever the ultimate purposes of the Rule may be, it is quite clear that its one immediate purpose is that of destroying executory limitations which may possibly suspend the power of alienation beyond the period tolerated by law. The meaning of the term “power of alienation” will be discussed later in this article.

44 “. . . from the Duke of Norfolk’s Case until the present time courts and lawyers have thought of a perpetuity as an inalienable interest.” 2 Sime, op. cit. supra note 10, at 344. “The rule against perpetuities is a rule of public policy resting upon the view that it is socially undesirable that the alienation of property be fettered for long periods of time.” Fiduciary Trust Co. v. Mishou (1947) 321 Mass. 615, 623, 75 N.E. (2d) 3, 9.

45 See Gray, op. cit. supra note 7, § 2.1.

46 “We have seen that by means of contingent remainders, shifting and springing uses, executory devises and powers of appointment, it had become possible so to settle property that it must, for an indefinite period, continue to be enjoyed by a series of limited owners, no one of whom had complete powers of alienation.” 7 Holdsworth, op. cit. supra note 21, at 193.

47 Restatement, Property (1944) Introductory Note 2129-2133.

48 Leach, Powers of Sale in Trustees and the Rule against Perpetuities (1934) 47 Harv. L. Rev. 948, 952.

49 “There is . . . a wide difference between a suspension of the power of alienation, and a straight restraint or express denial of the right to alienate. The former creates a limited present interest and a remote future interest which together produce inalienability. The latter attempts to create a complete present interest and then, frankly and bluntly, to declare it inalienable.” Gill, The Practical Side of Perpetuities (1927) 61 Am. L. Rev. 751, 758.
Regardless of the forms which "perpetuities" have assumed, the immediate object of each has been to render property inalienable. Thus, in the relatively early period of English legal history, when the owner of a great estate desired to provide economic security for succeeding generations within a family line bearing his name, the unbarrable entail was attempted. So also, when the landowner employed the device of creating an indefinite succession of contingent remainders, his object was to "tie-up" ownership in the designated family line by what he believed to be an effective restraint upon the power of the tenant in possession to alienate.

Finally, as we have observed, the executory interest presented a possible means of making property almost permanently inalienable when it was held to be indestructible. But the courts, always on the alert to destroy the perpetuity, met this new and indirect restraint upon alienation with the new and "modern" Rule against Perpetuities.

1. Alienability, the Key Factor

We shall see that the word "alienability" becomes susceptible of more than one meaning when we seek to determine the validity of the perpetual or long-term option under the Rule against Perpetuities. Property may be alienable in law and yet not alienable in fact. To illustrate: A owns Blackacre. If he is an adult, we can say, in the majority of cases, that Blackacre is legally alienable because A usually has the absolute legal power to convey. But if A happens to be non compos mentis, a minor, a joint owner, or a person who is so obstinate that he refuses to convey, we can conclude that Blackacre is not alienable—at least not in a practical sense. Which aspect, then, of the term "alienability" is the one underlying the various rules against perpetuities, and in particular, the "modern" Rule? Does the Rule have as its object the destruction of remote nonvested interests which restrain or suspend the legal power of alienation, or is it much broader in scope? That is, does it go to the extent of destroying such future interests if they suspend, or tend to suspend, the practical or factual power of alienation? The answers to these questions are of highest importance when we consider the long-term option in light of the Rule.

a. Legal or Practical Alienability?

There is no indication that, in the interval between the inception of the modern Rule against Perpetuities and the latter half of the nineteenth century, the courts were called upon to give a precise explanation of just what was meant by the "alienability" which the Rule
seeks to promote. If the holder of an executory interest were not in being or were otherwise unascertained at the time of the creation of the future interest, it would be obvious that the mere existence of such future interest would constitute not only a practical restraint upon the alienability of the property, but also a legal restraint, for it would be impossible as a matter of fact and impossible in a legal sense to bring about a transfer of an absolute ownership of the property. A great many of the settlements or devices attacked under the Rule have involved future interests of the type in which the takers were not presently identified or were not identifiable until the interests were to take effect. This may explain why it became the acceptable practice to state the modern Rule in terms of a Rule prohibiting remoteness of vesting. Since there was the possibility that the property would be both legally and practically inalienable beyond the prohibited period, it was unnecessary to state as a preamble to the Rule that such remote future interests were inalienable interests. The dictates of simplicity called for a concise statement of the Rule in which there would be an indication of the exact period of time during which the law would allow these indirect restraints on alienation to endure. The result was a formula stated in terms of a prohibition against remoteness of vesting. This simplified statement of the Rule created confusion, for it obscured the primary purpose of the Rule—that of striking down remote future interests which tend to create unreasonable restraints upon the power to alienate property—and stressed only an incidental or “secondary” purpose—that of preventing remoteness of vesting.

We are referred to many decisions, particularly those rendered during the period in which the Rule against Perpetuities was taking shape, all of which stress the point that property should not be made "inalienable" nor "tied up" for longer than the permitted period. These are helpful in that they announce the broad policy underlying the modern Rule, but they are of little assistance in answering our

50 "Since there is no ascertainment of the ultimate taker until the arrival of that future date, the alienability of the affected property is suspended until that future date. In all such cases it would be equally true to say either that 'alienability has been diminished', or that there has been a 'suspension of the power of alienation', or that there has been a 'postponement of vesting'." Rep. N.Y. Law Revision Comm. (1936) 511-512.

51 "A perpetuity is a limitation of property which renders it inalienable beyond the period allowed by law . . . . A secondary meaning is 'an interest which will not vest till a remote period'." Shipman, J., in Duggan v. Slocum (C.C.A. 2d 1899) 92 Fed. 806, 808.

52 See Fox, The Criticism of Cases (1892) 6 Harv. L. Rev. 195-196.
inquiry as to the specific meaning of the word "alienability" as applied to the modern Rule.

It is interesting to observe that the source of the modern Rule—the Duke of Norfolk's Case—dealt with the validity of a future interest in favor of a person who was in existence and identified when the interest was created. The fact that the future interest was at all times releasable seems to have concerned neither counsel nor court, for the case proceeded to a decision which upheld the future interest upon the ground that it was not too remote. There was absolute certainty that it would vest within the period of a life in being. Long v. Blackall is another case in which a releasable future interest was upheld simply because it was not too "remote." There were other cases decided in England toward the close of the eighteenth century wherein nonvested future interests which were releasable from the time of inception were held void because of violating the Rule. The fact that these interests were releasable was not discussed in the cases.

Since the primary purpose of the Rule against Perpetuities is that of promoting the alienability of property, and if by the word "alienability" is meant the legal power of alienation, it is difficult to understand why a remote future interest is void if it is presently releasable or is certain to become releasable within the perpetuities period. The common law permitted holders of future interests to release to those whose estates would be divested by the vesting of these future interests, so whenever they were held by existing persons, or when it was certain that the holders of such interests were to be ascertained within the perpetuities period, there was unquestionably the legal power to alienate the property free of the future interest within the period permitted by the Rule.

Perhaps in these relatively early cases lies hidden a germ of the idea that the "alienability" which the Rule seeks to promote is that

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53 Supra note 35.

54 To the effect that a contingent future interest was releasable at common law, see Lampet's Case (1613) 10 Co. 46b, 77 Eng. Rep. 994. By Statute, 8 & 9 Vict. (1845) c. 106, § 6 (1845) future interests were made alienable. In the United States future interests are alienable in all but five or six states. This has been brought about either by judicial decision or by statute. See 3 Simes, op. cit. supra note 10, c. 43; Roberts, Transfer of Future Interests (1932) 30 Mich. L. Rev. 349.


of a practical or factual nature. Those who accept this version of the Rule's primary purpose point to the fact that a releasable or alienable nonvested future interest is normally of a very speculative value. Since it is of uncertain value, the prospective purchaser of the interest is usually unwilling to pay more than a nominal sum. On the other hand, the holder of the interest has little to lose by refusing to sell at a nominal sum. Consequently, there is always the danger that the property which is subject to the nonvested future interest will become inalienable "in fact" or in the "practical" sense.

During the formative period of the Rule, and indeed until recent years, there were those who insisted that the main objective to be accomplished in striking down remote future interests was that of assuring the legal or "absolute" power of alienation. The point of conflict between this and the view of those who regarded the Rule as designed to prohibit nonvested future interests which might suspend the practical power of alienation beyond the perpetuities period centered around the remote but alienable future interest.

Those who believed that the Rule was aimed at promoting the legal power of alienation saw no perpetuity occasioned by limitations of remote future interests in favor of existing persons. The holders of such interests could always release and thereby place absolute ownership in the grantee. Those who adopted the other version of the "alienability" concept admitted the existence of this legal power of alienation, but objected to the improbability of alienation from a practical or factual point of view.

There was considerable legal sentiment in England in the early nineteenth century favoring the view that the Rule against Perpetuities was designed to prohibit only suspensions of the legal power of alienation. Apparently this was attributable to the broad language appearing in the earlier cases. For example, in Scatterwood v. Edge, it

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57 That Professor Gray fully understood this is discernible from this language: "... the Rule has been extended so as to cover all future interests whether alienable or not, and this extension, though not a logically necessary consequence of the establishment of the Rule, is now well settled, and it is a reasonable extension. If there is a gift over of an estate on a remote contingency, the market value of the interest of the present owner will be greatly reduced, while the executory gift will sell for very little, or in other words the value of the present interest plus the value of the executory gift will fall far short of what would be the value of the property if there were no executory interest. Further, if the owner of the present interest wishes to convey an absolute fee, the holder of the executory gift can extort from him a price which greatly exceeds what it ought to be. ..." Gray, op. cit. supra note 7, § 268.


59 Supra note 37.
was said: "... these limitations make estates unalienable, every executor devise being a perpetuity as far as it goes, that is to say, an estate unalienable, though all mankind join in the conveyance." The report of Washborn v. Downs contains this language: "And in the debate of this Case it was said that a Perpetuity is, where if all that have interest, join, and yet cannot bar or pass the Estate."60 Other relatively early English61 and some American62 cases contain language of similar import.

Consequently, it is not surprising to find an English Chancery case, Avern v. Lloyd,63 wherein the view was taken that the Rule was designed to avoid remote suspensions of the absolute (legal) power of alienation. An examination of the facts discloses that the ultimate limitation in the testator's will created a future interest that was not certain to vest within the permitted period. Despite the remoteness of the future interest, the court held that it did not violate the Rule. In answer to the contention that the survivor named in the will had a remote nonvested interest which should fail under the Rule, the court pointed to the fact that such interest was alienable by joint action of the life tenants. On this issue the opinion indicated that "Each of the tenants for life ... had as much right to alien his contingent right to the absolute interest as to alien his life estate," and that the one taking from the surviving life tenant would become the absolute owner whenever his assignor became survivor. Thus, the court decided, not by inference, but by a holding squarely upon the point, that a remote nonvested future interest would not violate the Rule, providing it was alienable or certain to become alienable within the permitted period.

Professor Gray noted that Edmondson's Estate,64 which is reported immediately after Avern v. Lloyd, is a case in which an interest in favor of the survivors of a class was held too remote, even though the interest would have been alienable within a life in being.65 He also listed three other cases66 in which remote future interests were held

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60 (1671) 1 Ch. Cas. 213, 22 Eng. Rep. 767.
62 Proprietors of the Church in Brattle Square v. Grant (Mass. 1855) 3 Gray 142, 152; French v. Old South Society (1871) 106 Mass. 479, 488.
63 (1868) L. R. 5 Eq. 383.
64 (1868) L. R. 5 Eq. 389.
65 Gray, op. cit. supra note 7, § 277.
void regardless of their alienability within the perpetuities period. Undoubtedly Gray was correct in his analysis of these cases, but it should be observed that the courts were not urged by the litigants to uphold the future interests because of their alienability. It is commonly known that courts are reluctant to decide cases upon issues that have not been presented by the parties.

A few years prior to the decision of Avern v. Lloyd, the Court of Exchequer passed upon a similar problem in Gilbertson v. Richards, wherein a future interest in an incorporeal hereditament—an annual rent charge of £40—had been limited by the mortgagor to arise in favor of himself and his heirs in the event that the mortgagee should enter into possession of the lands under a power contained in the mortgage. The exercise of the power was not confined to the limits of any life or lives in being, nor was it restricted to any period in gross. Thus, considered as a nonvested future interest in property, the rent charge was clearly remote. But the court, viewing the modern Rule against Perpetuities as one directed solely against remote suspensions of the absolute or legal power of alienation, upheld the rent charge. This view was expressed in these unmistakable terms: "It is vested in Thomas Billings and his heirs. He or his heirs may sell it, or release it, at their pleasure . . . A perpetuity arises when a rent is granted to a person who may not be in esse until after the line of perpetuity be passed; but when the estate in the rent is vested in an existing person and his heirs in fee simple, who may deal with it at his . . . pleasure . . . we think it is not subject to the objection of remoteness notwithstanding that its actual enjoyment may depend upon a contingency which may never happen, or may happen at any time however distant." An appeal was taken to the Court of Exchequer Chamber, where the decision was affirmed. The appellate court did not lend its entire support to the decision of the lower court, but it did not overrule the ratio decidendi of the Exchequer. It treated the limitation which created the rent charge as comparable to a transaction involving a power of sale in a mortgagee, "which, as incidental to his estate, is held not to be within the Rule as to Perpetuities." But significant is this observation of the Exchequer Chamber: "There may be considerable doubt

68 Professor Gray advanced the views that this rent charge might be considered either as a mere contract obligation, or as a remedy, and not as a right in property. See Gray, op. cit. supra note 7, § 273.1.
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also on the point raised by counsel, whether the Rule as to Perpetuities applies to a case like the present where the party who or whose heirs are to take is ascertained and who can dispose of, release, or alienate the estate.\(^7\)

As late as 1883, Lord Blackburn, in *Witham v. Vane*,\(^2\) expressed the opinion that it was impossible to have a perpetuity when there existed a present power to alienate the remote interest.

One of the earliest cases expressly passing upon the validity of a perpetual option to purchase land also advanced the view that the Rule against Perpetuities was concerned solely with preventing suspensions of the legal power of alienation. The case, *Birmingham Canal Co. v. Cartwright*,\(^3\) was decided in the Chancery Division. The court, speaking through Fry, J., concluded that a perpetual preemption option in gross to purchase reserved minerals did not violate the Rule. At least one of the reasons underlying the decision seems to be this: at no time did the option suspend the legal power to alienate the fee; at any time an absolute conveyance of a fee simple could have been perfected upon a release or assignment of the option together with a conveyance by all those who held interests in the property; at no time did the existence of the option cause an abeyance of the legal power to alienate. Professor Gray concedes that this was “a clear decision that an executory interest which could be released was not within the Rule against Perpetuities.”\(^4\)

But the early part of the nineteenth century saw the inception of a doctrine which stressed another meaning of the “alienability” which the Rule seeks to advance. Those who adhered to this different view believed that the modern Rule was designed to promote the practical alienability of property. This version would condemn the remote future interest even though presently alienable. What seems to be a pioneer pronouncement of this thought is contained in a passage of Sanders on *Uses and Trusts*. In the first American edition of this work, published in 1830, we find this passage: “It is said in the case of Washbourne *v.* Downes, 1 Cha. Ca. 23. that ‘A perpetuity is where, if all that have an interest join, yet they cannot bar or pass the estate’; and

\(^7\) *Id.* at 459, 157 Eng. Rep. at 1261.

\(^2\) *Challis*, REAL PROPERTY 440, 458 (3d ed. 1911) (H. L. 1883). “The person who is entitled to receive this sixpence a chaldron ... and the person who has now got the estates in question ... can come to an agreement for releasing it ... The parties could settle the matter that way; it is no perpetuity.”

\(^3\) (1879) 11 Ch. D. 421.

\(^4\) *Gray*, *op. cit. supra* note 7, § 274.
in the case of Scattergood v. Edge, 1 Salk. 229, that 'every executory devise is a perpetuity so far as it goes; i.e., an estate unalienable, though all mankind join in the conveyance.' But these definitions of a perpetuity are not accurate. If an estate be limited to the use of A. and his heirs, but if B. should die without heirs of his body, then to the use of C. and his heirs, the limitation to C. and his heirs would be void, as tending to a perpetuity. Yet C. might, no doubt, release or pass his future estate; and with the concurrence of the necessary parties, the fee-simple might be disposed of, before there was a failure of issue of B. A perpetuity may, with greater propriety, be defined to be a future limitation, restraining the owner of the estate from alienating the fee-simple of the property, discharged of such future use or estate, before the event is determined, or the period arrived, when such future use or estate is to arise. If that event or period be within the bounds prescribed by law, it is not a perpetuity."

The decision of the Chancery Division in the landmark case of London and South Western Ry. v. Gomm placed much emphasis upon this quotation and upon a similar quotation found in Lewis on Perpetuities. The Gomm case, which considered the validity of a perpetual option in gross to repurchase land, disagreed with the rationale of the Rule advanced in Gilbertson v. Richards and Birmingham Canal Co. The language of Kay, J., in the Gomm case is significant: "But I am unable to agree with these dicta. In my opinion a present right to an interest in property which may arise at a period beyond the legal limit is void notwithstanding that the person entitled to it may release it." Then, in language which reveals that the court regarded the Rule as one designed to prevent remote suspensions of the practical power of alienation, it was pointed out that an executory interest in favor of an existing person might be lodged in "an infant, a lunatic, or in a person who would refuse to release it, and thus the estate would be practically inalienable for a period long beyond the prescribed limit." It is evident that the court labored under the fear

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76 Sanders, Uses and Trusts 144 (1st Am. ed. 1830).
77 (1882) 20 Ch. D. 562.
78 "In other words, a perpetuity is a future limitation, whether executory or by way of remainder . . . which is not to vest until after the expiration of, or will not necessarily vest within, the period fixed and prescribed by law for the creation of future estates and interests; and which is not destructible by the persons for the time being entitled to the property subject to the future limitation, except with the concurrence of the individual interested under that limitation." Lewis, Perpetuities 164 (1843).
79 (1882) 20 Ch. D. 562, 573.
80 Ibid.
that remote executory interests in property would suspend the practical power to alienate property for unreasonable periods.

But in the ultimate analysis, the Chancery Division refused to find that the Gomm option created a future interest in property. Instead, it chose to regard the option as a contract, and since the Rule is inapplicable to contracts, the option was upheld. An appeal was taken from this decision.

In reversing the decision of the Chancery Division, the Court of Appeal rejected the notion that the option created no future interest in property and rendered the first decision in which the perpetual or long-term option in gross was regarded as giving rise to a remote future interest in property.\(^{1}\)

The view that a remote, though alienable, executory interest violates the modern Rule seems to have been crystallized in England in In re Hargreaves,\(^{2}\) a decision rendered by the Chancery Court of Appeal in 1890. There, without citation of authority, Avern v. Lloyd was overruled. Since that time the authorities, both in England and America, have been practically uniform in declaring that the remote, though alienable, future interest is void within the meaning of the modern Rule against Perpetuities.

The confusion that has pervaded the underlying rationale of the Rule must have caused the revisers of the New York Statutes of 1830 no little concern. Apparently they believed that the statutory rule drafted by them was a restatement of the common law Rule against

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\(^{80}\) Gray, op. cit. supra note 7, § 329.

\(^{81}\) Supra note 78 at 581.

\(^{82}\) (1890) 43 Ch. D. 401.

\(^{83}\) Supra note 30. In addition, remote though alienable future interests have been held void, without discussion of the alienability feature, in these cases: In re Whiteford [1915] 1 Ch. 347; In re Peel's Release [1921] 2 Ch. 218 (possibility of reverter). But cf. In re Chardon [1928] Ch. 464.

\(^{84}\) Winsor v. Mills (1892) 157 Mass. 362, 32 N. E. 352; Starcher Bros. v. Duty (1907) 61 W. Va. 373, 56 S. E. 524. In the following cases remote though alienable future interests have been held void without discussion of the alienability feature: Miller v. Weston (1920) 67 Colo. 534, 189 Pac. 610; Johnson v. Preston (1907) 226 Ill. 447, 80 N. E. 1001; Quinlan v. Wickman (1908) 233 Ill. 39, 84 N. E. 38; Moroney v. Haas (1917) 277 Ill. 467, 115 N. E. 648; Welsh v. Foster (1815) 12 Mass. 93; Proprietors of Church in Brattle Square v. Grant, supra note 62.

Remote equitable future interests as well as remote legal future interests are void under the Rule. Gray, op. cit. supra note 7, § 323. For example, the Rule applies to a remote contingent interest of a cestui que trust even though the trustee has a power to sell. Simes suggests that in such case the property is less marketable from a commercial standpoint in spite of the trustee's broad power to sell and reinvest. 2 Simes, op. cit. supra note 10, § 553.
Perpetuities, with a more limited perpetuities period.\textsuperscript{85} From the wording of two sections of the statute\textsuperscript{86} it seems reasonable to assume that the revisers acted under the belief that the modern Rule was designed to assure the legal power of alienation within the permitted period. Or, as Professor Simes has stated, "We may well infer that this legislation was originally designed to lay down a rule with the same objective as that laid down with respect to the rule against perpetuities in Avern v. Lloyd."\textsuperscript{87} In so far as options to purchase are concerned, this has proved to be the correct deduction, for it is uniformly held in New York\textsuperscript{88} and in other states which have adopted perpetuities legislation\textsuperscript{89} modeled after the New York statute, that the option to purchase, regardless of its potential duration, does not offend the statute where there are persons in being who can unite in conveying an absolute interest.\textsuperscript{90}

\begin{footnotesize}
\textsuperscript{85} See 1 Bobert, Trusts and Trustees § 219 (1935); 2 Simes, op. cit. supra note 10, § 565; Anderson, Restraints on Alienation and the Rule against Perpetuities (1930) 64 U. S. L. Rev. 640, 647.
\textsuperscript{86} "Every future estate shall be void in its creation, which shall suspend the absolute power of alienation for a longer period than is prescribed in this article. Such power of alienation is suspended, when there are no persons in being, by whom an absolute fee in possession can be conveyed." N. Y. Rev. Stat. (1829) pt. 2, c. 1, Tit. II, Art. I, § 14.
\textsuperscript{87} "The absolute power of alienation, shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate, except in the single case mentioned in the next section." Id. § 15.

Substantially the same provisions are now found in N. Y. TERS. PROF. LAW § 11, and in N. Y. REAL PROF. LAW § 42.
\textsuperscript{90} Perpetuities legislation similar to that of New York will be found in these statutes: ARIZ. CODE ANN. §§ 71-106, 71-112 (1939); CAL. CIV. CODE §§ 715, 716, 770 (1941); D. C. CODE tit. 45, §§ 102, 103, 104, 823 (1940); IDAHO CODE § 54-111 (1932); KY. REV. STAT. § 381.220 (1942); MICH. COMP. LAWS §§ 12934, 12935, 12943 (1929); MIZ. STAT. § 500.13 (1941); MONT. REV. CODES ANN. §§ 6705, 6706, 6732 (Anderson & McFarland, 1935); N. D. REV. CODE tit. 47, §§ 0227, 0231, 0411 (1943); OKLA. STAT. tit. 60, § 31 (Harlow, 1941) (real property); S. D. CODE §§ 51.0231, 51.0232 (1939); WIS. STAT. §§ 230.14, 230.15, 230.23 (1943).
\textsuperscript{90} Blakeman v. Miller (1902) 136 Cal. 138, 68 Pac. 587, based upon CAL. CIV. CODE §§ 715, 716 (Hart, 1883). These code sections (as amended in 1917 so as to include a gross period of 25 years) now appear as CAL. CIV. CODE §§ 715, 716 (1941); Windiate
Additional confusion has been cast upon the New York perpetuities law because of the fact that remote future interests have been declared void even though presently alienable. In 1909 the New York Court of Appeals determined that a contingent remainder in favor of ascertained persons was void because it was not certain to vest within the permitted period of two lives in being.\(^9\) The same rule was later extended to a remote springing use in favor of an existing railway company, the future interest being held void despite its present alienability.\(^2\) It has been suggested that the net result of these two cases is the creation of two rules in New York, the one which prohibits suspension of the absolute power of alienation in excess of two lives' duration, and the other which prohibits the creation of future interests, particularly contingent remainders, which are not certain to vest within the period of two lives in being.\(^3\) Professor Simes believes it is undesirable to speak of two rules in states which have adopted statutes against perpetuities. He would prefer to speak of but one rule in these jurisdictions—one condemning nonvested future interests which may suspend not only the legal power but also the practical power to alienate property beyond the permitted period.\(^4\) This brings the New York statutes against perpetuities into far closer accord with the primary purpose of the common law Rule against Perpetuities, and it has the additional advantage of making the long-term option cases more understandable.

The leading exponent of the proposition that the modern Rule against Perpetuities is aimed solely at preventing suspensions of the legal or "absolute" power of alienation is Professor Reeves, whose last treatise upon the subject appeared in 1909.\(^5\) Others have intimated that they regard the Rule in the same light as does Reeves.\(^9\) These writers are to be commended in that they have minimized Professor Gray's tendency to direct attention to "remoteness of vesting" as the

\(^9\) In re Wilcox (1909) 194 N.Y. 285, 37 N.E. 497.
\(^3\) Chaplin, Suspension of the Power of Alienation 1-2 (3d ed. 1928). As to the validity of the long-term option in New York under the rule against remoteness of vesting, see § 397.
\(^4\) See 2 Simes, op. cit. supra note 10, § 567.
\(^5\) See 2 Reeves, Real Property §§ 957, 958, 964, 965 (2d ed. 1909).
primary evil to be eradicated under the Rule. They are to be criticized in that they have failed to catch the hint found in the perpetuities decisions rendered since the latter part of the nineteenth century, to the effect that the modern Rule was designed to prohibit those indirect restraints upon practical alienability occasioned by future interests which might not vest within the perpetuities period. Those writers who urge that the modern Rule against Perpetuities has as its object the preservation of the practical power of alienation or of the “fact of alienability” in all probability have hit upon the key factor which will go far toward making understandable both this judge-made Rule and the rules which purport to be its statutory counterparts in the legislation of New York and certain other states.

The cases dealing with the applicability of the Rule to long-term options can be solved with much less difficulty if we advert to the fundamental proposition that the modern Rule is something more than a mere prohibition against remoteness of vesting, that it is in reality a rule of law having as its primary objective the striking down of limitations of contingent future interests which may suspend, beyond the perpetuities period, the practical power to alienate property. It would seem appropriate to designate this as the “fundamental” common law Rule against Perpetuities. It will be described in that fashion throughout the balance of this article. Gray’s “rule against remoteness” will be designated hereafter as the “Rule” or the “Rule against Perpetuities,” but when special emphasis is placed upon its contrast with the “fundamental” Rule, Gray’s Rule will be called the “technical” Rule, or as it has been designated by another writer, “the narrow, mechanistic Rule against Perpetuities.”

97 See 2 Reeves, op. cit. supra note 95, § 959; Fowler, supra note 96, at 177; Fowler’s, REAL PROPERTY LAW OF THE STATE OF NEW YORK 270-274 (3d ed. 1909).

98 This version of the Rule seems to have been set forth clearly for the first time by Dean Everett Fraser. See Fraser, The Rationale of the Rule against Perpetuities (1922) 6 Minn. L. Rev. 560, 561; 2 Simms, op. cit. supra note 10, §§ 490, 514, 567; Powell, Book Review (1930) 30 Col. L. Rev. 140, 141; compare Rep. N. Y. LAW REVISION COMM. 512 (1936); Gray, op. cit. supra note 7, § 268; (1927) 27 Col. L. Rev. 959, 964.

“Accordingly the Rule is not concerned with the certainty of the event upon which the future interest is limited. Its object is to limit the distribution of the power of alienation in favor of freedom of alienation.” Rundell, supra note 87, at 454.

99 See perpetuities legislation cited supra notes 86, 89.

100 Bordwell, supra note 10, at 734.
LONG-TERM OPTIONS

B. INAPPLICABILITY OF THE RULE TO LONG-TERM OPTIONS

1. Types of Options under Consideration

The principal type of option to which this article is directed is that which conceivably may have a duration in excess of a period measured in terms of a life or lives in being and twenty-one years thereafter. If the modern Rule against Perpetuities applies to such an option, it can be invoked only when there is a possibility that the permitted duration may be exceeded. All options which cannot last longer than the "perpetuities" period are necessarily valid under the Rule. Accordingly, options which by any possibility may remain outstanding in excess of this period will be called "long" or "long-term" options. This description will be employed whether the options are of indefinite duration or are to last for specified terms of years.

Options may or may not be supported by consideration. Only those based upon good consideration will be discussed in this article. Professor Williston has aptly described options which are given without consideration as "offer-options." Therefore "contract-option" will indicate those supported by consideration. The word "option" will be used henceforth with reference to the "contract-option."

Several varieties of land-purchase options will be discussed from time to time. If an option originates in one of the provisions of a lease, it will be designated as an "option appendant." Unless otherwise indicated, it is to be understood that the option appendant has a duration coextensive with that of the lease in which it appears, and that it is incapable of separation from the lease.

The term "option in gross" will refer to the type of option which does not originate in a lease.

The "preemption option" is that type of option—either appendant or in gross—under which the optionee acquires a power to purchase land, the power being exercisable only in the event that the optionor expresses his willingness to sell.

2. Rule not Germane to Land-Purchase Options

The modern Rule against Perpetuities had its inception in the field of future interests, particularly with respect to the contingent inter-

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101 See 3 WILLISTON, CONTRACTS 2390 n. 2 (rev. ed. 1936).
102 In Detwiler v. Capone (1947) 357 Pa. 495, 55 Atl. (2d) 380 a three-year lease gave the lessee an option to purchase, but the duration of the option was not specified. Held: a three-year option, therefore not within the Rule against Perpetuities. Compare LEACH, CASES ON FUTURE INTERESTS 924 n. 9 (2d ed. 1940).
103 The meaning of the term "preemption" is discussed in Garcia v. Callender (1891) 125 N. Y. 307, 26 N. E. 283.
ests created in family settlements and gift transactions designed to perpetuate land ownership in the great landed families of England. The present-day option is a device employed almost exclusively in the field of business. The courts might have been more logical had they recognized this commercial aspect of the option and refused to extend the Rule to it. Perhaps another rule should have been designed to dispose of the evils harbored by some long-term options; perhaps such rule should have limited the duration of certain options to a term far shorter than that permitted by the Rule against Perpetuities. In the main, the Rule has been regarded as foreign to matters pertaining to contracts and commercial transactions. Nevertheless, long-term option contracts frequently have been held void under the Rule. The logic of this is somewhat difficult to comprehend, especially in view of the fact that many comparable devices are excepted from the Rule or considered not germane to it. These devices will be discussed in the following paragraphs.

3. Other Devices Not Affected by the Rule

a. Covenants to Renew Leases

In the early years of the eighteenth century, when the modern Rule against Perpetuities was in its formative stage, the highest court of England rendered a decision in which it held that a lessor’s covenant to renew a twenty-one year lease perpetually was not in violation of the Rule. Thereafter, an almost unbroken line of cases in England and America upheld covenants of that type. But these renewal covenants bothered several legal writers and judges, and vague theories were sometimes advanced in an effort to justify the non-applicability of the Rule. Some authorities suggested that renewal

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105 It was aimed to curb the power of the great English landed proprietors by disabling them from placing obstacles in the way of the alienation of their estates out of their respective families for a period longer than was deemed politic.” Comment (1925) 35 Yale L. J. 213, 215.

106 Compare Leach, supra note 104, at 660.

107 See cases collected in 2 TIMES, op. cit. supra note 10, § 511 n. 75; Note (1919) 3 A. L. R. 498.

108 “. . . the covenant to renew is part of the lessee’s present interest. The right which the present possessor of land has to continue or drop his possession is not a right subject to a condition precedent.” Gray, op. cit. supra note 7, § 230.

109 “. . . the exercise of the right of renewal being in the absolute control of the tenant of the estate for years, it may be regarded as a mere appurtenance thereto, and has no such independent existence as to involve any clog on the title . . . .” 2 TIFFANY, REAL PROPERTY § 410 (3d ed. 1939).
covenants were simply exceptions to the Rule. At first Professor Gray saw no difficulty in upholding the validity of such perpetual covenants. In his estimation they gave the lessees estates akin to fees simple defeasible upon conditions subsequent. Mr. T. Cyprian Williams criticised Professor Gray’s analysis in so far as it pertained to rights of renewal based upon conditions precedent (such as the giving of notice of renewal or the paying of a consideration for the renewal), for it was Williams’ belief that a condition precedent to the exercise of the renewal caused all future terms to become contingent future interests. In reply, Gray admitted that his own view was not too sound but contended that the only alternative was to regard covenants of perpetual renewal either as void or as exceptions to the Rule.

In spite of all that has been said upon the subject, it is believed that the validity of unlimited covenants to renew leases could be upheld on at least two plausible grounds.

First, under the view that the Rule is designed to destroy indirect restraints upon the practical alienability of property which are brought about by remote nonvested future interests, covenants to renew leases, without time limit, do not suspend the practical power to alienate land. So long as the value of the land does not drop to the point where the rental becomes prohibitive, the lessee always has in himself the legal as well as the practical power to convey that which is substantially a fee simple. On the other hand, when the lease becomes unprofitable, the lessee will give up his right to renew and the lessor will resume complete ownership.

Second, and of greater importance, is the proposition that the perpetual renewal covenant should never have been classified as an “exception” to the Rule, but that it should have been considered to be outside the province of the Rule. The first English case from which we can draw this inference involved a commercial arrangement—

110 See Gray, op. cit. supra note 7, § 230.
111 Williams, Options to Purchase in Leases and the Rule against Perpetuities (1898) 42 Sol. J. 628, 630.
112 See Gray, op. cit. supra note 7, § 230.1.
113 See 2 Tiffany, LANDLORD AND TENANT § 221 (1910).
a renewal covenant in connection with a lease of water mill property. In this country the renewal covenant has been used by businessmen, especially in connection with mineral leases and oil and gas leases. The courts must have realized that covenants to renew leases were devices employed by businessmen to secure the safety of their investments in real property business enterprises. The point is most aptly expressed in the argument of counsel in the early case of Bridges v. Hitchcock, where it was stated that the covenant "... was the only foundation and encouragement which the parties had, for expending so much money upon the premises as they had done ..." The lessor's desire to retain ownership of the land as a good business investment might influence him in granting a lease with such a covenant. On some occasions he might be motivated by a sentimental unwillingness to part with the land, but in any event it is difficult to twist the transaction so as to impute to him the desire to create an inalienable interest.

b. Corporate Stock Preemptions and Perpetual Option Warrants

Corporate stock purchase options, unlimited in duration, present themselves most commonly in two principal forms. The first is the option to repurchase stock, hereafter called the "stock preemption." The second is that which is usually designated in business circles as the "perpetual option warrant." The courts have not applied the Rule against Perpetuities to such options. This favorable attitude of the courts would seem to be attributable to the seldom-expressed, but entirely logical, view that the Rule against Perpetuities was not designed to regulate devices related solely to the field of business and commerce.

Under the preemption form of stock purchase option, the stockholder contracts to give the holder of the option the "first refusal" upon the stock in the event that the stockholder desires to sell. Usually the price to be paid for the stock will be market value, book value, appraised value, or the optionor's selling price. The holder of the option may be the corporation issuing the stock or the stockholders of that corporation. In some cases the corporation will acquire the

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115 Illustrative are the renewal covenants found in the following cases: Lloyd’s Estate v. Mullen Tractor & Equip. Co. (1941) 192 Miss. 62, 4 So. (2d) 287; Haefner v. A. P. Green Fire Brick Co. (Mo., 1934) 76 S. W. (2d) 122; Montana Consol. Mines Corp. v. O'Connell (1938) 107 Mont. 273, 85 P. (2d) 345; Thaw v. Gaffney (1914) 75 W. Va. 229, 83 S. E. 983. "Such covenants are commonly attached to leases for commercial purposes ..." 2 S. Eng., op. cit. supra note 10, § 511.

option for the purpose of selecting a suitable purchaser. The option may be contained in the charter, the by-laws, or in a separate contract.117

By their very nature these preemption options are intended to bind assignees and successors in interest of the original stockholders; otherwise they would fail to accomplish their main purpose. It is possible, therefore, that such preemptions might be exercised at some time beyond the perpetuities period. Yet it is interesting to observe that the applicability of the modern Rule to stock preemption agreements has been discussed at length in only one American case, Warner & Swasey Co. v. Rusterholz.118 In that case the provisions of an inter vivos trust and contract collateral to the trust gave the plaintiff corporation a preemption option upon shares of its stock which were issued to the defendant. The preemption was exercisable whenever the defendant desired to sell or otherwise dispose of her shares, or in the event that the defendant should die possessed of the shares. Payment was to be made at book value. Defendant apparently desired to sell, and the corporation indicated its willingness to purchase. When the corporation sued for specific performance, the defendant sought to avoid the preemption upon two grounds. She contended, first, that it violated the rule against restraints on alienation, and second, that it violated the Rule against Perpetuities.

The court found no difficulty in disposing of the first objection. It advanced what seems to be the true basis for tolerating these options, namely, that they do not constitute unreasonable restraints upon alienation of the stock, and that they are predicated upon the legitimate purpose of furthering the welfare of other stockholders by preventing stock ownership in hostile or untrustworthy persons.

It must be admitted that these preemptions tend to effect direct restraints upon alienation during the stipulated period for which the optionee is allowed to accept or reject the stockholder's offer. Furthermore, the great majority of the reported cases uphold the validity of such preemption provisions regardless of their theoretical perpetual duration.119 These decisions stress the fact that the preemptions seek to advance the welfare of the corporation in a manner that is not unreasonable.

117 Note (1940) 26 Va. L. Rev. 354, 357 n. 25-27.
118 (D. Minn. 1941) 41 F. Supp. 498.
The defendant’s second ground of attack upon the preemption option in *Warner & Swasey Co.*—its alleged violation of the Rule against Perpetuities—noticeably perplexed the court. Its opinion first proceeded upon the theory that the option created no property interest of any nature in favor of the optionee corporation. Without further elaboration upon this point, the court focused its attention upon the more pertinent line of reasoning “that under the modern view the rule has no application to an unlimited option for the purchase of corporate stock.” In other words, the court took cognizance of the fact that the modern Rule is not designed to regulate devices that are peculiar to the field of business and commerce.

Apparently the court had not convinced itself of the soundness of this reasoning, for it added a third ground for sustaining the preemption under the Rule against Perpetuities. For the purpose of argument it assumed that the Rule applied to such transactions, but then concluded that the holder of the option would have to assert its claims thereunder during the lifetime of the stockholder, or, in the event of the death of the stockholder, within the period permitted under the applicable statute of limitations. In this case the period for asserting such claims was said to extend no later than six years and thirty days after the death of the stockholder. Accordingly, it was the court’s opinion that the vesting of the stock in the preemption optionee would have to occur in all events before the expiration of twenty-one years after a life in being.

Under the view that the Rule against Perpetuities is designed to strike down remote nonvested interests that tend to suspend the practical power of alienation there would seem to be no valid reason for regarding the usual forms of stock preemption options as violating the Rule. Upon making a sale the stockholder is primarily interested in obtaining the best available price for his stock. It should be of no concern to him whether that price is paid by the preemption optionee or by some third person. If the amount to be paid upon the exercise of the option is to be determined by the optionee at the time of the proposed sale, he has every opportunity to obtain the best available

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121 (D. Minn. 1941) 41 F. Supp. 498, 504.
price. It is equally true that the preemption which calls for payment at the "appraised" or "market" value of the stock assures the stockholder of the best price. Stock preemptions which are cast in such form cannot give rise to appreciable restraints upon the practical power to alienate corporate stock because the existence of such preemptions will not cause the stockholder to withhold his stock from the market through fear of receiving less than the best price.

It is conceivable that a stock preemption option which gives the optionee the power to repurchase the stock at book value, when offered for sale by the owner, might tend to create a suspension of the practical power of alienation if the book value were less than the speculative value upon the market. However, it is seldom that one would encounter such preemptions in connection with speculative issues. Since book value would be substantially the same as the market value in the case of non-speculative stock, it would be unreasonable to invoke the Rule as to such preemptions.

If a preemption option should call for payment in a fixed sum, or at par value, it might tend to restrain practical alienability of the shares because the preemption price might be less than the market value at the time of the proposed sale. If the Rule could ever be invoked in this type of case, it should be invoked here. But as previously pointed out, the Rule should never be applied in regulating transactions which are so peculiar to the field of business and commerce. Rather, the common law rule against restraints on alienation should be modified so as to extend to the indirect restraints brought about by stock preemption provisions which do not substantially reflect the best price obtainable for the shares at the time the preemption is to be exercised.

The perpetual option warrant, commonly called "stock purchase warrant," is of greater potential danger than the preemption type just discussed. Under it the option holder is given the power to acquire unissued stock of the corporation, sometimes for an unlimited period, upon payment of a stipulated price. The danger of this device lies not in any inalienability or perpetuity aspect, but in the resulting di-

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123 A case upholding the validity of a stock preemption calling for payment at par is In re Laun, supra note 119.

125 BERLE AND MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 180-181 (1933). Four general types of these options are listed in Hills, Model Corporation Act (1935) 48 HARV. L. REV. 1334, 1357.
The applicability of the Rule to a stock purchase warrant which had been granted by a corporation to an individual was discussed in *Kingston v. Home Life Ins. Co.* In this case suit was brought by the minority shareholders to have the option contract cancelled upon the ground that it was in violation of the Rule. The court very logically disposed of this contention by observing that this was not the type of transaction which the Rule was designed to cut down. After noting that the Rule was “particularly applicable to land and interests in land,” the court summed up in these words: “No case has been produced or found which so extends the rule . . . and I do not feel justified in extending it to the stock option, and, therefore, cannot hold the option contract entirely invalid for either of the reasons urged . . . .” Upon appeal the Supreme Court of Delaware affirmed the validity of the option but suggested that a long lapse of time in exercising the option, accompanied by a substantial increase in value of the stock, might create inequities which would prejudice the minority stockholders. It was indicated that in such event a court of equity could decree discontinuance of the option.

Unissued stock is the subject matter of the perpetual option warrant. It cannot be considered as an interest in property. It does not amount to a property interest in the corporation because it constitutes no present share of the corporate assets. Clearly then, it cannot be regarded as within the Rule. It is no more than a contract under which the option holder derives a power to acquire a claim to participate in the corporation at some time in the future. As such it cannot constitute a restraint upon the alienability of future participation rights. A businessman is primarily interested in profits, and the fact that the stock is subject to an option in favor of another at a higher price will not necessarily deter him from purchasing. There is no policy of the law which would prohibit the issuance of the stock to him subject to the option.

The Rule against Perpetuities offers no solution to the evils gen-

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124 *Berle and Means, supra* note 123 at 181-185.
125 (1917) 11 Del. Ch. 258, 101 Atl. 898.
126 *Id.* at 267, 101 Atl. at 901.
erated by perpetual stock purchase warrants. Courts of equity alone must provide the remedy by standing ready to cancel such options whenever they create inequities against existing stockholders.

c. Long-term Mortgages

There are in existence today two principal theories as to the nature of the interests held by mortgagor and mortgagee. Of these the older is that which developed under the common law, usually known as the "title" theory. For many purposes it attributes to the mortgagee the ownership of the legal title to the extent of the interest mortgaged. The second, or "lien" theory, has found favor in the majority of jurisdictions of this country. Under it, the mortgagor is regarded as the owner of the mortgaged property and the mortgagee a mere holder of a lien for security purposes. It has also been suggested that the mortgagee has no more than a power of sale.

Even under the "technical" version of the Rule there is no reason for striking down long-term mortgages in "title" jurisdictions. The mortgagor's power to re-acquire legal title upon satisfying the conditions of the mortgage can be exercised until barred by foreclosure or by the operation of some applicable statute of limitations. By some this power is regarded as tantamount to a "right of re-entry." It has also been compared to the right of reverter. To Professor Gray the "right of re-entry" in the long-term mortgage seemed too remote and thus within the Rule. But he also recognized the fact that in the United States the right of re-entry is not within the Rule, thus eliminating the perpetuities objection. If we should regard the power of the mortgagor as being in the nature of a possibility of reverter, we would have to conclude that it brings about no violation of the Rule because such future interests are not within the Rule in the United States.

Do long-term mortgages violate the "technical" Rule against Perpetuities in "lien" states? In "lien" jurisdictions the mortgagor retains full ownership subject to a lien or power of sale in the mortgagee. The lien cannot be foreclosed, nor can the power of sale be exercised, until

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129 Tiffany, Real Property § 1380, n. 10 (3d ed. 1939).
130 Gavit, Is the Mortgage Only a Power of Sale? (1931) 15 Minn. L. Rev. 147.
131 See Gray, op. cit. supra note 7, § 563; Gavit, supra note 130 at 158 n. 43.
132 See Walsh, Mortgages 5 (1934).
133 Gray, op. cit. supra note 7, § 563.
134 Tames, op. cit. supra note 10, § 507. In England there is considerable doubt as to whether or not rights of re-entry are subject in the Rule. See 25 Halsbury's Laws of England 102, § 189 (2d ed. 1936).
there has been a default by the mortgagor. If sale under decree orium power may possibly take place more than twenty-one years after the inception of the mortgage (the duration of a mortgage seldom being based upon a life or lives), the estate to be created in the prospective purchaser would appear upon the surface to violate the technical version of the Rule.\textsuperscript{135}

An excellent reason for not applying the Rule to long-term mortgages in lien states has been suggested by Dean Gavit, who points out that the legislatures in lien states have in effect amended the Rule by formulating statutory proceedings for sale upon mortgage default.\textsuperscript{136}

Whatever the justification may be, the courts have never applied the Rule to long-term mortgages. This suggests an argument for the proposition that the Rule was never designed to cut down transactions which are primarily commercial in nature.

Under the “fundamental” version of the Rule, does the long-term mortgage violate the Rule?

The mortgagor may convey his legal title or equity of redemption, as the case may be, at any time before it is lost through foreclosure.\textsuperscript{137} The existence of the mortgage in no way tends to impair alienability of the property. In the event that a purchaser desires to acquire the property from a willing seller, the purchase price may be computed by deducting the amount of the mortgage from what the parties agree to be the total value of the property. The mortgagee cannot interfere with an alienation by the mortgagor unless he is permitted to do so by the terms of the mortgage contract. In such case the question is not one of perpetuities, but of the validity or reasonableness of a direct restraint.

In states wherein the Rule against Perpetuities has been reduced to the form of statutory prohibitions against restraints upon the absolute power of alienation, the long-term mortgage should be upheld. A contrary result would upset every mortgage in those states in which the permitted period of suspension is limited to lives in being, for most mortgages have durations expressed in terms of years. In 1897 a federal circuit court decision\textsuperscript{138} held that a deed of trust in the nature of a mortgage, the duration of which was not limited to lives in being,

\textsuperscript{135} See Gray, \textit{op. cit. supra} note 7, § 566.

\textsuperscript{136} Gavit, \textit{supra} note 130, at 159.

\textsuperscript{137} 2 Jones, \textit{Mortgages} § 836 (8th ed. 1928); 23 Halsbury, \textit{op. cit. supra} note 134 at 309, § 466; 37 Am. Jur. 314.

was valid, notwithstanding the provision of the California code\textsuperscript{139} which at that time permitted suspensions of the absolute power of alienation only during the period of lives in being. The court upheld the deed of trust upon the ground that it did not suspend the absolute power of alienation. This seems correct, for there are always persons in being—the mortgagor and mortgagee—by whom an "absolute interest in possession" can be conveyed. In the following year a decision of the California Supreme Court\textsuperscript{140} held that a trust deed in the nature of a mortgage, which secured a note due one year from date, was not in violation of this same code provision.

In the one decision which has dealt with the applicability of the modern Rule to the long-term mortgage, the controlling factor that influenced the court in upholding the mortgage was this: The mortgage is a commercial or business device; the Rule was not designed to regulate transactions that are primarily commercial in nature. In this case, \textit{Knightsbridge Estates Trust, Ltd. v. Byrne}\textsuperscript{,141} the mortgage assumed the form of a demise for 3000 years. By the terms of the contract it was provided that the mortgagor was to repay the mortgage debt in eighty semiannual installments, and that full payment of the debt should operate to extinguish the mortgagee’s estate. After the mortgage had run about six years the mortgagor offered to pay the balance due. Upon the mortgagee’s refusal the mortgagor sought to accelerate payment and to terminate the mortgage by bringing suit to have the mortgage declared void because in violation of the Rule against Perpetuities. It was the mortgagor’s contention that the postponement of a reconveyance for at least forty years constituted such violation. In the Chancery Division, Luxmore, J., regarded the postponement of the period of redemption for forty years as unreasonable, and held in favor of the plaintiff.\textsuperscript{142} But the court did not find that the mortgage violated the Rule against Perpetuities. One of the reasons for the court’s view on this point was its conclusion that mortgages are exempt from the Rule.

\textsuperscript{139}CAL. CIV. CODE § 715 (Hart. 1889).
\textsuperscript{140}Sacramento Bank v. Alcorn (1898) 121 Cal. 379, 53 Pac. 813; accord: Priddel v. Shankie (1945) 69 Cal. App. (2d) 319, 159 P. (2d) 438 (mortgage). In Board of Church v. First Presbyterian Church (1898) 19 Wash. 455, 53 Pac. 671 it was held that a covenant in a mortgage whereby the debt secured was to become due upon alienation or upon abandonment of the mortgaged premises for church purposes did not constitute a direct restraint on alienation.
\textsuperscript{141}[1938] Ch. 741; [1939] Ch. 441; (1939) 52 HARV. L. REV. 1020; [1940] 56 T. L. R. 652, 2 All Eng. 401 (H. L.).
\textsuperscript{142}Knightsbridge Estates Trust, Ltd. v. Byrne [1938] Ch. 741.
The case was carried to the Court of Appeal, where the decision of the Chancery Division was reversed upon the ground that the mortgage created no clog on the equity of redemption. The perpetuities problem was discussed briefly, but a portion of the language used by the court expresses what seems to be the most forceful reasoning that can be advanced in this respect: "The rule against perpetuities is a rule which was made to prevent the mischief arising from attempts of settlors, testators and others to postpone the alienation of property for unduly long periods.... The rule has never been applied to mortgages, no doubt because such transactions do not produce the mischief which the rule was intended to prevent...." Upon appeal to the House of Lords, the decision of the Court of Appeal was affirmed. Viscount Maugham agreed that the long-term mortgage under consideration did not offend the Rule. He agreed with the view that mortgages have always been excepted from the Rule, and also stated that the Rule does not apply inasmuch as the Law of Property Act of 1925 sanctions mortgages which are of 3000 years' duration.

The mortgage is a business transaction of the most fundamental variety. It is not employed for the purpose of perpetuating property ownership within families, nor for rendering property inalienable. Its object is to afford security for a debt owed by the mortgagor to the mortgagee. It was never intended that the Rule against Perpetuities should regulate such transactions. This in itself may serve to explain why the courts so seldom associate the long-term mortgage with the Rule against Perpetuities.

We have seen that present-day covenants to renew leases perpetually, long-term corporate stock purchase warrants and preemptions, and long-term mortgages all can be placed outside the Rule upon the basis that they are primarily commercial transactions. The present-day long-term option to purchase land, whether it be of the preemption or ordinary type, whether it be appendant or in gross, is also a purely business or commercial transaction. This suggests the reasonableness of excluding it from the application of the Rule against Perpetuities.146

143 Knightsbridge Estates Trust, Ltd. v. Byrne [1939] Ch. 441.
144 Id. at 463.
146 Professor Leach has also pointed out that two other important business devices—insurance and suretyship contracts—have never been held void under the Rule. See Leach, supra note 104 at 660.
d. Contracts

It is well settled that the modern Rule against Perpetuities has no application to contracts that do not create future interests in property.\(^{147}\) The case which is cited most often as an authority upon the point is that of \textit{Walsh v. Secretary of State for India}..\(^{148}\) Though the report of the case makes no mention of the Rule, the inference concerning the inapplicability of the Rule is very strong. The facts, as interpreted in the House of Lords, indicate that in 1770 Lord Clive transferred five lacs of rupees (about £62,833) to the East India Company in order to create a trust in the annual interest therefrom for the benefit of soldiers in the employ of the company. The company covenanted that it would repay Clive or his estate five lacs of rupees if it should be dispossessed of its territorial possessions other than by war, or if it should cease to maintain military forces in the East Indies after 1784. The East India Company having ceased to be a trading company, and its troops having been transferred to the Crown, the plaintiff as legal representative of Lord Clive brought an action to recover the amount due under the company's covenant (the Crown having succeeded to all the rights and obligations of the company). It was held by Sir John Romilly, M. R., that Clive's representative was entitled to nothing because the entire fund was being held upon a trust under administration by the Crown.\(^{149}\) The decision of the Master of the Rolls was reversed in the House of Lords and the balance of the fund was awarded to the plaintiff. The opinion of Lord Chancellor Westbury was very precise in pointing out that there was no trust as to the principal fund: “The obligation of the East India Company . . . is a common personal contract entered into by the East India Company, not to pay out of any specific fund—not to render back any definite trust security—but, out of its general revenues, if a certain event should happen, to repay to the representative of Lord Clive such a sum of money as should be equal to the full sum of five lacs of rupees . . . .”\(^{150}\)

This decision indisputably upheld A's contract to pay B or his heirs a sum of money at an indefinite time in the future upon the happening of a contingency, the contract in this instance being enforced some ninety years after its inception. Although the perpetu-
ties question was not raised, we gain the impression that the court was endeavoring by inference to dispose of any contention of that nature when it went to such pains to point out that the original agreement was not an arrangement calling for the creation of a future interest in a fund—a future interest in property—but rather one which amounted to a simple contract to repay a sum of money from the promisor’s general revenues upon the happening of a contingency. The Rule against Perpetuities was not in issue because no future interest in property was involved.

In the case of Witham v. Vane a purchaser of lands covenanted for himself, his heirs and assigns, to pay the vendor, his heirs and assigns, the sum of sixpence for every chaldron of coal taken and shipped from the land. Later, the assignees of the vendor sued the executors of the vendee upon the covenant. The Rule against Perpetuities was urged as a defense to the action, but the court held that the defense was not well taken because the Rule has no relevancy to a mere personal contract. Here again the court refused to invoke the Rule because it concluded that the contract did not create a future interest in property.

It is at times extremely difficult to determine when a particular transaction gives rise to mere contractual interests and when it creates property interests. In fact, one transaction may give rise to both. A case which exemplifies the difficulties sometimes encountered in differentiating between contracts which do and those which do not create future interests in property is that of South Eastern Ry. v. Associated Portland Cement Manufacturers. Here the plaintiff railway sought to enjoin the defendant company from constructing a tunnel under the plaintiff’s tracks. In 1847 the railway purchased from one Calcraft the land upon which it later constructed its tracks. The parties agreed at the time of purchase that if Calcraft or his heirs should desire to construct a tunnel or archway under the tracks, he or they should be free to do so. The adjoining land was leased by Calcraft’s devisee to the defendants, who sought to construct a tunnel in accordance with the agreement of 1847. The railway contended that the agreement violated the Rule against Perpetuities, and urged this as one of several grounds for an injunction. In denying the injunction,

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151 Supra note 72.
152 Id. at 451 (per Selbourne, L. C.).
153 See GAVIT, INDIANA LAW OF FUTURE INTERESTS 275 (1934); Note (1925) 25 Col. L. Rev. 77.
154 [1910] 1 Ch. 12.
both the Chancery Division and the Court of Appeal found no viola-
tion of the Rule. Professor Gray\textsuperscript{155} maintains that in the Chancery
Division, Swinfen Eady, J., correctly stated the basis of the decision
when he observed that the agreement gave Calcraft and his heirs an
equitable right to an easement—\textit{a present}, not a \textit{future}, right.\textsuperscript{156} There
are several recent American cases which tend to bear out Professor
Gray's view in this respect. In these cases options (without time limit)
to purchase surface rights appurtenant to grants of underlying min-
erals have been upheld.\textsuperscript{157} Such options have been interpreted as per-
taining only to the future payment for present easements in the sur-
face. Since no future interests are involved, the Rule is regarded as
inapplicable.

The opinion of the Chancery Division in the \textit{Associated Portland
Cement} case also stressed the fact that the railway's contract, as a
contract, had nothing to do with the Rule. The case was taken to the
Court of Appeal, where Farwell, L. J., agreed that the personal cove-
nant of the railway was a mere contract, hence not within the Rule.
Then, by way of dictum, the court suggested that where the cove-
nantor still has the land, the covenantee may, in the discretion of the
court, obtain specific performance of the contract. It is this dictum
which evoked Gray's criticism, for, as he observed, "\ldots to have a
right to have specific performance of a contract to convey an interest
in land is to have a right of property in the land, which is subject to
the rule against perpetuities."\textsuperscript{158}

The most striking example of a court's refusal to cut down a con-
tract interest by applying the Rule is found in the English case of
\textit{Worthing Corp. v. Heather},\textsuperscript{159} where a thirty-year option appendant
was held void under the Rule. But the option, as a \textit{contract}, was held
to be perfectly valid, and the optionee was permitted to recover dam-
ages for breach of the contract to convey which arose upon accept-
ance of the option. An opposite holding, in which the long-term option

\textsuperscript{155} \textit{GRAY, op. cit. supra} note 7, \S 330.2.

\textsuperscript{156} "It is not a right to arise at some future time, it is an immediate right." \textit{South

\textsuperscript{157} \textit{Chicago, Wilmington & Franklin Coal Co. v. Herr} (C.C.A. 7th 1942) 127 F.
(2d) 1010; \textit{Threlkeld v. Inglett} (1919) 289 Ill. 90, 124 N.E. 368; \textit{Post v. Bailey} (1931)
\ldots W. Va. \ldots..., 42 S. E. (2d) 46.

\textsuperscript{158} \textit{GRAY, op. cit. supra} note 7, \S 330.3.

\textsuperscript{159} [1905] 2 Ch. 532, (1907) 7 \textit{Col. L. Rev.} 406, (1907) 20 \textit{Harv. L. Rev.} 240.
was held void as a contract, is found in the Massachusetts case of *Eastman Marble Co. v. Vermont Marble Co.*

Setting aside for the present our contention that the Rule against Perpetuities is designed to foster practical alienability of property by voiding remote future interests that render property inalienable in fact, and assuming for the purposes of argument that it is no more than a technical rule designed to destroy remote future interests in property, will we be justified in concluding that all long-term options create future interests and therefore fall within the ambit of the technical Rule against Perpetuities?

We have observed that the Rule, even in its technical or "narrow, mechanistic" form, is inapplicable to long-term contracts that do not create remote future interests in property. Hence, the next installment of this article will include a study of the "interests," if any, possessed by the holder of a long-term land-purchase option. If we should conclude that he holds no future interest in land, we would be in a strong position to claim that the technical Rule against Perpetuities is inapplicable.

In approaching this problem from the standpoint of the technical Rule, an attempt must be made to answer this fundamental question: What is an interest in land? More specifically, what is a future interest in land?

To some readers it might seem that discussion along this line is futile, and upon reflection it will appear that there is much merit to their position. They can point out, correctly it would seem, that courts and writers are unable to give clear and understandable meanings to the concepts of "interest in land," "future interests," "vested interest," and "property interest." Therefore, with much persuasiveness they are entitled to ask: "If we are unable to define intelligibly the terms 'future interest' and 'vested interest,' why attempt to ascertain whether or not the long option creates a nonvested future interest?"

But it is the writer's opinion that discussion of this problem is not without some value. If it serves no other purpose, it tends to focus our attention upon the "narrow, mechanistic" nature of the commonly accepted statement of the Rule; it shows how the courts have accepted the remoteness of vesting formula at face value and how they have enlarged the incidents of the option so as to bring the long-term option within the prohibition of the Rule in spite of the fact that the Rule is not an ideal device for eliminating the socially undesirable

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features of such option. Above all, such discussion will make us aware of the fact that at least a portion of the law of future interests rests, not upon reason, but upon rigid adherence to formalism.

(To be continued.)