

### III. Long-Term Options and the Rule Against Perpetuities\*

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#### D. THE OPTION-PERPETUITIES PROBLEM IN THE COURTS

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

Courts as well as some text writers of this country often apply a rule of the common law without discussing the policy underlying such rule. This is disturbing to our constant skeptic, the legal analyst, because it leaves him in doubt as to whether or not there is a rational basis for the court's decision. Perhaps the grounding of decisions upon mere rules unaccompanied by explorations of basic reasons saves the time and efforts of judges, but in some cases this method produces poorly formulated decisions.

Many of the decisions involving the application of the Rule against Perpetuities to long-term options demonstrate this willingness of some courts to disregard fundamentals. In striking down long options in gross under the technical Rule against Perpetuities (the "rule against remoteness of vesting") the courts usually treat the Rule as though its sole object is to prevent remoteness of vesting of future interests. By labeling the Rule in terms of a formula rather than in terms of its fundamental purpose, these courts have failed to place the Rule in its true perspective; they have overlooked the basic proposition that common law courts worked out this rule to foster alienability of property by destroying remote future interests that possibly may suspend the practical power of alienation. This writer has previously designated this version of the Rule as the fundamental Rule against Perpetuities.

To add to the confusion in the option-perpetuities cases, the courts have usually construed the long option as a future-interest-creating device in order that it may be brought under the technical Rule against Perpetuities. In other branches of the law, by way of contrast, the optionee is not deemed the holder of a future interest in property by virtue of his option to purchase. Of course, an optionee may be treated as a holder of a future interest for one purpose and as a holder of a contract right for another purpose, but when courts fail to make frank

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admission of these two concepts they contribute to the confusion already prevalent in the option-perpetuities field.

If we assume that long options to purchase land bring about future interests in optionees, we shall discover, rather surprisingly, that the hit-and-miss system employed by the courts in disposing of the long option cases has usually produced correct results. But courts could clarify this matter if they would base their decisions upon the fundamental Rule rather than the technical Rule.

In the preceding installments of this paper, we observed that a long-term, fixed-price option in gross has potentialities for bringing about a restraint on the practical power to alienate the optioned land. But before analyzing the decisions which have applied the technical Rule to these options, this question deserves attention: Should the Rule against Perpetuities, even in its technical version, be considered inapplicable to a long-term land purchase option upon the theory that the option holder is, in practical effect, the owner or *dominus* of the optioned land?

a. *The Optionee as Dominus*

Professor Simes states ". . . it may be argued that, where one person has a present power to acquire the absolute fee, practical alienability is not interfered with, and therefore the rule should not apply."<sup>1</sup> If the option in gross were cast in terms which would give the optionee the power to acquire the optioned land by simply signifying acceptance without paying or agreeing to pay the purchase price it could be argued persuasively that the optionee would be the virtual owner and the holder of a present interest in land. Obviously, such interest would be outside the Rule.<sup>2</sup> Yet optionees can exercise most options in gross only upon tender of the price or the making of an agreement to pay. This requirement would seem to place the holder of the unexercised option in a position inferior to the *dominus* of the optioned land. "It would seem that if, as is usually the case, the payment of the purchase price is a condition precedent to the existence of a present right to a conveyance, the holder of the option can hardly be said to have an unconditional power to acquire the fee."<sup>3</sup>

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<sup>1</sup> 2 SIMES, *THE LAW OF FUTURE INTERESTS* 379 (1936).

<sup>2</sup> "If the purchaser had paid the purchase price in advance and had, under his contract, a right to call for a conveyance at any time upon giving notice, it could hardly be contended that the Rule against Perpetuities would be violated. In such a case the purchaser would be, in fact, the *dominus* of the property. He would not have a future interest, but a present absolute interest." KALES, *FUTURE INTERESTS* § 665 (1920). A case of this type is *Dodd v. Rotterman* (1928) 330 Ill. 362, 161 N. E. 756.

<sup>3</sup> 2 SIMES, *op. cit.* *supra* note 1 at 379.

b. *Long-Term Options in Gross and the Rule: Case Law*

*London and Southwestern Railway v. Gomm*<sup>4</sup> is the foremost case concerning the Rule's applicability to long-term options in gross. The railway company conveyed land to a grantee by deed of indenture. In the same deed this grantee covenanted for himself and his "heirs, executors, administrators and assigns" to reconvey the land to the grantor or its successors and assigns upon six months' notice in writing and the payment of £100 at any time thereafter when the land might be required for the railway or works of the company. Gomm purchased the land with notice of this covenant. Later the company, desiring to exercise the option, gave the requisite notice to Gomm, but the latter refused to comply with the terms of the covenant. The company sued Gomm for specific performance. Gomm contended that the covenant to reconvey was void "as tending to a perpetuity." The Chancery Division decided that the Rule was inapplicable because the covenant gave the optionee no interest in land. Nevertheless it decreed specific performance of the covenant because it considered Gomm a transferee with notice bound in equity under the doctrine of *Tulk v. Moxhay*.<sup>5</sup>

The case was taken to the Court of Appeal where Gomm obtained a reversal of the Chancery Division's decree. This higher court rejected the proposition that Gomm, as a purchaser with notice, should be bound under the doctrine of *Tulk v. Moxhay*. That doctrine, said the court, applies only to negative covenants and not to an affirmative covenant such as that given to the railway company.

The Court of Appeal then held that the covenant was void under the Rule because the covenantee acquired under it an interest in land, or something akin thereto, which was void for remoteness. Incidentally, the court also found other grounds, statutory in nature, for upholding Gomm's title as against that of the company.<sup>6</sup>

Much of the confusion now existing in the option-perpetuities field can be traced to the Gomm case. Noteworthy is the willingness of the Court of Appeal to place the option to purchase land upon the same plane as a land purchase contract, at least to the extent of holding that an optionee has an interest in land equivalent to that of a vendee.<sup>7</sup> The court failed to point out essential distinctions between the contract to purchase and the option to purchase land so far as the remedy of specific performance is concerned. Presumably this

<sup>4</sup> (1882) 20 Ch. D. 562.

<sup>5</sup> (1848) 2 Ph. 774, 41 Eng. Rep. 1143.

<sup>6</sup> *London and South Western Ry. v. Gomm*, *supra* note 4 at 584.

<sup>7</sup> "The right to call for a conveyance of the land is an equitable interest or equitable estate. In the ordinary case of a contract for purchase there is no doubt about this, and an option for repurchase is not different in its nature." *London and South Western Ry. v. Gomm*, *supra* note 4 at 581.

case is the source of the oft-repeated fallacy that the optionee has an equitable future interest in land because his option will be specifically enforced in equity.

The Court of Appeal in the *Gomm* case expressly overruled *Birmingham Canal Company v. Cartwright*.<sup>8</sup> But in so doing the Court of Appeal failed to make it clear that in the *Canal Company* case a different version of the Rule was applied. In the latter case the court conceived of the Rule as one aimed against restraints on the absolute or legal power of alienation. Obviously, the long option to purchase land does not violate that version of the Rule. An excellent opportunity to remove some of the haze surrounding the rationale of the Rule was overlooked by the Court of Appeal in the *Gomm* case. It could have clarified the option-perpetuities problem by pointing out that it had rejected the "absolute power of alienation" concept of the Rule and that the true purpose of the Rule is to foster alienation by the destruction of devices that tend to restrain practical alienability.

There is some evidence that the fundamental Rule may have played an important part in the *Gomm* case. Hannen, J., in his concurring opinion in the Court of Appeal said: "Now this covenant plainly would restrain the future owner from alienating the estate to anybody he pleases, it restricts him to aliening it to the railway company in the event of the company exercising their option."<sup>9</sup> Since there is no rule of law preventing the optionor or his grantee from conveying the optioned land subject to the option,<sup>10</sup> Hannen, J., must have had reference to the option's tendency to restrain the practical power of alienation. The absolute or legal power of alienation was always present under the facts of the *Gomm* case.

From a practical standpoint, not many buyers would feel inclined to purchase land subject to a long-term, fixed-price option if the law should uphold such devices. It would be risky financially to make improvements upon the land during the life of the option because there would be an ever-present danger of losing the land through its acceptance. If we assume that a long-term option gives the optionee a future interest in land, it is clear that the *Gomm* option violated the fundamental version of the Rule against Perpetuities.

Did the option in the *Gomm* case give the railway company, as optionee, virtual ownership or the *dominus* of the optioned land? There were three conditions to be fulfilled upon a valid exercise of the option. First, it had to be clear that the company needed the land

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<sup>8</sup> (1879) 11 Ch. D. 421. The rationale of this case is discussed briefly in Berg, *Long-Term Options and the Rule against Perpetuities* (1949) 37 CALIF. L. REV. 1 at 15.

<sup>9</sup> London and South Western Ry. v. Gomm, *supra* note 4 at 586.

<sup>10</sup> ". . . doubtless the owner could alienate his property subject to the option if he wished." 2 SIMES, *op. cit. supra* note 1 at 305.

for its railway or works. Second, the owner had to be given six months' notice in writing. Third, the company had to pay £100 for a reconveyance. The giving of written notice and the paying of £100 might be considered of little consequence to a railway corporation, but the first condition, namely, the actual need of the land for one of the purposes mentioned, was not the type of condition which could be said to have been completely within the control of the company. The presence of this condition obviously placed the railway outside the status of one who could be classified as the owner of the property. Hence, if the option gave the company a future interest, that interest was void under the Rule. Professor Kales agreed with this conclusion when he observed that the optionee did not have enough absolute control to warrant the conclusion that it was the *dominus*.<sup>11</sup>

In America the applicability of the Rule to the long-term option in gross seems to have been considered for the first time in *Winsor v. Mills*.<sup>12</sup> In that case the option was included as one of the provisions of an *inter vivos* trust, the option and the trust being unlimited in duration. By its terms, Mills, a cestui, was to have an equitable estate in fee in an undivided one-third share of certain land. Among other provisions, Mills, his heirs and assigns, were given a "right" to purchase any portion of a certain twenty-foot strip of land at fifty cents per square foot at any time before such land was otherwise sold. The original trustee died, and the executors and trustees under his will brought a bill in equity to obtain a decree for the sale of trust land. In the course of the proceedings plaintiffs contended that Mills' option was void under the Rule against Perpetuities. The Supreme Judicial Court of Massachusetts accepted the reasoning of the *Gomm* case without reservation. It held that the option created a nonvested future interest in land because it "provides for the possible creation of an estate in lands at some time in the distant future, and clearly comes within the rule against perpetuities."<sup>13</sup>

Then the Massachusetts court proceeded to obscure the true rationale of its decision when it remarked with reference to the option and to another portion of the trust agreement which it had found void as a restraint upon alienation: "Both parts of the scheme are contrary to the policy of the law, as tending to restrain alienation and to create a perpetuity." It is true that this last quoted statement may mean that the option was void as a perpetuity and that the other provision was void as a restraint upon alienation. But it is just as reasonable to infer that the court regarded the option as offending both rules. If so, the decision illustrates the objectionable tendency of courts to center at-

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<sup>11</sup> See KALES, *op. cit. supra* note 2, § 665.

<sup>12</sup> (1892) 157 Mass. 362, 32 N. E. 352.

<sup>13</sup> *Id.* at 365, 32 N. E. at 353.

tention upon the remoteness of vesting aspect of the Rule rather than upon its basic purpose of destroying those remote future interests which tend to suspend the practical power of alienation.

The *Winsor* case rejected the idea that the Rule is designed to prohibit suspensions upon the absolute power of alienation. In this connection the court observed: "Undoubtedly the fact that the holders of vested interests cannot convey tends to make the property practically inalienable, for oftentimes the holders of contingent interests are unknown or cannot be found, and if they are accessible it is not easy to obtain releases of contingent rights on which it is impossible to fix a value. But the possibility or impossibility of obtaining releases is not the test by which to determine the validity or invalidity of a limitation." Here the court hinted at what is perhaps the true rationale of its decision—that the option constituted a "practical" suspension of the power to alienate the strip of land. It is regrettable that the court did not stress this line of reasoning in applying the Rule.

After holding the interest of the optionee void under the Rule against Perpetuities, the court decreed a sale of the trust land in accordance with the prayer in the plaintiff's bill but ruled that defendant Mills (the optionee) be allowed to purchase the optioned property pursuant to the option in spite of the fact that his interest had been declared void under the Rule. This reasoning defies even the comprehension of a lawyer.

Fifteen years later the problem of the long-term option in gross was adjudicated by the Supreme Court of Appeals of West Virginia in the two cases of *Starcher Bros. v. Duty*.<sup>14</sup> In these cases two optionors gave to the same optionee options which covered different tracts of land. The optionee was given the right to purchase the land at six dollars per acre for the period of one year and to extend the option annually by paying ten dollars per year. The options expressly extended to the "heirs, assigns, executors, and administrators" of the contracting parties. Starcher Bros. kept the options alive by extension payments and then gave notices of acceptance. After the optionors refused to convey, the Starchers sued for specific performance. The Supreme Court of Appeals decided that the options were not limited to reasonable periods of duration and therefore concluded that Starcher Bros. possessed remote future interests which failed under the Rule. Like other courts, this court effectively clouded the true nature of the Rule by stating: "This rule against perpetuities is aimed not only against restraints on the alienation of present interests, but is also directed against the creation of future interests in property."<sup>15</sup>

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<sup>14</sup> (1907) 61 W. Va. 373, 56 S. E. 524; (1907) 61 W. Va. 371, 56 S. E. 527.

<sup>15</sup> *Id.* at 379, 56 S. E. at 526.

In 1914 the Supreme Court of Pennsylvania considered the validity of an option in gross of unlimited duration. In *Barton v. Thaw*<sup>16</sup> the long-term option giving the grantee the power to purchase the fee of certain coal lands at not less than \$100 per acre was included in successive grants of the coal and minerals underlying the lands. The plaintiffs, who had inherited from the original grantor, brought a bill in equity to remove the option as a cloud on their title. They contended that the Rule voided the option. The defendant optionee claimed that the option gave him a vested interest. There was much merit to this latter contention because Pennsylvania is one of the few jurisdictions holding that an optionee has a present equitable interest in the optioned property.<sup>17</sup> This point troubled the trial court, for in one part of its opinion it made this inexplicable statement: "Except for the absence of a limit as to the time of acceptance, the option to purchase this land constituted a substantial interest in land which could be conveyed."<sup>18</sup> However, in a subsequent portion of the opinion the court concluded that the interest created under the option was contingent and that ". . . it did not constitute such a vested interest in the land as can escape the rule against perpetuities."

The trial court sustained the plaintiff's objection in a lengthy written opinion. Later the Supreme Court of Pennsylvania affirmed this decision and adopted the trial court's written opinion as its own. This adopted opinion cited with approval the reasoning employed in the *Gomm, Winsor v. Mills* and *Starcher v. Duty* cases. There is a definite hint in the *Barton* case that the trial court sensed the true nature of the Rule. In the latter portion of its opinion appears the following statement: "We cannot conceive of a more violent breach of the rule against perpetuities. Such an impress on the land ought not to be sustained, and it cannot be. It isolates the property. It takes it out of commerce. It removed it from the market. It halts improvements. It prevents the land from answering to the needs of growing communities. No homes can be built or towns laid out on land so incumbered, because the land always remains subject to be taken under the option."<sup>19</sup> Here the court almost adopted the suspension of the practical power of alienation version of the Rule. Unfortunately the court did not rely exclusively upon this version.

The unsuitability of the Rule against Perpetuities to options of the type involved in the preceding cases was brought to light in the *Barton* case when, toward the close of its opinion, the court pointed out that such options, made without reference to lives in being, were void unless

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<sup>16</sup> (1914) 246 Pa. 348, 92 Atl. 312.

<sup>17</sup> *Kerr v. Day* (1850) 14 Pa. 112; *Barnes v. Rea* (1908) 219 Pa. 287, 68 Atl. 839.

<sup>18</sup> *Barton v. Thaw*, *supra* note 16 at 357, 92 Atl. at 314-315.

<sup>19</sup> *Id.* at 364, 92 Atl. at 316.

limited in duration to a period of twenty-one years from date. In other words, the court granted tacit approval to an option which might endure for a period measured by a life or lives in being and twenty-one years. If an option tends to suspend practical alienability, it should not be permitted to last for such a potentially unreasonable period of time.

In another case, *Woodall v. Bruen*,<sup>20</sup> long-term repurchase options were set forth in two grants of the fee. In both deeds the grantees covenanted to give the grantors the right to repurchase the minerals and mining rights of way in each tract at fixed prices. One option had no time limit; the other was to become void after ninety-nine years. Plaintiff Woodall acquired both tracts. Since he thought that these option covenants constituted clouds on his title, he brought a bill in equity to cancel them upon the basis that they violated the Rule.

In an exemplary decision holding the options void under the Rule the West Virginia court rendered an opinion which was probably the first of the long-term option cases to display an understanding of the true nature of the modern Rule against Perpetuities. The court pointed out that there were two main schools of thought concerning rationale of the Rule. The first of these, said the court, considered the Rule as one prohibiting suspensions of the absolute power of alienation while the second thought it was designed to condemn "limitations that clog alienation and unduly restrain it for an unreasonable length of time, without absolute prevention thereof."<sup>21</sup> Here the court must have been referring to the fundamental Rule.

In 1920 the Supreme Judicial Court of Massachusetts again considered the validity of a long-term option in gross. In the case of *Eastman Marble Co. v. Vermont Marble Co.*,<sup>22</sup> the Vermont Marble Company by contract gave an optionee and his assigns a long-term option to purchase certain land at a fixed price at any time during twenty-five years from the date of the agreement. After acquiring the rights of the optionee the plaintiff Eastman Marble Company exercised the option. The optionor refused to convey. Plaintiff sued for specific performance but relief was denied.

The court's reasoning in this case is ambiguous, but its language indicates an understanding—perhaps somewhat vague—of the correct basis of the Rule. The court referred first to the two companion rules aimed at promoting the alienability of property—the Rule against Perpetuities and the rule against restraints on alienation—and then found that the twenty-five year option in gross violated "one or both" of these rules. It correctly observed that the Rule against

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<sup>20</sup> (1915) 76 W. Va. 193, 85 S. E. 170, (1916) 14 MICH. L. REV. 231.

<sup>21</sup> *Id.* at 195, 85 S. E. at 171.

<sup>22</sup> (1920) 236 Mass. 138, 128 N. E. 177.

Perpetuities was founded upon the principle that “. . . it is contrary to the spirit of our institutions that titles to real estate be tied beyond the period fixed so as to stifle free exchange.”<sup>23</sup> This statement by itself fails to specify the type of alienability involved. Did the court speak of the absolute power of alienation or of the practical power of alienation? The nearest approach to an answer is found in this portion of the opinion: “It purports to create an absolute right to be exercised within twenty-five years and imposes an immediate restraint upon alienation by the owner for a like period.” Since the option was found in a contract which was not framed in the formal language of the limitation of a future interest the court was confronted with the problem of ascertaining just how such an option could give the optionee a remote future interest in land. This was finally accomplished by the court’s observation that the twenty-five year option was something more than a “mere option to purchase.”

This case is typical of the many cases that display a certain reluctance to apply the Rule squarely to long-term options. Rather than stand firmly upon the proposition that the twenty-five year option was void under the rule against restraints and the Rule against Perpetuities, the court made the weak assertion that the option violated one or both of these rules. Since the court concluded that the optionee had a future interest in land, it is regrettable that the vague hints that the option brought about a suspension of the practical power of alienation were not replaced with a positive assertion of that fact.

In the Georgia case of *Turner v. Peacock*<sup>24</sup> the Supreme Court of Georgia frankly admitted that it was reluctant to hold that a long option in gross falls “technically within the Rule against Perpetuities.” Nevertheless, that court voided a long term option, without time limit, which appeared in a covenant collateral to the conveyance of another tract of land. At the outset of its discussion, the court expressed its approval of the results reached in the *Starcher v. Duty* and *Barton v. Thaw* cases but refused to base its conclusion solely upon the reasoning found in them. Instead, it used this interesting language: “Without holding that the case falls technically within the rule against perpetuities, we agree . . . that the option in this case is void. We do not think that it created . . . any interest in the land . . . which could take effect under the rule against perpetuities as laid down in our Code.”<sup>25</sup>

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<sup>23</sup> *Id.* at 153, 128 N. E. at 183.

<sup>24</sup> (1922) 153 Ga. 870, 113 S. E. 585.

<sup>25</sup> *Id.* at 877, 113 S. E. at 589. The Georgia Rule against Perpetuities is set forth in GA. CODE § 85-707 (1933). This code section appears to be declaratory of the common law Rule. See 2 SMILES, *op. cit. supra* note 1, § 561.

The quoted language, considered in its entirety, is rather unintelligible. If the option did not "technically" fall within the Rule, then under what theory was the option held void? Was the option condemned as being "against public policy"; was it void as a "restraint on alienation"? The basis of the decision must rest in conjecture. *Turner v. Peacock* provides a good example of the unsatisfactory methods most courts have employed in solving the problem of the applicability of the Rule to the long-term option in gross.

Also noteworthy, by reason of its contribution to the already abundant confusion in the law upon this subject, is the Pennsylvania case of *In re Lilley's Estate*.<sup>26</sup> Here the option was included in a testamentary ninety-nine year trust. It gave a named corporation the power to remove coal from certain trust lands at any time during the pendency of the trust upon a royalty suitable to the company. The Rule against Perpetuities was one of the two grounds upon which the option provision was voided. However, the court stated that the Rule is designed to prohibit remote suspensions upon the *absolute* power of alienation.<sup>27</sup> If the court really intended to apply this version of the Rule, it should not have held the option void because long term options never suspend the absolute power of alienation.

One additional case which deserves brief mention is *Skeen v. Clinchfield Coal Corp.*<sup>28</sup> In it a grantor conveyed land to a corporation and reserved five acres for a home. The deed contained an agreement, a careful reading of which reveals that the corporation was given an option to purchase the reserved five acres for \$3,000. The deed also stated that the grantor would sell and that the corporation buy the five acres for the sum of \$3,000 whenever the grantor should decide to sell. The agreement extended to the heirs and assigns of the grantor and to the successors and assigns of the corporation.

Skeen became the grantor's successor in interest to the extent of a 24% interest in the 5 acres. The corporation exercised its option and then sued to compel conveyance of Skeen's interest. Skeen contended that the agreement was void under the rule against restraints on alienation and the Rule against Perpetuities.

For some reason, which is difficult to understand, the court construed the agreement as one involving only an option to sell.<sup>29</sup> The most legitimate objection to the option—that of its tendency to sus-

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<sup>26</sup> (1922) 272 Pa. 143, 116 Atl. 392.

<sup>27</sup> "A perpetuity is any limitation or condition which may take away or suspend the absolute power of alienation for a period beyond life or lives in being and 21 years thereafter. If there is a possibility that a violation of this rule may happen, the devise is void." *Id.* at 148, 116 Atl. at 394.

<sup>28</sup> (1923) 137 Va. 397, 119 S. E. 89; (1924) 22 MICH. L. REV. 279; (1924) 10 VA. L. REV. 333.

<sup>29</sup> *Id.* at 403, 119 S. E. at 90.

pend the practical power of alienation of the property—went unheeded and the court decided that the agreement attempted to create an executory interest in the corporation and that this interest was void because it might not vest within the period required under the Rule. Finally the court added, by way of dictum, that even if the corporation had had a mere option to purchase, the option would have been within the Rule.

Equity regards the vendee in an executory land purchase contract as being the owner of the land<sup>30</sup> and the Rule against Perpetuities is inapplicable to his present equitable interest in the purchased land.<sup>31</sup> The court did not go into the problem of whether or not the corporation in the *Clinchfield* case should have been considered the equitable owner of the land. The decision deprives us of what might have been a highly informative discourse on this aspect of the perpetuities problem.<sup>32</sup>

It is appropriate to observe by way of summary that each of the foregoing cases involving long-term options in gross could have been decided upon the basis that the options created potential suspensions of the practical power of alienation which might possibly have extended beyond the period permitted by the Rule. The courts did not consider the proposition that the Rule should have no application to commercial or business transactions of this type. Evidently they were not absolutely certain that they were correct in applying the technical Rule since most of them sought some additional basis of decision. For example, some also thought that such options constituted restraints on alienation; others decided that they were also void as against public policy. It seems strange that the courts found it necessary to follow the policy of relying upon hazy, artificial, and laborious reasoning when the problem might have been settled in simple fashion by considering the validity of each option under some "suitable adaptation" of the rule against restraints on alienation. That the courts did not do so is probably attributable to the powerful influence of the *Gomm* case.

## 2. The Long-Term Option Appendant and Suspension of the Practical Power of Alienation

### a. *Business Utility of the Option Appendant*

It has been suggested that the land purchase option appendant to a long-term lease is so "absolutely in the control of the owner of an

<sup>30</sup> 2 POMEROY, EQUITY JURISPRUDENCE § 368 (5th ed. 1941).

<sup>31</sup> *In re Doyle's Estate* (1907) 1 Ir. R. 204.

<sup>32</sup> Compare *Kauri Timber Co. v. Dist. Land Reg.* (1902) 21 N. Z. L. R. 84, wherein the grantee covenanted to reconvey the fee without cost whenever the timber was removed, and agreed to reconvey in any event before the expiration of 99 years. The covenant was held void under the Rule.

existing estate therein" that it does not constitute a "clog on the title independent of such estate."<sup>33</sup> This *dominus* argument loses some of its effectiveness, however, when we consider that optionees will not always have ability to make immediate payment or to promise payment of the consideration stated in the option.

There is much less reason for regarding the long-term option appendant as a device tending to suspend the practical power of alienation than there is for so regarding the long-term option in gross. The long-term lease commonly assumes the form of the ninety-nine year term. In England it has served a variety of functions,<sup>34</sup> but in America it has been employed to accomplish two principal objectives as stated in the Maryland case of *Banks v. Haskie*.<sup>35</sup> First, land can be developed in spite of the owner's lack of capital. Second, the owner thus has an excellent source of regular income. In more recent years the long-term lease has also been used as a device for avoiding or lessening income taxes, but its primary function is still that of financing the improvement of business realty.<sup>36</sup> Obviously, the option appendant aids rather than interferes with the business utility of the long-term lease.

#### b. *The Long-Term Lease and the Practical Power of Alienation*

Does a long-term lease bring about a suspension of the practical power to alienate land?

In a Maryland case involving a ninety-nine year lease renewable perpetually, it was said that this character of tenure did not place the property *extra commercium*.<sup>37</sup> Clearly, such a lease does not suspend the absolute or legal power of alienation. Is it equally true that the long-term lease can never operate so as to suspend the practical power to alienate the property?

It would be impossible to answer this question with an academic "yes" or "no" because long-term leases differ in duration and content. In some localities ninety-nine year leases are cast so as to be renewable perpetually; in others long leases are customarily non-renewable; in still others they assume the form of twenty-one year leases renewable for additional terms of the same duration.<sup>38</sup> There are instances in which 999 year leases have been construed in reported cases.<sup>39</sup>

Even though the reversion under a long-term non-renewable lease

<sup>33</sup> 2 TIFFANY, REAL PROPERTY 179 (3d ed. 1939).

<sup>34</sup> Comment (1939) 48 YALE L. J. 1400, 1401.

<sup>35</sup> (1876) 45 Md. 207, 217.

<sup>36</sup> Comment, *supra* note 34 at 1405.

<sup>37</sup> *Banks v. Haskie*, *supra* note 35 at 218.

<sup>38</sup> Comment, *supra* note 34 at 1402, n. 13.

<sup>39</sup> See *Palmer v. Conn. Ry. Co.* (1941) 311 U.S. 544, and cases cited therein.

might be of little value apart from the reserved rentals during the early part of the term, it would still have potentialities for preventing practical alienability of the land. For example, a prospective purchaser might desire to develop the property. If the reversioner were willing to sell at a reasonable figure, it is conceivable that the lessee might block the transfer by demanding an unreasonable price for the release of his interest. On the other hand, if the lessee were willing to sell his interest at a reasonable figure, the purchaser might find that the reversioner would demand an exorbitant price for his interest and the unexpired term of the lease might not be of sufficient duration to warrant the prospective purchaser developing the property as intended.

Normally, the existence of a long-term lease, renewable perpetually, would not impede practical alienability of the leased land. Should the lessee desire to sell his interest, the purchaser would be protected against the lessor by the provision for perpetual renewal. Yet, even here the terms of the lease might operate to prevent alienation of the land. Consider, for example, the effect of a graduated rental for the renewal period. A prospective purchaser might not be willing to acquire the lease from the lessee with such a renewal provision outstanding and the lessor might be unwilling to dispose of his interest at a reasonable price.<sup>40</sup>

Notwithstanding the fact that long-term leases may conceivably suspend the practical power of alienation, they have never been held void under the Rule against Perpetuities.<sup>41</sup> Since the common law has never struck down long-term leases, the common law should be equally tolerant of land-purchase options appendant to such leases, particularly in view of the fact that long options are inserted for practical business purposes.

### *c. The Option Appendant: Its Effect upon Alienability*

Only in highly imaginative situations does the option appendant have a tendency to suspend the practical power to alienate the leased land. To illustrate, let us first assume that the market value of the leased land (exclusive of improvements placed thereon by the lessee) should increase during the term. An option appendant to a long lease

<sup>40</sup> Restraints upon assignments by lessees have been upheld upon the theory that they are designed to protect lessors' interests. See 2 SIMES, *op. cit. supra* note 1, § 466.

<sup>41</sup> 2 BL. COMM. \*142; 1 TIFFANY, *op. cit. supra* note 33 § 74, n. 13. Constitutional and statutory provisions of some states have cut down the permissible duration of long-term leases. For example, see ALA. CODE tit. 47, § 18 (1940); CAL. CIV. CODE § 718; IOWA CONST. Art. I, § 24; MICH. CONST. Art. XVI, § 10; MINN. CONST. Art. I, § 15; MONT. REV. CODE ANN. §§ 6707, 6708; NEV. COMP. LAWS § 1549; N. D. REV. CODE § 47-1602 (1943); S. D. CODE § 38.0403 (1939); WIS. CONST. Art. I, § 14; compare MASS. ANN. LAWS ch. 186, § 1 (lease of 100 years or over considered estate in fee for enumerated purposes provided fifty years of the term are unexpired).

would tend to foster rather than suspend practical alienability under such facts. Since the amount due the lessor is fixed by the terms of the option, he cannot prevent alienation. If the lessee-optionee should be willing to sell his interest, the purchaser could deal with him alone. The existence of the option would be an inducement to the sale because upon its exercise the optionee would derive a profit.

Next, let us assume that the market value of the land should decrease during the term of the long lease. Upon the surface it might appear that the option appendant would constitute an effective suspension of the practical power to alienate the land, but upon careful analysis it becomes clear that the option would have very little tendency in that direction. Unlike the option in gross there would be small likelihood that the option appendant would be used by the holder as a wedge to pry an unreasonable price for a release of the option. This conclusion is based upon the assumption that if the market value of the land should decrease, the leasehold would become less valuable to the lessee. When earnings and the value of the land decline, the holder of an option in gross has nothing to lose other than the highly improbable chance for profit to be derived from a return of higher land values. The lessee, however, under a long-term lease has far more to lose in such case because the rental which he pays under the lease will have become disproportionately high in comparison to the market value and earnings of the land. The lease would tend to become oppressive and the lessee would be inclined to assign, surrender or abandon<sup>42</sup> his rights rather than continue paying rentals upon a losing enterprise. Here the danger of a suspension of the practical power of alienation is so small that it could be disposed of under the maxim *de minimis non curat lex*.

One fact situation under which the option appendant to a long-term lease could suspend the practical power of alienation deserves only casual mention. Assume that at the inception of the lease the purchase price named in the option was substantially higher than the market price of the land. Usually the purchase price inserted in options appendant to long leases approximates the value of the reserved rents capitalized at the prevailing rate of interest.<sup>43</sup> Therefore, the use of an almost theoretical fact situation such as that just mentioned seems unrealistic. To employ it as a reason for striking down long

<sup>42</sup>A re-entry by the landlord would terminate the lessee's option to purchase. *London v. Tebo* (1923) 246 Mass. 360, 141 N. E. 234.

Where the lease and option are not independent, an abandonment of the lease may cause of failure of consideration for the option. *Helbig v. Bonsness* (1938) 227 Wis. 52, 277 N. W. 634.

<sup>43</sup>*Prout v. Roby* (U. S. 1872) 15 Wall. 471 (rent charge capitalized at six per cent); *Keogh v. Peck* (1925) 316 Ill. 318, 147 N. E. 266 (five per cent); *Hollander v. Central Metal Co.* (1908) 109 Md. 131, 71 Atl. 442 (six per cent); *Hagar v. Buck* (1872) 44 Vt. 285 (eight per cent).

options appendant would give not enough emphasis to the practical and too much to the theoretical.

Finally, let us assume that the market value of the leased land remains constant during the term. It is conceivable that under such facts a lessee who would be willing to dispose of his interest as lessee for a reasonable figure if the lease were without purchase option appendant would be unwilling to dispose of the lease at anything less than an "extortion price" if it contained an option to purchase. This inalienability could be traced to the option in that the lessee-optionee might entertain the hope of a sudden increase in the market value of the land and a profit upon his exercise of the option.

Under the circumstances of this last illustration the option appendant (if we assume that it brings about a future interest) would be within the fundamental Rule because of the possibility that it might suspend the practical power of alienation. But such an illustration is not realistic. Common experience indicates that there is no basis for the supposition that the market value of land will remain constant—particularly for the duration of a long lease. The only legitimate assumption that can be made is that the market value will rise or fall, perhaps many times over, during the life of the lease.

There is much to be said in favor of the small but uniform body of law in the United States,<sup>44</sup> which the Restatement of Property<sup>45</sup> follows and which holds the option appendant to the long lease immune to attack under the Rule. There is little to be said in support of the contra decisions<sup>46</sup> in England. In practice (though possibly not completely in theory) the option appendant acts as an aid rather than a hindrance to the practical alienability of land which is under long-term lease.<sup>47</sup> Furthermore, it is an extremely useful commercial device in that it encourages development of land by the lessee and protects him against possible loss of valuable improvements at the expiration of the lease.<sup>48</sup>

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<sup>44</sup> *Todd v. Citizens' Gas Co.* (C. C. A. 7th 1931) 46 F. (2d) 855, 866 (option appendant to a twenty-five year franchise); *Keogh v. Peck*, *supra* note 43; *Hollander v. Central Metal Co.*, *supra* note 43.

<sup>45</sup> RESTATEMENT, PROPERTY § 395 (1944). Note that the Restatement "excepts" such options from the operation of the Rule. *Id.* comment a.

<sup>46</sup> *Woodall v. Clifton* [1905] 2 Ch. 257; *Worthing Corp. v. Heather* [1906] 2 Ch. 532.

<sup>47</sup> Comment, *supra* note 34 at 1413, n. 87. Compare Comment (1925) 35 YALE L. J. 213, 219-220.

<sup>48</sup> "Clearly, any decision on this point must be superficial which fails to consider whether the purposes of the Rule are really furthered if it discourages commercial improvement of the property during the last fifteen or twenty years of the lease period by depriving the lessee of the power to secure the capital benefits of his improvements through exercise of the option." Leach, *Powers of Sale in Trustees and the Rule against Perpetuities* (1934) 47 HARV. L. REV. 948, 949.

d. *Long-Term Options Appendant and the Rule: Case Law*

The meagre body of case law dealing with the applicability of the Rule to long options appendant has a tendency to confuse rather than enlighten the student upon the nature of the Rule. It is strange that the problem was not considered in the English case of *In re Adams and the Kensington Vestry*<sup>49</sup> which was decided in the Chancery Court of Appeal in 1884. In that case the option was appendant to a sixty year lease. The optionee died and his son exercised the option. The litigation that ensued dealt with the son's alleged inability to convey good title without concurrence of his father's next of kin. At no point in the case was the option-perpetuities problem raised, although counsel for the vendor cited the *Gomm* case upon another point.<sup>50</sup> Presumably the parties to the litigation thought it inconceivable that the Rule could be germane to an option appendant to a long lease.

Approximately twenty years later the decision of Warrington, J., in the case of *Woodall v. Clifton*<sup>51</sup> made it certain that in England the Rule has a direct bearing upon the option appendant. This case involved a ninety-nine year lease with an option appendant. The lessee, his heirs and assigns, were given the power to purchase one or more acres of the leased land from the lessor, his heirs or assigns, at the rate of £600 per acre. The validity of the option was challenged.

In the Chancery Division it was held that the interest of the optionee was void under the Rule. The court reasoned thus: The Rule against Perpetuities prohibits the remote vesting of executory interests. The option appendant created a nonvested future interest in the optioned land in favor of the optionee. This future interest was not certain to vest within the permitted period. Therefore, the optionee's interest was "obnoxious to the Rule." The court relied fully upon the *Gomm* case in support of its conclusion, although it admitted that this was "in some ways a rather puzzling case."

To the student who attempts to glean knowledge of the nature of the Rule against Perpetuities, this decision of Warrington, J., will itself be "in some ways rather puzzling." Which, if either, of the two versions of the Rule did the decision invoke? We cannot find the answer in the *Gomm* case, upon which the court purported to rely, because the *Gomm* case is silent upon the point. Did Warrington, J., intend to infer that the Rule was one designed to prohibit remote suspensions of the absolute power of alienation? Surely not, for it cannot be asserted that a land purchase option can ever suspend that power.

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<sup>49</sup> (1884) 27 Ch. D .394.

<sup>50</sup> *Id.* at 397.

<sup>51</sup> *Supra* note 46.

Did the court view the Rule as one aimed at destroying devices which tend to create remote suspensions of the practical power of alienation? Probably not, because it has been demonstrated that for all practical purposes the option appendant to a long lease does not tend to create a suspension of the practical power of alienation. There remains but one alternative, and that is to assume that the court did lip-service to the formula of the Rule without stopping to consider the nature of the evils which the Rule is designed to eradicate.

The *Woodall* case was carried to the Court of Appeal, where it was affirmed.<sup>52</sup> An unusual feature of this decision on appeal was that appellate court neither affirmed nor disaffirmed the lower court's stand on the perpetuities question. The result reached by the lower court was upheld solely upon the basis that the option covenant was not of the type which could run with the land so as to be binding upon the land in the hands of an assignee of the reversion. The single reference to the Rule lay in a vague statement that to enforce the option as a covenant running as a burden on the reversion would "lead to . . . most undesirable results as to perpetuities. . . ." Perhaps the Court of Appeal intentionally avoided any reference to the Rule because of an intuition that it would be absurd to apply the Rule squarely to options appendant.

*Worthing Corporation v. Heather*<sup>53</sup> is another English Chancery Division case which voided an option appendant to a long lease. There a thirty-year lease was acquired by a certain municipal district. A covenant in the lease gave the lessee, its successors or assigns, the option to purchase the fee for the sum of £1325 at any time during the term from the lessor, her heirs or assigns. The successor of the lessee gave notice of its desire to exercise the option, but the devisees refused to convey, asserting that the option was in violation of the Rule. The plaintiff sought a decree for specific performance and in the alternative damages for breach of the option covenant. It is noteworthy that upon argument to the court counsel for the corporation conceded that under the authority of *Woodall v. Clifton* the plaintiff was not entitled to specific performance. Counsel, however, asserted that since the land was to be conveyed for charitable purposes the option should not be held void under the Rule. The court, speaking again through Warrington, J., rejected the charitable purpose argument and ruled that under the *Gomm* and *Woodall v. Clifton* decisions it would be impossible to decree specific performance. Thus, the court placed the option appendant within the ban of the Rule.<sup>54</sup> Strangely

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<sup>52</sup> *Id.* at 278-280.

<sup>53</sup> *Supra* note 46.

<sup>54</sup> *Accord*, *United Fuel Supply Co. v. Volcanic Oil & Gas Co.* (Ont. High Ct. Justice, 1911) 3 Ont. Weekly Notes 93, 95 (preemption option to lease). Compare

enough, the covenant was upheld as a *contract* and the corporation was allowed damages for its breach.

The *Woodall* case is weak as an authority because the Court of Appeal refused to affirm or to disaffirm the stand which was taken upon the perpetuities point by Warrington, J., in the Chancery Division. The *Worthing* case, emanating from the Chancery Division, is not a controlling authority upon the point. The case was appealed but was compromised before a decision was rendered by the Court of Appeal.<sup>55</sup>

It is of interest to note that in two early American cases<sup>56</sup> decrees were rendered granting specific performance against lessors who refused to carry out their obligations upon the acceptance of options appendant to ninety-nine year leases. In neither case was the Rule urged by way of objection.

The first case in America which discussed the applicability of the Rule to such options was that of *Hollander v. Central Metal & Supply Co.*,<sup>57</sup> decided in 1908. In that case the option was appendant to a ninety-nine year lease of Maryland land and provided that it could be exercised at any time during the term for \$600. The lessee exercised the option and then sued the reversioners for specific performance. Defendants interposed the Rule against Perpetuities. Ultimately, the Court of Appeals of Maryland decided that the option did not violate the Rule.

The Court of Appeal first quoted the definition of the Rule as stated in *Lewis on Perpetuities*<sup>58</sup> and conceded that, if the fee covenanted to be conveyed under the option covenant be regarded as a future limitation, it was not certain to vest within the permitted period. That being the case, the court found it necessary to resort to the use of the dialectical syllogism in sustaining the option. The court said that covenants for perpetual renewal of leases were not within the Rule—the decisions sometimes being based upon the theory that the covenant was “a part of the lessee’s present interest” and that if such were true, then it would be equally true that the option appendant was part of the lessee’s present interest. The court also noted that titles to property of great value in Baltimore and other parts of

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Rider v. Ford (1923) 1 Ch. 541, wherein an option to purchase was included in an agreement for a lease of “3, 5, or 7 years.” The lessee-optionee became a tenant from year to year after the expiration of seven years. The court held that he could not exercise the option because it violated the Rule. The soundness of this decision has been questioned. See 2 WILLIAMS, VENDOR AND PURCHASER *addenda* xxxix (3d ed. 1923).

<sup>55</sup> 1 WILLIAMS, *op. cit.* *supra* note 54 at 359, n. (y).

<sup>56</sup> Prout v. Roby, *supra* note 43; Hagar v. Buck, *supra* note 43.

<sup>57</sup> *Supra* note 43.

<sup>58</sup> LEWIS ON PERPETUITIES 164 (1843).

the state were held under long leases with options appendant<sup>59</sup> and that the technical rules applying to such estates in England had been relaxed in favor of a more liberal attitude in Maryland. The court concluded that "the lease in question did not place the property extra commercium, and that the rights of the parties under the covenants therein are 'not open to any of the objections against perpetuities'."<sup>60</sup>

The next American case giving attention to the same subject was *Keogh v. Peck*,<sup>61</sup> decided in the Supreme Court of Illinois in 1925. Again, one of the principal questions under consideration was whether specific performance could be decreed against the holder of the reversion after the lessee's acceptance of an option appendant to a ninety-nine year lease. The court decreed specific performance and decided the Rule against Perpetuities was inapplicable.

To the Illinois Supreme Court belongs the distinction of being the first court to point out in unmistakable terms that the option appendant to a long lease does not give the optionee an interest in land.<sup>62</sup> Instead of grounding its decision upon this basis alone, the court also reasoned that the option appendant was entitled to as much toleration under the law as options to perpetually renew leases, optional powers of forfeiture, and rights of re-entry for condition broken. Since these devices have never been held invalid under the Rule, concluded the court, neither should the purchase option appendant.

Perhaps as an afterthought, the court found that the option did not suspend the power of alienation. By "power of alienation" the court must have meant the absolute power of alienation, for it said: "The lessor can convey the reversion. The lessee can convey the estate for years, and by the joint action of the two the estates can at any time during the term of the lease be united in one person."<sup>63</sup> However, this same opinion also contains a statement that a perpetuity is "a limitation taking the subject thereof out of commerce for a longer period of time than a life or lives in being and twenty-one years thereafter . . ."<sup>64</sup> One might conclude from this that the court understood the Rule to be aimed at destroying remote nonvested future interests since they tend to suspend the practical power of alienation.

The *Keogh* case undoubtedly reached the correct result, but the method of reasoning employed by the court was far from commend-

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<sup>59</sup> It is said that Lord Baltimore "initiated the ground lease system as the primary form of tenure" in the Maryland Colony. Comment, *supra* note 34 at 1401.

<sup>60</sup> *Hollander v. Central Metal Co.*, *supra* note 43 at 161, 71 Atl. at 448.

<sup>61</sup> *Supra* note 43.

<sup>62</sup> 316 Ill. at 332, 147 N. E. at 271.

<sup>63</sup> 316 Ill. at 334, 147 N. E. at 272.

<sup>64</sup> 316 Ill. at 332, 147 N. E. at 271. This definition can be traced to Randell, *An Essay on the Law of Perpetuity* 48 (1822).

able. The decision is typical of the many involving long-term options wherein the courts, failing to understand the true fundamental purpose of the Rule (an excusable tendency when so intricate a branch of the law is involved), grasp for any surface reason which seems plausible enough to support their conclusions.

In the case of *Todd v. Citizens' Gas Co.*,<sup>65</sup> the city of Indianapolis had granted a twenty-five year franchise to a corporation to be formed for the purpose of supplying gas to the inhabitants of the city. The franchise gave the city the power to acquire the corporate property by paying off the balance due stockholders at the termination of the franchise. When the franchise expired, the plaintiffs, stockholders of the corporation, brought a bill in equity to prevent such a transfer to the city. Plaintiffs asserted, among other things, that the city's option to acquire the property violated the Rule. In an interesting opinion the federal circuit court of appeals held that the Rule pertains only to interests in property and that the option in favor of the city was merely a contract which conferred no property interest. The federal court concluded that a long-term option in a franchise should be governed by the same rule as that which is applied in this country to options appendant to long leases.

The perpetuities problem was handled correctly in the *Todd* case. The court properly stressed the contract aspect of the option and avoided the confusion which might have resulted had it treated the option as tantamount to the limitation of a future interest. However, Professor Gavitt has indicated that the case is "more or less valueless as an authority" since the court did not refer to the Indiana statute on perpetuities.<sup>66</sup>

There is a distinct need for much clarification with respect to the validity of long-term options appendant under the Rule. The few and inconclusive English cases upon the subject have failed to observe a substantial difference between the option in gross and the option appendant insofar as the fundamental Rule is concerned. The American cases reach the correct results but are deficient in that they seldom point out that the long option appendant is valid because it does not violate the fundamental Rule. These courts are inclined to grasp any reasons which seem plausible in order to sustain their conclusions. Options appendant are upheld because they are comparable to perpetual renewal options in leases and to rights of forfeiture and re-entry for condition broken. Sometimes they are upheld because they do not suspend the absolute power of alienation. A better reason for refusing to apply the Rule in this situation is that found in the *Todd*

<sup>65</sup> *Supra* note 44.

<sup>66</sup> GAVITT, INDIANA LAW OF FUTURE INTERESTS 276 (1934). The pertinent Indiana statutes are these: 1 Ind. Acts 1945 c. 216, p. 983.

case: the option involves only contract interests to which the Rule has no application. However, the most satisfactory reason for upholding the long option appendant, even though we assume it to be the equivalent of an executory interest, is that it does not have an appreciable tendency to cause a suspension of the practical power to alienate the optioned land.

### 3. The Long-Term Preemption Option and Suspension of the Practical Power of Alienation

Whether a preemption option tends to bring about a suspension of the practical power of alienation depends almost entirely upon the matter of price. If the price to be paid by the optionee upon the exercise of the preemption is low as compared with today's market value of the land, a suspension of practical alienability almost invariably will result because the natural tendency of the optionor will be to withhold the land from sale at a price which is under the market. If the preemption price is equal to, or in excess of, today's market value of the land, the preemption presents no obstacle to practical alienability. When the optionor desires to sell he is enabled to get the best market price. As a practical matter it will be of little concern to him whether the land is purchased or refused by the preemption optionee.

Since market values fluctuate, a preemption option which does not suspend the practical power of alienation may operate later as a suspension. The law cannot base the validity of the preemption option upon market fluctuations so the only feasible alternative is to hold void as a potential restraint on practical alienability any long preemption option which calls for a payment of a fixed price when exercised. Nevertheless, preemption options are customary and useful in the world of commerce. We should consider whether the Rule against Perpetuities offers the proper solution to the problem of the long-term preemption.

A preemption option, regardless of its potential duration, should be upheld if the price to be paid upon acceptance reflects the true market value of the land at that time. The formula for computing a price equivalent to such market value can be framed in a variety of terms but it usually calls for payment of the "offeror's price," the "market price," or the "appraised value" at the time the optionor expresses a desire to sell.

#### a. *Long-Term Preemption Options and the Rule. Case Law*

The case law relating to preemption options and the Rule against Perpetuities is far from satisfactory. Some decisions apply the technical Rule, others apply the rule against restraints on alienation, and

some purport to apply both in the same case. In few, if any, of these cases is there any effort to explain the fundamental purpose of the Rule.

Referring first to the English decisions, we find that the earliest case dealing with the validity of the long-term preemption option under the Rule, that of *Birmingham Canal Co. v. Cartwright*,<sup>67</sup> held the preemption valid. There the vendee of certain land was given a preemption upon the reserved minerals. Specifically, the vendee was to have the "refusal" of the minerals, at the same price as that of adjoining minerals belonging to the vendor, when and if the latter should sell such adjoining minerals. The preemption extended to the heirs and assigns of both contracting parties. In litigation which followed the court decided that the preemption did not violate the Rule. In this decision the court followed what was probably the prevailing view concerning the Rule at the time, that is, that the Rule was aimed at destroying devices which tended to suspend the absolute power of alienation. The court found no such suspension in the case because the total interest in the land was divided between the covenantor and covenantee who had the legal ability to convey the land free of the preemption.<sup>68</sup>

Later, in *Manchester Ship Canal Co. v. Manchester Racecourse Co.*<sup>69</sup> the court of Chancery Division indicated in a dictum that a preemption of "first refusal" without time limit extending to the successors and assigns of the contracting corporations "would be clearly void for perpetuity."

The first American case involving a long-term preemption option was *Henderson v. Bell*,<sup>70</sup> decided by the Supreme Court of Kansas in 1918. The preemption upon the land in that case was included in a contract for the sale of other lands. It provided that in the event the preemption optionors should decide to sell a certain forty-acre tract of land the preemption optionees should have the right to purchase the tract at \$65 per acre. From the report of the case it would appear that the provision extended only to the immediate contracting parties, but the court construed it as being capable of running for an indefinite period of time in favor of the optionees, their heirs, or assigns. Eventually the validity of this preemption was tested in a foreclosure suit. The mortgagor-optionor contended that the option was void, first, because it was against public policy, second, because it was in violation of the Rule, and third, because it involved an unreasonable restraint upon alienation.

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<sup>67</sup> *Supra* note 8.

<sup>68</sup> *Id.* at 432-433.

<sup>69</sup> (1900) 2 Ch. 352, 360.

<sup>70</sup> (1918) 103 Kan. 422, 173 Pac. 1124.

The court stressed only the second of these reasons in upholding the optionor's contentions. It made no attempt to state the true nature of the Rule, but it may have sensed the same. This is indicated by the court's observation that if the preemption were to be held valid, a sale thereunder would have to be at \$65 per acre even though the land might be worth \$1,000 per acre at the time of the sale. Undoubtedly, a suspension of the practical power of alienation would exist under such facts. The court cited the case of *Woodall v. Bruen*<sup>71</sup> in support of its decision. The *Woodall* case was perhaps the first to declare the long-term option in gross void as a suspension of the practical power of alienation.

The second American case which dealt with the effect of the Rule upon the preemption option was the Connecticut case of *Lewis Oyster Co. v. West*.<sup>72</sup> The facts disclosed that in 1888 the grantee received a deed to a certain dock and premises. At the same time he executed a covenant in favor of the grantor "in the manner prescribed for the conveyance of land" which expressly extended to the heirs and assigns of the contracting parties. In the covenant it was agreed that the grantee would not convey the dock and premises to any other party without giving the grantor an opportunity to purchase them for the sum of \$2,500 plus the value of improvements added by the grantee-optionor. Later, a successor in interest of the grantee leased the property for ninety-nine years renewable for an additional term. The property had not been offered to the plaintiff who had succeeded to the grantor's interest.

Plaintiff brought suit to obtain a conveyance under the terms of the covenant. The court conceded that the giving of a long lease constituted a violation of the covenant, but this fact became unimportant in view of the court's ultimate conclusion that the preemption covenant violated the Connecticut statute of perpetuities.<sup>73</sup> This statute, said the court, "pursued the same objects as the common-law rule." The court reasoned that the covenant attempted to create a contingent future interest in property which was not certain to vest within the period permitted by the statute and that the covenant could not be "gotten rid of at the will of the covenantor." After concluding that the covenant was objectionable upon the score of remoteness of vesting, the court added that it also brought about a restraint on alienation just as effectively as would an ordinary option contract.

The court in this case also stated that the covenant amounted to a very "practical restraint on alienation" in that property worth \$25,000

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<sup>71</sup> *Supra* note 20.

<sup>72</sup> (1919) 93 Conn. 518, 107 Atl. 138.

<sup>73</sup> CONN. GEN. STAT. § 2952, which is set forth verbatim in 2 *STIMES, op. cit. supra* note 1, § 584. The statute was repealed in 1895. Conn. Public Acts 1895, c. 249.

would have to be sold for \$7,100 if the provision were upheld. Unfortunately, it is impossible to ascertain whether the court considered the Rule as one designed to prevent restraints upon the practical power of alienation or whether the statement meant the covenant involved a restraint upon alienation in addition to a violation of the Rule against Perpetuities.

A relatively recent decision which made an excellent analysis of the Rule as it applies to the preemption option is that of *Weber v. Texas Co.*<sup>74</sup> In that case the option was appendant to an oil and gas lease which ran for a "primary term" of five years and "as long thereafter as either oil or gas is or can be produced from any well on said land." The lease extended to the lessee's "heirs, representatives, successors and assigns." A one-eighth royalty had been reserved by the lessors, but the lease contained a preemption provision giving the lessee the option to acquire all or any part of the reserved royalty interest "at the best bona fide price offered by responsible third parties when and if offered for sale or transfer by the lessor." The lessors sold defendant Weber a one-fourth interest in their reserved royalty for \$7,000 without first offering it to the Texas Company, the successor in interest of the lessee. Weber took with notice. About two weeks later the Texas Company tendered Weber \$7,000 for the one-fourth interest. The latter refused to sell and a suit for specific performance followed.

Defendant contended that the reserved one-eighth royalty constituted real property under the Texas law and that the preemption option created an interest in land that was void under the Rule. The court's answer was that the preemption was within neither "the purpose nor the reason for the rule."

The opinion of the Fifth Circuit Court of Appeals in the *Weber* case is admirable in its exposition of the nature and purpose of the Rule. The Rule, said the court, endeavors to prohibit "fettering real property with future interests dependent upon contingencies unduly remote which isolate the property and exclude it from commerce and development for long periods of time, thus working an indirect restraint upon alienation. . . ." The court tested the preemption option with this purpose in mind and found that it was unobjectionable because the lessee had no power to restrain alienation. The lessee's only right was to accept or reject the reserved interest as a "preferred purchaser" whenever the lessor should desire to sell. Hence, it is clear that the court found the preemption to be valid in that it did not violate the fundamental Rule against Perpetuities.

One must be extremely hesitant in criticising this decision be-

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<sup>74</sup> (C. C. A. 5th 1936) 83 F. (2d) 807.

cause it is so excellent in most respects. Nevertheless, the court failed to consider the possible tendency toward a suspension of the practical power of alienation which might arise in determining the price to be paid for the royalty. How could "the best bona fide price offered by responsible parties" be ascertained? Would it ever be possible to obtain a bona fide offer for the property from a prospective purchaser who knew that his offer would only be the basis for an exercise of the option by the preemption optionee? Computation of the amount to be offered might be a simple matter in some instances, but in others it could involve expenditures of large sums in appraising and studying values. Thus, in some cases it would be impossible to obtain bona fide offers to serve as the basis of determining price under the preemption price formula of the *Weber* case.

This objection concerning the formula for determining the preemption price was among several<sup>75</sup> advanced by the defendant in the *Weber* case in an effort to convince the court that the preemption tended to restrain alienation. The court summarily dismissed the objections with the statement that such hypothetical situations were not presented by the facts. In so ruling, the court lost sight of the fact that the applicability of the Rule is determined by an inquiry into whether the contingent event might happen after the period permitted by the Rule.<sup>76</sup> Also, the court assumed the point it was trying to decide when it ruled that *Weber*, having purchased subject to the lease, could not complain of its burdens.

In 1933 the Court of Appeals of Kentucky rendered its decision in the case of *Coley v. Hord*.<sup>77</sup> Here the preemption agreement provided that upon acceptance the optionee should pay \$1,000 plus the value of any improvements which increased the worth of the land. The court decided that the preemption did not violate the Kentucky statute against perpetuities.<sup>78</sup>

If the Kentucky statute against perpetuities is directed against suspensions of the absolute power of alienation, there can be no objection to the result reached in *Coley v. Hord* because at all times the land could have been conveyed free of the preemption provision

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<sup>75</sup> Defendant contended: (1) That no bona fide offer could be obtained if the offeror must yield to a preemption optionee, (2) that if the leasehold was split up by assignment to plural assignees, each with preemption rights, it would render a sale by the optionor impossible, (3) that if the lessor should desire to sell the land to one who was willing to purchase the entire fee less the  $\frac{7}{8}$  mineral rights but could get no offer for his  $\frac{1}{8}$  royalty as a severed estate, he would have no means to force the exercise or destruction of the option. *Id.* at 808-809.

<sup>76</sup> GRAY, *THE RULE AGAINST PERPETUITIES* § 214 (4th ed. 1942).

<sup>77</sup> (1933) 250 Ky. 250, 62 S. W. (2d) 792, (1934) 29 ILL. L. REV. 112.

<sup>78</sup> KY. REV. STATS. (1944) § 381.220. This statute appears to have been modeled upon the New York legislation prohibiting suspensions of the absolute power of alienation. See N. Y. PERSONAL PROPERTY LAW § 11.

by the joint action of the land owner and the holder of the preemption. Possibly, the court had this in mind. It noted that at any time Coley or his heirs might desire to sell and Hord or his heirs might desire to buy and that there would be nothing which would forbid a sale of the land for a period in excess of that tolerated by the statute.

It has been suggested that the Kentucky statute against perpetuities is declaratory of the common law Rule.<sup>79</sup> The *Coley* decision was silent on this point. If the preemption was equivalent to a limitation of a future interest, the court should have declared that it made possible a suspension of the practical power of alienation in violation of the fundamental Rule. If the preemption did not involve a future interest, the court should have treated it as an indirect restraint on alienation and then fixed the maximum period of its duration.<sup>80</sup>

*Maddox v. Keeler*,<sup>81</sup> decided by the Court of Appeals of Kentucky in 1944, expressly overruled *Coley v. Hord* but in so doing heaped confusion upon uncertainty.

In the *Maddox* case, Hoskins and wife conveyed a fee simple to Wheeler by a deed which provided that if Wheeler should desire to sell or convey, R. H. Hoskins would have the option to repurchase for \$1,000. Wheeler's devisee placed \$13,000 in improvements on the land and then desired to sell. Hoskins' heir sought to enforce the option. In an action under the Kentucky Declaratory Judgment Act, the option was held void under the Kentucky statute against perpetuities.

It is extremely difficult to follow the court's reasoning in the *Maddox* case, but it is clear that the court did not consider the option personal to R. H. Hoskins. It did not find that the option brought about a future interest in the land. It did, however, assume for the purpose of discussion that the option created a "future equitable interest in land, susceptible of inheritance." The court also found that under such assumption the option would be a "limitation upon the power of absolute alienation" and that the right to exercise the option might not vest until after the expiration of the perpetuities period. Finally, in its concluding paragraph, the court decided that it was not necessary to determine whether the right of option "is such an equitable interest in real estate as to be the subject of inheritance."

A commentator writing in the *Kentucky Law Journal*<sup>82</sup> ably pointed out the illogical nature of the court's reasoning in the *Maddox*

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<sup>79</sup> See 2 SIMES, *op. cit. supra* note 1, § 563, n. 18; (1934) 29 ILL. L. REV. 112 at 114, n. 11.

<sup>80</sup> The *Coley* case is particularly confusing in view of the recent Kentucky case of *Saulsberry v. Saulsberry* (1942) 290 Ky. 132, 160 S.W. (2d) 654. In the latter case a preemption option which was to be exercised at the offeror's price was held to be in violation of the Kentucky perpetuities statute.

<sup>81</sup> (1944) 296 Ky. 440, 177 S.W. (2d) 568.

<sup>82</sup> (1945) 33 Ky. L. J. 118.

case and expressed the views that (1) the holder of the option had a mere personal right exercisable only during his lifetime inasmuch as the option did not extend to his "heirs or assigns" and (2) the option should have been held bad as an unreasonable restraint on alienation rather than in violation of the Kentucky statute against perpetuities. This writer fully agrees with the commentator's second conclusion.

b. *Long-Term Preemption Options and the Rule Against Restraints: Case Law*

Occasionally, courts have employed the common law rule against restraints on alienation rather than the Rule against Perpetuities in order to determine the validity of long-term preemption options.

In America, as early as 1820, *Jackson v. Shutz*<sup>83</sup> upheld a perpetual preemption covenant under which a lessee of the fee gave a lessor a preemption upon land to be exercised whenever the lessee or his heirs should desire to sell. The court, after construing the lease of the fee to be tantamount to a fee simple subject to a condition subsequent, conceded that an agreement "not to alien" would have been repugnant to the estate granted. It decided that the preemption covenant in question was valid because it was a partial restraint on alienation. Professor Simes doubts the wisdom of upholding such partial restraints.<sup>84</sup>

The Alabama case of *Libby v. Winston*<sup>85</sup> considered the validity of a perpetual fixed-price preemption given by the grantee to the grantor and his heirs. In a suit to quiet title against the holder of the preemption the land owner claimed that the provision constituted a restraint on alienation which was repugnant to his estate. The Supreme Court of Alabama ruled, in a unique decision, that the estate which the grantee acquired was not a fee simple absolute, but a fee defeasible upon a condition subsequent. The court also decided that the general rules prohibiting restraints on alienation were inapplicable where the estate is less than an absolute fee simple. The court concluded that the Rule against Perpetuities was inapplicable because in this country the Rule does not apply to rights of entry for breach of condition subsequent.

A preemption option to be exercised at a fixed price is usually held void as a restraint on alienation. Such was the holding in the California case of *Maynard v. Polhemus*.<sup>86</sup> In that case the preemption was included in a deed by which land was conveyed. The California Supreme Court observed that if the provision should be viewed as a

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<sup>83</sup> (N. Y. 1820) 18 Johns. 174. Compare *French v. Old South Society* (1871) 106 Mass. 479 at 488.

<sup>84</sup> See 2 SIMES, *op. cit.* supra note 1 at 306.

<sup>85</sup> (1922) 207 Ala. 681, 93 So. 631.

<sup>86</sup> (1887) 74 Cal. 141, 15 Pac. 451.

covenant, it was an obligation personal to the grantee alone (he having died in the interim) and that if it should be regarded as a condition, it was void because in restraint of alienation. The English case of *In re Rosher*<sup>87</sup> stands for the same proposition. There the Chancery Division held that a testamentary provision giving the widow of the testator a fixed-price preemption upon certain lands limited in duration to the lifetime of the widow was void in restraint of alienation.<sup>88</sup>

On the other hand, the early California case of *Laffan v. Naglee*<sup>89</sup> upheld a preemption option appendant to an eight-year lease wherein the lessee was given the "refusal" of the land in the event the lessor should decide to sell during the term. In the Virginia case of *Bing v. Burrus*<sup>90</sup> the court held valid a provision in a will which gave a preemption option to the brothers of any devisee who should desire to alienate his interest in the devised lands. The price to be paid upon acceptance of the preemption was "as much as an outsider" would pay. It would appear that this particular preemption was limited to the lives of the three sons named as devisees.

In *Hardy v. Galloway*<sup>91</sup> the preemption was included in a conveyance to the grantee and gave to the grantor, his heirs or assigns the "right to repurchase" the land when sold. The deed also provided that it should become null and void upon breach of this agreement. The court decided that the preemption agreement involved a condition subsequent of unlimited duration which was repugnant to the estate granted and void as a restraint on alienation. There was also a hint that the absence of a stipulated price made the preemption invalid.<sup>92</sup>

In general, whether the preemption at a fixed price causes a restraint on alienation depends upon the matter of price. If the market price happens to be higher than the preemption price, the preemption optionor will be reluctant to sell. However, the validity of the preemption cannot be determined by fluctuations of the market. Accordingly, the fixed-price preemption should not be permitted to have unlimited duration.

A preemption option not involving a fixed price does not tend to restrain alienation. Illustrative are the preemptions found in the *Hardy* case and in cases wherein the price to be paid is either the offeror's price or the price which he can obtain upon the market. The

<sup>87</sup> (1884) 26 Ch. D. 801.

<sup>88</sup> *Accord*: *Hutt v. Hutt* (1911) 24 Ont. L. R. 574.

<sup>89</sup> (1858) 9 Cal. 662. In this case the court held that the preemption could be exercised at the lessor-optionor's price.

<sup>90</sup> (1907) 106 Va. 478, 56 S. E. 222.

<sup>91</sup> (1892) 111 N. C. 519, 15 S. E. 890.

<sup>92</sup> Where the preemption does not stipulate a price it is normally understood that the price is that demanded by the optionor at the time the preemption is to be exercised. *Laffan v. Naglee*, *supra* note 89 at 675; see Schnebly, *Restraints Upon the Alienation of Legal Interests* (1935) 44 YALE L. J. 1380 at 1391, n. 302.

optionor gets the best price in either case. Whether that price comes from the preemption optionee or from some other person should be of no concern to him. Such options should be upheld by the courts regardless of their possible duration.

#### E. FINAL OBSERVATIONS

##### 1. Options in Gross

Land purchase options in gross serve useful purposes in the world of business. This is very clear in the case of the short-term option, but there are situations in which the long option may be useful. Consider, for example, the case of the quarry operator who wishes to assure himself an adequate supply of nearby granite in the event that future demands for his product exceed those presently anticipated. To this operator the long-term option in gross to purchase nearby granite land might be the most expedient means of assuring a future supply of raw materials.<sup>93</sup> Or, a mining operator might want to preserve the opportunity to purchase inaccessible mining lands in the event that minerals in paying quantities should become transportable. The long option in gross might be employed to accomplish this end.<sup>94</sup>

The useful attributes of the fixed-price option in gross to purchase land are to a certain extent offset by its tendency to suspend the practical power to alienate the land. However, it is a worthwhile commercial device which should not be cast aside simply because of its undesirable features. In practically all cases the inalienability which may be caused by such option is purely fortuitous. Seldom is an option created for the purpose of suspending the power to alienate land.<sup>95</sup> In the final analysis, the fact that the business world demands the use of the option in gross should turn the scales in its favor. The law should uphold the long-term option in gross, but should make certain that the indirect restraint upon alienation brought about by its use cannot last for an unreasonable period of time.

What plan should be developed to check the undesirable features of the long option in gross? The Rule against Perpetuities is not the appropriate device because under its inflexible formula it would permit the option to last twenty-one years beyond lives in being (if such were employed in measuring duration) and in a specific case this

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<sup>93</sup> Possibly the options in gross found in *Turner v. Peacock*, *supra* note 24, and in *Eastman Marble Co. v. Vermont Marble Co.*, *supra* note 22, were obtained for such purpose.

<sup>94</sup> The options set forth in *Buck v. Walker* (1911) 115 Minn. 239, 132 N. W. 205 and in *Mineral Land Inv. Co. v. Bishop Iron. Co.* (1916) 134 Minn. 412, 159 N. W. 966 may have been designed for such purpose. Compare *In re City of New York (Upper N. Y. Bay)* (1927) 246 N. Y. 1, 157 N. E. 911, wherein the option in gross was designed to make available suitable harbor space when and if needed by the city of New York.

<sup>95</sup> See Sweet, *Restraints on Alienation I* (1917) 33 L. Q. Rev. 236 at 247.

might be greatly in excess of a reasonable period under the circumstances.<sup>96</sup>

If the option in gross were to be brought within the compass of the common law rule against restraints and if the rule were to be applied in all its vigor, the option could not endure for an instant. It is the well-established majority view that a direct restraint upon alienation cannot be tolerated even though limited in duration.<sup>97</sup> Fortunately, the law has not gone so far as to destroy all options in gross by analogy to this rule.

The only logical solution to the problem of the validity of any option in gross is that which has been mentioned by another writer upon the subject.<sup>98</sup> He has suggested that the rule against restraints upon alienation should be applied with "suitable adaptations." Under this plan the court would abandon reference to the Rule against Perpetuities when considering the validity of the long-term option and would construe the option in light of the rule against restraints, as modified.

If we are to construe long options under the rule against restraints, the courts must be willing to bring within the sphere of the rule against restraints the indirect type of restraint caused by the option. Second, there must be a modification (as to the option in gross) of the well-established majority rule that a restraint cannot be tolerated for any length of time whatsoever. Such options, if designed to last only for reasonable periods of time, should be held valid.

If it should appear from the option itself that it was intended to operate simply as a suspension of the practical power of alienation and not in the furtherance of a commercial transaction, it should be cut down summarily by the operation of the rule against restraints. Also, if by its terms the option remains effective for a fixed period—such as a definite number of years—and if it should further appear that this period is not reasonable under the circumstances, the option must be declared void. To do otherwise would be to change the contract of the parties.

What of the option without time limit which extends to the "heirs

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<sup>96</sup> "To allow such a restraint to last for the period of perpetuities is monstrous." Leach, *Perpetuities in a Nutshell* (1938) 51 HARV. L. REV. 638 at 661.

<sup>97</sup> To fall strictly within the rule against restraints the option would have to be treated as a direct restraint. Professor Simes, in his excellent discussion of the law pertaining to direct restraints, points out that directions to the effect that the grantee or devisee shall not alienate his interest are void, even though limited as to persons or time. 7 SIMES, *op. cit. supra* note 1, §§ 447, 450, 451. Conditions subsequent, special limitations or executory limitations whereby the fee shall not be alienated are void though limited as to time. The same rule probably applies even where they are limited as to the persons who are to take. *Id.* §§ 456, 457, 459.

A few jurisdictions permit restraints of short duration. *Id.* § 451.

<sup>98</sup> Schnebly, *supra* note 92 at 1393.

and assigns" of the optionor and optionee? To construe the words "heirs and assigns" as manifesting the intent that the options should continue to be effective in an unending succession of option holders, time without end, would seem to constitute an undue emphasis upon mere words.<sup>99</sup> The meaning of these words need not greatly concern us. Under a "suitable adaptation" of the rule against restraints, courts could determine whether the original parties intended that such option in gross should last for a period of time in excess of that which is reasonable under the circumstances. If the court should find that a construction limiting the duration of the option to a reasonable time after inception would not be contrary to the intent of the original parties, the option should be upheld.<sup>100</sup> Such a construction seems logical when we recall that most options today are granted in furtherance of some business transaction and not for the purpose of creating unending successions in family lines. It is worthy of mention at this point that the word "heirs and assigns" may possibly be inserted in option contracts for the purpose of emphasizing the fact that such options are not personal to the contracting parties alone, but that the rights and obligations arising out of them are to survive in the event that either party should die before the expiration of a reasonable time.

It would not be an innovation to rule that the long option in gross should last for a period deemed reasonable under the circumstances. There are comparable interpretations in other branches of its law. For example, contracts unlimited in time have been held valid for reasonable periods of time<sup>101</sup> or for periods which are valid under statutes which limit the durations of particular contracts.<sup>102</sup>

We have at least one case on record which points to the proper method of handling long options in gross extending expressly to the heirs and assigns of the contracting parties. In *Bauer v. Lumaghi Coal Co.*,<sup>103</sup> an option in gross gave the optionee power to acquire a railroad right of way upon payment of \$300. The option had no time limit and extended to the heirs and assigns of both parties. Plaintiff company, successor in interest of the optionee, sought to accept the option. The owners of the land, the heirs of the optionor, refused, whereupon plaintiff brought suit for specific performance. Neither the court nor counsel invoked the Rule against Perpetuities. The court denied specific

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<sup>99</sup> Compare the cases in which the seller has agreed to repurchase stocks or bonds "at any time." The courts have held that the buyer has a reasonable time in which to make the return. The right to do so does not run in perpetuity. *Brooks v. Trustee Co.* (1913) 76 Wash. 589, 136 Pac. 1152; *Park v. Whitney* (1889) 148 Mass. 278, 19 N. E. 161.

<sup>100</sup> This line of reasoning was used in *Coley v. Hord*, *supra* note 77.

<sup>101</sup> 5 WILLISTON, CONTRACTS 4587, n. 4 (rev. ed. 1937).

<sup>102</sup> *Aikins v. Nevada Placer, Inc.* (1932) 54 Nev. 281, 13 P. (2d) 1103; *Parish v. Rogers* (1897) 20 App. Div. 279, 46 N. Y. Supp. 1058.

<sup>103</sup> (1904) 209 Ill. 316, 70 N. E. 634.

performance upon the ground that the plaintiff's unexplained delay in failing to assert his rights until some six years after the inception of the option constituted laches.<sup>104</sup> It may be inferred from this decision that the option was valid and that it was limited in duration to a reasonable period. At least there was no intimation that it should be considered perpetual.

By adopting the rule that an option in gross is to be effective for a period of time which is reasonable under the circumstances (unless it clearly appears that the option was intended to remain in force for a period in excess of that which is reasonable) courts will avoid the absurdity of laying down rigid iron-bound rules indicating exactly how long in weeks, months, or years an option in gross can endure. Justice might demand that one option be permitted to last a few weeks or months, whereas another option might conceivably have been given for a commercial purpose which would warrant its having a duration of many years. For example, in the Wisconsin case of *Wisconsin Club v. John*,<sup>105</sup> it was held that forty years was not an unreasonable time within which to exercise an option to acquire corporate stock at a fixed price.

## 2. Options Appendant

Little need be said in justification of the American decisions upholding options appendant to long leases. However, much criticism can be leveled at the reasoning processes employed in these decisions. Options appendant are designed for business purposes and usually tend to enlarge rather than to suspend the power to alienate leased land. We have seen that fluctuations in the market value of land which is subject to the option appendant do not cause the option to suspend the practical power of alienation.<sup>106</sup> Finally, it would be a specious law which would tolerate the long lease and yet strike down the option appendant thereto.

## 3. Preemption Options

Whether or not the preemption option has tendencies toward suspending practical alienability hinges entirely upon the matter of price. If the option calls for payment of a fixed price when exercised, such suspension is very probable. On the other hand, if it calls for payment at the offeror's price or for payment at the best market price (pro-

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<sup>104</sup> The court also concluded that the contract lacked mutuality and that the description of the right of way was indefinite.

<sup>105</sup> (1930) 202 Wis. 476, 233 N. W. 79. The transaction in this case arose at a time when Wisconsin had no Rule against Perpetuities affecting future interests in personal property. See 2 SIMES, *op. cit. supra* note 1, § 582.

<sup>106</sup> Text at note 42, *supra*.

vided the formula for ascertaining that price is not too cumbersome) there is no danger of suspension.

A court, in passing upon the validity of the long-term fixed-price preemption option could adopt any one of several courses. The court could (1) decide that the option would be valid for an unlimited period of time, (2) permit the option to last for a period deemed reasonable under the circumstances, (3) hold it valid for the period of the optionor's lifetime or (4) strike it down as void. The law in this respect is unsettled, and it constitutes a problem which has troubled the writers.

In justifying the existence of the fixed-price preemption option, it should be mentioned that a preemption provision promotes alienability of property in the initial transaction. Thus, the owner might be unwilling to sell property unless he should be given the benefit of a preemption option. Professor Simes believes that "business would not wish to get along without" the preemption contract, but he doubts the practical value of the condition of preemption.<sup>107</sup> It is true that a preemption option which assumes the form of a right of entry for breach of condition subsequent under a deed or will might become an effective device for perpetuating property in the family line. This is particularly true if the price to be paid for the land upon the exercise of the preemption should be low as compared with the market value. But, it is interesting that the preemption provision when construed as a right of entry for breach of condition is valid under the technical Rule against Perpetuities<sup>108</sup> because the American law regards the right of entry as a vested future interest. On the other hand, some long-term preemption options have been voided where the courts did not consider them equivalent to rights of entry for breach of condition.<sup>109</sup> This anomalous state of the law emphasizes the need for some device other than the Rule to regulate the preemption option.

Furthermore, it would not be wise to use the Rule against Perpetuities as the regulatory device for fixed-price preemption options because it would permit them to continue in existence as potential or actual restraints for the full span of the perpetuities period. In most cases this period would be unreasonable.

Certainly such an option which may so easily become a restraint upon alienation should not be tolerated without limit as to duration. Yet its commercial usefulness makes it inadvisable to outlaw it entirely.

It would be somewhat singular to allow fixed-price preemptions to endure for periods of time deemed "reasonable" under the circum-

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<sup>107</sup> 2 SIMES, *op. cit. supra* note 1, § 462.

<sup>108</sup> Schnebly, *supra* note 92 at 1394, n. 307.

<sup>109</sup> Lewis Oyster Co. v. West, *supra* note 72; Henderson v. Bell, *supra* note 70.

stances. If such were the law, when market values of land were rising the optionor would try to keep the property off the market until such time as a "reasonable" period had expired. Since the optionee would be powerless to compel the optionor to offer the property during the interval, the optionor could pervert the intended purpose of the "reasonable time" provision and use it to destroy the rights of the optionee.

As an alternative, courts might permit the unlimited fixed-price preemption provision to remain in effect during the lifetime of the optionor provided the preemption should not be made perpetual in express terms. This would result in a possible suspension of the power of alienation for one lifetime. Such a rule would not be particularly harsh in its operation because there seems to be no rule of law which prohibits a person who is *sui juris* from withdrawing his own property from the market throughout his life if he should be so inclined. By permitting a fixed-price preemption to last for the life of the optionor, we would be doing no more than to affirm the validity of the voluntary restraint upon alienation which any owner of property is entitled to impose upon himself as owner.

There is little danger that the suggestion made in the last paragraph would permit a fixed-price preemption option given by a corporation to endure for the lifetime of the corporation. In the first place, it is improbable that a corporation would grant such an option. If the directors of the corporation should authorize such a preemption, the potential restraint upon alienation and actual suspension of the power of sale of corporate property would amount to a breach of the directors' fiduciary obligation to the corporation and would not be binding upon the latter.<sup>110</sup>

#### 4. In General

During the course of this study certain matters have received special emphasis. Outstanding among these is the view that the Rule against Perpetuities is but a division of that larger branch of the law which prohibits restraints upon the power to alienate property.<sup>111</sup> Professor Gray might have disagreed with this conclusion because to him the Rule against Perpetuities and the rule against restraints were separate and distinct. However, he conceded that both were methods by which the common law "forwarded the circulation of property."<sup>112</sup>

<sup>110</sup> See Note (1930) 30 COL. L. REV. 870.

<sup>111</sup> ". . . it is conceded by all authorities that the term 'perpetuity,' in its primary meaning, refers to an inalienable interest; and that, whatever may be the immediate objective of the rule against perpetuities, its ultimate purpose is to prevent the tying up of property." 2 SIMES, *op. cit. supra* note 1 at 343. Compare Fraser, *The Rationale of the Rule against Perpetuities* (1922) 6 MINN. L. REV. 560 at 576.

<sup>112</sup> GRAY, *op. cit. supra* note 76, §§ 2, 2.1.

This plan of isolating the Rule, stressing its remoteness of vesting aspect, and divorcing it from the rule against restraints on alienation has led to confusion, particularly in the option cases, and has tended to create the impression that the Rule against Perpetuities is no more than a barren formula unsupported by reason.<sup>113</sup>

Also important is the fact that the Rule seeks to avoid unreasonable suspensions of the power of alienation which are brought about by certain contingent future interests in property. By a technical and inflexible rule of construction, any non-vested future interest which is not absolutely certain to vest within the perpetuities period is regarded as void because it has potentialities for unreasonably suspending the power to alienate property. Prior to the latter half of the nineteenth century, the concensus of judicial as well as legislative opinion was that the "power of alienation," as that term was employed in connection with the Rule against Perpetuities, referred to the legal or absolute rather than the factual or practical power of alienation.<sup>114</sup> Consequently, only those non-vested future interests which were apt to suspend the absolute power of alienation beyond the perpetuities period were considered within the ban of the Rule. Since that time there has been a growing tendency to emphasize a different meaning with respect to this "power of alienation." Today the courts, either directly or by inference, are beginning to perceive that the Rule was designed to prohibit not only those future interests which give rise to remote suspensions of the absolute power of alienation but also those tending to bring about remote suspension of the practical power of alienation.<sup>115</sup> Cases involving the long-term option had much to do with the shaping of judicial thought upon this point.

The Rule against Perpetuities, having developed in the field of property law, should be considered foreign to transactions such as land-purchase options which are so closely allied to the world of com-

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<sup>113</sup> "Gray did a great service in differentiating the rules against restraints on alienation from the rule against remoteness of vesting and in his masterful exposition of the law of future interests, but he had the faults of his time in taking a great field of property law like Perpetuities and confining it to a narrow, mechanistic rule against remoteness of vesting. This narrow, mechanistic rule, with all its ambiguity of vesting, he came to exalt as if it were an end in itself and wished to apply wherever analogy might lead." Bordwell, *Alienability and Perpetuities VI* (1940) 25 IOWA L. REV. 707, 734.

"Gray was of the opinion that the rule against perpetuities was concerned with the preservation of the fluidity of property as affected by remoteness alone. This conception of the narrow function and operation of the rule cannot be supported." Carey and Schuyler, *Gray on Perpetuities, Fourth Edition: A Review* (1942) 37 ILL. L. REV. 145, 152.

<sup>114</sup> The writer discussed this matter in the first installment of this paper. See Berg, *supra* note 8 at 9.

<sup>115</sup> See 2 SIMES, *op. cit. supra* note 1, §§ 514, 515. For the view that the Rule is "designed to preserve the fact of alienability," see Powell, Book Review (1930) 30 COL. L. REV. 140, 141.

merce. It is only when it plainly appears from the facts that the option was created in the form of a future interest for the sole object of creating a suspension upon the practical power of alienation that the Rule should be invoked in option cases.

Finally of great significance is the fact that the land-purchase option appearing in contract form involves only contract rights to which the Rule has no application. Furthermore, even when the option appears as a provision in a deed or will, it is difficult to fit it into the pattern of the traditional future interest.<sup>116</sup> Nevertheless, if we go so far as to assume that the long-term option does bring about a future interest (regardless of the form of the instrument in which it appears), the Rule against Perpetuities is not a suitable device for controlling such a future interest.<sup>117</sup> It is not suitable because with but two exceptions<sup>118</sup> options to purchase land tend to create suspensions upon the practical power of alienation which, under the Rule, could be permitted to endure for periods of time far in excess of those deemed reasonable under most circumstances.<sup>119</sup>

In conclusion, it is suggested that it would have been far better had the Rule against Perpetuities never been employed by the courts in determining the validity or invalidity of long-term options. Confusion and inconsistency have abounded in the law upon the subject because of the misapplication of a branch of the law which was never designed to regulate in the field of commerce.

Much remains to be done before we can say that the law upon this subject has become logical. The courts must abandon all reference to the Rule in the long option cases except where the options are cast in the unusual and rare form of true limitations. Significant advance will have been made when the courts determine the validity of these options under the rule against restraints as modified to meet the reasonable demands of business and commerce.

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<sup>116</sup> An exception would be the case in which a preemption provision is in favor of the grantor or testator and their heirs and calls for forfeiture or re-entry upon breach. In that situation the preemption optionee would probably have a right of entry on condition subsequent. This interest would not be within the Rule under the American law.

<sup>117</sup> "Assuming that it is desirable to have some restriction upon the equitable interests created by specifically enforceable contracts, the Rule against Perpetuities does not offer an appropriate limitation. The period of lives in being and 21 years, which works admirably with regard to gift transactions for family purposes, has no significance in the world of commercial affairs. Leach, *supra* note 96 at 660.

<sup>118</sup> Options appendant to long leases and preemption options wherein the optionor's price (or the best price obtainable on the market) is to be the preemption price.

<sup>119</sup> "The rule permits rights of either sort (options and preemptions) which may last for a long period of time, and which during such period may constitute insurmountable barriers to alienation." Schnebly, *supra* note 92 at 1393.