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THE RULE AGAINST PERPETUITIES AND THE INDIANA PERPETUITIES STATUTE

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I was afflicted with a substantial, but not fatal, touch of diffidence this morning with regard to the matter that I was dealing with then, and with regard to the matter I am dealing with now, I am afflicted with a considerable touch of embarrassment.

I am going to talk about the Indiana law of perpetuities.

I come from the outside and am talking to you about something to which you are willy-nilly, closely related.

There may be issues of local pride involved, but my job as I see it, as an impartial person having a general understanding of the law of perpetuities at common law, under your statutes and under other statutes, is to call them as I see them. In characterizing the Indiana law of perpetuities, I am faced with this embarrassment: Confidentially, my friends, it is not so good!

You haven't a great many cases on perpetuities, but such cases as you have reflect the difficulties which are bound to arise under the law as it is set up in your statute books. I

* Professor of law, Harvard Law School. This is the second of two lectures given by Professor Leach at the State Bar Association Institute, held at Indianapolis, January 12, 1940. The subject-matter of the first lecture may be found in an article by Professor Leach on "Powers of Appointment," 24 A. B. A. Jl. 807.

am not going to say everything that appears in the Indiana reports that one might term unusual is excused by the form of the statutes, but a good deal of it is. I hope you won't be offended. If I can by any chance tread that dizzy edge between offering criticism that is bound to be somewhat destructive, and offending the local pride that one feels towards his institutions when discussed by an outsider, it may be that something will be done to make it possible to avoid the difficulties which I assure you are going to arise with regard to your Indiana law even to a greater extent than they have arisen.

And those difficulties are going to be difficulties which in practically every case is going to thwart some perfectly decent, rational, reasonable intention of a testator, and cause some people who ought to be decently provided for by his funds to suffer the humiliation of being impoverished where they ought to be affluent, and a public liability from being charges upon the relief funds.

Something ought to be done and I will now proceed, not only in that vein, but I will now proceed in that vein and also, in the vein of suggesting to you as practitioners rather than legislators, how best to work things out until you have a better instrument to operate with.

The Rule and the Indiana Statutes

Let me urge upon you that in this field you do not satisfy your professional obligations to your clients by being aware of the Indiana law, because the rule against perpetuities that will be applicable to the wills which you draw is determined by two things:

(a) the nature of the property that is concerned, and
(b) where your testators die, or more exactly, the jurisdiction in which they are domiciled at the time of their death.

If real estate is involved, the real estate is governed as to the law of perpetuities by the jurisdiction in which it is located. If personal property is involved, the rule against perpetuities of the domicile of the testator at the time of his death governs, and either of those may or may not be Indiana. Hence, in

this matter, a general familiarity with perpetuities law not only under the Indiana statutes, but in other states and under the common law is of vital necessity to any practitioner. The common-law rule against perpetuities provides in its classic statement that

"No interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest."[1]

That rule against perpetuities exists in all but thirteen of the states of the United States. It used to exist in all but six, but of the thirteen dissenting jurisdictions three have since come back to the common-law rule as I shall point out shortly.

Comments on the Statutes

Now, your Indiana statutes were printed immediately after the common-law rule. I think I ought to say a word about your Indiana statutes and their origin.[2]

They are plagiarized from the New York Real Property Law, but apparently there was some literary pride in the draftsmen of your Indiana statutes, because they didn't take the whole thing. Since they didn't take the whole thing, the Indiana statutes as they appear in your books lack a considerable degree of the comprehensibility that they had in the New York statutes. But they have all of the difficulties in application which have driven New York lawyers and judges nearly mad for about a hundred years. Not only are those sections not taken in toto from the New York Real Property Code, but also a great many companion sections which define and modify the statutes in the New York code have been left out of the Indiana code. That is no help in making these sections workable. Mind you, the silver lining of this cloud is that most of the potential difficulties with these sections have not yet arisen in litigation that has been reported. The situation can still be saved without great loss to anyone. But if something isn't done about these statutes, mark my

1 Gray, Perpetuities (3rd ed.), § 201.

2 Burns' Ind. Stat. 1933, §§ 56-142 and 51-101.

words, they are going to cause some results which are simply horrifying.

"The absolute power of aliening lands shall not be suspended by any limitation or condition whatever, contained in any grant, conveyance or devise, for a longer period than during the existence of a life or any number of lives in being at the creation of the estate conveyed, granted, devised and therein specified, with the exception that a contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the person or persons to whom the first remainder is limited shall die under the age of 21 years, or upon any other contingency by which the estate of such person or persons may be determined before they attain their full age."

Now, I say that section was taken from the New York Real Property Law. When it was taken, three principal changes were made. In the first place, the definition of suspension of the power of alienation, which the New York code contains, was omitted.

So that the Indiana courts, and you as practitioners, have no aid in determining what suspension of the power of alienation means. That hasn't caused any difficulty yet, but it is bound to be a source of litgation in the future. The New York code provides:

"The absolute power of alienation is suspended when there are no persons in being by whom an absolute fee in possession can be conveyed."[3]

That has a meaning.

If there are persons who can get together, and convey a fee, then you have no suspension of the power of alienation. That was omitted. What does the omission mean as a matter of statutory construction? Does it mean that the omission was intentional and hence the Indiana Legislature meant something different from what the New York Legislature meant? Well, that would tend to be the inference one might draw, and if they didn't mean that, what did they mean by suspension of the power of alienation?

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[3] N. Y. Real Property Law, § 42.

That is an issue which your court some day will have to decide if these statutes remain on the books.

The second thing that the Indiana Legislature did in adopting these sections from New York was to change the period of perpetuities, which in New York is two lives, to any number of lives. Now, that is all to the good. That two-life rule in New York has been a nightmare for about a hundred years. The courts of New York have become very astute in making two lives grow where three grew before, but even that hasn't been able to save a great many reasonable dispositions. In New York where a man has three persons he wants to take care of, three branches of the family—say, three children and their children—it is a practical impossibility to do that economically.

Now, you don't have to do it economically if you have five million dollars. But if you have the kind of an estate that you or I hope to be able to leave, then those assets have to be marshalled very, very carefully. This can be done under the common-law rule, but cannot be done in New York.

So variation number two was all to the good.

Variation number three consists of those words "and therein specified," which occur in the following clause of the statute:

> "Any grant, conveyance or devise, for a longer period than during the existence of a life or any number of lives in being at the creation of the estate conveyed, granted, devised, and therein specified."

Does the "therein specified" refer to the estate, or does it refer to the lives? I don't know and I defy you, authoritatively to state, before your court has determined it.

It seems to me quite possible that it refers to the lives, and Dean Gavit, the Indiana University School of Law, so believes, as revealed in his book. It also seems to me quite possible that it refers to the estate which is granted. If it refers to the latter, there is no difficulty with it. If it refers to the former you may have some real difficulties with it, and those difficulties will cause interests which would be good under the common-law rule to be bad under your Indiana statute.

Now, like New York, you have a different statute which applies to personal property, and that is the one which follows:

"No limitation or condition shall suspend the absolute ownership of personal property longer than till the termination of lives in being at the time of execution of the instrument containing such limitation or condition, or, if in a will, of lives in being at the death of the testator."[4]

Observe that the words "therein specified" are omitted, and that there is no exception for remainders to take effect in the presence of a previous remainder before the first remainder man reaches 21. Why it should be that there is a difference between the rule against perpetuities as applied to real property and as applied to personal property, no one, I think, has even undertaken to explain. If there is an explanation, it ought to be a very good one, because as you know the usual clause which calls these sections into operation is a residuary clause setting up a trust, and that residuary clause, nine times out of ten, will be disposing of real and personal property together. It ought to be a very good reason which will cause a gift as to real property to be valid and a gift as to personal property to be invalid, or vice versa.

Now, the personal property section also omits a clause which the New York statute contains. The New York statute is Personal Property Law, Section 11,[5] and it has a final clause that provides that in other respects, the rules as to devolution

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[4] Burns' Ind. Stat. 1933, § 51-101.

[5] The absolute ownership of personal property shall not be suspended by any limitation or condition for a longer period than during the continuance and until the termination of not more than two lives in being at the date of the instrument containing such limitation or condition, or, if such instrument be a last will and testament, for not more than two lives in being at the death of the testator; except that a contingent gift in remainder may be made on a prior gift in remainder, to take effect in the event that the persons to whom the first remainder is limited die under the age of twenty-one years, or on any other contingency by which the interest of such persons may be determined before they attain full age. For the purposes of this section a minority is deemed a part of a life, and not an absolute term equal to the possible duration of such minority. Lives in being or a minority in being shall include a child begotten before the creation of the estate but born thereafter. In other respects limitations of future or contingent interests in personal property are subject to the rules prescribed in relation to future estates in real property.

of personal property shall be governed by the rules as to devolution of real property. It seems to me not impossible that a great deal of difficulty may arise in the future on the question whether certain rules which your statutes specify as applicable to real property can properly be held applicable to personal property.[6]

Now, as an example of the kind of thing which I mean when I say that other related sections were not brought over from the New York Real Property Law, I refer to the word "remainder" near the end of the real property section. I was not able to find in your statutes a definition of the word "remainder."

The New York statute defines the remainder—not a remainder as anything you ever heard of in law school, but a remainder for purposes of those acts. The word "remainder" as defined in the New York Real Property Law makes sense in this section. The word "remainder," as used apart from the definition given—its ordinary common law meaning—does not, I submit, make sense here for reasons which I will later discuss.

Now, to comment on certain aspects of those statutes. I suggest to you that this is not only missionary work, but that in these comments what we are developing from your point of view as users of these statutes are certain fundamental conceptions as to the nature of the thing we are dealing with and that you must deal with.

I should be delighted if anything that I say shall cause some movement to be initiated to bring about an amendment to these statutes. But entirely apart from that it seems to me that a discussion of the fundamental problems of these statutes (and they are fundamental differences from the common-law rule) is a useful thing to build upon in more detail.

The common-law rule requires that the interest must vest within the period specified by that rule which is lives in being, plus 21 years. That is, that the interest in question must be given actually in possession or must have that quality which the common law gave to vested remainders, even before they

came into possession. The common law concept of the vesting of an interest which is not yet possessory, is a highly metaphysical thing. You don't find it in any other law. We have that concept of an interest which is at once future and present, future as to possession, present as to the existence of the future right. Hence the common-law rule is satisfied if the interest becomes possessory within the period of the rule, or if it becomes vested in interest under our peculiar common law idea that that thing can take place before it becomes possessory. You are, of course, familiar with the fact that the so-called executory interest, that is, the shifting or springing use, or shifting or springing executive devise never had the capacity for vesting in interest. In the words of my old preceptor, the old preceptor of many of you, to-wit, Bill Warren, the common law remainder had the quality of patient politeness. It came in immediately after the preceding estate, but didn't hurry it a bit. It waited until the preceding estate was all through and then came in immediately. It didn't overlap the preceding estate, in which case it would have been a shifting executory interest. It didn't leave a gap between it and the preceding estate in which case it would have been a springing executory interest. No lap, no gap—patiently polite!

Thus, the common law remainder was the only type of interest which had the capacity of being vested in interest before it became vested in possession. Of course, all reversionary interest (including the very thin possibility of reverter), were vested because they were things that just remain in the grand total.

But the statutes do not require that, and are not satisfied with that. Your statute requires that the power of alienation shall not be suspended, which is a different thing as the two problems indicate. I am now assuming that the suspension of the power of alienation means in Indiana what it means in New York, which, as I suggested a few moments ago, may be a violent and false assumption. If it doesn't mean that we can never tell what it does mean until your court has told us.

Take problem one:

"1. To the A church in fee simple, but if the premises ever cease to be used for church purposes, then to B."

Now, that gift to B is void under the common-law rule. It is an executory interest, a shifting executory devise. It may not vest in possession until long after lives in being, and twenty-one years. Hence it fails under the common-law rule and A has a fee simple absolute.

Under the Indiana statute, subject, however, to another questionable construction to be discussed later,[6] I issue the caveat at this point that under the Indiana statutes it would seem that the interest in B was valid, because A and B can at any time get together and give an absolute fee simple of the property.

The New York statute defines the suspension of the power of alienation as follows:

"The absolute power of alienation is suspended when there are no persons in being by whom an absolute fee in possession can be conveyed."[7]

There are persons in being that can convey an absolute fee in possession. Those persons are A and B.

So problem one presented a situation in which your statutes appear to be more lenient than the common-law rule.

Problem two is just the reverse:

"2. Property in trust for A for life, then for A's children for their lives, then for B."

Under the common-law rule, all interests are valid. A's interest is, of course, good. A's children's interest must vest in possession at A's death. Hence they are valid. The fact that they will extend beyond the period of perpetuities is no objection because the test of the common-law rule is vesting,

[6] The question "Do the Indiana statutes by implication require that an interest vest within lives in being as well as requiring that there be no suspension beyond that period?" will be discussed later in this paper.

[7] N. Y. Real Property Law, § 42.

not the duration of the estate, and the interest of B is valid because that is a vested remainder at the outset. Hence, everything is good.

Now, you might say that that ought also to be good under the Indiana statutes, because at A's death, A's children and B together can convey an absolute fee, and you can suspend the power of alienation or the absolute ownership during the existence of any number of lives in being at the time of the creation of the interest, and all that you are suspending is the ownership during A's life. That line of argument would be sound except for the fact that your statute,[8] provides that a beneficiary of a trust of real estate cannot dispose of his interest unless the right of disposal is expressly given. That is, an automatic spendthrift clause is imposed upon beneficial interests under trusts of real estate unless the reverse is expressly stated. Hence, at A's death A's children cannot convey an absolute fee, because the statute says they can't, and hence, in Indiana it seems clear that the gift in problem two is void because not until all children of A have died can an absolute fee in possession be given. And it may be that the children are not lives in being at the time of the testator's death. But if the property involved is personal, to which this statute does not expressly apply, and if the court does not rule that section 56-604 is by implication applicable to personalty, or if real estate is involved, and there is an express power to alienation given in the instrument then the case in problem two is a valid limitation.

Now, I ask you, in all honesty, does that state of the law make sense? Are there reasons why that gift should be good as to land and bad as to stocks and bonds? Are there reasons why we should have to wait for the court to determine whether section 56-604 applies to personalty? I understand there are some cases which tend to indicate it should not. Should the validity of that interest depend upon whether the beneficiaries of the trust have the right to convey or don't have the right to convey? Are there really substantial interests of public

[8] Burns' Ind. Stat. 1933, § 56-604.

policy which are served by holding that thing invalid under one circumstance and valid under the other?

My question suggests that the answer is no. If that is the state of the law—and on the basis of such study as I have been able to make of the Indiana law of perpetuities by reading as far as I know, every decision on the question that appears in your reports, I am convinced that it is—it is a state of the law about which something ought to be done. If that has not yet arisen, it is the kind of a problem that you are going to find.

Now, you are going to say to me, or think in your mind, that isn't the kind of a limitation that people make. You don't find cases where somebody gives property to A for life and then to A's children for their lives and then to B. You are right about that—you don't, in the first instance. What happens is this: You get that case through the exercise of a power of appointment. What happens is a testator leaves property to A for life, remainder for him to appoint by will. Then A leaves the property to A's children for their lives, remainder to B. That is the way this sort of thing arises, over and over again.

Bearing in mind the fact, as is pointed out later, that when a power of appointment except inter vivos is exercised, and further bearing in mind the fact that you have to read back the appointment into the instrument creating the power for purposes of the rule against perpetuities, the net result that you come out with is this case, over and over and over again—not once but fifty times, in the course of a year, in the Massachusetts Probate Courts.

Your statute also presents this question:

> "Do the Indiana statutes by implication require that an interest vest within lives in being as well as requiring that there be no suspension beyond that period?"

That requires a brief dissertation on New York law. The New York courts have held in the *Matter of Wilcox*[9] that the two-life rule imposed by the New York statutes not only

[9] 194 N. Y. 288, 87 N. E. 497.

requires that the suspension of the power of alienation terminate within two lives, but also requires that the interest vest within two lives. In other words, problem one above is not a valid limitation in New York, although there is no suspension of the power of alienation at all. A and B are both living, and the minute the testator dies they can convey, but that interest is not good in New York. It isn't good in New York, because the courts have construed into the perpetuity statute, not only the requirement of termination of suspension of the power of alienation that appears there, but also a requirement of vesting.

Now, how they have done that takes us about two hours, in my course in Property Three, to point out, and I am certainly not going to undertake to do it here in two minutes. *Matter of Wilcox, supra,* will give you some suggestion as to how it is going to be done.

Another case which my students will remember is *Walker v. Marcellus & O. L. Ry. Company,*[10] which deals with the same problem. Chaplain has a book on the suspension of power of alienation, which deals with New York.[11] Under your present statute Chaplain is an Indiana textbook because when it comes to construction of these statutes you have really to go back to the source of the legislation, which is New York, and Chaplain deals with this at length.

Suffice it to say that for reasons sufficient to the New York courts they have imposed the requirement of vesting within the specified period by implication. There is a vital difference. I am going to say only this as to this background material. There is a vital difference between the Indiana and New York statutory setup due to the fact that although your section 56-142 is a paraphrase of section 42 of the New York Real Property Law, there is another section in New York, to-wit 50, which is not in your code. That section 50 was a large part of the basis upon which the New York courts imported the requirements of vesting into their perpetuities law.

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10 226 N. Y. 347, 123 N. E. 736.

11 Chaplin, Suspension of the Power of Alienation.

But in the District of Columbia, and in Kentucky, where something like your statutory setup exists, although there are considerable differences, responsible people in those jurisdictions have come to the conclusion that *Matter of Wilcox, supra,* the New York case, will be applicable there.[12] Whether it will be applicable here is one of those unanswered questions which must ultimately be answered at the cost of some unfortunate client who has the doubtful privilege of settling a law, unless there is something radical done about your Indiana statutes.

Again the Indiana statute differs from the common law in this:

"The Indiana statutes allow no period of years (such as 21 years, which the common-law Rule allows) in addition to lives in being."

Why did the common-law rule against perpetuities put the 21-year period in? Well, for this reason: the common-law rule against perpetuities—and indeed I suppose every statutory rule against perpetuities was designed to thwart capricious, vain dispositions. Now, the most natural thing in the world for a man to want to do is to take care of his children and grandchildren. The most natural way to do that is to provide, subject to proper power, that the income of his property should go to his children for their lives and then the property should go to his grandchildren. Grandchildren at any age? No. Grandchildren who are old enough to take care of property, and the age of 21, in the old days, was the age which was accepted as manhood.

Of course, you and I know that it makes a lot of difference whether the duties of a man are riding a horse, carrying a spear and wearing a tin suit, or on the other hand, consist of judgment in the handling of investment funds. There is much to be said for the fact that the ancient age of majority at 21 is far too low at the present time, but we are not going to try to change anything that is as fundamentally rooted as that.

12 Updegraff, The Rule against Perpetuities in the D. C.; 14 Georgetown L. J. 336; Roberts, Kentucky Statute against Perpetuities, 16 Ky. L. J. 97; see also Gavit, Indiana Law of Future Interests 242.

The notion was that he wanted to be able to leave property to his children for their lives, and to his grandchildren when they were old enough to take care of it, and that, under the old notion, was 21 years. So lives in being and 21 years lets them do that. Moreover, the fact that the 21-year period is in gross, and is not attached to any minority, enables a man to do certain things unrelated to lives within a relatively short period; that is, 21 years. It gives him some latitude to make dispositions which are not connected with lives.

Now, your provision for lives only, excludes the possibility of taking into account the minority of the remainderman, except in so far as your statute relating to real estate covers it, there being no statute as to personalty. Thus it prevents a man from making dispositions which are not related to lives.

Now, frequently a man wants to do something that has no relation to any lives in being. I dare say many of you have run into the situation where a man has been making up out of his pocket bonuses for his employes, and he wants that to continue for a certain time after his death. He wants to reward continuation in service in his business by additional payments out of his estate for a period of years—reward not only the people who are there who would be lives in being, but people who may be employed.

That sort of thing, the sort of thing that induces the creation of trusts, limited by a number of years rather than by the lives of persons, is frequently, as things turn out, a desirable thing to do. But you can't do it here, and it is by reason of the fact that the 21-year period in the common-law rule is stricken out in Indiana.

For example, take that case of *Phillips v. Heldt*.[13] There was a trust of real estate for one year. It is bad under your rule. It is bad because it isn't limited by any particular number of lives and because the statute forbids the beneficiaries of trusts to alienate the property during that one-year period. Of course, if your draftsman had in mind the Indiana statute of perpetuities it is the easiest thing in the world to take

[13] 33 Ind. App. 388, 71 N. E. 520.

care of it. That he picks out a half dozen lives doesn't make any difference, and says, the trust is to last one year, or during the duration of these lives, whichever is shorter, and, of course, he comes out with a perfectly good trust. But my point is that your statute lays a trap for the unwary, in situations which are perfectly reasonable, and where no man who didn't have an expert knowledge in this field would have the slightest notion that there was a perpetuity question involved. How many of you would feel, if you didn't know the terms of this statute, when you were setting up a trust for one year, that you ought to look up the rule against perpetuities? It is by imposing a mathematical formula which is fundamentally, as I suggest, an unsound one. You are laying a trap for persons who are trying to do perfectly reasonable decent things.

Secondly, look at this: A gift to "such of my issue as are living one year after my death" is bad.

Of course it is. If it were, "such of my children," that would be all right, because, of course, the children of themselves are lives in being and the power of alienation will be suspended no longer than those lives in any case. But here is a fellow who has a child that may die leaving issue during the year. He wants to benefit the people available at the period of distribution, and he can't do it, unless being an appreciant fellow, he realizes that the Indiana rule against perpetuities forbids doing this, as it would naturally be done, and protects the thing by an artificial period of perpetuities, as I have stated; that is, picking out a half dozen persons and saying, "gift to my issue, who has been living to the survivor of these people or one year after my death, which is early."

New York has this same difficulty, and as I shall point out at the very end of this talk, here and in New York, the absence of any period of years in gross included in your rule against perpetuities raises a terrific dilemma, when you are dealing with commercial transactions which may be subject to the rule against perpetuities. And there are some. Commercial transactions which are subject to the rule against perpetuities practically everywhere are options to purchase. That

is in gross unconnected with the lease, options to purchase in a lease, and stock option warrants, or conversion privileges in bonds under certain circumstances.

In its fourth report, the New York Decedent Estate Commission has indicated the hardships that are caused by having the period of perpetuities not include some period of years.[14]

Now, the exception in the real property statute. That reads:

"With the exception that a contingent remainder in fee may be created on a prior remainder in a fee to take effect in the event the persons or first owner, limited shall die under the age of 21, or any other contingency that will exist under their minority."

Now, how does it apply to the two cases which I state? And I suggest to you that the first of these cases is the natural disposition, and I suggest to you that in all probability that natural disposition is void although the second one which is an unnatural disposition, and that the result is probably valid.

First problem:

"To my children for life, remainder to my grandchildren who shall reach 21, but if all die under 21 then to A."

Observe that no grandchild takes a vested interest until he is twenty-one years old. To be sure, he has a contingent remainder up to that time, and under your Indiana law he can probably convey that as a contingent remainderman. He can convey it as a contingent remainderman except for the fact that he is a minor.

Query: Under what circumstances could a guardian convey it? Does the power of a guardian to convey when, as, and if authorized by the appropriate court appointing the guardian—does that prevent the suspension of the power of alienation? There is one of the things you are going to have to be illuminated upon by your court.

They do not get rights, they do not get vested remainders until they are twenty-one years old. If the requirement of

14 Fourth Report of N. Y. Decedent Estate Commission 254 (1932).

vesting is imputed into your statute, is employed in your statute as it has been in New York, and as they say it has to be in the District of Columbia and in Kentucky, it is as clear as can be that this case is void, because the interest will not be vested within lives in being which are the children. It will only be vested twenty-one years after the children die. The probability is that your court will rule that the interest must vest within the period specified, that is lives in being. If so, that one is bad, because there is nothing in the remainder, in the exception to the statute, which saves it, since the only thing saved by that exception is the gift over if they fail to reach twenty-one. It has nothing to do with the original remainder.

Look at problem two:

"To my children for life, remainder to my grandchildren, but if any grandchild dies under 21 then his share (including any accrued share) shall go to the survivors, but if all die under 21 then the property shall go to A."

Now, that one has a chance of success. It has a chance of success because the exception in the statute provides that a gift over of another remainder, if the prior remainderman dies under twenty-one, is valid. It has a chance of success, unless the court should rule that that can only be done once, that you can only have one remainder, limited over on a prior remainder, but that you can't have the accrued share going over. Suppose there are five children. Child 1 dies at the age of six. His share goes to the other four. Now, Child 2 dies at the age of 8. His original share goes to the other three, but can the interest which he acquired from Child 1 go over to the other three? And when they all die under twenty-one can the whole works go over to A because one of those interests of A will have been four times accrued with four children already. Another question that your court has to decide.

Moreover, if you will observe any common law definition of the word remainder, those second interests are not remainders at all; they are all executory interests. They do not jibe with any definition of the word remainder, except a

definition that appears in the New York statutes and was not imported by Indiana at the time they took these sections.

Hence, I suggest to you that if this statute permits anything as to gifts to grandchildren which will not really accrue to them until they reach twenty-one, it permits a thing which is an extraordinary complex and an unnatural form of limitation, and clearly doesn't allow the natural form of gift which a testator would want to make and which a draftsman would naturally draw.

Then you have that final question, Does this thing apply to personalty? If it doesn't, is there good reason why there should be an exception as to such gifts which does not apply to real estate?

Well, apart from background material this discussion has been given to create seeds of unrest, if not already there. From such conversations as I have had with those with whom I have already talked, there is a pretty thorough understanding that you are up against some difficulties in your Indiana law of perpetuities. The question is, What can or should be done about it?

You are not alone. Connecticut, Ohio and Alabama had statutes which—and this is strong language—were infinitely less workable than yours. Each of those states repealed their statutes and enacted a very simple law. The Ohio law was enacted as recently as 1932, Alabama in 1931, and Connecticut in 1895. Each of these states repealed its existing statutes and established the common-law rule against perpetuities.

The Trend Back to the Common-Law Rule.

That rule grew up in the finest tradition of the English common-law over a period of almost exactly one hundred and fifty years. The first case announcing the common law was the *Duke of Norfolk's Case*[15] in 1680, and the definitive decision which completed the picture except for variations of detail was *Kadell v. Palmer*[16] in 1833. One hundred and

[15] 3 ch. cas. 1.
[16] 1 cl. 8 F. 372.

fifty years that thing grew up by an accretion of the wisdom of the English judges seeking to impose restraints upon vanity and caprice, without keeping reasonable men from making decent family dispositions. It began in 1680 and it is in effect in all but 13, in 35 of the American States today, absolutely unchanged from the time when it was first announced, and as it finally developed up until 1833.

Now, there are a precious few rules of the common law which have been developed in that cautious way, and have stood the test of time the way this one has. It is not lacking in significance that the Legislatures of Connecticut, Alabama and Ohio came to the conclusion when they found their own rules against perpetuities didn't work that they wanted to go way back to the common law. The common-law rule is essentially simple.

Now, everybody, every lawyer has for some reason or other, a tendency to feel that the rule against perpetuities is an abstruse thing, something to be afraid of, and that it takes a long, long time to get the slightest idea of what it means.

I felt that very strongly as the result of teaching it and talking about it to lawyers, and for the purpose of indicating that it wasn't true, I tried almost exactly two years ago to take the common-law rule against perpetuities and substantially everything that relates to it and put it in thirty pages of type—that is, to write a thirty-page textbook on the common-law rule against perpetuities. And it is a standing challenge to have pointed out some problem with regard to perpetuities that isn't covered in those thirty pages. The thing that I have referred to is that article on "Perpetuities in a Nutshell."[17] That thing could have been cut down a third or even half if I had been willing to leave out the illustrative cases that were put in to try to make it abundantly clear.

The common-law rule is essentially simple. It is workable. There has been a consistent body of authority with reference to it. To be sure, from time to time there are records that the court has got off the track, but after it has, there has been a tendency to come back, to try to overrule its previous deci-

[17] Leach, Perpetuities in a Nutshell, 51 Harv. L. R. 638.

sions, more than in any other field. It is easy to see where they got off the track and then tried to get back. If your legislature ever comes to the conclusion that there is something wrong with regard to the perpetuities law in Indiana it is going to be a hard thing for you to hope to do a better thing than put Indiana back in the long list of states which are working satisfactorily under the common-law rule.

Now, let's talk about the detail of the rule, in the course of which we shall be considering some of the problems which are most troublesome.

The Indiana rule, like the common-law, allows the period to be measured by any number of lives in being; that is, any number of lives in being provided they are not so numerous that you cannot ascertain when they fall, in which case the instrument for the gift falls, not because of the rule against perpetuities, but because of the rule of uncertainty.

I have a little quotation in there which is just a crotchet on my part: This gorgeous old case of *Scattergood v. Edge,*[18] where they first decided that you could have any number of lives, and the opinion reads: "For let the lives be never so many, still 'tis but the length of one life; for as Twisden used to say, the candles are all lighted at once."

I give you that because I promise you you will remember it.

Lives in Being

In 1916, the Editor of Burk's Peerage stated it appeared in his columns that a witness had testified that, as far as he knew, there were 224 descendants of Queen Victoria living in some 19 different countries; and that he had to inject "so far as he knew" because he had no actual knowledge or means of finding out, whether the children of the Czar and Czarina of Russia had really been killed by the Bolsheviks, or whether, as some people allege, they are wandering around.

Well, anyway, 224 people was considered not too many lives in that case, but naturally none of us is going to do a thing like that. However, ten or a dozen is all right.

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[18] 1 Salk. 229.

"Under the common-law Rule the persons upon whose lives the Rule is measured need not be mentioned, need not be the holders of previous estates, and need have no connection with the property or with the persons designated to take it. But the Indiana statute as to realty requires that the lives be "therein specified."

Now let us take the following problem:

"To A for life, remainder to my grandchildren living at A's death or thereafter born." Testator has living children. In a will, valid under the common-law rule, query in Indiana. In an inter vivos trust, invalid both at common-law and in Indiana."

Well, of course, that is as good as gold under the common law if it is in a will, because my grandchildren must necessarily be born within the lives of my children who are lives in being, and although the children are never mentioned in the will and take no estate, they nevertheless are lives in being, which will render the gifts good under the common law. Observe this, however, and this has a generic or broader significance: "To my grandchildren who shall reach the age of twenty-one" is perfectly good in a will, but it is bad in an inter vivos trust. Do you observe why?

It is bad in such a trust because it is possible that after the date of the trust more children may be born to the testator, and the grandchildren may be the issue of those unborn children. A gift to grandchildren of the testator in a will is always good, if it isn't an age in excess of twenty-one because the children are necessarily lives in being due at the death of the testator himself. But a gift to the grandchildren by an inter vivos is not necessarily good, though limited to twenty-one, because more children may be born to him. The generic significance of that remark is this: it does not follow from the fact that a gift is good in a will, that it is also good in an inter vivos trust. The soundness of a trust in a will may well depend upon the fact that the testator is dead and hence can have no more children. If it does depend upon that factor, then a similar gift in an inter vivos trust will not be valid because, of course, that situation doesn't exist.

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19 284 Pa. 334, contra, Ward v. Van der Loeff (1924), A. C. 653; Jee v. Audley, 1 Cox Eq. Cas. 324.

Now, query whether that gift is good in Indiana, even in a will, because the lives in being which will make that gift to the grandchildren good at common law, are not specified. The children are the lives in being, and no specification of those lives has been made.

Dean Gavit, in his book, thinks it would still be good. Naturally, he may be right and probably his guess is a good deal better than mine. I have no guess, which is one good reason, but it is perfectly clear also that whether his guess is right or not is an issue that is going to have to be litigated if this statute stays on the books.

There are two little addenda I would like to make, one to something I said this morning and one to something I said this afternoon—I mean something I didn't say this morning. The power of appointments is frequently a very useful thing in keeping down income taxes in this situation.

Suppose a father has a son who is doing well in business, say an income of twenty thousand a year, and he wants to leave to him property which will produce an income of ten or fifteen thousand dollars a year. If he leaves that property to him, the income taxes the boy will be paying on the additional increment from his father's estate will be at the surtax rates which begin at the end of the son's earned income and will be fairly high.

What he can do in that situation is to leave the property not to the son, but to the son's wife, who has no earned income. The result will be that she is paying an income tax upon ten or fifteen thousand dollars starting from scratch, not starting at the surtax rates at which the son's earned income leaves off. Of course, the difficulty with that is that the son and the wife may get into a row, and that the wife will then have the property that the man meant for his son, and that is where the power of appointment can come in, because the property can be left in a trust for the wife, and the son given the power of appointment to divest that interest in favor of himself or anybody else. If the son doesn't get into a row with his wife, then the income is coming in to his wife and she is paying the tax at the lower rate. If he does get into a row

with her, he has to pay, under those circumstances, the higher rate, but if the family goes along as everybody expects, nice and smoothly, then a very considerable amount of income taxes is saved.

The second thing I wanted to talk about is this: While I was out in the corridor, two or three people spoke to me about the technique of getting the Indiana statutes changed, if anybody should make up their minds they wanted to take the time and trouble to do it, and I think I should call attention to the trouble that they had in New York. The New Yorkers are sick and tired of their rule against perpetuities and there have been movements to amend that thing for a long, long time. But they made a great mistake: The trust companies have always got behind them.

Now, you can see why that is a mistake. There isn't any question that a liberalization of the rule against perpetuities will be of benefit to the trust companies. It will also be of benefit to lawyers who act as trustees, and the up-country legislators have always had the feeling that these movements to amend the New York rule against perpetuities were just trust company propaganda and entirely apart from the merits. Those beliefs on the part of the legislators have been successful in preventing the amendment from carrying through.

Well, in 1932, however, the New York legislature did repeal their rule against perpetuities and re-established the common-law rule, passed the statutes to that effect, and then somebody got to the Governor and began pouring some kind of poison into his ear, and the Governor of the State at that time was who you know and that legislation was vetoed. I suggest to you, as a matter of practical wisdom, that any movement to put the common-law rule back in force in Indiana as it has been in Connecticut, Alabama and Ohio, that the trust companies should keep as jolly well far away from it as they can, and that the movement ought to be started by somebody whose motives cannot be impugned as being anything other than the improvement of the law. I can think of nobody better for that purpose than the persons at your University who specialize in this field.

TECHNIQUE OF APPLICATION OF THE RULE

"The situation is viewed as of testator's death or creation of the trust; and it is immaterial that, viewing the case as of the time litigation arises, the estates have vested and the suspension of the power of alienation has terminated within the prescribed period."

That is fundamental; that is true everywhere. The interest is either good when the testator dies, on the basis of any possibility which can be viewed as of that time, or it is bad. Hence you have this case:

"To A for life, remainder to A's children who reach 25." At testator's death A is still living (and is conclusively presumed to be capable of having more children, regardless of sex and age.[20] At A's death it appears either that (a) no more children are born to A, or (b) all children have reached 25 in the life of A."

That doesn't make any difference. The fact that when the case is litigated it appears the suspension terminated in time or the vesting occurred in time, that is immaterial. Then, of course, there is that delicious and hearteningly subsidiary rule that it "being conclusively presumed that any person is capable of having children, regardless of sex and age."

Not only must the interest be looked at from the time when testator died or the trust was set up, but from that time there must be an absolute mathematical certainty, that all the contingencies will happen in time.

Now, what absolute mathematical certainty means is indicated by these next three cases, and I offer these under the promise that I made in the introductory material of calling to your attention cases in which really reasonable, natural things are forbidden, not only by the Indiana rule, but by the common-law rule—things with reference to which one's mind never runs in the direction of perpetuities at all, things which are readily corrected if you see that the perpetuities exist, but where the existence of such a problem is hardly suspected.

Look at the first: If a man is engaged in the gravel business and at the time of his death had three or four daughters who don't know anything about running gravel pits, and has a

[20] Jee v. Audley, 1 Cox Eq. Cas. 324.

couple of trusted employes who know the business and can take care of it—sets up trust.

"Gravel pits to trustees to work out the pits (actually and predictably exhausted in 4 years) sell the land at public auction and distribute the proceeds to my issue then living."

He thought the pits would be worked out in four years. He had three or four daughters. He expected they would be worked out within the lives of those daughters. Everybody thought the same thing, but there was a mathematical possibility that they wouldn't be worked out under the common-law rule of twenty-one years, or in Indiana law, within the lives of the daughters. So the thing appears a perfectly reasonable disposition. All you have to say is, that if all of the issues living at the time of his death should die before the gravel pits are worked out, then the property shall pass to them outright. It will never happen in the wide, wide world. This would save the gift from the rule against perpetuities.

Look at the second one—another natural case. Here is a man that owns rent producing commercial real estate, subject to a mortgage. The mortgage calls for serial payments, the rent is $1,750 a year, and five thousand dollars only to go to clear up the mortgage. This testator has got a perfectly sound notion that what he wants to do is to see that these children get this property free and clear. He has had too much experience with hard times where a bank clamps down upon property, upon mortgagees who can be made to pay.

The minute that money gets tight and the rents and profits get low, then the bank comes in and claims its due, and the testator wants to protect it. So he says, "I want this property to go to trustees to pay off the mortgage out of income; then when the mortgage is paid off to turn over to my heirs that shall be living at that time"—a foresighted idea. Yet that is bad, because although everybody thinks that the income will be able to pay that mortgage off within the lives of his children, the Indiana rule, or within twenty-one years under common-law rule—although everybody thinks that and it might be true, it might happen that the income of that property

would go down, and so the gift is bad. All these were bad under the common-law, as well as the Indiana rule.

It is easy to cure. All you have to say is, if this mortgage is not paid off within the lives of A, B, and C, and then at their deaths the subject to be turned over to the issue living at that time. That will not happen, but that makes it possible for the other disposition to become valid.

This is worse—"To my issue living at the time of distribution of my estate." And the other was, "To my issue living at the time of probate of my will." The testator realizes it is going to take time for the will to be administered. He said, "When the estate is distributed, I want you to turn it to living people, to such of my issue as are living at that time."

The court says that is bad. That is bad, although they expect the estate will be administered in a year or two, during the lives in being. Under your Indiana rule, there is a possibility that it might not be. Hence, it is all bad. The cure, of course, the same thing, provides if by chance the estate is not administered within the lives of A, B, and C, it shall pass to the issues living at the deaths of A, B, and C.

In other words, in these cases, where you have a case where there is interest contingent upon any event, no matter how approximate it is to the time of the testator's death, or the creation of the trust, it is desirable, natural and imperative to provide your own little artificial period of perpetuities, and provide if the contingency doesn't occur sooner than you expect it will, your little artificial period of perpetuities will govern.

Application of the Rule to Interests Created by Exercise of a Power of Appointment

That is a simple matter, and yet one which is frequently overlooked. I have here a series of little cases, which solve themselves on the basis of simple propositions, which I am now going to set forth.

As to a special power, that is, to "A for life, remainder to such issue as he may appoint." The question is as to the validity of the appointed interest, when A exercises the power.

Put it this way: The appointed interest is valid only if it will vest under the common-law rule, or terminate the power of suspension under the Indiana rule, within the period of perpetuities computed from the creation of the power; that is, the period of perpetuities is computed from the testator's death, not from A's death.

Or to put it in a different way: The appointment is treated somewhat as the exercise of a power of attorney. The testator, the donor of the power, leaves blanks in his will and says to A, the donee of the power, "You fill in the blanks." And hence, when A fills in the blanks he is making the testator's will for him, and the validity of that disposition is determined as if the testator had done it himself. As the courts so frequently say, the appointment is read back into the instrument creating the power. Hence, as to interests created by the exercise of a special power, the period of perpetuities is computed from the donor's death, that is the creation of the power, not from the donee's death—that is, it is exercised.

As to general powers exercisable by will only, the same rule applies: that is, the appointment is read back, and the period of perpetuities is computed from the creation of the power.

As to appointments under a general power which could be exercised by deed, whether it is exercised in fact by deed or will, it is the nature of the power, the permission as to method of exercise given by the power, not the method which is chosen by the donee that counts. As to a general power which could be exercised by deed, whether in fact it is or not, the period of perpetuities is computed from the exercise of the power, not from its creation—a different rule, that is, and that is good sense. It isn't just a technical rule. The motion is that where a person has a general power exercisable by deed, he could appoint the whole thing to himself, and if he did appoint to himself, then he would be able to devise or bequeath that property as his own property.

Now, instead of doing that double thing, appointing to himself and then devising or bequeathing it as owned property, he makes an appointment to somebody else. The transaction

is given the same consequences as far as the perpetuities law is concerned, as if he had gone through the double process: that is, the general power exercisable by deed is in this particular treated as equivalent to ownership in fee by him.

Those rules are simple and understandable. I think the discretionary trust which is a power of appointment is worth noticing. I have always talked about powers of appointment here as being powers in somebody who is a life tenant, but you don't have to have a power in the life tenant. Frequently enough the power is in the trustee. The trustee has the power to determine the shares in which income shall be received by children, or the disposition which shall be made of the principal at the death of the life tenant. If the trustee has that power, he has a power of appointment just as much as the life tenant has.

If, on the other hand, you can give it to an absolute stranger, give it to John Jones, who has no connection with the property and can never benefit by it, that is a power of appointment, too.

As a matter of fact, some of the New York offices have a very interesting device which they habitually employ. A man sets up his will, as he likes. And then he gives a power of appointment to a committee of three persons which is self-perpetuated, entitling them to make any change in the will which they want at any time, provided that neither they nor any persons related to them benefits by the change.

Now, the persons that are selected are three of the partners of the law firm which draws the will, and it is understood among them that the reason for that power of appointment, to kick out any gift, substitute for it any other gift, eliminate any beneficiary from the will, is only this: The testator figures he can amend that will just as fast as Congress can amend the tax laws up until he dies, but that after his death he has lost the power, so he gives it to these people, and he understands that is all he has them there for, to keep that will from doing things which will stick the estate for a large amount of taxes in the event of some drastic amendment of the tax laws.

Now, I have considered that device, and for reasons which may or may not appeal to you it has not seemed wise to follow it.

I cite that as an example of the fact that a power of appointment can be not only in the life tenants of a trust, but can be in the trustee or can be in some rank outsider.

CONSTRUCTION AND THE RULE

Now, construction is a matter which becomes important in a tremendous number of instances, and the issue is this: Suppose that on one construction a will will be valid under the rule against perpetuities, and on another construction of the same language the will would be invalid.

What effect should that have upon the court in determining which construction to adopt? Can the court in approaching the issue of construction say to itself, "We will favor the construction of this instrument which will produce valid interest."

Now, the English view on that purports to be very hard-boiled. They say: "We will construe this will as if no perpetuities question were involved, and then to the instrument thus construed, we will remorselessly apply the rule against perpetuities."

Well, you can say that, and they do, but I strongly suggest to you that that is not sound. I tell you on the basis of the American authorities, and more particularly the recent American authorities that I have read, that it is not the American practice and it certainly is divergent from an analogy with which we are thoroughly familiar in the field of constitutional law, that is very persuasive.

Of course, we know that on the issue of constitutionality of a statute, the Supreme Court of the United States will submit language to the most horrible torture for the purpose of producing a constitutional result; not only of producing a constitutional result, but of producing a result which will not even raise a constitutional question. The leading authority on that is the case of *Delaware and Hudson*,[21] which I have

[21] United States v. Del. & H. R. R., 213 U. S. 366.

suggested. The analogy is perfect. In each case we are dealing with a written instrument created by someone who was subjected to a restriction by law. In one case it is a constitutional restriction; in the other case, it is a restriction evolved for purposes of social policy which we call the rule against perpetuities. In each case, we proceed from the primary assumption that the testator or Congress meant to do a valid thing. If he hadn't been meaning to do a valid thing he would never have put his pen to paper.

Proceeding on that assumption, however, and taking that as a major premise, we say, if there is any possibility of construing this language in such a way as to produce a valid interest, we will accept that construction. Why? Because we must assume that the testator would prefer that a valid construction be given to his instrument rather than an invalid.[22]

"Almost invariably," I say, "the question is whether after-born children are included in a class gift."

Take the case: "To A for life, remainder to her children for their lives, and then to the children of such children." A is fifty years old. Now, ordinarily, that second gift to children means children whenever born. Ordinarily when you say for life, remainder to A's children, that word "children" would include a child born after the testator's death and during the life of A.

Bearing in mind the fact that, first, A was fifty years old; second, that if children includes after-born children, then the gift to grandchildren is void. Should you not then rule that in this case, children does not include after-born children, but includes only those children who are in being at the death of the testator. The case of *Wright's Estate*[23] said, yes, you should so construe it, and the English cases, as you might guess, said no.

Now, of course, that thing can be carried too far, and I want to read you a couple of excerpts from a Georgia case, and then from one in Rhode Island.

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22 Forman v. Troup, 30 Ga. 496.

23 284 Pa. 334.

The general principle behind the Rule of Construction to which I have been arguing, is, of course, the principle that the testator intends to do a valid thing and hence you could construe it as valid, but in the case of *Forman v. Troup*,[24] which was a Georgia case back in 1860— The issue arose as to whether children in a particular will included after-born children. Mr. Justice Lumpkin, after referring to the statutes of New York, went on to point out that the testator in this case was the former Governor George M. Troup of Georgia, a man who in fact had named one of his daughters after one great state, and named another after the great neighboring state of Florida, that he was known to be a member of the court. Then he wound out in this fine peroration:

"For myself, I shall never consent to such a construction of either the Act of 1821 or of 1864, and of all men, never would I impute such an intention to violate the laws of his state to a man who loved her, and every letter of her laws, and every inch of her soil with an energy and devotion that no soul could inspire, but that of George M. Troup."[24]

Now, I say that was in the sunny South, back in the hand-in-the-vest-button days.

But this, my friends, is from the State of Rhode Island, in 1929. The issue there was whether Colonel Samuel Pomeroy Colt, of Bristol, Rhode Island, had violated the rule against perpetuities in his will.

The issue was whether the gift to children included after-born children, and the conclusion was that he did not mean to include after-born children. Therefore, that the gift was valid. The reasoning is as follows:

"Col. Colt was a member of the bar of this state for many years and was Attorney General for several years. It is presumed that he knew of the rule against perpetuities and that he would not knowingly make a will attempting to dispose of his property in violation of that rule. Col. Colt was prominent in the social, political, and business life of the state, a man of vision, big deeds, and generous impulses. He accumulated a large fortune—organized the trust company which he made executor of his will and trustee of his estate. By the eighteenth

[24] Forman v. Troup, 30 Ga. 496.

clause of his will he made a generous bequest to many persons in the employ of the trust company. See Industrial Trust Co. v. Alves, 46 R. I. 16, 124 A. 260. Col. Colt was devoted to his family and wished to see them happy and prosperous. He lived in the homestead where his mother was born. In memory of his mother, he erected the Colt Memorial High School for the town of Bristol on a portion of the homestead estate, and in his will gave the town $100,000 in trust to use and employ the income therefrom in perpetuity for the maintenance of this memorial. He extended and developed the Colt farm on the shores of Narragansett Bay, and as a part of the development constructed a beautiful motor drive through the farm and along the shore of the bay, and at the entrance to the drive erected a sign: "Colt Farm. Private Property. Public Welcome." This drive was used by thousands of motorists for many years preceding the death of the testator.[25]

Application of the Rule to Options

What I have to say applies, as you will observe, to options to purchase real estate, and also to options in security transactions, that is, stocks and bonds, where the option is specifically enforceable against particular property.

Now, that will not ordinarily be the case, either, because no specific property, no specific shares, are subject to the options or because the property is not unique in such a way that the remedy at law for damage is inadequate; in other words, that the person who is not broke can get money and go out and buy the shares on the market, but if you get a case where the option is referrable to particular property, and where the shares are so unique that a remedy at law is inadequate, the same thing that I am saying will obviously be applicable to option warrants, attached to stock or conversion privileges and bonds, but its primary application is to options to purchase real estate.

Now, the rule against perpetuities has nothing to do with contracts as such.

But under the common-law cases—and I am going to discuss first the common-law cases and then the Indiana variations—the rule against perpetuities does apply to those contingent,

[25] Colt v. Industrial Trust Company, 50 R. I. 242, 146 Atl. 628.

equitable interests in property which are the consequence of the specific enforceability of contracts, particularly contracts where A, the owner of Black acre, gives B an option to purchase it. B has a contract which he can have specifically enforced if A fails to perform—specifically enforce if B exercises the option and performs the conditions which are a portion of the option. That specific enforceability gives to B a contingent, equitable interest in Black acre which, under the common-law cases, is subject to the rule against perpetuities.

Now, it never should have been subject to the rule against perpetuities. That, I am prepared not only to concede, but to claim, because the rule against perpetuities wasn't intended to cover this kind of a transaction. The rule against perpetuities grew up out of gift transactions in the family relationship, and the period of perpetuities, that is, lives in being and twenty-one years, is a period which is admirably adapted to imposing satisfactory limits upon gift transactions within the family. It has no relevance to commercial transactions where lives in being are not the normal basis, so the rule of perpetuities should never have been applied to commercial contracts of this character. If they wanted a limitation upon options to purchase, fair enough, but not the rule against perpetuities. Still it was done, and in the English case of *London & Southwestern Railroad v. Gomm,*[26] they applied the rule against perpetuities to an option to purchase in gross. In gross, I say, as distinguished from an option attached to a leasehold interest.

Now, in regard to an option to purchase in a lease, the arguments against the application to the rule against perpetuities are infinitely stronger. Suppose you have a 99-year lease, and an option to purchase at any time within the lease hold period. The English laws said that option is subject to the rule against perpetuities and is void. That, I suggest, is thoroughly unsound. The purpose of the rule against perpetuities is to produce liquidity of property values, to enhance alienability, to cause property to be developed, to keep it from being tied up so it can't be developed.

[26] London & Southwestern Ry. v. Gomm, 20 Ch. D. 562.

Now, let's consider first the position of a leaseholder for 99 years who has an option to purchase; and then, secondly, one who hasn't. If a man who has an option to purchase at the end of his lease, or any time during his lease, can afford to put up a million-dollar building on that property ten years before his lease expires, because he knows he can get the benefit of that property by exercising the option, but the man who hasn't an option to purchase during his lease, can't afford to put up a million-dollar building on his property ten years before the lease expires. Indeed, it isn't economically practical for him to improve that property at all, within the period of depreciation of ordinary commercial property, say, thirty years. In other words, the absence of the option to purchase, in the person who has possession of the property, the absence of property control over the future in the person who has possession of the property, and who, if anybody, is going to develop it, must operate it as a clog upon the use of that property. If A owns Black acre, and B has an option to purchase it, that is a bad thing, because A is in possession; if the property is going to be developed, B has to do it, and an option overhanging that land is a clog on its use. Of course, some restriction should be put on the option in gross, and it is insane to think that a man ought to be able to clog his property indefinitely—maybe a century—he can prevent himself or any future purchaser from developing that property.

If, on the other hand, the person leases the property for a long period, the lessee is the fellow who has absolute control over the future of that property in such a way as to make it economically practical to develop the property, if it is to be developed.

So in a good many states—and the courts are cited in those two articles in the Yale and Virginia Law Review[27]—in a good many states, the laws have refused to hold options to purchase in leases are subject to the rule against perpetuities, and hold that such options are subject to no time restrictions whatsoever.

Now, what is your situation in Indiana? Obviously, an option to purchase is no suspension of the power of alienation.

[27] Abbott, 27 Yale L. J. 878 Langeluttig, 17 Va. L. Rev. 461.

That is, if A owns Black acres and B has an option to purchase, A and B together can give an absolute fee. The only reason you might get into trouble with options in Indiana is if the court rules that not only do the Indiana statutes forbid suspension of the power of alienation, but also require vesting within the time of perpetuities, that is lives in being: If they so hold, then they are faced with a complete dilemma.

Of course, an option to purchase does create a contingent, equitable interest in property, which may not vest within the period of perpetuities, that is lives in being. Indeed, an option for one day may not cause that interest to vest within the period of perpetuities, because, of course, mathematically, everybody in the world can die within that one day. That is mathematically possible. You are faced with a complete dilemma of either declaring all options valid, because the rule doesn't apply to them, or all options invalid unless you have the peculiar situation where some very cautious fellow has limited his thirty-day option to the lives of A, B and C. That option would be good, but the ordinary option which is limited only upon a period of days, months or years, must necessarily fall.

Well, faced with that dilemma which the New York courts did face, the New York courts, of course, had no difficulty in deciding which horn of the dilemma they would be impaled upon.[28] The New York courts have held that the statute does not apply. In New York there is no restriction on the holding of options. An option can be created to last in perpetuity and be perfectly valid.

Now, the Indiana state courts have not passed upon that problem, but there is at least a dictum in the Federal case of *Todd v. Citizens Gas Company of Indianapolis,*[29] that options in Indiana are not subject to the perpetuities law at all.

Well, as between knocking them all out and leaving them all in, certainly that selection is better.

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28 Epstein v. Werbelosky, 233 N. Y. 525, 135 N. E. 902; In Re Waterfront, 246 N. Y. 1, 157 N. E. 911.

29 Todd v. Citizens Gas Company of Indianapolis, 46 Fed. 2d 866; see also Gavit, Indiana Law of Future Interests, p. 275.

If, in the course of discussions which may arise as to the advisability of a change in the Indiana law, it certainly would be worth while to consider whether it was not desirable to make some specific provision as to the legality of options.