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# Rule Against Perpetuities -- Commercial Leases

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past,[17] that a consent judgment merely evidences the agreement of the parties and is not an adjudication of negligence.

In view of *Pack* it seems almost impossible in North Carolina for two parties to settle a third-party-infant's claim and at the same time protect their right to litigate the issue of damages between themselves. Either the out-of-court settlement with the infant will be open to later disaffirmance, or the in-court settlement will bar future litigation between the defendants.[18] There is a possibility of a separate consent judgment in favor of the infant against each of the defendants, as an injured party may sue one or all joint tortfeasors.[19] It is submitted that it should not be necessary to use this cumbersome and uncertain procedure. The writer believes that the North Carolina court should follow the reasoning of the dissent in *Pack,* which would allow all parties to a controversy to litigate their claims while at the same time encouraging the settlement of suits by an infant.

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## Rule Against Perpetuities—Commercial Leases.

A leasehold to commence after the completion of a building was declared void *ab initio* by the California District Court of Appeals in the recent case of *Haggerty v. City of Oakland*[1] as a violation of the rule against perpetuities.[2] The City of Oakland and one Goodman entered into a written contract whereby the city was to build a building and lease it to Goodman for a term of years. The term was not to commence until the first day of the second month after completion of the building. The lease contained no specified date for beginning construction on the building but did provide that the city "shall and will in good faith immediately after the execution of this lease proceed with plans for

[17] The North Carolina Supreme Court, in holding an Ohio divorce decree not to be a consent judgment, stated, "A judgment by consent is the agreement of the parties. . . . It is not a judicial determination of the rights of the parties and does not purport to represent the judgment of the court, but merely records the pre-existing agreement of the parties." McRary v. McRary, 228 N.C. 714, 719, 47 S.E.2d 27, 31 (1948).

[18] The holding in the principal case does not apply to actions involving a contract. Stanley v. Parker, 207 N.C. 159, 176 S.E. 279 (1934).

[19] Denny v. Coleman, 245 N.C. 90, 95 S.E.2d 352 (1956); Charnock v. Taylor, 223 N.C. 360, 26 S.E.2d 911 (1943). Since there can be only one recovery for an injury, satisfaction of the infant's first consent judgment would bar a suit against the second tortfeasor. Bell v. Hawkins, 249 N.C. 199, 105 S.E.2d 642 (1958). Likewise, a release of one tortfeasor will bar an action against the other. King v. Powell, 220 N.C. 511, 17 S.E.2d 659 (1942); Smith v. Thompson, 210 N.C. 672, 188 S.E. 395 (1936).

[1] 161 Cal. App. 2d 407, 326 P.2d 957 (Dist. Ct. App. 1958).

[2] Dallapi v. Campbell, 45 Cal. App. 2d 541, 114 P.2d 646 (Dist. Ct. App. 1941); Spicer v. Moss, 409 Ill. 343, 100 N.E.2d 761 (1951); Johnson v. Preston, 226 Ill. 447, 80 N.E. 1001 (1907); McQueen v. Branch Banking & Trust Co., 234 N.C. 737, 68 S.E.2d 831 (1952).

the construction . . . and shall thereafter prosecute the same to completion with all *due diligence.*"[3] (Emphasis added.)

Haggerty, taxpayer of the City of Oakland, brought suit to have the lease declared void, *inter alia,* on grounds that it violated the common law rule against perpetuities[4] as embodied in a California statute.[5] The court so held, reasoning that since there was an uncertain and unfixed commencement date for the lease, a possibility existed that the estate might not vest within twenty one years. This holding reflects generations of judicial adherence to the rule against perpetuities.

The classic definition of the rule against perpetuities, as stated by Gray,[6] is as follows: "No 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." Basically the rule is one invalidating *interests* which vest too remotely, so that postponement of possession or enjoyment is not affected.[7] If the time of the commencement of the interest is indefinite, then the rule applies.[8] It is not a rule of construction but a positive mandate of law to be obeyed irrespective of intention and to be applied even if accomplishment of the expressed intent of the grantor is made impossible thereby.[9]

The ultimate purpose of the rule is to prevent the tying up of the title to real property and to facilitate the use of land in commerce.[10] Thus the rule concerns rights in real property only and does not affect the making of contracts which do not create such rights.[11] The authorities are in conflict as to whether a lease is a contract, a conveyance, or a conveyance with contractual obligations superimposed.[12] However

[3] 161 Cal. App. 2d at —, 326 P.2d at 966.

[4] If the time within which a contingency must occur is not annexed to a life in being, the period allowed for vesting is twenty one years from the interest's creation. See Estate of McCollum, 43 Cal. App. 2d 313, 110 P.2d 721 (Dist. Ct. App. 1941); Smith v. Renne, 382 Ill. 26, 46 N.E.2d 587 (1943); Leach, *Perpetuities in a Nutshell,* 51 HARV. L. REV. 638 (1938).

[5] CAL. CIV. CODE § 715.2: "No interest in real or personal property shall be 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 . . . . It is intended by the enactment of this section to make effective in this State the American common-law rule against perpetuities."

[6] GRAY, THE RULE AGAINST PERPETUITIES § 201 (4th ed. 1942).

[7] McEwen v. Enoch, 167 Kan. 119, 204 P.2d 736 (1949); Forbringer v. Romano, 10 N.J. Super. 175, 76 A.2d 825 (App. Div. 1950); McQueen v. Branch Banking & Trust Co., 234 N.C. 737, 68 S.E.2d 831 (1952).

[8] TIFFANY, REAL PROPERTY § 268 (Abr. ed. 1940) and cases there cited.

[9] Emerson v. Campbell, 32 Del. Ch. 178, 84 A.2d 148 (1951); Monarski v. Greb, 407 Ill. 281, 95 N.E.2d 433 (1950); Mercer v. Mercer, 230 N.C. 101, 52 S.E.2d 229 (1949); Crockett v. Scott, 199 Tenn. 90, 284 S.W.2d 289 (1955).

[10] GRAY, THE RULE AGAINST PERPETUITIES §§ 1, 4, 235 (4th ed. 1942).

[11] Todd v. Citizens' Gas Co., 46 F.2d 855 (7th Cir.), *cert. denied,* 283 U.S. 852 (1931); First Nat'l Bank & Trust Co. v. Purcell, 244 S.W.2d 458 (Ky. 1951); First Nat'l Bank v. Gideon-Broh Realty Co., 139 W. Va. 130, 79 S.E.2d 675 (1953); West Virginia-Pittsburgh Coal Co. v. Strong, 129 W. Va. 832, 42 S.E.2d 46 (1947).

[12] See generally 25 N.C.L. REV. 516 (1946).

the lease be classified in legal theory, if in fact it does create definite rights in realty, then it must follow that the rule against perpetuities applies. There seem to be relatively few cases discussing the rule as applied to leases *in futuro*[13] but the leading text-writers agree[14] that no legally defined interest is vested and that, if a lease of a term for years is to take effect on a condition precedent which may not occur within the period of the rule, it violates the rule and must fall.

There was a strong dissent in *Haggerty* based upon the proposition that, under modern conditions and concepts, there could be no question of the lease's failure to vest in interest within twenty one years. The dissent said, "To hold that under modern economic conditions there is even a bare possibility that a landlord and tenant . . . would ever wait over twenty one years for their lease to take effect is unrealistic, fantastic and even absurd."[15] Rather, the dissent chose to emphasize the "reasonable performance" feature of the lease agreement. The dissenting judge would have followed an accepted rule of the law of contracts and allowed the court to construe the phrase "with all due diligence" as requiring performance within a "reasonable time."[16]

At first blush this seems to be the logical solution, but as the majority points out, "This argument is deceptively simple, and is unsound."[17] Had the language of the instrument in the principal case been such as to create a lease *in præsenti*[18] then the argument of the dissent would have been in point. The lessee would have had a present right of possession in the property, and the construction provision would have been an incidental part of the lease. In a proper action the court could enforce this contractual part of the lease agreement by determining what would be a "reasonable time"[19] for completion of the building. No case has been found, however, where such concepts of contract law have been applied in resolving the question of when the lease vests an interest in the lessee.

[13] This note is dealing with a specific type of commercial interest, a lease limited to commence *in futuro*, and does not explore the whole field of future interests to which the rule against perpetuities is applicable.

[14] GRAY, THE RULE AGAINST PERPETUITIES § 320.1 (4th ed. 1942); 3 SIMES & SMITH, FUTURE INTERESTS § 1242 (2d ed. 1956); 2 TIFFANY, REAL PROPERTY § 406 (3rd ed. 1939).

[15] 161 Cal. App. 2d at ——, 326 P.2d at 967-68.

[16] 17 C.J.S. *Contracts* § 360 (1939).

[17] 161 Cal. App. 2d at ——, 326 P.2d at 966.

[18] A grant *in præsenti* imports a transfer, subject to the limitations mentioned, of a present possessory interest in the lands designated. Van Wych v. Knevals, 106 U.S. 360 (1882).

[19] *E.g.*, Florence Gas, Elec. Light & Power Co. v. Hanby, 101 Ala. 15, 13 So. 343 (1893), contract to erect an electric light plant "as soon as possible"; Stark v. Shaw, 155 Cal. App. 2d 171, 317 P.2d 182 (Dist. Ct. App. 1957), *cert. denied*, 356 U.S. 937 (1958), where contract for roofing houses contained no commencement date, but it was held that a promise to perform within a reasonable time was implied; Western Land Roller Co. v. Schumacher, 151 Neb. 166, 36 N.W.2d 777 (1949), a contract to complete a well and install pump "as quickly as possible."

The decision in the principal case has been criticized as hampering land development under current commercial conditions.[20] The parties clearly contemplated the active use of the land for purposes beneficial both to themselves and to the public generally.[21] Consequently the point has been made that the rule against perpetuities—itself aimed at freeing the use of land for such purposes—has here been so applied as to do just the opposite.[22] This view seems to attach more importance to the execution of commercial agreements than to the settlement of outstanding interests in land. The same sentiment is expressed by the dissent, which finds some support from Simes & Smith.[23] The latter authority, however, in turn rests upon three cases where the facts are clearly distinguishable.[24] Each of these cases involved a trust, the subject matter of which was currently in existence. In *Haggerty* the subject of the lease was only a contemplated building which might never come into existence. If the lessor-builder experienced hardship and could not perform, the lessee might insist upon "standing on his rights" under the lease, take no legal action whatsoever, but refuse to dissolve the contract. Should the lessor later desire to convey the land which the building was to occupy, his prospective purchaser could reasonably object that the title was encumbered.[25] Thus it can be seen how realty

[20] 47 CALIF. L. REV. 197 (1959); 73 HARV. L. REV. 1318 (1960); 10 HASTINGS L.J. 439 (1959); 6 U.C.L.A.L. REV. 165 (1959). The editor in 35 N.D.L. REV. 170 (1959) favored the majority decision. In a brief comment on the case, the editor in 35 N.Y.U.L. REV. 401 (1960) finds no fault with the result. He points out to be safe this type of lease should have a provision for completion which complies with the rule, but he describes both the majority and dissent as "well-reasoned opinions."

[21] "Haggerty and the city were obviously both satisfied with the arrangement, so the city constructed the building and the management company is now operating it under a slightly changed arrangement. The only losses, apart from Haggerty's, are the professional reputation of the municipal attorney who drafted the instrument and the lessee's attorney who accepted it." 73 HARV. L. REV. 1318, 1323 (1960).

[22] Commentary cited note 20 *supra*.

[23] 3 SIMES & SMITH, FUTURE INTEREST § 1228 (2d ed. 1956). The author states: "Occasionally one finds cases where vesting is, in effect, to take place 'in a reasonable time,' and the court sometimes presumes that a reasonable time will necessarily be within twenty-one years. If, in light of the surrounding circumstances, as a matter of construction, 'a reasonable time' is necessarily less than twenty-one years, then such holdings are not subject to criticism." 3 SIMES & SMITH, *op. cit. supra* at 122.

[24] See Brandenburg v. Thorndike, 139 Mass. 102, 28 N.E. 575 (1885), where trustees were to make gift effective three years after wife's death, or at such time, earlier or later, as in their discretion would be expedient and practicable for settlement of the estate; Plummer v. Brown, 315 Mo. 627, 287 S.W. 316 (1926), where trustees were to sell and distribute trust when it could be done to advantage and without injury to the estate or beneficiaries; West Texas Bank & Trust Co. v. Matlock, 212 S.W. 937 (Tex. Com. App. 1919), where trust was created to pay a bonus to the first railroad passing through certain property within a reasonable time.

[25] It is not altogether clear what interests or rights the would-be lessee does have under a lease *in futuro*, but it has been suggested that by the common law he would have an *interesse termini*. And this is only a right to an estate at best, a mere interest in the term. TIFFANY, REAL PROPERTY 68 (Abr. ed. 1940).

might become tied up for an indefinite period of time. In such a situation the rule against perpetuities provides the obvious solution, dissolving any rights the lessee might have had.

While the precise issue litigated in the principal case appears never to have been before the North Carolina Supreme Court, there are indications that our court would reach the same result. The common law rule against perpetuities is recognized and enforced in this state.[26] A fact situation similar to that in the principal case was before the North Carolina court in *Manufacturing Co. v. Hobbs*.[27] The action at the trial level was conducted altogether on a question of fact as to whether fraud had been committed by the plaintiff in inducing the contract.[28] The contract was for the sale of timber and contained a provision which allowed the plaintiff "the full term of five years within which to cut and remove the timber hereby conveyed, said term to commence from the time said party of the second part begins to manufacture said timber into wood or lumber."[29] The court did not comment on the fraud issue but simply stated that "there is on the face of the pleadings an insuperable obstacle to recovery on the part of the plaintiff . . . ."[30] This obstacle was the fact that the interest might never become vested. That the court had in mind a violation of the rule against perpetuities appears obvious from a portion of the opinion which states, "It is evident from the reading of the contract that the fee in the land was not to pass, and yet no one can tell how long the land and other timber upon it may remain useless to the defendants and to the Commonwealth under the indefinite and uncertain time at which the lease is to begin."[31]

This statement of the court sums up the necessity for the majority decision in the principal case. Without a clear holding that the lease violates the rule against perpetuities, the land might be tied up indefinitely. It is submitted that courts in North Carolina, if faced with a similar issue, would be on firm ground in following the majority in *Haggerty*. To insure the validity of commercial leases of the type herein discussed, it would seem advisable for the draftsmen always to insert a saving clause in such leases. This clause should state that "if the completion of the building takes more than twenty years, then this lease and contract are to be null and void." While such leases are not entirely new to the business world,[32] they are used much more frequently in

[26] Mercer v. Mercer, 230 N.C. 101, 52 S.E.2d 229 (1949). See also N.C. CONST. art. I, § 31: "Perpetuities . . . ought not to be allowed."
[27] 128 N.C. 46, 38 S.E. 26 (1901).
[28] *Id.* at 47, 38 S.E. at 26.
[29] Ibid.
[30] Ibid.
[31] Id. at 48, 38 S.E. at 26.
[32] An agreement to build and lease a garage, construction to start *at once*, was the commercial transaction in the not too recent case of Monger v. Lutterloh, 195 N.C. 274, 142 S.E. 12 (1928).

this era of supermarkets and shopping centers; and under the holding of the principal case, they are certainly of questionable validity without such a saving clause.

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**Specific Performance—Oral Contracts to Devise—Statute of Frauds.**

In a recent Kentucky decision,[1] an illegitimate daughter brought suit against her father's estate on his oral promise to devise real property to her in consideration of her mother's foregoing the institution of bastardy proceedings against him. The trial court held the oral contract unenforceable under the Statute of Frauds, but awarded damages on the basis of *quantum meruit,* measured by the value of the property promised to be devised. On appeal, the court of appeals remanded with directions to enter a decree for specific performance of the contract if the property was still vested in the heirs of the decedent and still available for transfer to the plaintiff.

Uniformly, it is held that oral contracts to devise realty are within the section of Statute of Frauds relating to contracts for the transfer of real property.[2] However, the majority of jurisdictions will grant specific performance of the contract on the theory of part performance where there has been a performance by the promisee which is incapable of monetary evaluation.[3] The rationale of these courts is that the Statute of Frauds, which was designed to prevent fraud, should not be used to perpetuate a fraud and that the equity of the promisee who has performed in reliance upon the oral contract requires the specific deliverance of the thing promised.[4]

Prior to the decision in the principal case Kentucky had repudiated the doctrine of part performance as taking the oral contract out of the

[1] Miller v. Miller, 335 S.W.2d 884 (Ky. 1960).

[2] *E.g.,* Pocius v. Fleck, 13 Ill. 2d 420, 150 N.E.2d 106 (1958); Griggs v. Oak, 164 Neb. 296, 82 N.W.2d 410 (1957); Gales v. Smith, 249 N.C. 263, 106 S.E.2d 164 (1958); Hill v. Luck, 201 Va. 586, 112 S.E.2d 858 (1960); 49 AM. JUR. *Statute of Frauds* § 215 (1943).

[3] Jones v. Adams, 67 Idaho 402, 182 P.2d 963 (1947); Jatcko v. Hoppe, 7 Ill. 2d 479, 131 N.E.2d 84 (1956); Betterly v. Granger, 350 Mich. 651, 87 N.W.2d 330 (1957); Randall v. Tracy Collins Trust Co., 6 Utah 2d 18, 305 P.2d 480 (1956); Patton v. Patton, 201 Va. 705, 112 S.E.2d 849 (1960). The courts have varied widely in terminology and in description of the particular acts necessary to take the oral contract out of the statute. See Parker v. Solomon, 171 Cal. App. 2d 125, 340 P.2d 353 (Dist. Ct. App. 1959) (equitable estoppel); Hurd v. Ball, 128 Ind. App. 278, 143 N.E.2d 458 (1957) (fraud). See generally Annot., 101 A.L.R. 923 (1936); Comment, 36 U. DET. L.J. 316 (1959).

[4] Monarco v. Lo Greco, 35 Cal. 2d 621, 220 P.2d 737 (1950); Anselmo v. Beardmore, 70 Idaho 392, 219 P.2d 946 (1950); Gladville v. McDole, 247 Ill. 34, 93 N.E. 86 (1910); Gossett v. Harris, 48 S.W.2d 739 (Tex. Civ. App. 1932).