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THE RATIONALE OF THE RULE AGAINST
PERPETUITIES

By Everett Fraser

There have been two schools of thought as to the nature of the common law rule against perpetuities. One school has argued that the object of the rule is to prevent too long postponement of the power of alienation of property by the creation of future interests therein; that the rule is satisfied by the existence of persons who can jointly convey an absolute fee in the property; and that the law has no objection to unvested interests as such, but only in so far as they postpone this power of alienation; that this was particularly the nature of the rule originally even if it may have taken a new bent in its later development.

The other school has maintained that the rule is aimed at too long postponement of vesting, that remotely unvested interests are per se obnoxious to the law, that although a power of alienation by the joint action of persons having interests is often promoted by the vesting of these interests, that is not the main object of the rule but only an incidental result, and that the law requires a not

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The Minnesota rule against perpetuities is: "Every future estate is void in its creation, which suspends the absolute power of alienation for a longer period than is prescribed in this chapter; such power of alienation is suspended when there are no persons in being by whom an absolute fee in possession can be conveyed." General Statutes 1913, sec. 6664. This rule was taken from the Revised Statutes of New York which were enacted in 1828. Part 2, chapter 1, sec. 14. It has been since debated whether the New York revisers intended to adopt the common law rule or to make a new rule, and, indeed, it has been a matter of dispute what the common law rule was. See, for example, Fowler's Real Property Law in New York, 3d Ed., p. 261 et seq.; Chaplin, Suspension of the Power of Alienation, 2d Ed., p. 177 et seq.; Reeves, Real Property, p. 1261 et seq. The late decisions in New York seem to establish a rule against remoteness in vesting, at least in certain cases, in addition to the rule stated here. See Matter of Wilcox, (1909) 194 N. Y. 288, 87 N. E. 497; Walker v. Marcellus & Otisco Lake Ry. Co., (1919) 226 N. Y. 347, 123 N. E. 726. This brief study of the common law rule is here presented as preliminary to a further consideration of the Minnesota statutory rule and its operation.

Fowler's Real Property Law, 3d Ed., 261; Reeves, Real Property, 1261; Fox, The Criticism of Cases, 6 Harv. L. Rev. 195.
RULE AGAINST PERPETUITIES

...remote vesting even when such vesting is unnecessary to, or does not promote, this power of alienation of the property.

Each side has apparently been able to find support in the cases and dicta of the courts, and has dubbed authorities of the other side “misfits,” wrongly decided. The first formulation of the rule leaves more misfits than the second. But there are authorities which do not conform to the second formula. The language of the cases has pretty consistently been that the rule is against suspension of the power of alienation.

There is another possible view of the nature of the rule. The rule is aimed at the practical suspension of the power of alienation which results from postponing ownership of the property. It requires that there be a tenant (or co-tenants) with power to alienate the property by reason of his ownership. It is not satisfied with a power of alienation by joint action of all parties with interests, yet it does not require vesting where vesting does not at all promote this power of alienation.

The policy and history of the law, the decisions and language of the courts point to this as the true purpose of the rule. This view has the merit of leaving fewer decisions among the “misfits” than either of the others.

In so abstruse a matter, it will be well first to restate the rule in terms of these several purposes and to examine the practical result of the application of these several forms of the rule to the various classes of cases into which the problems fall. The rule affects only contingent or executory limitations.

The rule makes void such executory limitations as might suspend the absolute power of alienation beyond what the law has fixed as a reasonable period. The absolute power of alienation is suspended when there are no persons in being by whom an absolute fee can be conveyed. It is not suspended when there are persons in being who can jointly convey an absolute fee in possession. Such limitations as create the former situation are void;

Lewis, Perpetuities, supp., 16-19; Marsden, Perpetuities, Chapter III; Gray, Perpetuities, Chapter VII; Chaplin, Suspension of Power of Alienation, 2nd Ed., 177 et seq.; Tiffany, Real Property, 2d Ed., 591.


See post page 575.

See post notes 27, 49, 58, 61.

such limitations as create the latter situation are not affected by the rule.

II The rule makes void such executory limitations as might remain unvested beyond what the law has fixed as a reasonable period. Such limitations are void whether the power of alienation is postponed by them or not.

III The rule makes void such executory limitations as suspend the absolute power of alienation of the fee, beyond what the law has fixed as a reasonable period, by postponing the absolute ownership of the fee. The absolute power of alienation of the fee is suspended when there is no present tenant (or co-tenants) by whom an absolute fee can be conveyed. It is not suspended when there is a tenant (or co-tenants) in being who can convey an absolute fee. Nor is it suspended by such executory limitation when an absolute fee could not be conveyed if the executory limitation did not exist.

Subject to an exception noted later, executory interests which are indestructible by the present tenant and which cannot be released, necessarily suspend the power of alienation of an absolute fee. Executory interests that can be released do not suspend the power of alienation by joint action, but do suspend the power of the present tenants to make an absolute fee. In this respect executory interests may be divided into four classes.

(1) The limitation may be to a person not in being and who may not be in being within the period allowed. Such a limitation is void under any form of the rule. A devise to the first born grandchild of A (a bachelor when the limitation is made) might remain executory and inalienable during the life of A and the lives of all A's children. The possibility that it might remain executory avoids the limitation under forms II and III. The possibility that it might remain inalienable avoids it under form I. Each form treats the possibility of the situation objectionable to it as cause for rendering the limitation void in its creation.

(2) The limitation may be to a person to be ascertained out of an unlimited group who may remain unascertained beyond the period allowed. This also is void under any form. A devise to the person who will be elected president of the United States in 1960 must remain both executory and inalienable until he is ascertained.
(3) The limitation may be to a person to be ascertained out of a limited group, all of whom are now in being, or will be in being within the period allowed, but who might not be individually ascertained within that period. This is void under forms II and III, but valid under form I. A devise to the survivor of the children of A (a bachelor when the limitation is made) might remain contingent during the life of A and the lives of several children. But the group power of alienation is suspended only during the life of A. The group of whom the survivor must be one will all be in being at the death of A, and each can release his possibility, so that jointly they can release the interest, and in conjunction with those having present interests in the property, convey an absolute fee.

(4) The limitation may be to a person in being and ascertained, but on a condition precedent which may remain eventual beyond the period allowed. This too is void under forms II and III but valid under form I A devise to the A corporation on condition precedent that it pay to the B corporation a sum of money, without limit as to the time of payment, might, if it were allowed, remain contingent forever, but the interest of the A corporation can be released at any time.

(5) So far there is no difference in effect between forms II and III. But they part company when we consider the exception already referred to. Suppose a devise to corporation A on trust to use the income for certain charitable purposes, with a devise over to corporation B also for a charitable purpose if A ever neglects to carry out the purpose in testator’s will. From the nature of the charitable trust the property would be inalienable by A even if there were no gift over. There would be a suspension of the power of alienation by the nature of the present interest. The executory gift consequently does not make it any more inalienable.

8In re Lord Stratheden, L. R. 18941 3 Ch. 265, 63 L. J. Ch. 872, 71 L. T. 225, 42 W. R. 647.
13Christ’s Hospital v. Grainger, (1849) 1 MacN. & G. 460, 1 Hall & Tw. 533, 19 L. J. Ch. 33, 14 Jur. 339.
The executory gift might remain contingent forever, but it does not suspend the power of alienation either by group action, or by postponing the absolute ownership of the fee. Even if it were required to vest in B corporation within the period usually allowed, it would still be 'inalienable by B. Assuming the validity of present gifts on such trusts for charitable purposes, the executory limitation would be good under forms I and III and void under form II. 1

The problem presented by the last three classes of cases may be put in the form of two questions.

1. Does the rule against perpetuities require only a power of alienation of the fee by joint action of the parties with successive interests, or does it require vesting?

2. Does it require vesting when vesting does not promote any power of alienation?

The history of the law of real property is full of efforts of alienors to control the future succession to the property transferred. The common law has persistently defeated these efforts. The fee simple conditional was an early example. If A gave an estate to B and the heirs of his body, the manifest intent was that the land remain to B's issue and when the issue failed that it should return to the donor. 2 But the courts held that B could alien the land in fee simple so soon as issue was born, and the intent was defeated. The statute De Donis Conditionalibus, 1285, provided that the will of the donor should be observed and took away B's power of alienation on birth of issue. The statute assured the succession of the land to B's issue against all the efforts of B or his creditors. Thus was created the estate tail which was an unblushing perpetuity in its time. Efforts to repeal the statute failed, 3 but the courts after two centuries allowed the tenant to

1See Gray, Remoteness of Charitable Gifts, 7 Harv. L. Rev. 412.  
2See the preamble to the Statute De Donis, 1285. "In all the cases after issue begotten and borne between them to whom the lands were given under such condition, heretofore such feoffees had power to alien the land so given and to disinherit their issue of the land, contrary to the minds of the givers, and contrary to the form expressed in the gift."  
3In Sir Anthony Mildmay's Case, (1605) 6 Co. 40a, the reporter states: "And in this case some points on great consideration were resolved. . . . 1. That all these perpetuities were against the reason and policy of the common law; for at common law all inheritances were fee-simple. . . . But the true policy and rule of the common law in this point was in effect overthrown by the statute de donis conditionalibus . . . which established a general perpetuity by act of Parliament for all who had or would make it, by force wereof all the possessions of England in effect were entailed accordingly, which was the occasion and cause of the said
lock the entail by a common recovery, and to alien the land in fee simple."

Donors attempted to prevent recourse to this means of docking the entails by attaching clauses restraining alienation to the estates created. The courts called these estates attempted perpetuities and held the estates good and the restraining clauses void. The term perpetuity is here applied to a present estate made inalienable.

Restraints on the alienation of the fee simple were held void from an early date. Even restraints on the alienation of life estates or estates for years were held void, although provision could be made for their forfeiture out of regard for the interest of the landlord.

Defeated at law donors resorted to equity. But equity was no more regardful of donors' wishes. Alienation could no more be prevented by putting the property in trust for the donee than by a restraint on the legal title. These rules against restraining the alienation of presently vested estates are everywhere in force and are known as the rules against restraints on alienation.

Unable to control the succession to their gifts by restraining the alienation of present interests, donors attempted to control it, by so formulating their gifts that their donees would not have the ownership to alien, in other words by the creation of future interests therein.

and divers other mischiefs. And the same was attempted and endeavored to be remedied at divers Parliaments and divers bills were exhibited accordingly (which I have seen), but they were always on one pretense or another rejected. But the truth was, that the Lords and Commons, knowing that their estates-tail were not to be forfeited by felony or treason as their estates of inheritance were before the said act, and finding that they were not answerable for the debts and incumbrances of their ancestors, nor did the sales, alienations, or leases of their ancestors bind them for the lands which were entailed to their ancestors, they always rejected such bills.

"Corbet's Case, (1599) 1 Co. 83b; Sir Anthony Mildmay's Case, (1605) 6 Co. 40a; Mary Portington's Case, (1613) 10 Co. 35b. Gray, Perpetuities, sec. 140 et seq.
"Gray, Restraints on Alienation, sec. 19. Gray, Restraints on Alienation, sec. 134 et seq.
"Gray, Restraints on Alienation, secs. 144, 168, 286, 269. Two exceptions were allowed in equity. There could be restraint on alienation of a married woman's estate during coverture, Gray, Restraints on Alienation, secs., 125-131k., and in many of the United States there may be spendthrift trusts which are inalienable, Gray, Restraints on Alienation sec. 177a et seq.
"But the term perpetuity and the general principle of law forbidding
The law had come to allow several forms of future interests. Vested remainders were first allowed, then contingent remainders, and after the Statute of Uses, 1535, and Wills, 1540, contingent remainders by way of use, springing and shifting uses and executory devises.12

The law has never objected to vested remainders. The remaindermen are in being and can alien their interests and there never has been any objection to the postponement of possession provided that the remainder was vested in interest, that is provided there was ownership of an estate and not a mere possibility.13

Contingent remainders might have been troublesome. They could be limited to persons not in esse. They might be given to each person in succession to whom it was desired to secure the property. For example, to A for life, and after to the use of every person who should be his heir, one after another, for the term of the life of every such heir only.14

Alienation of the fee would be impossible because the fee was not given to anyone, but only life estates. But contingent remainders were kept within bounds by a rule much older than the rule against perpetuities. This rule was that after a life estate to a person not in being, a remainder limited to that person’s issue was void.15 Whatever the reason for this rule its effect was, by

the creation of a perpetuity are first met with, after it had become well settled that an estate tail might be barred by a common recovery, amongst the reasons given for deciding that any contrivance to restrain a tenant in tail from suffering a recovery shall be of no effect. When the law came to recognize as valid the limitation of estates in remainder to unborn children, and further to admit the creation of future estates by way of shifting use and executory devise, it was seen that such devices, unless restrained within due bounds, might pave the way to perpetual settlement of land; and the same principle of policy was again invoked.”

Williams, Real Property, 23d Ed. 439.

“For the history of the development of the various classes of future interests see Fraser, Future Interests in Property, 4 Minnesota Law Review 307.

12Gray, Perpetuities, sec. 205.

13See cases discussed in Chudleigh’s Case, (1595) 1 Ch. 120a, 138, Perrot’s Case, (1594) Moore 308, 372; Manning & Andrew’s Case, (1576) r Leon, 256, 258, Gray, Perpetuities, sec. 937 note 2; Williams, Real Property, 23d Ed., 445 note.

14In England after a life estate in real property to an unborn person there cannot be a remainder to that person’s issue even if the remainder is so limited as not to offend the rule against perpetuities. Whitby v. Mitchell, (1890) 41 Ch. D. 85, 59 L. J. Ch. 485, 62 L. T. Rep. N. S. 771, 36 Wkly. Rep. 337; In Re Nash, (1910) 1 Ch. 1, 79 L. J. Ch. 1, 101 L. T. 837, 54 S. J. 48, 26 T. L. R. 57; In Re Parks Settlement, [1914] 1 Ch. 595, 83 L. J. Ch. 526, 110 L. T. 813, 58 S. J. 362. This rule is older than the rule against perpetuities. Williams, Real Property, 23d Ed. 445; Flitcher,
restricting the number of contingent remainders, to ensure an earlier vesting of the fee in one who would have power to alien it. The wings of contingent remainders were further clipped by the requirements of seisin. The remainders failed unless they were vested before, or at the moment when the prior estate of freehold ended. And as the present tenant for life could put an end to his estate by a tortious alienation or by merger, it was within his power to destroy the contingent remainders at any time."

After the Statute of Uses, alienors attempted to accomplish the same object by limiting remainders by way of use. It was argued that the seisin for the use was in the fee to the use and the contingent interest limited was therefore not dependent upon the seisin of the present tenant and consequently he could not destroy the contingent interest by destruction of his own estate. The argument was logically sound, but it did not prevail. Contingent remainders by way of use were held equally destructible with those of the common law. Neither could be used to control the devolution of the property into the remote future, or to prevent the alienation of the fee by the present tenant.

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"As is stated in Mr. Butler's note to Coke on Littleton, 342 b. l., although the suspense or abeyance of the inheritance (as distinguished from the freehold) was allowed by the common law, it was discountenanced and discouraged as much as possible and modern law has added her discouragement of every contrivance which tends to render property inalienable beyond the limits settled for its suspense, because it is clear that no restraint on alienation would be more effectual than a suspense of the inheritance. He adds: 'The same principles have, in some degree, given rise to the well-known rule of law, that a preceding estate of freehold is indispensably necessary for the support of a contingent remainder; and they influence, in some degree, the doctrines respecting the destruction of contingent remainders.'" Per Farwell, J. in In Re Ashforth, L. R. [1905] 1 Ch. 535, 74 L. J. Ch. 361, 92 L. T. 534, 21 T. L. R. 329, 53 W. R. 328.

"The 'sacred rule' enunciated in Purefoy v. Rogers, (1669) 2 Wms. Saund. 768, 681, n. 9, that no limitation shall be construed as an executory or shifting use which can by possibility take effect by way of remainder . . . probably owes its origin to the chance of destruction by the failure of the particular estate incident to the one and not to the other."

In Chudleigh's Case, (1589-95) 1 Rep. 120 a (the case of perpetuities), the court defeated an attempt to make the Statute of Uses serve as a means of protecting contingent remainders from destruction, lest lands should remain too long in settlement." Per Farwell, J. in In Re Ashforth, L. R. [1905] 1 Ch. 535, 544, 74 L. J. Ch. 361, 92 L. T. 534, 21 T. L. R. 329, 53 W. R. 328.
The arguments that failed to save contingent remainders created by way of use, prevailed with respect to the new future interests that could not be classified as contingent remainders—springing and shifting uses and executory devises. They were held indestructible by any act of the present tenant." They too could be limited to persons not in esse. A slight change in the wording of the limitations would prevent the interests being classified as contingent remainders, and would require that they be classified as executory uses or devises.

Reverting to the example previously given it was only necessary in a will to say, to A for life, and one day after his death to the use of every other person who should be his heir, one after another, each person to take one day after the death of his predecessor, for the term of the life of every such heir only. These life interests could not be classified as remainders, since they were not limited to begin immediately on the termination of the preceding estates. They were executory devises and indestructible. In this way it would have been possible for alienors to control the succession to the property and to render the fee inalienable, into the remote future, had not some check been put on the creation of these interests. To such interests, indestructible by the present tenant, as might continue farther into the future than the policy of the law could allow, the term perpetuity was applied, and the rule against perpetuities was developed to keep them within bounds.

The old rules against restraints on the power of alienation had been concerned with restraints on the present interests. These restraints were express and collateral to the interests given and the law could accomplish its object by holding the restraint void and the interests good. But when the device of future interests was used, the suspension of the power of alienation by a present tenant arose out of the very existence of the future interests. The only way to remove the suspension and to restore the power was to hold the future interests themselves void. And this the rule against perpetuities does.

Another important difference developed between the rules against restraints on the power of alienation and the new rule against perpetuities. Since the express restraints on present interests could be destroyed without affecting the interests no period of grace was allowed them. A restraint on the alienation of a

present absolute fee for a life in being or for five years is void."
The restraint is at once and altogether bad. But when the suspension
is by force of a future interest the interest itself must be destroyed
to end the suspension. Now future interests have their legitimate
uses. It is not the use but the abuse of the scheme of future in-
terests that calls for condemnation. Suspension of the power of
alienation should be endured long enough to enable the scheme of
future interests to be used for beneficent purposes but not so long
as to make them the recourse of the whimsical and capricious. It is a
balancing of interests, the public interest in having property alien-
able against the public and private interest in allowing testators
to make reasonable dispositions of their property and provision for
dependents. As the period of suspension is extended the former
interest grows weightier and the latter lighter. The period per-
missible was finally fixed at twenty-one years after the termina-
tion of lives in being at the creation of the interests. There can
consequently be a suspension of the power of aliena-
tion of the absolute fee by a present tenant for this period
because of the limitation of future interests thereon, although
there cannot be any restraint at all on alienation of a present abso-
lute fee.

The rule against perpetuities was a special rule developed to
take care of suspensions caused by future interests and has no
application to other restraints, express or implied, on present in-
terests.

The above historical retrospect shows that in some cases the
object and in all cases the result of the rules allowing docking of
entails, against restraints on alienation, and maintaining the de-
structibility of contingent remainders, was to secure a power of
alienation of the fee to a present tenant. It was an infraction of

"Morse v. Blood, (1897) 68 Minn. 442, 71 N.W. 682; Hause v. O'Leary,
(1917) 136 Minn. 126, 161 N.W. 392.

"By the device of trustees to support contingent remainders property
could be made practically inalienable at common law for lives in being
and twenty-one years. It was on analogy to this that the period of the
rule against perpetuities was fixed. "The rules respecting executory de-
vises have conformed to the rules laid down in the construction of legal
limitations, and the courts have said that the estate shall not be un-
alienable by executory devises for a longer time than is allowed by the
limitations of a common law conveyance. In marriage settlements the
estate may be limited to the first and other sons of the marriage in tail,
and until the person to whom the last remainder is limited is of age the
estate is unalienable. In conformity to that rule the courts have said
so far we will allow executory devises to be good." Per Lord Kenyon,
C. J., in Long v. Blackall, (1797) 7 Durn. & E. 100.
this policy to hold that the new springing and shifting uses and executory devises were indestructible by the present tenant. But having held them indestructible the courts set about to limit the mischief such interests might cause. So long as indestructible interests remained executory there could not be a present tenant with power to convey an absolute fee. The courts restricted the period for which they could be created to continue executory and held all that might continue executory beyond that period void. The period finally adopted was lives in being at the creation of the interest and twenty-one years thereafter. By allowing interests to remain executory during this period the ownership of the absolute fee could be postponed, and there would not be, during this period, a present tenant with power to alien an absolute fee. But on the other hand by restricting the period for which they could be limited to remain executory it was insured that there would again be, when the period had expired, a tenant entitled to an absolute fee with power to alien the same. So the rule against perpetuities took the form of a rule against remoteness in vesting, but its object was to prevent an unreasonable postponement of the power of alienation by a present tenant entitled to the fee. And where that object is not served the rule should not apply.

In most of the cases in which the rule against perpetuities was developed the future interests were both contingent and unreleasable and so were void under any form of the rule. But there were early some cases in which contingent interests could be released which, nevertheless, were held void without referring to this fact.

In the first great case on the rule, the Duke of Norfolk's case a term for 200 years was limited to H, but if T die without issue in the lifetime of H, then it should go to C. The validity of the limitation to C was questioned. H and C were both lives in being at the time the limitations were made. C could have released his interest at any time. The term was consequently alienable by

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*The notion that an executory devise was not barred by a recovery "went down with the judges like chopped hay." Per Powell, J., Scattergood v. Edge, (1699) 12 Mod. 278, 281. "These executory devises had not been long countenanced when the judges repented them; and if it were to be done again, it would never prevail." Per Treby, C. J., Id 287." Gray, Perpetuities, sec. 159 n. 3.

(1662) 3 Ch. Cas. 1.

2 Preston, Abstracts, 283; Lampet's Case, (1613) 10 Co. 46b; Tiffany, Real Property, 2d Ed. 589.
H and C joining. The case was in equity before Lord Chancellor Nottingham. He was assisted by Chief Justice Pemberton, Chief Justice North, and Chief Baron Montague. The three justices delivered opinions agreeing that the limitation to C was void. North and Montague said it was void because it would create a perpetuity. Pemberton was more definite. He said it was void because H could not alien the property. There is not a suggestion in the opinions that the power of release of the executory interest of C would save the limitation. The Lord Chancellor held that the limitation to C was good. He said:

“If it tends to a perpetuity, there needs no more to be said, for the law has so long labored against perpetuities, that it is an undeniable reason against any settlement, if it can be found to tend to a perpetuity.

“A perpetuity is the settlement of an estate or an interest in tail, with such remainders expectant upon it, as are in no sort in the power of the tenant in tail in possession, to dock by any recovery or assignment, but such remainders must continue as perpetual clogs upon the estate; such do fight against God, for they pretend to such a stability in human affairs, as the nature of them admits not of, and they are against the reason and policy of the law and therefore not to be endured.

“But on the other side, future interests, springing trusts, or trusts executory, remainders that are to emerge and arise upon contingencies, are quite out of the rules and reasons of perpetuities, nay, out of the reason upon which the policy of the law is founded in those cases, especially, if they be not of remote or long consideration; but such as by a natural and easy interpretation will speedily wear out, and so things come to their right channel again.”

The decision was rested on the ground that where it is within the compass of one life that a contingency is to happen, there is no danger of a perpetuity. Such limitations “produce no inconvenience. They wear out in a little time.” The Lord Chancellor added:

“They will perhaps say, where will you stop . . . ?

“Where? Why everywhere, where there is not any inconvenience, any danger of a perpetuity; and whenever you stop at the limitation of a fee upon a fee, there we will stop in the limitation of a term of years. No man ever yet said, a devise to a man and his heirs, and if he die without issue, living B. then to B. is a naughty remainder, that is Pell's and Brown’s Case.

“Now the ultimum quod sit, or the utmost limitation of a fee upon a fee, is not yet plainly determined, but it will be soon found

*{1682} 3 Ch. Cas. 1, 17, 20, 24.

*Not italicized in the original.
out, if men shall set their wits on work to contrive by contingencies, to do that which the law has so long labored against, the thing will make itself evident, where it is inconvenient, and God forbid, but that mischief should be obviated and prevented."

There was another limitation over to E, a person in being, on the event that the issue of C ever failed. That too would be releasable. But the Lord Chancellor and judges agreed that this limitation was void."

Child v. Bayliss and Grey v. Montague were similar cases in which the future interests were held void without advertting to the fact that they were to persons in being who could release them, and that the property was consequently alienable by the joint action of the parties with interests.

The first cases in which the courts referred to the effect of a power of release on the validity of a future interest were Gilbertson v. Richards, Birmingham Canal Co. v. Cartwright, and Avern v. Lloyd. In all three cases it was held that remoteness in vesting was unobjectionable provided that the power of alienation by joint action was not unduly suspended. "It seems obvious," said the court in Avern v. Lloyd, "that such a case is not within the principle on which the law against perpetuity rests and that the limitation in question of the absolute interest does not fail as being too remote."

But these decisions did not prevail. Gilbert v. Richardson was put on other grounds by the Court of Exchequer Chamber. Birmingham Canal Co. v. Cartwright was overruled in London & S. W. R. Co. v. Gomme and Avern v. Lloyd was overruled in In Re Hargreaves. It is now firmly established that the common law rule is not satisfied by a power of alienation by joint action of the parties with successive interests in the property. And in its present form it is true to its original purpose."

The effect of the rule in operation fortifies authority. The

\[\text{Footnotes:}\]
\[(1682) \text{3 Ch. Cas. 1, 48.}\]
\[(1618) \text{Cro. Jac. 458, 459.}\]
\[(1761) \text{Eden 205, 3 Brown P. C. 314.}\]
\[(1839) \text{4 H. & N. 277, 28 L. J. Ex. 158.}\]
\[(1879) \text{L. R. 11 Ch. D. 421, 48 L. J. Ch. 552, 40 L. T. 784, 27 W. R. 597.}\]
\[(1868) \text{L. R. 5 Eq. 383, 37 L. J. Ch. 489, 18 L. T. 282, 16 W. R. 660.}\]
\[(1880) \text{5 H. & N. 353, 29 L. J. Ex. 213, 6 Jur. N. S. 672.}\]
\[(1882) \text{L. R. 20 Ch. D. 562, 51 L. J. Ch. 530, 46 L. T. 449, 30 W. R. 620.}\]
\[(1890) \text{43 Ch. D. 401, 59 L. J. Ch. 384, 62 L. T. 473, 38 W. R. 470.}\]
\[\text{Gray, Perpetuities, Ch. VII.}\]
difference in the effect of the two forms is well illustrated by options to buy land. These options are specifically enforceable in equity. Consequently they are in effect executory equitable limitations of the property." A devise to A and his heirs but if B or his heirs ever pay a sum of money to A or his heirs, then the property to go over to B and his heirs would have the same effect. The executory limitation is void. But as it could be released, it would be good if the rule required only a power of alienation by joint action of A and B.48

If land be limited to A and his heirs and if A's issue ever fails to B and his heirs, the limitation to B is void. It would be good if the rule were only against a suspension of the power of alienation by joint action of A and B. This power of alienation is not suspended even for a day. Estates tail have been generally abolished, but some of their objectionable features reappear in a limitation of this kind.

The rule against perpetuities is a practical rule." It does not look so much at the theoretical possibility of a joint conveyance as at the practical improbability of it. It would be difficult to agree on the value of the executory interest. The dif-

48""Now is there any substantial distinction between a contract for purchase, or an option for purchase, and a conditional limitation? Is there any difference in substance between the case of a limitation to A, in fee, with a proviso that whenever a notice in writing is sent and £100 paid by B or his heirs to A, or his heir, the estate shall vest in B, and his heirs, and a contract that whenever such notice is given and such payment made by B or his heirs to A or his heirs, A shall convey to B and his heirs? It seems to me that in a court of equity it is impossible to suggest that there is any real distinction between these two cases. There is in each case the same fetter on the estate and on the owners of the estate for all time, and it seems to me to be plain that the rules as to remoteness apply to one case as much as to the other." Per Jessel, M. R., in London & S. W. Ry. Co. v. Gomm, (1882) L. A. 20 Ch. D. 552, 51 L. J. Ch. 530, 46 L. T. 449, 30 W. R. 620.


""If the owner in fee of an estate, or the absolute owner of any property could be fettered from disposing of it by a springing use or executory devise or future contingent interest which might not arise till after the period allowed by the rule, it would be easy to tie up property for a very long time indeed. The present interest under the executory limitations might be vested in an infant, a lunatic, or in a person who would refuse to release it, and thus the estate would be practically inalienable for a period long beyond the prescribed limit. That is clearly not the law." Per Kay, J., in London & S. W. Ry. Co. v Gomm, (1882) L. R. 20 Ch. D. 562, 51 L. J. Ch. 530, 46 L. T. 449, 30 W. R. 620. And see Gray, Perpetuities, secs. 268 et seq.; Rundell, The Suspension of The Absolute Power of Alienation, 19 Mich. L. R. 242.
ficulty of getting life tenants and remaindersmen to unite in a conveyance is well known. There is greater difficulty here. The contingencies on which executory limitations may be made operative are without number. There is nothing to correspond to actuarial tables of mortality as in the case of life interests. The executory devisee can use his comparatively valueless interest as a club over the present tenant. True the fee may be aliened without a release but it would continue subject in the hands of the alienee to the executory interest. This interest is indestructible by any act on A's part. Purchasers cannot be found for such defective titles.

Professor Reeves, who has made the best argument for the other form of the rule," answers this objection as follows:

"The Anglo-Saxon policy as to values has generally been to let them regulate and care for themselves. Otherwise, there would doubtless have been numerous rules for compelling alienation by co-tenants, for example, in many cases of which the price of the interests of some of the owners may be as injuriously affected by the refusal of the others to sell or release, as if the latter were contingent remaindersmen."

Co-tenancy serves a useful purpose. One tenant's right to say whether the property should be sold or held is as good as his co-tenant's. There is no difficulty in determining the value of concurrent interests. And co-tenants can generally have partition. But remote future interests are not of such use that the inconveniences arising from them should be endured.

How the law looks at the practical results is well shown by In Re Rosher," a case of express restraint on the alienation of a present interest. A devised real estate to his son and his heirs with the proviso that if he should desire to sell the property, in the lifetime of devisor's widow, she should have the option to purchase the same for £3000. The value was £15000. Theoretically the land was not inalienable. But the condition was held void as a restraint on alienation. The court said that "to compel him, if he does sell, to sell at one-fifth of the value, and to throw away four-fifths of the value of the estate is equivalent to a restraint upon selling at all.""
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Turning more particularly to the second question, does the rule require vesting when vesting does not promote any power of alienation?

It has already been shown how the courts have historically defeated restraints on the alienation of present interests, and how donors resorted to the device of giving only limited present interests and future interests thus postponing ownership of the fee in order to control the devolution of the property into the future. Certain classes of these interests were finally held indestructible by the present tenant and the courts were compelled to set a bound to them in order to carry out the ancient policy of the law. That bound was the rule against perpetuities. It took the form of a rule against remoteness in vesting, but its object was to insure that there will again be when the period has run, a tenant with power to alien.

There are two classes of cases in which this object would not be promoted by holding the future interest void. 1. When the future interest is destructible by the present tenant. 2. When the present interest would be inalienable even if the future interest limited thereon were held void.

Future interests upon an estate tail or after an estate tail are destructible by the tenant in tail. If they are so limited that they cannot persist after the estate tail has come to an end, they are not affected by the rule against perpetuities. If they are so limited that they might persist after the estate tail has terminated they are subject to the rule. To give this statement another form: If there will always be a tenant with power to alien the fee the future interests are not void no matter how remotely they might vest; if there might come to be a tenant without power to alien the fee because of the future interests, they are void if too remote.

Present charitable trusts are inalienable from their nature. They may be created to last forever. The law favors them and sanctions a perpetuity where it is for a charitable purpose.

"Gray, Perpetuities, Ch. XIV.

*It is often said that trusts for charity are unalienable because there are no definite cestuis que trust and there is consequently no one to alien them. "No one has any alienable rights because no one has any rights." Gray, Perpetuities sec. 590. But is this the true reason? The trustee has the legal title and if no one else has any rights, he must also have the equitable title. Why can the trustee not alien? Are they not inalienable because the law recognizes the interest of the indefinite group and makes
Suppose the gift is to A corporation on a charitable trust with an executory gift on a remote contingency over to B corporation also on a charitable trust. This was the case in Christ's Hospital v. Grainger." The gift over was held good. The court said:

"It was then argued that it was void as contrary to the rules against perpetuities. These rules are to prevent, in the cases to which they apply, property from being inalienable beyond certain periods. Is this effect produced, and are these rules invaded by the transfer, in a certain event, of property from one charity to another? If the corporation of Reading might hold the property for certain charities in Reading, why may not the corporation of London hold it for the charity of Christ's Hospital in London? The property is neither more nor less alienable on that account."

Of this case Gray says:

"But here, with submission to so great an authority, is the common confusion between perpetuity in the sense of inalienability and perpetuity in the sense of remoteness. Property dedicated to a charity is inalienable necessarily; but to allow a gift to charity to commence in a remote future is not necessary; and the object of the rule against perpetuities is to restrain the creation of future conditional interests.

"If a remote gift to a charity after a gift to another charity is good, because it is by nature inalienable, then a gift to a charity after a gift to an individual should be good; the individual can alienate the whole of his present interest, and the remote interest is no more and no less inalienable than when limited after a gift to another charity. Yet after a gift to an individual a gift to a charity may be unquestionably bad for remoteness. So a remote gift to a charity without any preceding gift at all is too remote."

This case and Gray's comment raises the question whether Gray's insistence that the rule is against remoteness investing is quite justifiable. The language of the cases is that it is a rule against suspension of the power of alienation. Gray fought valiantly and rightly against the idea that alienability by joint convey-

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"(1847) 16 Sim. 83, 1 McN. & G. 460, 1 H. & Tw. 533.
"Perpetuities, secs. 600, 601. See also Remoteness of Charitable Gifts, 7 Harv. Law Rev. 412.

88In extending the period of the rule to include an infancy after a life in being, the judges of the King's Bench gave as a reason that "the power of alienation will not be restrained longer than the law would restrain it, viz. during the infancy of the first taker, which cannot reasonably be said to extend to a perpetuity." Stevens v. Stevens, (1736) Cas. Temp. Talb. 228.

"The question always is, whether there is a rule of law, fixing a period, during which property may be unalienable. The language of all these cases is, that property may be so limited as to make it unalienable dur-
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...ance satisfied the rule. But did he not lean too far to the other side? In the second and third editions of his Rule Against Perpetuities he expressed some doubt of the "entire correctness" of his criticism quoted above. He states the doctrine to be that "future interests must arise within a certain time," but that when the law allows property to be taken out of commerce as in the case of charities there seems to be no occasion to apply the rule. But does not the rule itself need restatement to accord with the language of the cases and with Christ's Hospital v. Grainger and the cases that follow it?*

If property is given to an individual and then on a remote contingency over to a charity, the reason for holding the gift over void is obvious. The present tenant would have a power to alien but for the charitable gift, and the charitable gift is illusory." The public policy that overlooks inalienability in present charities would be going far to sanction inalienability in individuals for the remote possibility to the charity. And the same reasoning applies to a remote gift to a charity without any preceding gift at all. Some one has the right to the property subject to the executory gift to the charity and cannot alien it because of that gift.

The common law rule against perpetuities is a logical development from the policy of the law to keep property alienable. The law has generally insisted on a power of alienation by an individual tenant. Indestructible executory interests necessarily suspend that power pro tanto. The only way to end the suspension is to get rid of the executory interest. It may be got out of the way

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**Although the interest of the charity is created by the contract, it does not become effective until the happening of a future event, and it is the very postponement of its effectiveness which renders it obnoxious to the rule against perpetuities." Per Warrington, J., in Worthing Corporation v. Heather, (1906) 2 Ch. 532, 75 L. J. Ch. 761.
by vesting or by avoidance. If it vests there will be a new tenant with power to alien; if it is avoided the old tenant will have the power. In either case there will be a tenant with power to alien the fee. Some suspension must be endured out of respect to the legitimate uses of executory interests. The period allowed is fixed by the rule. If the interests are such that they cannot remain executory longer they are good, alienability will be restored by vesting. If the interests might remain executory longer, and thereby the power of alienation is suspended longer, they are void, and the power of alienation of the prior tenant is unrestrained. But if avoiding the executory interest would not promote the power of alienation the rule has no application.

The rule against perpetuities might be stated thus: An executory limitation of property which causes suspension of power in the persons having the property subject to it to convey an absolute fee and which might remain executory for more than twenty-one years after the termination of lives in being at its creation is void.

"The mere fact that a contingent interest may be released by persons in being, and that a good title may thus be made, is not enough to take the case out of the rule, if the estate cannot be alienated by those having vested interests in it, because a possible future interest is created which may not vest within the time fixed by law." Windsor v. Mills, (1892) 157 Mass. 362, 365, 366, 32 N. E. 352. See also quotation from Kay, J., in note 49.