CHAPTER 14

Interests to Which the Rule Applies

SPEAKING generally, as Chapters 9, 11, and 12 have indicated, the requirement of certainty of vesting within the period of the Rule Against Perpetuities applies to all future interests in property limited to persons other than the transferor, whether in land or in chattels, whether legal or equitable, and whether, under English law, they would have been remainders, executory interests, powers of appointment, or interests created by the exercise of a power of appointment. There remain for consideration (1) interests retained by or created in the transferor under the terms of the instrument of transfer, (2) interests created in others which are not strictly property rights but derive from the law of contract, and (3) interests which are excepted from the operation of the Rule.

329 This statement should be read with the qualification that certain administrative powers which do not have the characteristics of a power of appointment are not subject to the Rule Against Perpetuities. A power of appointment is dispositive in character. Its exercise cuts off an interest of a taker in default and creates one in the appointee. PROPERTY RESTATEMENT, §318, Comment g. (1940). Trustees’ powers to sell, lease, mortgage, invest, and appoint successor trustees during the term of the trust are not dispositive in character and are not subject to the Rule. PROPERTY RESTATEMENT, §382 (1944); Leach and Tudor, “The Common Law Rule Against Perpetuities,” 6 AMERICAN LAW OF PROPERTY, §24.63 (1952). The same is true as to a mortgagee’s power of sale. Gray, RULE AGAINST PERPETUITIES, 3rd ed., §§562-571 (1915). However, powers of a trustee which are dispositive in character, such as a discretionary power to allocate income between life beneficiaries or to apply principal to the use of a life beneficiary, are subject to the Rule. Leach and Tudor, id., §24.32. Cf. Chapter 20, Section B (1), infra.

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A. INTERESTS OF A TRANSFEROR

When an owner of property transfers an interest in it which is less than his whole interest and less than a fee simple, or the equivalent in personalty, his retained interest is a reversion. If Andrew Baker, owning land in fee simple, conveys it to John Stiles for life, in tail, or for forty years, Andrew retains a reversion expectant upon the termination of John’s estate.\textsuperscript{330} When an owner in fee simple transfers an estate for life followed by a contingent remainder, he retains a reversion. Thus if Andrew Baker conveys land to John Stiles, who has no son, for life, remainder to the eldest son of John and his heirs, Andrew retains a reversion in fee simple which will become possessory on the death of John if John never has a son.\textsuperscript{331} Although, as in the last example, a reversion may be subject to defeasance, all reversions


There cannot be a reversion expectant upon an estate tail in Michigan because our statutes convert estates tail into estates in fee simple. Part One. note 84 supra. There is no such thing as a reversion expectant upon a fee simple. A reversionary interest expectant upon a fee simple is a possibility of reverter. Part Two, note 385 infra. In strict common-law theory, a reversionary interest upon an estate for years is a present rather than a future estate, since the lessor retains seisin. Cf. Part Two, note 150 supra. Our statutes appear to define such a reversion as a “present estate in possession” in Toms v. Williams, 41 Mich. 552 at 572, 2 N.W. 814 (1879).

are deemed to be vested, and they are not subject to the Rule Against Perpetuities. If Andrew Baker bequeaths land to John Stiles for a thousand years “but if John’s descendants ever become extinct, then the estate bequeathed to him shall terminate,” the heirs of Andrew have a valid reversion which will become possessory on the extinction of John’s descendants or the expiration of a thousand years, whichever first occurs.

When an owner in fee simple transfers an estate in fee simple on special limitation, his retained interest is a possibility of reverter. If John Stiles conveys land to the Detroit, Lansing, and Northern Railroad Company “so long as used for railroad purposes,” John has a possibility of reverter which will become possessory when use for railroad purposes ceases. There is disagreement among the authorities as to whether such an interest is vested or contingent. A recent English decision holds

335 Property Restatement, §154, Comment c. (1936); 1 Simes, Law of Future Interests, §§177-187 (1956); Part One, note 354 supra.
336 Gray, Rule Against Perpetuities, 3rd ed., §113, n.3 (1915) (vested); Property Restatement, §154 (3) and Comment e. (1936)
that it is contingent, subject to the Rule Against Perpetuities and, consequently, void, if the event which will terminate the estate conveyed may not occur within the period of the Rule. All American authority is to the effect that possibilities of reverter are not subject to the Rule. Several Michigan decisions assume the validity of possibilities of reverter, but they relate to conveyances which became effective between 1847 and 1949, when the common-law Rule Against Perpetuities was not in force as to Michigan land.

When an owner in fee simple transfers an estate in fee simple on condition subsequent, his retained interest is a right of entry. If John Stiles conveys land to the Detroit, Lansing, and Northern Railroad Company "but if the said land shall cease to be used for railroad purposes the grantor or his heirs may enter and terminate the (not vested); 2 Simes, Law of Future Interests, §507 (1936) (essentially contingent).


Part Two, note 50 supra.

Gray, Rule Against Perpetuities, 3rd ed., §12 (1915); 1 Simes, Law of Future Interests, §159 (1936). Property Restatement, §24, Comment b. (1936) denominates such an interest a "power of termination." This term is not a happy one because the old law made a sharp distinction between a condition subsequent, which was permissible in a common-law conveyance, and a power of revocation, which could be used only in a conveyance operating under the Statute of Uses. 1 Coke, Institutes, 237a (1628).
estate hereby granted," John has a right of entry which will entitle him or his heirs to take possession when use for railroad purposes ceases. Such rights of entry are contingent, and recent English cases indicate that they are subject to the Rule Against Perpetuities and so void if the event which will entitle the transferor to enter is not certain to occur within the period of the Rule. The American decisions are to the effect that rights of entry on breach of condition subsequent are not subject to the Rule. No Michigan reported decision discusses the applicability of the Rule Against Perpetuities to rights of entry. Their validity has been assumed in cases involving conveyances executed both before and after 1847, and they have been enforced in a few in-

345 Michigan State Bank v. Hastings, 1 Doug. 225 (Mich. 1844); Michigan State Bank v. Hammond, 1 Doug. 527 (Mich. 1845); People v. Beaubien, 2 Doug. 256 (Mich. 1846); Campau v. Chene, 1 Mich. 400 (1850); City of Detroit v. Detroit & Milwaukee R.R. Co., 23 Mich. 173 (1871); Hatch v. Village of St. Joseph, 68 Mich. 220, 36 N.W. 36 (1888); County of Oakland v. Mack, 243 Mich. 279, 220 N.W. 801 (1928). The rights of entry involved in these cases and those cited in the two following notes were on breach of conditions subsequent, which might not occur within the period of the Rule annexed to conveyances in fee simple. A right of entry on breach of a condition subsequent in a conveyance of a term of years (lease) is an incident of the reversion, which is vested. Part One, notes 360, 375, Part Two, notes 330, 334, supra.
stances where the conveyances were executed after 1847.\textsuperscript{347}

The American exemption of possibilities of reverter and rights of entry on breach of condition subsequent from the operation of the Rule Against Perpetuities is a strange anomaly. If Andrew Baker conveys land to James Thorpe and his heirs so long as the Penobscot Building shall stand and then to John Stiles and his heirs, the interest of John is void under the Rule. But if Andrew Baker conveys to John Stiles and his heirs and John conveys to James Thorpe and his heirs so long as the Penobscot Building shall stand, John retains a possibility of reverter which the American decisions treat as valid and which may become possessory after centuries. Why the law should forbid one and permit the other is difficult to see. Indeed, the possibility of re-


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verter is the more serious indirect restraint on alienation of the two where, as in Michigan, it is probably inalienable \(^{348}\) and so must descend to the heirs of the transferor. Under our system of descent, the heirs of a grantor are likely to be very numerous and very scattered a hundred years after his death. Unless all of them can be found and persuaded to release, the owner of the fee subject to defeasance cannot afford to erect expensive improvements on the land and cannot sell it for an adequate price because the title he has may be cut off at any moment by an event beyond his control. The only possible explanation of this anomalous rule is the historical one that the Rule Against Perpetuities was developed to restrict interests created by virtue of the Statutes of Uses and Wills and that possibilities of reverter and rights of entry were interests known to the common law before the enactment of these statutes.\(^ {349}\) This argument has not deterred our courts from applying the Rule to contingent remainders, which were also known to the common law.\(^ {350}\) The Michigan Supreme Court has never enforced a possibility of reverter or a right of entry defeating a fee arising from a conveyance which became

\(^{348}\) Part One, note 377 \textit{supra}. Rights of entry on breach of conditions subsequent in conveyances of estates in fee executed before 1931 are also inalienable. Part One, note 374 \textit{supra}.

\(^{349}\) Part Two, notes 338, 344, \textit{supra}. Professor Leach is wont to cite as a horrible example of the tendency of remote possibilities of reverter and rights of entry to prevent the development and use of land, a tract in Boston which was conveyed long ago on condition that no building over thirteen feet high ever be erected on it. The probable motive of the grantor was a desire to preserve a view of his cattle grazing in the vicinity. The tract is now in a closely built-up section of the city but the owners dare not erect an appropriate building on it. They cannot secure releases from the heirs of the grantor because these cannot be found. Hence no one can use the land effectively. \textit{Cases and Materials on Future Interests} (2d ed.) 50, note 25 (1940); Leach & Tudor, "The Common Law Rule Against Perpetuities," \textit{6 American Law of Property}, §24.62 (1952).

\(^{350}\) Part Two, notes 37, 39, 42, \textit{supra}.
effective at a time when the common-law Rule Against Perpetuities applied to Michigan land. It is, therefore, free to follow the English decisions holding that these interests are subject to the Rule,\textsuperscript{351} and it ought to do so.

A fee simple subject to an easement, a profit à prendre, or a use restriction is a present estate which is vested and not subject to the Rule Against Perpetuities. If John Stiles, owning land in fee simple, grants to James Thorpe and his heirs a right to take oil and gas from his land so long as they can be extracted, John retains a present possessory fee simple which does not violate the Rule although it will become more enjoyable at some remote future time when the oil and gas operations cease.\textsuperscript{352} In England it is not possible to create a legal easement which entitles the holder to exclusive possession of the servient land, a right to exclusive possession being deemed a possessory estate.\textsuperscript{353} Several Michigan cases,

\textsuperscript{351} Part Two, notes 337, 343, supra.

\textsuperscript{352} This was assumed in McClanahan Oil Co. v. Perkins, 308 Mich. 448, 6 N.W. (2d) 742 (1942), which involved such a grant.

however, have treated conveyances of rights of exclusive possession and control, particularly to railroad companies, as grants of easements. If John Stiles grants to the Detroit, Lansing, and Northern Railroad Company "an easement of right of way, with the right to exclusive possession, control and enjoyment, so long as used for railroad purposes," the railroad takes, under English law, a possessory fee simple on special limitation, and John's retained interest is a possibility of reverter. Under Michigan law it would seem that the railroad takes only an easement and John retains the present fee simple subject to the easement, not a mere possibility of reverter. Yet his right to possession is contingent upon a remote future event.


The American exemption of possibilities of reverter and rights of entry on breach of condition subsequent from the Rule Against Perpetuities does not appear to extend to any other type of contingent future interest in property retained by or created in a transferor under the terms of the instrument of transfer. Thus it would seem that a reserved power of revocation or power of appointment and the possibility of being an appointee under a power of appointment created by the instrument are subject to the Rule to the same extent that interests limited to persons other than the transferor are so subject. So is a reserved option to repurchase which would be specifically enforcible if valid.

356 Foulke, "Powers and the Rule Against Perpetuities," 16 Cor. L. Rev. 627 at 644 (1916). A power of revocation exercisable only by the transferor personally would not violate the Rule because it could not be exercised beyond a life in being. See Part Two, note 296 supra. But a power of revocation reserved to the transferor and his heirs, exercisable only upon a remote condition precedent, it is believed, offend the Rule. It is noteworthy that the only future interests retained by or created in a transferor which the American decisions exempt from the Rule Against Perpetuities are those which were recognized at common law before the enactment of the Statutes of Uses and Wills. Powers were a creation of equity and acquired recognition at common law only by virtue of these statutes. An option is an interest in property only by virtue of the equitable doctrine of specific performance of contracts.

357 A power of appointment exercisable only by the transferor personally would not offend the Rule because it could not be exercised beyond a life in being. Part Two, notes 296, 298, supra. But a power of appointment reserved to the transferor and his heirs, exercisable only upon a remote condition precedent, would seem to violate the Rule. For example, if Andrew Baker conveys land to John Stiles and his heirs "but if the descendants of John ever become extinct, to such person as the grantor or his heirs may appoint."

358 Property Restatement, §872, Comment a. (1944). For example, if John Stiles conveys land "to such persons as Andrew Baker may appoint and until and in default of appointment to James Thorpe and his heirs" and Andrew Baker appoints "to John Stiles and his heirs if the descendants of James Thorpe ever become extinct."

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B. CONTRACTS, OPTIONS, AND MORTGAGES

The Rule Against Perpetuities is a part of the law of property. It has no application to contracts which do not create interests in property.380 If the Iosco Life In-

An option to repurchase stock in a closed corporation, probably limited in duration to the life of the transferor-optionee, was enforced in Halsey v. Boomer, 236 Mich. 328, 210 N.W. 209, 48 A.L.R. 622 (1926). The validity of an option to repurchase land, given in 1838 for a term of fifteen years, was assumed in Swetland v. Swetland, 3 Mich. 482 (1855). As the common-law Rule Against Perpetuities did not apply to limitations of interests in land made between March 1, 1847, and September 22, 1949 [Part Two, note 50 supra], decisions relative to the validity of options to repurchase given during that period are not precedents as to the application of the Rule. In a number of cases options to repurchase land given during that period, limited in duration to twenty-one years or less, were enforced or assumed to be valid. Cornell v. Hall, 22 Mich. 377 (1871); Daniels v. Johnson, 24 Mich. 430 (1872); Stahl v. Dehn, 72 Mich. 645, 40 N.W. 922 (1888); Reed v. Bond, 96 Mich. 134, 55 N.W. 619 (1893); Abbott v. Gruner, 121 Mich. 140, 79 N.W. 1065 (1899); Blumberg v. Beekman, 121 Mich. 647, 80 N.W. 710 (1899); City Lumber Co. v. Hollands, 181 Mich. 531, 148 N.W. 361 (1914); Gogarn v. Connors, 188 Mich. 161, 155 N.W. 1068 (1915); McFadden v. Huron Valley Building and Savings Association, 255 Mich. 659, 239 N.W. 322 (1931); Becher v. Morse, 286 Mich. 513, 282 N.W. 226 (1938). As such options could not have been exercised beyond the period of the Rule Against Perpetuities, they would not have violated the Rule if it had been in force. In Livonia Township School District v. Wilson, 339 Mich. 454, sub nom. Wayne County v. Wilson, 64 N.W. (2d) 563 (1954), a reserved option in a 1944 deed to repurchase for $80 if, within 25 years, the land should not be used for school purposes, was treated as valid. The validity of a perpetual pre-emptive option to repurchase land was assumed in Stony Pointe Peninsula Association v. Broderick, 321 Mich. 124, 92 N.W. (2d) 563 (1948), Part One, note 233 supra, and there is dictum to the effect that an option of this type would be valid in Smith v. Barrie, 56 Mich. 314 at 317, 22 N.W. 816 (1885), Part One, note 230 supra. Such an option reserved in a conveyance executed since September 23, 1949, should be deemed void both as a direct restraint on alienation and as violating the Rule Against Perpetuities.

PERPETUITIES AND OTHER RESTRAINTS

Insurance Company, in consideration of being designated beneficiary under a $100,000 insurance policy on the life of John Stiles, contracts with John that it will pay $3,000 per annum to the eldest son of John for life, to the eldest son of such eldest son for life, and to the eldest son in each successive generation forever, in like manner, it would seem that the contract is valid although such a perpetual succession of life interests, if limited as interests in property, whether legal or under a trust, would be void.

An option to purchase property is a contract right to purchase which is always subject to at least two conditions precedent, notification of election to purchase and payment of the purchase price. Irrevocable options to purchase land and unique chattels are specifically enforceable in equity. Consequently such an option, to the extent that it is valid for that purpose, is a limitation of a contingent equitable future interest in the property involved. The decisions in England and this country are uniform in holding that options, insofar as they are limitations of contingent future interests in property, are subject to the Rule Against Perpetuities. In England an option, in its purely contract aspects, is not subject to the Rule, and therefore, even though it may under its terms be exercised at some time beyond the period of the Rule, it may be enforced against the original optionor either by an action for damages for breach or, if the original optionor still owns the property, by a suit

for specific performance. In this country an option which would otherwise be specifically enforcible and which, under its terms, might be exercised at a time beyond the period of the Rule Against Perpetuities, is wholly void and cannot be enforced in any way either against the original optionor or against a subsequent purchaser. If Andrew Baker, owning land in fee simple, contracts with John Stiles to convey it to John, his heirs or assigns, upon notice and payment of $10,000 at any time within forty years, the contract is void.

An option given to someone who has no other interest in the land is a very severe indirect restraint on alienation and development. Neither the optionor nor anyone who acquires the land can afford to expend money on improvements while his title remains subject to defeasance by the exercise of the option. An option given to a lessee under a long-term lease does not have the same restraining effect. It increases the value and improves the salability of the lessee's estate and encourages him to make valuable improvements, since by exercise of the option he may extend the duration of his possession. In England options in leases, entitling the lessee to renew, are not subject to the Rule Against Perpetuities even though they permit perpetual renewal, but an option to purchase the fee is subject to the Rule, even

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though given to a lessee under a long-term lease.\(^{366}\) In this country options given to a lessee, exercisable only during the term of the lease, whether to renew\(^ {367}\) or to purchase the fee,\(^ {368}\) are exempt from the Rule Against Perpetuities. If Andrew Baker, owning land in fee simple, leases it to John Stiles, his executors, administrators, and assigns for 99 years, with options in the lessee to renew forever on the same terms and to purchase at any time at a price to be determined by arbitrators at the time of exercise, both options are valid.

*Windiate v. Lorman*\(^ {369}\) was a suit to remove a cloud from title. In 1910 the plaintiff, John Windiate, executed an instrument providing,

“If I ever desire to sell, or if my heirs or devisees shall ever desire to sell [certain lands], I will give to Janette Lorman, her heirs, devisees and assigns the first opportunity to buy the said land at the best price, not to exceed $1,000, which I can get for it from anyone else - - - and


\(^{369}\) 236 Mich. 531, 211 N.W. 62 (1926). In Livonia Township School District v. Wilson, 339 Mich. 454, *sub nom.* Wayne County v. Wilson, 64 N.W. (2d) 563 (1954), a provision in a 1944 deed giving the grantor an option to repurchase for $80 if, within 25 years, the land should not be used for school purposes, was treated as valid. In Braun v. Klug, 335 Mich. 691, 57 N.W. (2d) 299 (1953), land was conveyed in fee simple subject to a covenant against sale to anyone but the grantors or their heirs. A decree holding the provision void as a direct restraint on alienation but giving the grantors a pre-emptive option to repurchase, to which the grantees did not object, was affirmed. As to whether a pre-emptive option is a direct restraint on alienation see Part One, at notes 226-231, *supra.*
upon payment or tender of such price by her, her heirs or assigns, to me, my heirs and devisees, that the land shall be conveyed to her, her heirs or assigns, in fee simple - - ."

The plaintiff, at a time when the land was worth some $8,000, sought a declaration that this option was void under the Rule Against Perpetuities. An assignee of the optionee intervened as party defendant and filed a cross-bill for specific performance of the option. The Court affirmed a decree for the intervenor, granting specific performance of the option, saying that the common-law Rule Against Perpetuities was not in force in Michigan so far as land was concerned and that the option did not suspend the absolute power of alienation in violation of the statutes then in force. Subsequently

John Windiate's widow sued for admeasurement of her dower in the optioned land, joining as a defendant Frank Tyack, who claimed to have an interest as a vendee under a land contract executed by John Windiate in 1920. Tyack, who was not a party to the earlier case, urged the invalidity of the 1910 option. The Court reaffirmed its previous decision that the option was valid, saying,

"Inasmuch as we do not follow the common law on the subject it will not be necessary for us to take up the many English and American cases cited to us by counsel dealing with the common-law rule. - - -

"In Gray on the Rule Against Perpetuities (3d Ed.), §329, it is said:

"'The rule against perpetuities concerns rights of property only, and does not affect the making of contracts which do not create rights of property.'" 371

Tromley v. Lange, 236 Mich. 240, 210 N.W. 202 (1926); Rashken v. Smith, 236 Mich. 440, 210 N.W. 485 (1927); Beardslee v. Grindley, 236 Mich. 453, 210 N.W. 486 (1926); Clark v. Muirhead, 245 Mich. 49, 222 N.W. 79 (1928); O'Toole & Nedeau Co. v. Boelkins, 254 Mich. 44, 235 N.W. 820 (1931); Danto v. Kunze, 255 Mich. 135, 237 N.W. 390 (1931); Stevens v. Stott, 270 Mich. 637, 259 N.W. 157 (1935); Thomas v. Ledger, 274 Mich. 16, 263 N.W. 783 (1938); State v. Owen, 312 Mich. 73, 19 N.W. (2d) 491 (1945); Bergman v. Dykhouse, 316 Mich. 315, 25 N.W. (2d) 210 (1946); Le Baron Homes, Inc. v. Pontiac Housing Fund, Inc., 319 Mich. 310, 29 N.W. (2d) 704 (1947); Deane v. Rex Oil & Gas Co., 325 Mich. 625, 39 N.W. (2d) 204 (1949). See also cases cited in Part Two, notes 359 supra, 372, 373, infra. In Digby v. Thorson, 319 Mich. 524, 30 N.W. (2d) 266 (1948) an option to purchase land, exercisable for two lives in being, was enforced. As such options could not have been exercised beyond the period of the common-law Rule Against Perpetuities, they would not have violated the Rule if it had been in force. In Caughey v. Ames, 315 Mich. 643, 24 N.W. (2d) 521 (1946) an option to purchase land without a stated time limitation was construed to be exercisable only for a reasonable time. As a reasonable time would be less than twenty-one years, such an option would not have violated the Rule if it had been in force as to land. In Bohnsack v. Detroit Trust Co., 292 Mich. 167, 290 N.W. 367 (1940), an option to purchase stock in a closed corporation, exercisable during the lives of named persons, was enforced. This option, as it related to unique chattels personal, was subject to the Rule Against Perpetuities but did not violate it.

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If this language quoted from Professor Gray's treatise is to be considered dictum that options are not subject to the common-law Rule Against Perpetuities, it should be read in the light of the following section of that treatise, which asserts positively that specifically enforceable options are subject to the Rule. Options to purchase land given since September 23, 1949, when the common-law Rule Against Perpetuities came into force as to land, should be deemed subject to the Rule here as elsewhere.

The Michigan Supreme Court has frequently enforced or assumed the validity of options to purchase and to renew a single time in leases for terms of less than


than twenty-one years given between 1847 and 1949, when the Rule Against Perpetuities was not in force as to limitations of land. Such options would not, of course, have violated the Rule even if it had been in force and if it extended to options in leases.\(^{374}\) \textit{Stender v. Kerreros} \(^{375}\) was a summary proceeding for possession of land. Mrs. Cady leased the land to the defendants for three years from August 1, 1904, by a lease providing,

"And the said parties of the second part at the end of the said three years may have the privilege of renewing this lease at the same rental for so long a term as said parties of the second part may see fit, upon the same terms and conditions as in this lease contained, with this exception: That on and after three years from said August 1, 1904, the said party of the first part shall have the privilege of entering and occupying said premises and terminating said lease, in case she wishes to rebuild upon said premises, upon giving said parties of the second part sixty (60) days' notice in writing of such intention; - - - ."

The plaintiff purchased the reversion from Mrs. Cady, and on May 29, 1907, served the defendants with a notice...
to quit on August 1, 1907, which did not state that the plaintiff intended to rebuild. On July 27, 1907, the defendants notified the plaintiff that they elected to renew the lease for fifty years from August 1, 1907. A judgment for the plaintiff was affirmed. All members of the Court agreed that the option to renew the lease for an indefinite term was valid and that it could not be cut off unless the reversioner actually intended to rebuild. The majority deemed the notice to quit a sufficient manifestation of such an intention. Three justices dissented on the ground that it was not. The dissenting opinion, in the course of an argument that the option to renew was valid, stated,

"If they had nominated a term, the length of which, if originally agreed upon, would have violated the rule against perpetuities, a different question would be presented. They did no such thing. It will not be presumed that it was the intention of either party that a perpetuity was to be created, nor should the contract receive the construction that under its terms one might be created." 376

The meaning of this passage escapes the present writer.

_Gould v. Harley_ 377 was a suit to construe a lease. On

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376 156 Mich. 499 at 508.
377 215 Mich. 234, 183 N.W. 705 (1921). Brush v. Beecher, 110 Mich. 597, 68 N.W. 420 (1896), involved leases for terms of five years providing that, at the expiration of the term, the lessor might elect to purchase buildings erected by the lessee and that, if he did not so elect, the lease would be extended for five years, with like provision for election and extension at the expiration of each extension. After the lessee's death the lessor attempted to treat the leases as being perpetually renewable. It was held that as they only purported to bind the parties, their executors, administrators and assigns, not their heirs, the renewal provisions were limited to the joint lives of the parties. The opinion suggested that if the provisions called for perpetual renewal at the option of the lessor, they would probably be void as against public policy because of their tendency to restrict alienation and development. This public policy must be something other than the statutes prohibiting suspension of the absolute power
January 12, 1898, land was leased to the defendants for a term of ten years, "with the privilege of renewing said lease at the pleasure of said second parties." The defendants elected to renew for ten years in 1908 and notified the lessor in 1918 of their intention to renew for an additional ten years, which renewal the reversioner resisted. The trial court entered a decree for the defendants, holding that they had a perpetual option to renew the lease every ten years forever. The Supreme Court reversed, holding that, as a matter of construction, the option was limited to a single ten-year renewal. The opinion states that provisions for perpetual renewal are not favored and will not be found unless the language is clear and a provision that the renewal lease shall contain the same terms as the original does not include the renewal provision. These decisions are not authority as to the validity of options for perpetual renewal under the common-law Rule Against Perpetuities, but there is no reason to believe that the Court will deviate from its constructional preference against such options in cases governed by the Rule. That this is so is indicated by the recent case of *Rex Oil & Gas Company v. Busk,*\(^{378}\) where an option to purchase oil extracted from designated land, created by a contract of December 9, 1949, which expressed no time limit, was construed to be operative only for a reasonable time, not perpetually. The Court did not discuss the validity under the Rule of alienation and the common-law Rule Against Perpetuities, because all that could be renewed against the lessee's objection would be his obligation to pay rent, and a contingent obligation to pay money is not subject to either the statutes or the common-law Rule.

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\(^{378}\) 335 Mich. 368, 56 N.W. (2d) 221 (1953). As this option was not contained in a lease it should have been deemed, if perpetual, to violate the Rule Against Perpetuities. Part Two, note 364 *supra.* Accord, as to the proposition that options without time limits will be construed to be limited to a reasonable time: Caughey v. Ames, 315 Mich. 643, 24 N.W. (2d) 521 (1946), Part Two, note 370 *supra.*
Against Perpetuities of an option which is perpetual.

The common-law mortgage took the form of a conveyance by the mortgagor to the mortgagee, in fee or of some lesser estate, upon condition that if the mortgagor should repay the mortgage debt by the due date, he or his heirs might re-enter and terminate the estate of the mortgagee. As has been seen, by the seventeenth century, the mortgagor, in addition to a right of entry, also had an equity of redemption entitling him to revest title in himself by payment of the debt after the due date. Although these are really contingent future interests, they have never been deemed subject to the Rule Against Perpetuities. Under Michigan law the mortgagor retains a present possessory estate and the mortgagee acquires a lien, which is really a beneficial power of appointment exercisable on a future contingency. For the purpose at hand, the relations between the vendor and the vendee under an executory contract for the sale of land are essentially the same. The vendee has a present equitable fee simple and the vendor a nominal legal title which is really only a power of revocation exercisable on a future contingency. So, under our law, the interests of the mortgagee and the land contract vendor are really contingent future estates. Nevertheless, it would seem that they are not subject to the Rule Against Perpetuities. That is to say, mortgages and executory

379 Littleton, Tenures, Sec. 332 (1481); Part One, note 667 supra.
380 Part One, notes 678-688, supra.
382 Part One, note 704 supra.
383 Part One, notes 693-696, 705, supra.
land contracts may be made to run longer than twenty-one years.

The Restatement of Property takes the position that a limitation made by a corporation of its own unissued stock or securities is exempt from the Rule Against Perpetuities.

Albright v. Cobb, 34 Mich. 316 (1876). Although mortgages and land contracts themselves are exempt from the Rule, transfers of interests thereunder are not. Thus a mortgagee could not devise his interest to "my oldest descendant living when the Penobscot Building falls."

S.S. S. 400 (1944). See: 2 Simes, Law of Future Interests, §513 (1936). This would include long term options given as security and options to repurchase stock designed to keep the organization "closed". The Michigan Supreme Court has shown some favor to the latter type of arrangement, although it has not been confronted with one which might violate the Rule. Halsey v. Boomer, 236 Mich. 328, 210 N.W. 209, 48 A.L.R. 622 (1926); Bohnsack v. Detroit Trust Co., 292 Mich. 167, 290 N.W. 367 (1940); Barnes Co., Inc. v. Folsinski, 337 Mich. 370, 60 N.W. (2d) 302 (1953), Part One, note 522 supra.

Limitations to charities are partially exempt from the common-law Rule Against Perpetuities. Chapter 15 infra.