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# PERPETUITIES IN THE PENTAGON

by

ROBERT S. PASLEY\*

It would be hard to imagine a field of law more remote from the problems of the military and of defense procurement than future interests. Yet on at least two recent occasions in the Department of Defense, the ancient rule against perpetuities, and the even more venerable rule forbidding restraints on alienation, rose from the grave to shake their gory locks. In each case the ghost was laid, permanently, let us hope.

## I. *The National Security Clause and Restraints on Alienation*

During World War II, the Government spent huge sums of money in building up a tremendous industrial plant for the manufacture of ships, aircraft, ordnance, and other military equipment. Most of the plants so built were operated by defense contractors under lease or under "facilities contracts"; others were operated directly by the Government. At the end of hostilities, most of this property became "surplus," and there was great pressure to sell it, if need be at sacrifice prices. Before it was all gone, however, the War and Navy Departments, and other agencies concerned with demobilization and reconversion, decided that some of the plants involved should be preserved against possible future need. In general, it was found that defense plants could be divided into four categories: (i) those which were needed for current production; (ii) those which were needed for probable future use, but which could in the meantime be leased for commercial use; (iii) those which would be needed for future use, but only in the event of mobilization; and (iv) those for which there was no future need. No special legal problems were presented by categories (i) or (iv), once a satisfactory Surplus Property Act was enacted.<sup>1</sup> We will not concern ourselves here with the problems raised by plants in category (ii).

With respect to plants in category (iii), it was felt that the possible future need for them, in the event of full or partial mobilization, while real enough, was not such as to warrant their indefinite retention

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<sup>1</sup> 58 STAT. 765 (1944).

by the Government, with the attendant cost of upkeep and maintenance, and the accompanying loss of tax revenue to states and local communities. Yet if they were sold, there was a real risk that their defense potential would be forever lost.

The suggestion was therefore made: Why not sell these key plants with a "string" attached, which would insure their retention for possible use in the event of mobilization, but which would not be an unreasonable bar to their use in commercial production. This was the genesis of the so-called "National Security Clause." As first used, this clause consisted of a series of covenants included in the contract of sale, without benefit of any specific statutory provision. While the form of clause in use varied, it usually included the following agreements: (i) that the grantee would maintain the plant (and the principal production equipment located therein) in accordance with reasonable industrial standards of maintenance; (ii) that the grantee would not make any alterations, modifications or improvements of such character as to interfere with the intended mobilization use of the plant, unless they could be removed or restored in 120 days; (iii) that the grantee would not sell or transfer the plant, or sell, transfer or remove any important production equipment located therein, without the consent of the Government; and (iv) that the Government reserved the right to repossess the plant for a period up to five years (which period might be renewed) upon payment to the grantee of its expenses of clearing the plant, reasonable rental for the period of occupancy, and the expenses of converting the plant to commercial use at the end of the period.

The clause usually provided that it was to be effective 20 years in the case of buildings and improvements, and 10 years in the case of machinery and equipment, with provision for earlier release by the Government, in whole or in part, at any time it should decide that the plant, or part thereof, was no longer required for an anticipated defense need. The principal reason for selecting these periods of time was that they constituted the normal estimated useful life of facilities of this particular type. However, lurking in the minds of the draftsmen was the uneasy feeling that the whole business might somehow be running afoul of the rule against perpetuities, and twenty years seemed a good, safe period in most states.

An early version of the national security clause was recommended on August 22, 1946, by the old Army and Navy Munitions Board, and a standard form was approved for use by the Assistant Secretary of the Navy on October 19, 1946, and by the Under Secretary of War on October 21, 1946.<sup>2</sup> Such actions were only administrative, however,

<sup>2</sup> Brief for Appellee, p. 23, *Oakland Dock and Warehouse Co. v. United States*, 193 F. 2d 493 (9th Cir. 1951).

and the validity of any clause used pursuant thereto would have to be determined solely as a matter of contract. So far as is known, there has been no judicial test of any of these early clauses.

The first statutory authorization for the national security clause is found in Section 5 of the Act of August 5, 1947, which was primarily a statute authorizing the lease of Government facilities for commercial use. This section provided, in part:

"Sec. 5 (a) Whenever in the opinion of the Secretary of War or the Secretary of the Navy, as the case may be, the interests of national defense require assurance of the continued availability for war-production purposes of the industrial capacity of shipyards, plants, and equipment which are surplus to the needs of their respective Departments or of the Reconstruction Finance Corporation within the meaning of the Surplus Property Act of 1944, they are authorized to direct the imposition of such terms, conditions, restrictions, and reservations in the disposition of such property by the disposal agency under said Act as will in the opinion of the Secretary concerned be adequate to assure such continued availability."<sup>3</sup>

The need for more comprehensive legislation soon became apparent, and in 1948 Congress enacted the National Reserve Act of 1948,<sup>4</sup> which repealed Section 5 of the Act of August 5, 1947. The purpose of this statute was stated to be to provide "adequate measures whereby an essential nucleus of Government-owned industrial plants and a national reserve of machine tools and industrial manufacturing equipment may be assured for immediate use to supply the needs of the armed forces in time of national emergency or in anticipation thereof;" such reserve to be kept to the minimum necessary for immediate use in time of national emergency.<sup>5</sup>

The term "national industrial reserve" was defined to mean, *inter alia*, "that excess industrial property which has been or may hereafter be sold, leased, or otherwise disposed of by the United States, subject to a national security clause."<sup>6</sup>

The term "national security clause" was defined to mean "those terms, conditions, restrictions, and reservations, heretofore formulated or as may be formulated" under the Act for insertion in instruments of sale or lease of property, determined in accordance with the Act to be a part of the industrial reserve, "which will guarantee the availability of such property for the purposes of national defense at any time when availability thereof for such purposes is deemed necessary by the Secretary of Defense."<sup>7</sup>

The Act further authorized the Secretary of Defense (i) to determine which excess industrial properties should become a part of the

<sup>3</sup> 61 STAT. 775 (1947).

<sup>4</sup> 62 STAT. 1225 (1948); 50 U.S.C. §§ 451-462 (1952).

<sup>5</sup> 62 STAT. 1225 (1948); 50 U.S.C. § 451 (1952).

<sup>6</sup> 62 STAT. 1225 (1948); 50 U.S.C. § 452(a) (1952).

<sup>7</sup> 62 STAT. 1226 (1948); 50 U.S.C. § 452(c) (1952).

national industrial reserve, (ii) to formulate a national security clause, (iii) to consent to the relinquishment or waiver of all or any part of the national security clause in particular cases, and (iv) to designate what excess industrial property should be disposed of subject to the provisions of the national security clause.<sup>8</sup>

Admittedly, both the 1947 and the 1948 Acts are less than lucid. The term "national security clause" is defined in generalities; nowhere is its specific content spelled out: it is to be "formulated" by the Secretary of Defense. It is barely hinted, and then only to the initiate, that possibly this clause, "heretofore formulated or as may be formulated," will include some severe restrictions and, specifically, some restraints on alienation. Be that as it may, the legislative history of the two statutes makes it perfectly clear that they were intended to refer to precisely the type of national security clause which had been in use since 1946, and which included restraints on alienation.<sup>9</sup>

The first set of standard clauses formulated under the 1948 Act by the Munitions Board,<sup>10</sup> under authority delegated to it by the Secretary of Defense,<sup>11</sup> followed closely the pattern of the clauses previously in use, even to calling the Government's interest a "dormant estate," perhaps the first new estate known to the law of property since the time of the Year Books!<sup>12</sup> The clauses now authorized for use omit this phrase, referring to the various agreements and restrictions contained therein as conditions and covenants.<sup>13</sup> But the restraints on alienation remain.

The first, and so far as is known, the only judicial decision involving the validity of the national security clause is *United States vs. Oakland Dock and Warehouse Company*, decided by the United States District Court for the Northern District of California, Southern Division, in July, 1950.<sup>14</sup>

<sup>8</sup> 62 STAT. 1226 (1948); 50 U.S.C. § 453 (1952).

<sup>9</sup> *Hearings before Subcommittee of Committee on Armed Services on H.R. 3471*, 80th Cong., 1st Sess. 2363-2364 (1947); *Hearings before Committee on Armed Services on S. 1198*, 80th Cong., 1st Sess. 4, 17-18 (1947); H.R. REP. NO. 623, 80th Cong., 1st Sess. 1, 3 (1947); *Hearings before Subcommittee of Committee on Armed Services on H.R. 6098*, 80th Cong., 2d Sess. 6742-3, 6745-6, 6711-2 (1948); *Hearings before Committee on Armed Services on H.R. 6089*, 80th Cong., 2d Sess. 6797, 6800-6801 (1948); H.R. REP. NO. 1998, 80th Cong., 2d Sess. 3, 5 (1948); *Hearings before Committee on Armed Services on S. 2554*, 80th Cong., 2d Sess. 5, 26 (1948); SEN. REP. NO. 1409, 80th Cong., 2d Sess. 5, 8 (1948); 94 Cong. Rec. 6959 (June 1, 1948).

<sup>10</sup> 14 FED. REG. 1495 (1949).

<sup>11</sup> 32 CODE FED. REGS. § 111. 301-313 (1952).

<sup>12</sup> This phrase was first coined in a spirit of whimsey, and it is doubtful whether it was ever intended seriously. Lawyers have been known to complain, however that they could find no reference to the "dormant estate" in Blackstone!

<sup>13</sup> 32 CODE FED. REGS. § 113. 100-601 (1952).

<sup>14</sup> No. 29820; preliminary injunction granted July 13, 1950; permanent injunction granted November, 1951; appeal from order granting preliminary injunction dismissed as moot, 193 F. 2d 493 (9th Cir. 1951). No appeal was taken from the order granting the permanent injunction. Only the opinion in support of the preliminary injunction passed directly on the question discussed in this article. Unfortunately, this opinion

The case arose as follows: In 1949, the War Assets Administration offered for sale, subject to a national security clause, the Government-owned portion of the Moore Drydock Company shipyard in Oakland, California, consisting of about 52 acres, together with the machinery and equipment thereon. Defendant was the successful bidder. An award was made to it on April 11, 1949, which was confirmed by a "letter of intent" dated May 27, 1949. Possession was given on June 1, 1949. On the same date, the letter of intent was superseded by two documents, a quitclaim deed covering the real estate and a bill of sale covering the machinery and equipment. War Assets Administration executed both the deed and the bill of sale. Defendant signed only the deed.

Each of these documents included a national security clause, in the standard form then in effect as promulgated by the Munitions Board. The clause in the deed reserved a "dormant estate" in the "plant," defined as the land and certain appurtenances. The clause in the bill of sale was comparatively brief. It required defendant to preserve, protect and maintain the machinery and equipment for ten years, and prohibited defendant, for a period of ten years, from disposing of any machinery or equipment, loss of which would materially reduce the capacity of the plant for its designed purpose, without the written consent of the "Secretary of the military department having jurisdiction." It gave the Government a right of inspection, and a right of entry to cure default. It included a recital that the shipyard in which the machinery and equipment were located was a "war reserve plant," and another recital referring to the quitclaim deed of even date reserving a "dormant estate" for 20 years in said plant. A right of recapture by the Government was not specifically reserved in the bill of sale.

On February 28, 1950, after protracted negotiation, the national security clause in the deed was modified. No change was made or requested in the bill of sale.

Shortly thereafter, defendant began to sell some of the items of machinery and equipment located in the yard, without requesting or obtaining the consent of the Secretary of the Navy (the Navy being the military department having "jurisdiction," or more properly, "sponsorship," of the yard). When the Navy demanded that it desist, defendant claimed that the modification of the clause in the deed had had the effect of removing the restrictions on sale of the personalty, and that in any event, a restraint on the alienation of personal property, not coupled with some sort of reversionary interest in the grantor, was

was never published.

The national security clause was considered, but deemed inapplicable, in *Faris v. United States*, 192 F. 2d 53 (10th Cir. 1951).

void under the California Civil Code.<sup>15</sup> When defendant stated that it would not desist from going forward with its plans to sell the machinery and equipment, the Navy, after consulting with the Munitions Board and with the General Services Administration (the statutory successor to War Assets Administration), requested the help of the Department of Justice.

A complaint was filed in the United States District Court, and a preliminary restraining order obtained. After a hearing, on July 13, 1950, the Court granted a preliminary injunction enjoining defendant from making any further sales of the machinery, machine tools, or equipment during the pendency of the action, without the written consent of the Secretary of the Navy.

The Court overruled defendant's main argument, that the modification of the deed had removed the national security clause from the machinery and equipment, and also overruled certain subsidiary contentions of defendant. On the question of the validity of the restraint on alienation, the Court merely held that this was authorized by the National Industrial Reserve Act and that the "California law governing restraints on alienation does not control such transfer [i.e., from the Government to defendant] or accompanying restraints."<sup>16</sup>

Defendant appealed from this order. Before the appeal was decided, however, the defendant demanded a hearing on the question whether a permanent injunction should issue. Such a hearing was held and the defendant again lost. Thereupon the Court of Appeals, on its own motion, dismissed the appeal as moot.<sup>17</sup> Defendant took no further appeal.<sup>18</sup>

For some reason, during the hearing and argument on the

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<sup>15</sup> "Conditions restraining alienation, when repugnant to the interest created, are void." CAL. CIVIL CODE § 711 (Deering, 1949). See *Title Guarantee & Trust Co. v. Garrott*, 42 Cal. App. 152, 183 Pac. 470 (1919); *Hart v. Gould*, 119 Cal. App. 2d 231, 259 P. 2d 49 (1953); Fraser and Sammis, *The California Rules Against Restraints on Alienation, Suspension of the Absolute Power of Alienation, and Perpetuities*, 4 *Hast. L. J.* 101 (1953).

The common law is to the same effect. See GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY §§ 23, 27, 105, 113, 279 (2d ed. 1895); RESTATEMENT, PROPERTY § 406 (1944); *Clark v. Clark*, 99 Md. 356, 58 Atl. 24 (1904); *Kerns v. Carr*, 82 W. Va. 78, 95 S.E. 606 (1918). *But cf. Hinshaw v. Wright*, 124 Kan. 792, 262 Pac. 601 (1928).

The fact that the restraint here was limited to ten years, or that permission to alienate might be given by the grantor, would not make it valid at common law, under the accepted view. GRAY, *op. cit. supra*, §§ 37, 41, 52, 54; RESTATEMENT, PROPERTY § 406, *Comments e, b* (1944); Leach, *Perpetuities in a Nutshell*, 51 *Harv. L. Rev.* 638, 666 (1938).

<sup>16</sup> *United States v. Oakland Dock and Warehouse Company*, U.S.D.C., N.D. Cal., So. Div., No. 29820, July 13, 1950.

<sup>17</sup> *Oakland Dock and Warehouse Co. v. United States*, 193 F. 2d 493 (9th Cir. 1951).

<sup>18</sup> It is gratifying to note that, once the permanent injunction was granted, defendant completely changed its previous attitude and co-operated fully with the Government in carrying out the spirit and intent of the national security clause.

permanent injunction, defendant failed to press its point that the restraint on alienation was invalid. The Court of Appeals never passed on the question, since it dismissed the appeal as moot. Accordingly, Judge Erskine's brief, unreported opinion in support of the preliminary injunction is the only court decision on the point.

Although Judge Erskine did not elaborate on the problem, his reasoning is unquestionably sound. The Constitution vests in Congress full and complete authority over the acquisition, holding, and disposition of property by the Federal Government.<sup>19</sup> Congress may impose or authorize the imposition of such conditions thereon as it sees fit. When it does so, in aid of a federal policy, the Supreme Court has held that such conditions may not be defeated or limited by state law.<sup>20</sup> In a series of cases involving the disposal of Indian lands, the Court has affirmed the power of Congress to impose restraints on alienation, when it deems them essential to a plan of allotment of such lands, without being limited by technical concepts of property law.<sup>21</sup> Although not cited by Judge Erskine in his opinion, these rulings of the Supreme Court seem decisive on the point.

Accordingly, it seems safe to conclude that the restraints on alienation found in the national security clause, imposed under the authority of the National Industrial Reserve Act, are valid and enforceable, regardless of provisions of local law, and regardless of whether real or personal property is involved.

When Professor John Chipman Gray wrote his famous preface to the second edition of his classic treatise on Restraints on the Alienation of Property, he was able to see two possible motives for establishing such restraints, both equally reprehensible: one, the perpetuation of a privileged class, through a system of settling and entailing property in a given family line; the other, the avoidance of one's just debts, through the medium of the spendthrift trust.<sup>22</sup> It would appear that experience during and since World War II has inspired a third motive, perhaps less heinous, namely, the establishment and retention for mobilization purposes of a nucleus of essential production facilities.

Gray wrote in the heyday of *laissez-faire* and freedom of contract, but even he noted with dark foreboding the advent of the planned economy (he called it the "Socialist Utopia"), of which he regarded the spendthrift trust as the "shrieking harbinger, foul precurrer of the

<sup>19</sup> U.S. CONST. Art. IV, § 3, cl. 2.

<sup>20</sup> *United States v. County of Allegheny*, 322 U.S. 174, 183 (1944); accord, *United States v. Jones*, 176 F. 2d 278, 281 (9th Cir. 1949).

<sup>21</sup> *Heckman v. United States*, 224 U.S. 413, 437 (1912); *Bowling and Miami Investment Company v. United States*, 233 U.S. 528 (1914); *United States v. Noble*, 237 U.S. 74 (1915); *United States v. Reily*, 290 U.S. 33 (1933).

<sup>22</sup> GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY, vi-vii (2d ed. 1895).



fiend." In a sense, Gray was right. We *have* moved far toward a planned economy in the area of defense mobilization. But insofar as this has been forced on us by the grim demands of the "cold war," who is there who does not wish that it did not have to be?

Admittedly, it is an open question whether such a mobilization base can best be preserved by tying up a substantial number of plants for 20 years, rather than by relying on the normal workings of the national economy to create the necessary capacity when needed. An earlier age would unhesitatingly have elected the latter approach. Today our experts warn us that we cannot afford the risk: too little too late is no better than none at all.

Whatever the theoretical arguments may be, the concept of an industrial reserve has proved its usefulness. The first annual report of the Munitions Board under the National Industrial Reserve Act, made to Congress on April 1, 1949,<sup>23</sup> showed a total of 236 industrial facilities held in the reserve, representing an acquisition cost of 2.3 billion dollars. Of these, 96 plants, with an acquisition cost of \$772 million, had been sold to industry, subject to a national security clause. The remaining plants, still owned by the Government, were under lease, in active production by the Government, or in idle standby. In later years, while the total number of plants held in the reserve was reduced, the number held by private industry subject to the national security clause gradually increased. During the Korean conflict, approximately fifty of these plants were "reactivated" and put back into war production, while production in other facilities already partially active was greatly increased.<sup>24</sup>

The latest annual report of the Department of Defense under the Act, filed with Congress on April 1, 1954, shows a total of 154 facilities in the National Industrial Plant Reserve. 75% of these are actually being used for their intended mobilization product, or for similar production. Of the 154 plants, 101 have been sold to private owners under the national security clause.<sup>25</sup>

It can be seen then that the concept of a national industrial reserve has played and is today playing a most important part in our overall defense planning. The national security clause is an essential part of this concept. Restraints on alienation are an integral part of the na-

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<sup>23</sup> REPORT TO THE CONGRESS ON THE NATIONAL INDUSTRIAL RESERVE UNDER PUBLIC LAW 883, 80TH CONGRESS, MUNITIONS BOARD, 1 APRIL 1949, 5-9.

<sup>24</sup> FOURTH ANNUAL REPORT TO THE CONGRESS ON THE NATIONAL INDUSTRIAL RESERVE UNDER PUBLIC LAW 883, 80TH CONGRESS, MUNITIONS BOARD, 1 APRIL 1952, 3.

<sup>25</sup> SIXTH ANNUAL REPORT TO THE CONGRESS ON THE NATIONAL INDUSTRIAL RESERVE UNDER PUBLIC LAW 883, 80TH CONGRESS, DEPARTMENT OF DEFENSE, 1 APRIL 1954, 1-2, 14.

tional security clause. However unpleasant this may be to devotees of the common law, it is not apt to change in the immediate future.

## II. *Wherry Housing and the Rule Against Perpetuities*

"Wherry Housing" derives its name from a bill introduced by Senator Wherry, which ultimately became Title VIII of the National Housing Act. The National Housing Act, initially enacted in 1934,<sup>26</sup> and subsequently amended several times, created the Federal Housing Administration (hereafter referred to as FHA), and empowered it to insure financial institutions against loss on mortgages in connection with the construction or modernization of low-cost housing. But the Act in its original form, and even as amended, proved inadequate to meet the special housing needs of servicemen and their families. This was principally because of the instability and impermanence of most military installations. The construction of housing in the vicinity of such an installation was a highly speculative venture, too speculative for the FHA to insure. In an effort to remedy this situation, Congress in 1949 passed Title VIII of the National Housing Act.<sup>27</sup>

To be eligible for FHA insurance under Title VIII, a mortgage must be placed on property designed for rent to civilian or military personnel stationed at a military installation in the area. No mortgage can be insured under Title VIII "unless the Secretary of Defense or his designee shall have certified to the Commissioner that the housing with respect to which the mortgage is made is necessary to provide adequate housing for such personnel, that such installation is deemed to be a permanent part of the Military Establishment, and that there is no present intention to substantially curtail activities at such installation."<sup>28</sup> (Such a certificate would provide reasonable assurance that the installation would continue, and that the mortgaged property would earn an adequate rental). The mortgage could be placed on privately owned land, or on land under long-term lease, and the military departments were authorized to enter into long-term leases for this purpose.

The Wherry Act did not prove to be a panacea, but it did alleviate somewhat the military housing shortage. However, not only did it provide reasonable assurance to the lending institution and FHA, but it also virtually insured the builder, or "sponsor," against loss. Risking little or no capital, he could count on a continuing source of tenants at rents favorable enough to amortize the mortgage, pay other expenses, and leave a reasonable margin for profit. After the mortgage had been

<sup>26</sup> 48 STAT. 1246 (1934) as amended, 12 U.S.C. §§ 1701-1750 (1952 and Supp. I, 1954).

<sup>27</sup> 63 STAT. 570 (1949), as amended, 12 U.S.C. §§ 1748-1748i (1952 and Supp. I, 1954).

<sup>28</sup> 63 STAT. 572 (1949), as amended, 12 U.S.C. § 1748b(b) (2) (Supp. I, 1954).

amortized, his only expenses would be his operating costs, which would leave a substantial portion of the rental he received as net gain. One result was tremendous competition among those desiring to be sponsors, each submitting his own plans and specifications, and with no clear basis for selection as among them. In one case, 57 different sets of plans were submitted for one project by as many prospective sponsors.<sup>29</sup>

To look into this situation, the Secretary of Defense appointed a Department of Defense Housing Commission, known as the Giesecke Commission (after the name of its chairman), which made a study and submitted the following recommendations, among others:

- (i) All projects should be awarded to sponsors on the basis of strict competitive bidding;
- (ii) So as to permit sponsors to bid on each project on an equal basis, they should all be given the same architectural and engineering specifications;
- (iii) For the same reason, the site should be selected in advance and, if not already owned by the Government, an option thereon should be acquired for subsequent transfer to the successful bidder;
- (iv) Where the site was thus transferred (rather than leased) to the sponsor, the latter should be required to agree to convey it without further cost to the Government within a reasonable time after amortization of the mortgage, so as to compensate the Government for assuming the risk of insuring the mortgage, and to prevent a windfall to the sponsor.

The Commission's recommendations were accepted by the Department of Defense. It was concluded, however, that they could not be carried out without legislative authorization.<sup>30</sup> An amendment to the National Housing Act was drafted and passed by a sympathetic Congress, and was approved on May 2, 1950.<sup>31</sup> Though brief, the amendment contained adequate authority to cover each of the Commission's recommendations. To cover the anti-windfall point, it included the following innocuous looking provision:

"The Secretary is further authorized to enter into arrangements by contract or otherwise for eventual acquisition by the Government, without cost to the Government, of all right, title, and interest in sites on which housing is constructed pursuant to this title and improvements thereon."<sup>32</sup>

The next step was to draft the necessary forms and agreements

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<sup>29</sup> SEN. REP. NO. 1484, 81st Cong., 2 Sess. (1950); H.R. REP. NO. 1860, 81st Cong., 2d Sess. (1950).

<sup>30</sup> *Ibid.*

<sup>31</sup> 64 STAT. 97 (1950), 12 U.S.C. § 1748h (1952).

<sup>32</sup> 64 STAT. 98 (1950), 12 U.S.C. § 1748h (1952).

to put the statute into effect. On the anti-windfall point, the plan was for the Government to acquire an option or options on the land chosen for the project, and transfer such options to the successful sponsor, who would take them up, but agree to transfer the land, together with all improvements, without cost, to the Government, some two or three years after the mortgage had been fully amortized and the sponsor's initial investment recovered. It was estimated that this period would be about 37 years. All went well until someone said: "What about the Rule against Perpetuities?"

What about it indeed? Until that moment, no one had thought of it. Yet was this not an attempt to provide for the transfer of a fee, upon a contingency which might not occur, in fact was almost certain not to occur, for some 37 years, far beyond the permissible period of lives in being plus 21 years and a period of gestation?<sup>33</sup>

A hurried rush to the lawbooks ensued. The Pentagon opened its assault on that dread citadel, the awesome *Rule*, which had been known to break the hearts (and wills!) of some of the mightiest conveyancers of all time, including the great Coke himself.

The following possibilities were considered:

(i) *Lease*. The Government could take title to the site at the outset and make a long-term lease to the sponsor. By reserving the right to terminate the lease after amortization of the mortgage, the Government could prevent a windfall to the sponsor. The problem of perpetuities would be eliminated. This was the obvious solution, but it could not be adopted because the Department of Defense had given its word to Congress that it would not use the Wherry Housing program, at least, for the immediate future, to acquire any more Government-owned property, taking such property off state and local tax rolls.

(ii) *Reliance on the Statute*. It could be argued that the Act of May 2, 1950, was sufficient authority to overcome any objections based on the common law or State statutes. But this was a weak reed. For one thing, the amendment spoke only of "eventual acquisition" by the Government of title. It did not indicate whether "eventual" meant 1 year, 20 years, or 40 years. The legislative history shed no light on the problem. Secondly, the Wherry Housing program (unlike the National Security Clause) did not involve the *disposal* of Government property, but the *acquisition* by the Government *in futuro* of privately held land.

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<sup>33</sup> Although contracts generally are not subject to the Rule against Perpetuities, contracts which create an interest in land, specifically enforceable in equity, are so subject, and if the right to a conveyance depends upon a condition which may be too remote, the Rule is violated. *Horticultural Development Co. v. Lark*, 224 Ala. 193, 139 So. 229 (1932); GRAY, THE RULE AGAINST PERPETUITIES, § 330 n. 2 (4th ed. 1942). Cf. *Walker v. Marcellus and Otisco Lake R. Co.*, 226 N.Y. 347, 123 N.E. 736 (1919); *Skeen v. Clinchfield Coal Corp.*, 137 Va. 397, 119 S.E. 89 (1923).

It is doubtful whether the Government can move into this field in complete disregard of local law.

(iii) *Amendment of the Statute.* Even if Congress could grant the necessary authority, the Department of Defense was reluctant to ask for a third amendment of the National Housing Act. It had assured Congress that, once the Act of May 2, 1950 was enacted, the last bar to the success of the Wherry Housing program would be removed.

(iv) *Determinable Fee.* It would be possible for the Government to take title to the site at the outset, and convey it to the sponsor with a proviso for reverter to the Government when the mortgage had been amortized and the sponsor had recovered his investment plus an agreed profit. This was the ancient determinable fee or possibility of reverter. The general view in the United States is that a determinable fee may be validly created, and that it is exempt from the Rule against Perpetuities.<sup>34</sup> But the point has not come up in all jurisdictions, and it is not possible to say unqualifiedly that all 48 states will recognize the determinable fee.<sup>35</sup> Moreover, some authorities hold that the determinable fee was outlawed by *Quia Emptores*, in the year 1290.<sup>36</sup> Whether or not they are right, it did seem anomalous for the United States Government, in Anno Domini 1950, to go about creating determinable fees on a grand scale as a matter of deliberate national policy! The idea was discarded.

(v) *Option.* It would be possible for the sponsor to take title to the site, and give the Government an option to acquire it at a future date. This would be the so-called "option in gross" (i.e., not appendant to a lease). There is great confusion and disagreement among the authorities on whether such options are subject to the Rule,<sup>37</sup> so much

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<sup>34</sup> *Institution for Savings v. Roxbury Home for Aged Women*, 244 Mass. 583, 139 N.E. 301 (1923); *Leonard v. Burr*, 18 N.Y. 96 (1858); 2 SIMES, LAW OF FUTURE INTERESTS § 507 (1936); Leach, *Perpetuities in a Nutshell*, 51 Harv. L. Rev. 638, 664 (1938).

<sup>35</sup> See 1 SIMES, LAW OF FUTURE INTERESTS 323 n. 10 (1936), and GRAY, THE RULE AGAINST PERPETUITIES § 39, n. 2 (4th ed. 1942), for lists of American cases which have recognized the determinable fee. Between them, these lists cover some 36 of the 48 states. Even so, the roster is not complete. And in North Carolina, there seem to be opinions and *dicta* both ways. See GRAY, *op. cit. supra*, §§ 40.11, 41.1 n. 2.

<sup>36</sup> GRAY, *op. cit. supra* note 35, §§ 31-41, and app. E. Gray's view has been widely challenged. See, e.g., Powell, *Determinable Fees*, 23 Col. L. Rev. 207 (1923). For a recent defense of Gray's position, see Bordwell, *The Common-Law Scheme of Estates and the "English Justinian"*, 33 Iowa L. Rev. 449, 466-470 (1948).

<sup>37</sup> Most jurisdictions hold that options in gross are subject to the Rule. *Eastman Marble Co. v. Vermont Marble Co.*, 236 Mass. 138, 128 N.E. 177 (1920); *Barton v. Thaw*, 246 Pa. 348, 92 Atl. 312 (1914). In New York, and a few other states, such options have been upheld, despite remoteness. *Epstein v. Werbelovsky*, 193 App. Div. 428, 184 N.Y. Supp. 330 (2d Dept. 1920) *aff'd* 233 N.Y. 525, 135 N.E. 902 (1922); *Matter of City of New York*, 246 N.Y. 1, 157 N.E. 911 (1927) *rearg. den.* 246 N.Y. 549 (1927) *cert. den.* 276 U.S. 626 (1928). See 6 AMERICAN LAW OF PROPERTY § 24.56 (1952); Langeluttig, *Options to Purchase and the Rule Against Perpetuities*, 17 Va. L. Rev. 461 (1931); Leach, *Perpetuities in a Nutshell*, 51 Harv. L. Rev. 638, 660 (1938); Berg, *Long-Term Options and the Rule Against Perpetuities*, 37 Calif. L. Rev. 1, 235, 419 (1949).

so, that it was impossible to adopt this as a solution.

(vi) "*Vested Contract Right*". If a definite date could be established for the transfer of title to the Government, any contingency would be removed, and the Government's equitable interest in the property would be fixed and certain. On principle, such an interest should be regarded as immediately vested, and therefore not subject to the Rule.<sup>38</sup> But not all authorities so hold, and some would apply the Rule even to this type of interest.<sup>39</sup> Moreover, it would be difficult to select a definite date without defeating the purpose of the scheme, which was to assure transfer to the Government when the sponsor had recovered his investment plus a reasonable profit, but not before then, and not unreasonably long thereafter.

*Solution.* The solution finally adopted was a compromise between (i) and (vi). It took this form. The sponsor took title to the site at the outset, but agreed to convey it, plus improvements, without cost, to the Government 20 years later. The Government agreed to lease the property back to the sponsor for 55 years more, reserving the right to terminate the lease at its option after the expiration of 19 years of the 55, provided FHA had by then certified that its interest in the housing project had terminated.

By providing for the definite transfer of title in 20 years, there could be no possible objection in those 41 states (plus the District of Columbia, Alaska and Hawaii) which, in 1950 and since, have followed the common law rule, or have adopted a statute based thereon, or have recognized a period in gross of 21 years or more.<sup>40</sup> In five states, Idaho, Minnesota, Montana, New York, and South Dakota, there is no period in gross.<sup>41</sup> But the statutes in these states are directed primarily at suspension of the power of alienation, which is not the case here, since the sponsor and the Government could between them convey the complete fee (subject of course to the mortgage). And even where, as in New York, an independent rule against remoteness of vesting has been read into these statutes, such a rule should not invalidate an unconditional future transfer to a definite person on a definite date, Professor John

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<sup>38</sup> WALSH, *FUTURE ESTATES IN NEW YORK* 28-29, 43, 63, 99-100 (1931); 2 SIMES, *LAW OF FUTURE INTERESTS* § 498 (1936); *RESTATEMENT, PROPERTY* § 370, *comment g* and *illustration 2* (1944); 6 *AMERICAN LAW OF PROPERTY* § 24.20 (1952).

<sup>39</sup> GRAY, *THE RULE AGAINST PERPETUITIES* §§ 114, 201, 320.1, 330 n. 2 (4th ed. 1942). See discussion of problem in WALSH, *op. cit. supra* n. 38, 27 ff., 43, 63, 99-100, and in 1 *AMERICAN LAW OF PROPERTY* § 4.56, 6 *ib.* § 24.20 (1952).

<sup>40</sup> For complete lists, together with statutory citations, see the study made for the New York State Law Revision Commission by Prof. Richard R. Powell of the Columbia Law School and Prof. Horace E. Whiteside of the Cornell Law School, N.Y. LEG. DOC. (1936) NO. 65(H) 597-606; and Comment, *Recent Changes in Statutory Rules Against Perpetuities* (T. E. Munson) 38 *Corn. L.Q.* 543 (1953).

<sup>41</sup> *Ibid.*

Chipman Gray to the contrary notwithstanding.<sup>42</sup>

In Mississippi, although the situation is complicated by a statute,<sup>43</sup> a term in gross of 21 years has been judicially recognized.<sup>44</sup>

The only state which presents any real problem is Louisiana. Here we are not even dealing with the common law of future interests, but with a legal system based on the European civil law. Louisiana prohibits "substitutions," that is, the future substitution of one owner in place of another who has meanwhile had the ownership, but without power of alienation.<sup>45</sup> What was contemplated here was similar to this, but with the very important difference that the power of alienation would not be suspended. This might be enough to validate the arrangement. Again, Louisiana permits the transfer of the "usufruct," or enjoyment for life or a stated period, to one person and the "naked ownership" to another.<sup>46</sup> Usufruct may be established under a condition.<sup>47</sup> Perhaps the proposed scheme could be sustained as establishing "usufruct" in the sponsor, "naked ownership" in the Government. But the Louisiana law on this subject is very confusing and obscure, and to the common-law lawyer virtually unintelligible.<sup>48</sup> Those who struggled with the problem finally concluded that they would have to take their chances in Louisiana. Perhaps the argument could be made that in this one situation the federal statute did supersede the local law, since the former clearly contemplated, and authorized, the "eventual" transfer of title from the sponsor to the Government.<sup>49</sup>

It can be seen that the scheme finally adopted accomplished the following:

(a) Title was left in the sponsor for 20 years, during which time the property would remain on the local tax rolls;

(b) The transfer of title to the Government and lease back to the sponsor on a date certain 20 years later avoided the perpetuities problem everywhere, except possibly in Louisiana;

(c) The possible duration of the fee (really a term of years) and lease together would be 75 years, sufficient to support an FHA-insured

<sup>42</sup> See notes 38, 39, *supra*. Where, as in New York, the option in gross is valid despite remoteness, *a fortiori* an unconditional contract right in property is unobjectionable.

<sup>43</sup> MISS. CODE ANN. § 838 (Rice & Ethridge, 1942).

<sup>44</sup> *Cannon v. Barry*, 59 Miss. 289 (1881); *Middlesex Banking Co. v. Field*, 84 Miss. 646, 37 So. 139 (1904). See Lee, *The Rule Against Perpetuities in Mississippi*, 10 Va. L. Rev. 533 (1924).

<sup>45</sup> LA. CIVIL CODE, Art. 1520 (Dart., 2d ed. 1945).

<sup>46</sup> *Ibid.*, Art. 1522.

<sup>47</sup> *Ibid.*, Art. 542.

<sup>48</sup> For an exposition of the problems, see Nabors, *Restrictions Upon the Ownership of Property in Louisiana—Trusts, Fidei Commissa and Substitutions*, 4 Tulane L. Rev. 1, 190 (1929-30) and Nabors, *An Analysis of the Substitution—Usufruct Problem Under Articles 1520 and 1522 of the Louisiana Civil Code*, *ib.* 603.

<sup>49</sup> 64 STAT. 98 (1950), 12 U.S.C. § 1748h (1952).

mortgage under Title VIII of the National Housing Act;<sup>50</sup>

(d) The Government would have the right to terminate the lease after a total lapsed time of 39 years,<sup>51</sup> provided the FHA's interest had meanwhile been satisfied, which would prevent a windfall to the sponsor while at the same time give him reasonable assurance of a fair return.

### CONCLUSION

This article has been designed more as an excursion in the realm of legal *curiosa* than as pointing to any important moral. But if conclusions must be drawn, the following, trite though they may be, seem warranted and might bear repeating:

(1) No lawyer dealing with *any* field of property at *any* time under *any* circumstances can afford to forget the rules of future interests;<sup>52</sup>

(2) These rules grew up around the family settlement and the devolution of estates and are difficult to apply in any rational manner to problems arising out of modern industrial and commercial affairs;

(3) But until they are changed by statute (a difficult and risky process), the practicing lawyer must "make do" with them as best he can. It is surprising how much he can accomplish with the application of a little care, skill, and ingenuity.

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<sup>50</sup> 63 STAT. 571 (1949), 12 U.S.C. § 1748(a) (1952).

<sup>51</sup> The arrangement has since been modified to increase this period to 50-1/4 years, *i.e.*, to make the lease terminable after 30-1/4 years. The purpose of the change was to put owner-sponsors on an equality with lessee-sponsors, the latter holding leases from the Government which were not terminable until after 50 years. But this modification made no change in the principle involved.

<sup>52</sup> See the delightful illustration on page 108 of WORMSER, *YOUR WILL AND WHAT NOT TO DO ABOUT IT* (1937). The present writer must plead *mea culpa*, having been one of the drafters of the 1950 amendment, who forgot all about the Rule against Perpetuities!