IS IT TIME TO MODERNIZE THE LAWS OF OLD ENGLAND?

ARGUMENTS FOR STATUTORY ADJUSTMENTS TO THE RULE IN SHELLEY'S CASE AND THE RULE AGAINST PERPETUITIES

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One of the pleasures of practicing real estate law in Delaware is the comparative absence of statutory preemptions of the common law and the relative scarcity of case law. This can spur one's historic interests in delving into the common law that Delaware has preserved from its colonial origins. The flipside of this, of course, is that we Delaware lawyers remain saddled with arcane common law rules that seem at odds not just with modern commercial transactions but with the intent of the parties.

Two of these instances are the "Rule in Shelley's Case" and the "Rule against Perpetuities." Both have their origins in English common law of, respectively, the 16th and 17th centuries. Both came to Delaware by way of our colony's adoption of the laws of England. And both remain part of Delaware's common law in the twenty-first century. Perhaps, after half a millennium, it is time to rethink them both.

I. THE RULE IN SHELLEY'S CASE IN DELAWARE: A RELIC READY FOR ABOLITION?

A. Introduction

The Rule in Shelley's Case has a long history of continuous application in Anglo-American common law. The rule itself is simple, but is so fact-dependent as to have created headaches for courts over the past five centuries. This article will address what the rule is, how it arose, how it impacts Delaware real estate, and why it may be time to abolish by statute.

Not surprisingly, the Rule in Shelley's Case is a statement of law made in a namesake reported case.[1] The rule commonly refers to the statement of circumstances in which what appear to be two distinct estates granted in a deed are collapsed into one estate. Specifically, if the instrument contains a grant of a life estate to a specified person and a grant of a remainder to the heirs of that person (e.g., "to A for life, remainder to the heirs of A"), the law does not recognize the separate grant to the heirs after the estate in the named grantee, but conflates the two grants into a fee simple estate in the grantee.[2] If given literal effect, such a grant would create a contingent remainder in the heir, as that remainder estate

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1. *Wolfe v. Shelley*, as reported in Coke's Reports and other sixteenth and seventeenth Century reports. For applicable citations, *see* C. Sweet, ed., Challis's Law of Real Property (3rd ed. 1911), 152. For a modern discussion of the Rule in U.S. law, *see* Am. Jur. Estates §§ 106 et seq. (*See also* Restatement of Property, Future Interests § 312 and Donative Transfers § 30.1; 99 ALR 2d 1161 (1965); and J. Borron, ed., Simes and Smith, Future Interests (3d ed), §1541 et seq.

2. Note that if the grant references the "heirs of his body," the rule would construe the grant as creating a fee tail.

is contingent on a life estate of the named grantee.[3] What the rule does is complete the grant to the heir not as words of purchase effecting the grant of an estate,[4] but as words of limitation[5] on the grant to the named grantee, making the latter estate one of fee simple under which whoever is the heir ultimately takes by inheritance. When the rule says that the words "heirs" or "heirs of the body" of the named grantee are words of limitation[5] and not words of purchase, it simply means that "heirs" or "heirs of the body" refer to and are read in connection with the estate given to the named person, extending or modifying that estate, and are not taken as describing a group to whom an estate will attach at the time of the grant.[6]

In Shelley Case,[7] Edward Shelley and his wife Joan owned property in the Manor of Barhamwick located in Sussex, England. They held the property in tail for the heirs of them together.[8] Edward and Joan had two sons: Henry, the eldest, and Richard. Joan predeceased Edward, as did their son Henry. Son Henry left a pregnant widow, whose name is lost to history, as well as a daughter, Mary. The widow gave birth to a son, also named Henry, who was the defendant in the case. Prior to the birth of young Henry, Edward used the judicial process of recovery to create in himself a life estate, then to certain identified persons for a term of years and then to the male heirs of his body.[9] The judicial process to carry out this creation of the estate was made final after Edward's death, but before young Henry's birth. Uncle Richard claimed the estate on the basis that as young Henry was not yet born at the time the estate would vest (at Edward's death), Richard was the sole owner in tail. Richard proceeded to lease the lands in question to a Nicholas Wolfe. Young Henry subsequently claimed the tenancy, and Nicholas Wolfe brought suit in the county assizes against Henry for ejectment. The matter then found its way to the Court of King's Bench, where it was argued. The case was apparently of such importance that Queen Elizabeth had the Lord Chancellor, Sir Thomas Bromley, intervene to assemble a judicial conference to resolve the question.[10]

While the case had many facets, the issue that is important for the ultimate rule was, to greatly simplify a complex issue involving entails, whether the action by Edward vested a present contingent estate in Richard or instead merely provided for the inheritance by Edward's male heirs, both the then-living Richard and the posthumous Henry. While counsel for both sides made many arguments, and the Lord Chief Justice, Sir Christopher Wray, was pressed to articulate

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3. As a living person cannot have heirs during her life but only upon her death. Simes and Smith, Future Interests, § 154 at 187.

4. Words of purchase are words in an instrument that, taken by themselves, without any reference to any other words in the instrument, first attach an estate to a person or group of people.

5. Words of limitation are words that by referring to some other words in the instrument describe the extent or type of estate that has already attached to some person.

6. *See* Challis's Law of Real Property, 154.

7. *See* Challis's Law of Real Property, 154.

8. The intricacies of the entail are beyond the scope of this article and not directly germane to this discussion of the rule.

9. Tiffany Law of Real Property §46. For an early explanation of the common recovery used to convert a fee tail to a fee simple, *see Toltarum's Case*, discussed in Challis's Law of Real Property, 309.

10. This was a common practice for important cases. *See* J.M. Baker, *English Law and the Renaissance*, The Cambridge Law Journal, 44:1 (1985), 46.

clearly the reasons for the decision of the judges, the court held that Richard's rights were those of inheritance only, along with his nephew Henry. As Sir Edward Coke, counsel for the defense, articulated what has become the Rule in Shelley's Case, "it is a rule in law, when the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance, an estate is limited … to his heirs in fee or in tail, that always in such case (the heirs) are words of limitation of the estate and not words of purchase."[11]

So what is the actual rule of law established by the Rule in Shelley's Case? First, the so-called ancestor or prior estate, the estate of the named grantee, must be freehold. Second, the limitation must be to the heirs of that named grantee. Third, both the grant of the prior estate and the limitation must be in the same instrument. Fourth, both estates must be legal or both must be equitable. When these conditions are met, the named grantee is vested in a fee estate, and the heirs succeed by inheritance and do not have a present or contingent remainder. Why is the rule important? Put simply, the rule deprives the heirs of a separate estate; therefore, the actions of the named grantee to sell, to lease, to mortgage can impair or even extinguish the heirs' expectations.

It is not clear if the rule predated Shelley's Case or was first described in that case. Certainly, Sir Edward Coke suggests that the rule was of long standing before this case,[12] and such statements are consistent with pleading in English jurisprudence of the time, as precedent of antiquity was persuasive.[13] Earlier cases can be found along similar lines.[14] Although many commentators have advanced theories of why the rule was established, there is no single, definitive explanation. The explanation that seems most likely is that the rule was adopted as a means to prevent landowners from avoiding the various dues that, under the feudal system of land tenures, were owed to the overlord at the time of the owner's death and the succession by the deceased's heirs.[15] If the grant to the named grantee and then to the heir of that person were construed as separate, present grants, with the heir now holding a contingent remainder, the estate of the named grantee would escape any payment of "relief" to the feudal lord for the succession by the heir.[16] However, it also seems likely that

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11. Quoted in Challis's Law of Real Property, 160. Some commentators have construed this statement to mean that the rule predated Shelley's Case, but that is not clear. *See* Challis's Law of Real Property, 162n*?. There is an interesting case to be made that in fact the judges in Shelley's Case never enunciated a "rule" but that Sir Edward Coke in his later reports established as a rule of law the judicial findings on a collateral issue. D. Smith, *Was There a Rule in Shelley's Case*, The Journal of Legal History, 30:1 (2009), 53, 66. Such a view is consistent with the thesis of Richard J. Ross on the late-Tudor and early-Stuart changes in legal learning toward the elucidation of rules and principles. R. Ross, *The Memorial Culture of Early Modern English Lawyers: Memory as Keyword Shelter and Identity, 1560-1640*, Yale Journal of Law and the Humanities, 10 (1998), 229, at 268.

12. Challis's Law of Real Property, 160.

13. Ross, *Memorial Culture*, *supra*.

14. *See, e.g., Provost of Beverley's Case*, (1366) discussed in Simes and Smith § 1543 at 524. *See also* W. Holdsworth, 3 History of English Law, 107 (5th ed. 1942). Holdsworth's view seems more that, first, the rule naturally arose from the then longstanding rule that in a grant including " and heirs", the term " and heirs" were words of limitation, and, second, that there was in this period a general struggle against efforts to create perpetuities and restrain alienation. *Id*. 108. *See also* A. W. B. Simpson, An Introduction to the History of the Land Law (1961), 94.

15. The practice also caused the passage of the statute annulling feoffments made to those who would be the heirs of the feoffer. 52 Hen III c.6 (1267) (the so-called Wardship Act of 1267).

16. Challis's Law of Real Property, 166 n.8. Note that feudal tenure was abolished in 1660. Statute of Tenures, 12 Car. 2, c. 24 (1660), discussed in Challis's Law of Real Property, 23-24.

the justification for the rule changed over time, away from a means of enforcing feudal dues to one supporting the free alienability of real property against methods of tying up title. In other words, the attempt to create both the right of the named grantee and the contingent remainder in the heir would limit the rights of the named grantee to dispose of the property as that person saw fit.[17]

Certainly, whatever may have been the reason for the adoption of the principle embedded in the rule, the main policy behind the rule was to maintain the clearly defined distinction that the common law had always drawn between descent and purchase. One of the most effective ways the courts could accomplish this was to prevent by judicial decision the creation of new types of estates that would allow the grantee to take as purchaser without any of the obligations of descent. Correspondingly, there is a strong policy to preserve the nature of the estates that the law recognized at that time. With the development of the concept of fee simple, life estate, remainder and reversion, there grew a rule of law that if a person gave away the entire fee, that grantor could not restrict its subsequent alienation. The very nature of fee title was the right to alienate it; in order to preserve these rules of law intact, the judges firmly established the rule that one could not transfer the entire fee yet restrict its alienation. The limitation in Shelley's Case is a concrete example of an attempt by the owner of the fee to give the entire fee and at the same time restrict its alienation. If that grant could be held to mean that the remainder was given to the heirs of the named grantee as a separate estate, such interpretation would allow evasion of the policy that one cannot convey the fee and at the same time restrict its alienation.

Finally, the Rule in Shelley's Case is a rule of law and not a rule of construction. Its effect must be carried out in the grant, regardless of the intent of the testator or grantor with respect to the remainder. The words of the grantor control over the will of the grantor.[18] This reinforces the important principle in contract construction that technical words (like "heirs" or "heirs of the body") are presumed to have their technical meaning unless there is strong evidence in the context to rebut the presumption.[19]

Consider a similar rule that developed to promote alienability at the expense of a grantor's intent, the rule against perpetuities. Starting in 1682 with the *Duke of Norfolk's Case*,[20] the rule against perpetuities has operated to defeat the intention to tie up property over a long or potentially infinite duration. As a matter of policy, the common law determined that there could be such a thing as too long for a property to be unalienable.[21]

1. The Rule In Shelley's Case In Other States

Because the rule imposes the form of the devise or grant over the probable intent of the testator or grantor, a court wishing to carry out what that court believes to have been the grantor's intent has had to apply tools of construction to

17. This is the theory advanced by Justice Blackstone in *Perrin v. Blake*, 1.W.Bl. 672 (1769), quoted in W. B. Leach and J. K. Logan, Cases and Text on Future Interests (1961), 120. *See also* Charles Fearne, An Essay on Contingent Remainders and Executory Devises, (10th ed. 1844) § 85. *See* J.V. Orth, *Requiem for the Rule in Shelley's Case*, N. Car. L. Rev., 67:3 (1989) 681, at 686. Apparently, the Perrin case was the impetus for Charles Fearne's "Essay" in 1772. Simes and Smith, § 1542 n.4; *see also* Leach and Logan on Future Interests, 116.

18. *See* discussion in H. Carson, *The Rule in Shelley's Case in Pennsylvania*, U. Pa. L. Rev. 141.

19. Leach and Logan on Future Interests, 114.

20. 3 Ch. Cas. 1 (1682) discussed in J. C. Gray, The Rule Against Perpetuities (4th ed. 1942), §169; *see also* Haskins, *Extending the Grasp of the Dead Hand: Reflections on the Origins of the Rule Against Perpetuities*, 126 U. Pa. L. Rev. 19, 20 (1977).

21. 2 Tiffany Law of Real Property § 392. For the rule against perpetuities in Delaware, see 25 Del. C. § 501 et seq.

the words of the grant in order to avoid the effects of the rule. In the United States, the rule has been wholly or partially abolished or abrogated, expressly or effectively, in forty-three states (plus or minus depending on how one counts partial abrogation) and the District of Columbia.[22] The last to do so was North Carolina in 1987.[23] In most instances, statutory abrogation would only apply prospectively, so cases in those jurisdictions have still wrestled with the rule as it applied prior to abolition.[24]

2. The Rule In Shelley's Case In Delaware

The Rule in Shelley's Case is alive and well in Delaware. There have been a number of cases over the years in which the Delaware courts have considered, and sometimes enforced, the application of the rule. In *Roach v. Martin*,[25] the court construed a devise to A "and her heirs forever except she should die without an heir born of her own body," and then over to B. The Court noted that "heir born of her own body" referred to all the lineal descendants proceeding from the body, not just children, and held that by rule, this was an estate tail in A with a vested remainder in B, and not a contingent fee with an executory devise. As late as 1946, the Delaware Supreme Court applied the rule in a devise. In *Springbitt v. Monaghan*,[26] the testator devised real and personal property to his wife for life, on her death to the testator's adopted son for life, and on his death to the "heirs of his body" lawfully begotten. The court concluded that the testator's use of "heirs of his body" was to denote those who would take by descent from the son, and therefore the rule applied, making the devise to the son an estate in fee tail. The court noted that the rule applied despite the fact that limitations in the will related to both real and personal property.[27] Delaware courts, like those in many other jurisdictions, approach the applicability of the rule very carefully, seeming to construe the language of the devise or the grant to the greatest extent

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22. 99 ALR 2d 1161.

23. J.V. Orth, *Requiem for the Rule in Shelley's Case*. N. Car. L. Rev. 67:3 (1989), 681. Even England abolished the Rule in 1925. 15 & 16 Geo. 5, ch. 20 § 131. For a broader discussion of statutory abrogation of the rule, see *The Rule in Shelley's Case has been Abolished*, Fordham Law Review 4:2 (1935), 316. It is surprising that it took so long for North Carolina to abolish the rule given the abuse of the rule by some of its judges. For example, the North Carolina court wrote in 1897 that the rule is "the Don Quixote of the law, which, like the last knight errant of chivalry, has long survived every cause that gave it birth, and now wanders aimlessly through the reports, still vigorous, but equally unclear and dangerous." Stamper v. Stamper, 28 S.E. 20 (court? 1897); *see also* Leach and Logan on Future Interests, 116. *See* arguments for abolition in the other jurisdictions in, e.g., Note, *The Rule in Shelley's Case as Applied to Contingent Remainders*, U. Chi. L. Rev. 20:1 (1941), 50; "*The Rule in Shelley's Case has been Abolished*," *supra*.

24. *See, e.g.*, In re Estate of Hendrickson, 736 A.2d 540 (N.J. Super. 1999).

25. Roach v. Martin, 1 Del. 548 (Del. Ct. Err. App. 1835). The opinion in *Roach v. Martin* does not expressly name the Rule in Shelley's Case but applies the rule nonetheless. Interestingly, in a subsequent case, *Griffith v. Derringer*, 5 Harr. 284 (Ct. Err & App. 1850), counsel for the defendant expressed his uncertainty whether, as in England, Delaware had adopted the rule and directed the court's attention not to *Roach v. Martin* but to a New York case, *Anderson v. Eden*, 16 Johns. 382 (NY Supr. 1819), stating that it was important for the court to settle whether the rule was a rule of law in Delaware. In any event, the court held that a devise to the son for life and then to the oldest male heir of the body had vested a fee tail, meaning that the Rule applied to the devise.

26. Springbitt v. Monaghan, 50 A.2d 612 (Del. 1946).

27. Delaware courts have consistently held that the rule does not apply to personal property. *See* Gross v. Sheeler, 31 A. 812 (Del. 1885); Jones v. Rees, 69 A. 785 (Del. 1908); Mason v. Baily, 6 Del. Ch. 129 (1888).

possible to avoid the application of the rule. For example, in *Farrell v. Faries*,[28] a will gave land to the testator's niece for life and provided that after the niece's death, if she left lawful "issue of her body," the land should go to the niece's child or children, their heirs or assigns forever, and that if the niece died "without leaving lawful heirs of her body" the land should go to a named person. The court concluded that the quoted language was used by the testator in a restricted sense of "child or children." Therefore the rule did not apply; accordingly, the niece took a life estate under the will.[29] The court noted that if the quoted language had been "heir of her body," the court would have been more likely to apply the rule.

Similarly, in *Wright v. Gooden*,[30] the testator left four sons and seven daughters. He divided his realty between three of his sons, giving to each a particular portion "during his natural life and no longer," and, upon the death of such sons, gave the land devised to them to his seven daughters "during their natural lives, and no longer, and, at the death of my said daughters, I give the before-mentioned lands to my heirs, forever." The court concluded that the rule did not apply because the realty was not left ultimately to the heirs of either the sons or the daughters, but to the testator's heirs. The court held that the limitation of the remainder at the death of his daughters to the testator's heirs constituted a vested remainder in fee simple, which on the death of the testator immediately vested in his heirs at law.

3. Is It Time To Abolish The Rule In Delaware?

It may be time for Delaware to abolish the Rule in Shelley's Case.[31] As the New Jersey Court wrote in *In re Estate of Hendrickson*, "[t]he Rule in Shelley's Case is not only an anachronism — what one commentator referred to as 'exhibit A' in the museum of legal antiquities [citation omitted]' — but a doctrine which runs contrary to all modern thought on the interpretation of wills. It unabashedly causes a transfer of an interest in property greater than what may have been the actual or probable intent of the testator."[32] Delaware remains one of few states where, for better or worse, the rule remains law and that enforces the form of certain words to control over the substance of the devise or grant. For how much longer should Delaware hold onto a rule that evolved out of a desire to protect the incidents of federal tenures and that has been abrogated in almost every state?

II. THE RULE AGAINST PERPETUITIES: A RELIC READY FOR CHANGE?

A. Introduction

The common law rule against perpetuities applies in Delaware subject only to limited statutory exceptions and a few exceptions under Delaware case law. Greater clarity and closer adherence to the parties' intent in commercial transactions would likely be achieved if express statutory exceptions were adopted in Delaware.

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28. Farrell v. Faries, 17 A.2d 17 (Del. Ch. 1940); *affirm'd* 22 A.2d 380 (Del. 1941).

29. Jamison v. McWorter, 7 Houst. 242 (Ct. Err & App. 1885) (where the terms "child" and "children" were found not to require the application of the rule).

30. Wright v. Gooden, 11 Del. 397 (1881).

31. Currently, because Delaware has effectively abolished fee tail, the rule would only apply in Delaware to create an estate in fee simple from a purported grant of a life estate together with a remainder in that person's heirs. *See* 25 Del. C. §§301, 302.

32. *In re* Estate of Hendrickson, at 543.

The common law rule against perpetuities was developed to encourage the alienability of property. The classic rule states that "[n]o interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."[33] Developed over the course of the seventeenth century in England by judicial decisions, the rule has been said to be "one of the most striking instances of a purely judge-made rule of law of comparatively modern origin."[34] This rule, adopted by the Delaware courts in *Kingston v. Home Life Ins. Co. of America*,[35] is "grounded in the public policy against restricting the alienability of land and interests in land."[36] In effect, a future interest in a property is only valid if that interest must vest within the time limitation of the rule.[37] "If there is any possibility that the interest will vest beyond the period of the rule, then it is void *ab initio*."[38]

While the rule is easily stated, it is complex in its application. As a result, efforts have been made by various state legislatures over the years to modify the common law rule against perpetuities in order to simplify its application and, in some cases, to abolish it all together. A culmination of these reform efforts resulted in the approval in 1986 of the Uniform Statutory Rule Against Perpetuities, which was later amended in 1990 (the "USRAP").[39] Thirty-one jurisdictions (thirty states and the District of Columbia, but not Delaware) have adopted the USRAP. The USRAP, among other things, excludes nondonative interests from the rule against perpetuities.[40] As commercial transactions generally create nondonative property interests, the USRAP largely excludes commercial transactions from the scope of the rule against perpetuities.

In addition, the Restatement of Property takes the position that the rule against perpetuities does not void certain other interests such as a purchase option in a lease. In particular, section 395 of the Restatement of Property provides:

> When a lease limits in favor of the lessee an option exercisable at a time not more remote than the end of the lessee's term
>
> (a) to purchase the whole or any part of the leased premises; or
>
> (b) to obtain a new lease or an extension of his former lease, then such option is effective, in accordance with the terms of the limitation, even when it may continue for longer than the maximum period [of the rule against perpetuities].[41]

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33. J. Gray, The Rule Against Perpetuities, §201 (4th Ed. 1942). *See also* Simes and Smith on Future Interests, §1201-1298; Frederick R. Schneider, *A Rule against Perpetuities for the Twenty-First Century*, 41 Real Prop. Prob. & Tr. J. 743 (Winter, 2007).

34 Kales on future interests, §113 at 110 (1920).

35. 101 A. 898, 901 (Del. Ch. 1917).

36. Stuart Kingston, Inc. v. Robinson, 596 A.2d 1378, 1383 (Del. 1991).

37. *Id*.

38. *Id*.

39. https://www.uniformlaws.org/viewdocument/final-act-with-comments-85?CommunityKey=addf3263-af92-4421-a83c-2ef7bc9a1b94&tab=librarydocuments. (link last tested Dec. 18, 2018).

40. USRAP Sec. 4: "statutory rule against perpetuities does not apply to: (1) a nonvested property interest or a power of appointment arising out of a nondonative transfer …."

41. Restatement of Property §395 (1944).

Therefore, the Restatement suggests that an option to purchase contained in a long-term lease, as long as the option is only exercisable within the term of that lease, does not violate the rule against perpetuities. Comment a to section 395 of the Restatement explains the drafters' rationale in adopting such an approach:

> A lessee in possession of lands, especially when the term is sufficiently long to make a question as to the rule against perpetuities possible, needs to be able so to plan for the future as to get the benefit of the full utilization of the land during his lease-term. This makes it important for such a lessee and for society in general, that extensions or renewals of the term and purchase of the lessor's ownership be facilitated rather than prohibited.[42]

Likewise, many state courts have held that an option in a lease does not violate the rule against perpetuities.[43] For example, in *Grove Corp. v. Tinty*,[44] the court found that the rule against perpetuities should not apply to an option in a commercial lease exercisable within the term of the lease. In *Grove*, the defendant leased a parcel of real property to the plaintiff for a period of twenty years. The lease contained two five-year options to renew the lease, as well as an option to purchase the property at any time within the lease term. After exercising both renewal options, the plaintiff attempted to exercise its option to purchase the lease. The defendant contested this action, alleging that the lease option violated the rule against perpetuities because it could be exercised more than twenty-one years after its inception. The court, however, relied on earlier precedent in concluding that when an option to purchase included in a commercial lease can only be exercised within the term of that lease, there is no violation of the rule against perpetuities, even when it exceeds the applicable time period of that rule.[45]

In *St. Regis Paper Company v. Brown*,[46] the court dealt with a similar situation. In *Brown*, the lease at issue, which was a commercial lease for a term of sixty years, included an option for the lessee to purchase the property at any time during the term of the lease. The court held that "an option to purchase written into a lease and exercisable within the period of the lease does not violate the rule against perpetuities even though the period within which it may be exercised extends beyond the period specified in the rule."[47] In reaching this conclusion, the court recognized that the original purpose of the rule against perpetuities was to maintain the free alienability of land. The court wrote:

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42. Restatement of Property §395 cmt. a (1944).

43. *See* Coomler v. Shell Oil Co., 814 P.2d 184, 185 (Or. Ct. App. 1991) (finding that ""[i]n most American jurisdictions… lease-option provisions that allow the lessee to purchase the premises during the life of the lease are excepted from the rule" against perpetuities); Citgo Petroleum Corp. v. Hopper, 429 S.E.2d 6, 8 (Va. 1993) (citing a number of cases in support of the proposition that "a majority of ... jurisdictions have held that the rule [against perpetuities] does not apply to" an option "appendant to a long-term commercial lease and exercisable during the term of the lease"); *St. Regis Paper Co. v. Brown*, 276 S.E.2d 24, 26 (Ga. 1981) (finding that "[w]hen the option is part of the lease and exercisable beyond the period of the rule against perpetuities, most American jurisdictions have found it to be valid").

44. 1991 WL 27782 (Conn. Super. Ct. Jan 4, 1991).

45. *Id*. at *2.

46. 276 S.E.2d 24 (Ga. 1981).

47. *Id*. at 26.

> "Neither lives in being nor twenty-one years has any relevance to the commercial setting. This is particularly true when the holder of the beneficial interest in the property is able to utilize and develop his interest to its fullest, as is the case of the lessee who holds an option to purchase a leasehold."[48]

Other cases have also found similar policy reasons for supporting the recognition of this exception to the rule against perpetuities. For example, the court in *Texaco Refining and Marketing, Inc. v. Samowitz*[49] also stated that the underlying policy reason behind the rule against perpetuities is the maintenance of free alienability and marketability of land. "An option coupled with a long-term commercial lease is consistent with these policy objectives because it stimulates improvement of the property and thus renders it more rather than less marketable."[50]

1. The Rule Against Perpetuities In Delaware

The rule against perpetuities is deeply rooted in Delaware jurisprudence as a principle of public policy against restricting the alienability of real estate.[51] The rule against perpetuities is not a principle of construction but a rule of law.[52] And the rule is absolute. If there is a possibility the interest might vest beyond the period of the rule against perpetuities, the interest is void *ab initio*.[53]

Under Delaware law, the common law rule against perpetuities applies to various types of contracts that create a future interest, including options[54] and rights of first refusal.[55] Delaware law, however, modifies the common law rule against perpetuities for interests created in real property or personal property that are held in trust.[56] Real property held in trust must be distributed not later than 110 years from the later of its purchase or other acquisition by the trust.[57] Note, too, that interests in limited liability companies or most other business entities are not subject to this rule.[58] Aside

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48. *Id*.

49. 570 A.2d 170 (Conn. 1990).

50. *Id*. at 174.

51. Kingston v. Home Life Ins. Co. of America, 101 A. 898, 901 (Del. Ch. 1917). The Delaware Supreme Court has articulated the distinction between the rule against perpetuities and the rule against restraints on alienation: "Both rules have the same fundamental purpose, namely, to keep property freely alienable or stated differently, each stems from a general policy which focuses upon the withdrawal of property from commerce. The rule against perpetuities invalidates interests which ***vest*** too remotely. The rule against restraints or alienation relates to other reasonable restraints" (emphasis in the original). *Stuart Kingston*, *infra* at 1383 n.3 (quoting Atkinson v. Englewood, 170 Colo. 295, 463 P.2d 297, 301 (1969) (*en banc*).

52. Emerson v. Campbell, 84 A 2d. 148, 155 (Del. Ch. 1951).

53. Taylor v. Crossan, 98 A. 375, 377 (Del. Ch. 1916).

54. Emerson v. Campbell, 84 A.2d 148, 153 (Del. Ch. 1951).

55. Stuart Kingston, Inc. v. Robinson, 596 A.2d 1378 (Del. 1991).

56. *See* 25 Del. C. §503.

57. 25 Del. C. §503(b).

58. 25 Del. C. §503(e).

from the foregoing, Delaware does not otherwise have a statutory exception to the common law rule against perpetuities similar to Maryland's statute, which contains a list of express exceptions to the common law rule against perpetuities.[59]

Although Delaware has not adopted statutory exemptions (aside from the exemption for property held in trust), Delaware courts have developed certain exceptions to the common law rule against perpetuities through case law.[60] In particular, parties to commercial real estate transactions are permitted to negotiate a mutually acceptable time period within which rights under an agreement may be exercised without violating the common law rule against perpetuities.[61] Under Delaware law, "an agreement creating a future interest which exists for a fixed period of time does not violate the rule against perpetuities."[62]

In *Cornell*, the Supreme Court denied a motion to dismiss on grounds of violation of the rule against perpetuities. The plaintiff had entered into a contract with the defendant for the right to build, market and sell residences in a community being developed by the defendant. The plaintiff claimed that the developer had defaulted under the contract, seeking relief for damages and other remedies. The defendant claimed that the contract was void *ab initio* as it violated the rule against perpetuities. The court relied on *Pathmark* for its holding that the parties to a commercial real estate transaction can negotiate a mutually acceptable time period within which vesting can occur that is unrelated to the vesting period in the rule against perpetuities.[63] Because the court found that the contract between the parties provided a definite period for vesting, it applied the *Pathmark* analysis and dismissed the defendant's motion.

If no time is specified or an indefinite time period is specified within which rights under an agreement may be exercised, such a purported grant would violate the common law rule against perpetuities and be void *ab initio*.[64] For example, an option granted to a corporation is void under the rule against perpetuities because a corporation can have perpetual existence.[65] Accordingly, an option exercisable during the life of the option holder where that is a natural person does not violate the rule against perpetuities.[66]

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59. Md Code Et § 11-102. The Maryland statute expressly carves out certain types of arrangements or transactions from the common law rule against perpetuities in Maryland. In addition to excepting trusts, Maryland statute specifically lists exceptions to the common law rule against perpetuities, including options in leases, rights to acquire land from the state, and preemptive rights.

60. *See* Pathmark Stores, Inc. v. 3821 Assoc., L.P., 663 A.2d 1189, 1193 (Del. Ch. 1995) (ruling that an option agreement did not violate the common aw rule against perpetuities because it existed for a set number of years); Stuart Kingston, Inc. v. Robinson, 596 A.2d 1378 (Del. 1991) (finding that if an option may only be exercised for a term of years, then the option will not violate the rule).

61. Cornell Glasgow, LLC v. LaGrange Properties, LLC, 2012 WL 3157124 (Del. Super. Aug. 1, 2012)

62. *Pathmark*, *supra* at 1192. *See also Stuart Kingston, supra* at 1384 ("where the agreement does not purport to measure the exercise of the right by the life or lives of the parties but limits its exercise to a term of years, the rule is not offended").

63. *Cornell* at *3.

64. *See* Welsh v. Heritage Homes of DeLaWarr, Inc., 2008 WL 442549 (Del. Ch. Feb. 19, 2008) (voiding a buyback provision of unlimited duration and vested in a corporation). Heritage Homes of De La Warr, Inc. v. Alexander, C.A. No. , 2005 WL 2173992, at *2 (Del. Ch. Sept. 1, 2005) (same); *aff'd*, 900 A.2d 100 (2006) (Table).

65. *See Emerson v. Campbell*, *supra*; *Stuart Kingston*, *supra*.

66. *Stuart Kingston*, *supra* at 1384. *See also* McInerney v. Slights, 1988 WL 34528, at *4 (Del.Ch. April 13, 1988).

Nonetheless, Delaware case law has not provided a clear standard for the outer limits of the time period for exercising rights under an agreement that would be sufficient for purposes of exclusion from the common law rule against perpetuities. In other words, can a definite period for vesting be so long that it violates the policy underlying the rule against perpetuities? For example, Delaware case law has upheld a thirty-year option in real estate as not violating the common law rule against perpetuities;[67] however it is unclear whether a longer period would be valid and, if so, how much more time a court would permit. The court in *Stuart Kingston* appears to have stated an unequivocal test that so long as there is a definite period for vesting, the rule is not violated. But aside from an option to be exercised during the term of a lease, is this statement of the rule intended to have no temporal limits? As a result, there is no bright line test for applying bargained-for exceptions to the common law rule against perpetuities in commercial transactions in Delaware.

This lack of clarity is illustrated by *Welsh v. Heritage Homes of DeLaWarr, Inc.*[68] In *Welsh*, the Court of Chancery undertook a detailed analysis of *Pathmark*. In this case the court found a buyback provision (of unlimited duration and vested in a corporation) to be an option in real estate[69] and considered whether that option violated the rule against perpetuities. The court first noted the common law rule that if it is possible that an option might not be exercised within the limits of the time allowed by the common law rule against perpetuities, the option is void. However, the court, referring to *Pathmark's* upholding of a thirty-year option held by a corporation, noted that the "once well-settled [common law] principle" regarding options and the rule against perpetuities have not withstood the test of time.[70] The court next turned to the *Pathmark* holding. The court noted that Pathmark "emphasized the limited duration of the option" when sustaining the option as a reasonable commercial agreement between sophisticated parties, notwithstanding that it was not required to be exercised within the rule against perpetuities period.[71] *Pathmark*, the *Welsh* court said, "reflected this Court's effort to apply the [rule against perpetuities] to options in a nuanced fashion in circumstances in which the parties had agreed to a reasonable exercise period that otherwise would have violated the rule."[72] The court continued: "Consistent with the modern view eschewing the draconian application of the [rule against perpetuities] to options in real estate, Pathmark signals this Court's willingness, in certain situations, to adopt a pragmatic approach."[73] Finally, the court noted that the Delaware Supreme Court has not adopted the "view that the [rule against perpetuities] never applies to options in real estate; as the *Pathmark* Court noted, an option of unlimited duration necessarily violates the rule under Delaware law, even under a more modern and flexible application."[74] Thus, "although parties are free to negotiate for an option in real

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67. *Pathmark*, *supra at* 1193.

68. 2008 WL 442549 (Del. Ch. Feb. 19, 2008).

69. As in *Welsh*, the court in *Midland Grange No. 27 Patrons of Husbandry v. Walls*, cited *Pathmark* for the proposition that "[r]ights of first refusal in real property are subject to the [rule against perpetuities], and one of unlimited duration necessarily violates the rule." In so finding, the court also noted that the right of first refusal at issue would have rested in a corporation, an entity with a perpetual existence (rather than a person who would qualify as a "life in being" for rule against perpetuities purposes). 2008 WL 616239 (Del. Ch. Feb. 28, 2008).

70. *Welsh* at *29.

71. *Welsh* at *30.

72. *Welsh* at *30.

73. *Welsh* at *31 n.38.

74. *Welsh* at *31-*32 n.38.

estate that would endure for a period of time longer than that prescribed by the [rule against perpetuities] and although Delaware courts may uphold such options in certain circumstances," courts will not craft a reasonable duration for an option where the parties have failed to establish a duration in their agreement.[75] Accordingly, the court in *Welsh* held that the option of unlimited duration violated the rule against perpetuities. What is noteworthy in *Welsh* is the court's observation that *Pathmark* allows the parties to craft "a *reasonable* exercise period that would otherwise have violated the rule."[76]

Options in real estate of unlimited duration clearly violate the rule against perpetuities under Delaware law. As for options having a fixed term of years, even certain options having terms of greater than twenty-one years will not violate the rule against perpetuities (such as the thirty-year term in *Pathmark*). That said, Delaware courts have not yet addressed how long a term beyond thirty years would be permitted without constituting a violation of the rule against perpetuities.

The question, therefore, is whether there is merit for a statutory change in Delaware to clarify how long might be too long. Indeed, Maryland took that approach in 2012.

2. Maryland: An Example Of Statutory Change

Rather than adopting the USRAP, Maryland sought to carve out nondonative property interests and supersede the common law rule against perpetuities for commercial transactions through the adoption in 2012 of legislation providing that the common law rule against perpetuities does not apply to a nondonative property interest (i.e., a contract, lease, option, right of first refusal or other preemptive right to the use, possession, transfer or ownership of real or personal property that is given for consideration other than nominal consideration) other than a nondonative property interest created by, *inter alia*, a separation/divorce settlement, a marital arrangement, a contract not to revoke a will or trust, or a reciprocal transfer.[77] While the Maryland legislation continues to adhere in some respects to the common law rule against perpetuities,[78] the Maryland legislation is substantively identical to the USRAP's exception for some transfers. As such, the rationale behind adopting the USRAP is equally applicable to the Maryland legislation. Comment A to the USRAP provision for this exception states that "the Rule Against Perpetuities is a wholly inappropriate instrument of social policy to use as a control over [nondonative transfers]. The period of the rule a life in being plus 21 years is not suitable for nondonative transfers."[79] That rationale is in accord with similar statements in Delaware cases.

Unlike USRAP, however, subsection (d) of the Maryland legislation provides limitations on the commercial transaction carve-out to the rule against perpetuities, stating that: (1) a document creating a nondonative property interest will be void unless exercised or vested within seven years of the effective date of the property interest if such document does not state a date or make reference to lives in being by which the property interest must be exercised or vested; (2) a document creating a nondonative property interest, if expressly stating either a date by which the property interest will be

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75. *Welsh* at *32 n.38.

76. *Welsh* at *30 (emphasis added). The court did not say that any definite period, regardless of length, will satisfy the rule.

77. Md Code ET §11-102.1

78. Unlike the jurisdictions that have adopted USRAP, Maryland still adheres to the Common Law RAP. Although the Fiscal and Policy Note to House Bill 188, which came into law as the Maryland Provision, makes specific reference to USRAP, that note emphasizes that Maryland has not gone so far as to adopt the entire statutory model of USRAP. *See* Department of Legislative Services - Maryland General Assembly - 2007 Session, "Fiscal and Policy Note (Rev.) (Delegate Rosenberg) - House Bill 188," http://mlis.state.md.us/2007RS/fnotes/bil_0008/hb0188.pdf. (link lasted tested Dec. 18, 2018).

79. USRAP §4(1) cmt. A. at 64.

exercised or vested or one from which the date may be determined, will be void on the earlier of the expressed or determined date or sixty years after the effective date of the property interest; and (3) a document creating a nondonative property interest that refers to one or more lives in being for determining the date by which the property interest will be exercised or vested will be void (i) if the reference is to the duration of not more than ten identified lives in being and not more than twenty-one years, at the expiration of the period of time referenced, or (ii), if the reference is to the duration of more than ten identified lives in being or to identified lives in being and more than twenty-one years, at the expiration of sixty years.[80]

In practical terms, the Maryland legislation (as limited by its subsection (d)) operates to provide a commercial transaction that otherwise would have violated the common law rule against perpetuities with a seven-year "savings clause" so that the document evidencing such transaction will not be void *ab initio*.[81] To avoid the statutory default, however the parties may include in their documents another time period of up to sixty years. Alternatively, drafters may use the standard rule against perpetuities clause (with slight refinement) that the interests under the contract or right must vest before the death of the last to die of ten identified people plus up to twenty-one years. If a contract provides for too long a period of time, say 150 years, or too many lives in being, say twenty, the Maryland legislation operates to make the savings period sixty years.[82] The Maryland legislation was thus designed to respect the intentions of parties to commercial transactions while, by way of its subsection (d), supporting the traditional policy consideration behind the common law rule against perpetuities of "keeping property from being tied up for too long."[83]

3. Is It Time To Amend The Rule In Delaware?

Given the widespread adoption in other jurisdictions of exceptions to the rule against perpetuities for commercial transactions (primarily through adoption of USRAP) and the worthwhile policy objective to avoid frustrating the intent of parties to such transactions, especially in sophisticated commercial transactions, and given the lack of clarity of the common law exception to the common law rule against perpetuities in Delaware, Delaware could benefit from the adoption of legislative exceptions to the common law rule against perpetuities. This would serve to clarify the boundaries of the commercial exception that Delaware courts have applied in certain circumstances. If Delaware is reluctant to except commercial transactions from the common law rule against perpetuities entirely, the restrictions contained in subsection (d) of the Maryland legislation serve to allow for freedom of contract while maintaining, in part, the spirit of the common law rule against perpetuities.

III. CONCLUSIONS

The author hopes that this article promotes interest in revisiting these two relics of Anglo-American common law, dusting off the cobwebs, and bringing them into the current century. This will take legislative change for each of these old rules, but the legislative changes are not complex. It just takes the will to modernize the law.

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80. Md. Code Et §11-201.1(d).

81. *See* Edward J. Levin, "*Prescription for a Good Night's Sleep - The Rule Against Perpetuities No Longer Applies to Commercial Transactions*," in Ground Rules (Real Property Section of the Maryland State Bar Association), Fall 2007; revised and reprinted in ACREL News, Vol. 26, No.1, February 2008, a publication of the American College of Real Estate Lawyers.

82. *Id*.

83. *Id*.