



Volume 63 | Issue 1

Article 15

December 1960

Perpetuities--Interest Subject to the Rule--Equitable Interests

Herbert Shelton Sanger Jr.
West Virginia University College of Law

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Estates and Trusts Commons](#)

Recommended Citation

Herbert S. Sanger Jr., *Perpetuities--Interest Subject to the Rule--Equitable Interests*, 63 W. Va. L. Rev. (1960).
Available at: <https://researchrepository.wvu.edu/wvlr/vol63/iss1/15>

This Case Comment is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

out the intention of Congress. Judge Waterman, however in his dissenting opinion resolves the question of the meaning of the phrase "subsequent to the decree" by stating that it means any payment made after there has been adequate proof of a duty to pay arising out of a divorce decree.

Arthur Mark Recht

Perpetuities—Interests Subject to the Rule—Equitable Interests

The grantor, conveying land fronting on a highway, covenanted that in the event of the highway being relocated, additional land would be conveyed to the grantee without further cost so that the land presently conveyed would continue to front on the highway. The deed was recorded. By action of the State Road Commissioner the highway was relocated. In an action for specific performance of the covenant, the trial court granted the relief prayed for and the covenantor appealed. *Held*, upon delivery of the deed containing the covenant, the grantee therein became immediately vested with equitable rights or interests in the parcels of land to which the covenant related and that the rule against perpetuities has no application to such vested interests. The interest in or claim acquired by the grantee was held to be "conveyable," "vendable," and "alienable," within the meaning of a statute authorizing the conveyance of any interest in or claim to real estate, and hence not in violation of the rule against perpetuities. *Greco v. Meadow River Coal & Land Co.*, 113 S.E. 2d 79 (W. Va. 1960).

The significant point of this case, apparently unique in regard to its particular facts, is the presentation at the outset of the validity of a covenant to convey realty. The decision, it seems, fails to dispel the confusion that permeates the case in regard to the application of the rule against perpetuities to contracts which create "rights" or "interests" in property.

The rule against perpetuities is stated by Professor Gray 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." GRAY, THE RULE AGAINST PERPETUITIES § 201 (4th ed. 1942). If by any possibility, even a remote one, an interest might vest beyond the prescribed period, the interest is void. It is not necessary that the interest will actually vest but it is necessary to show

it will vest, if at all, within the limits prescribed by the rule. *Brookover v. Grimm*, 118 W. Va. 227, 190 S.E. 697 (1937); *Prichard v. Prichard*, 91 W. Va. 398, 113 S.E. 256 (1922).

It is well settled that the rule against perpetuities does not apply to mere contract rights. GRAY, *supra* § 329. However, it is equally well settled that whenever a contract raises an equitable right in property which the obligee can enforce by a decree for specific performance, such equitable right is subject to the rule against perpetuities. *Lewis Oyster Co. v. West*, 93 Conn. 518, 107 Atl. 138 (1919); *Natl Bank & Trust Co. v. Purcell*, 244 S.W.2d 458 (Ky. 1951); *Starcher Bros. v. Duty*, 61 W. Va. 373, 56 S.E. 527 (1907); *London & S. W. Ry. Co. v. Gomm*, 20 Ch. D. 562 (1880). In seeking to determine what amounts to an "interest," "claim," or "right," in property, it is quickly discerned that it is difficult to obtain a clear-cut definition. In the Restatement it denotes any one or all of the rights, privileges, powers or immunities a person has with respect to land. RESTATEMENT, PROPERTY § 5 (1936). However difficult it might be to define an interest in land, it is clear that the rule against perpetuities concerns itself only with remote contingent interests and has no applicability to vested interests. *Brookover v. Grimm, supra*. A contingent "interest," "estate," or "right," has been adequately defined as an "interest," "estate," or "right," which depends for its effect upon an event which may or may not happen. *Kalm v. Rockhill*, 132 N.J. Eq. 188, 28 A.2d 34 (1942).

The importance of ascertaining a precise definition of a contingent interest becomes apparent when considering the language of the court in the principal case. It is there stated that if the "interest in or claim" acquired by the grantee in the deed by virtue of the covenant was such an interest as might be "conveyed" under the particular statute, W. VA. CODE ch. 36, art. 1, § 9 (Michie, 1955), or "alienable" under *Miller v. Miller*, 127 W. Va. 140, 31 S.E.2d 844 (1944), or "vendable" under *Maudru v. Humphreys*, 83 W. Va. 307, 98 S.E. 256 (1919), then there is no prohibition against alienation and no violation of the rule against perpetuities. The decision was no doubt affected by the statute which authorizes the conveyance of any interest in or claim to real estate, but it appears likely, in view of the definition of a contingent interest in *Kalm v. Rockhill, supra*, that the court simply overlooked the fact that an equitable interest, even though alienable, may be contingent and thus subject to the rule against perpetuities.

The view that a remote, though alienable, interest violates the modern rule against perpetuities seems to have been crystallized in England in *In re Hargreaves*, 43 Ch. D. 401 (1890), a decision rendered by the chancery court of appeals. There, without citation of authority, *Avern v. Lloyd*, L.R. 5 Eq. 383 (1868), was overruled. Since that time the authorities, both in England, *In re Ashforth*, 1 Ch. 535 (1905), and America, *Starcher Bros. v. Duty*, *supra*; *Winsor v. Mills*, 157 Mass. 362, 32 N.E. 352 (1892), have been uniform in declaring that the remote, though alienable, future interest is void within the meaning of the modern rule against perpetuities. In England, remote though alienable future interests have been held void, without discussion of the alienability feature in these cases: *In re Peel's Release*, 2 Ch. 218 (1921); *In re Whiteford*, 1 Ch. 347 (1915). In the following American cases, remote though alienable future interests have been held void without discussion of the alienability feature. *Miller v. Weston*, 67 Colo. 534, 189 Pac. 610 (1920); *Moroney v. Haas*, 277 Ill. 467, 115 N.E. 648 (1917); *Quinlan v. Wickham*, 223 Ill. 39, 84 N.E. 38 (1908); *Johnson v. Preston*, 226 Ill. 447, 80 N.E. 1001 (1907); *Proprietors of Church in Brattle Square v. Grant*, 69 Mass. (3 Gray) 142 (1855).

Of course, whether the rule applies or not depends on whether the covenant gave an interest in land. If only a bare personal contract was created, it would not be obnoxious to the rule. *Keogh v. Peck*, 316 Ill. 318, 147 N.E. 266 (1925); *Windiate v. Leland*, 246 Mich. 659, 225 N.W. 620 (1929). But, it is at times extremely difficult to determine when a particular transaction gives rise to a mere contractual interest and when it creates a property interest. In fact, one transaction often may give rise to both. *South Eastern Ry. v. Associated Portland Cement Mfrs.*, 1 Ch. 12 (1910). Assuming that the covenant in the principal case did create an interest in land, the essential determination then to be made was whether the interest as created was such as to be violative of the rule against perpetuities.

In view of the definition of a contingent interest as set forth in *Kalm v. Rockhill*, *supra*, and with due deference to the learned court, the holding in the principal case that the interest created was vested, cannot be said to be satisfactory. There, ownership by the grantee depended on whether or not the state would ever relocate the highway. Until that event occurred the grantee had no vested right at all, and as the event might never have happened, the interest attempted to be created by the covenant appears to have been contingent and

never vested. The interest more aptly appears to be within the principle of *Mahoney v. Mahoney*, 98 Conn. 525, 120 Atl. 342 (1923) and *Grant v. Grant*, 187 Ga. 807, 2 S.E.2d 421 (1939), where it was stated that it is not the uncertainty of enjoyment in the future, but the uncertainty of the right of enjoyment which makes the difference between a vested and contingent interest. In the principal case the covenant was a unilateral contract upon an executed consideration to convey the land upon the indefinite contingency that the State Road Commission would relocate the highway. Until that event occurred the grantee had no right of enjoyment of the land in controversy. Nor, can it be considered of any consequence that the event actually occurred within the period of the rule against perpetuities as the law is well settled that the criterion of whether or not an interest is violative of the rule against perpetuities, is the possibility, and not the actual violation. *Prichard v. Prichard*, 91 W. Va. 398, 113 S.E. 256 (1922).

One of the earliest cases expressly passing upon the validity of a contract to purchase land was *Re Doyle's Estate* 1 Ir. R. 204 (1907). There, the proposition was advanced that an agreement for sale is not void because it does not expressly limit the time within which the agreement is to be carried out. The vendee is regarded as having an equitable interest, subject only to the condition that the price be paid, which must be done within a reasonable time, and that would be less than twenty-one years. The antithesis of *Re Doyle's Estate* may be seen in *Horticultural Dev. Co. v. Lark*, 224 Ala. 193, 139 So. 2d 229 (1932), where it was held that an agreement which gives the vendee the right to call for a conveyance only on the fulfillment of a condition which may be too remote, is unenforceable in equity.

The confusion that seems to pervade a rational rule in regard to the application of the rule against perpetuities to contractual interests is further exemplified in *Hill v. State Box Co.*, 114 Cal App. 2d 44, 249 P.2d 903 (1952), where it was held that one who becomes the vendee of a land purchase contract thereby acquires a vested equitable interest, and in the absence of specification of a date of performance, the parties must perform the contract within a reasonable time, with the result that no problem of the application of the rule against perpetuities is presented. The rule here declared is within the general principle of contract law calling for performance within a reasonable time when no date of performance is set. 12 AM. JUR.

Contracts § 299 (1938). In viewing the *Hill* case and the principal case together and recognizing that in the latter there was a specified date of performance, that being the happening of an uncertain event, then by analogy, it may be said that the *Hill* case would stand for the proposition that if a date for performance is specified, there is no ground to interpret the contract as calling for performance "within a reasonable time," and if the other requisites are present, the rule against perpetuities should be applicable.

The conclusion in the principal case that the covenant was not within the rule against perpetuities can be justified if the covenant can be construed as extending only to the immediate grantee. However, from the record of the case it seems clear that as the interest was "conveyable," "vendable," and "alienable," the heirs and assigns of the parties were bound. If the covenant was personal as between the parties then the rule against perpetuities would clearly be inapplicable but as the point is thus presented this contention would hardly be tenable.

Perhaps when the question is again presented to the court, it will once more declare the contract valid as not being obnoxious to the rule. But, it seems that to have a right to have specific performance of a contract to convey an interest in land on the happening of an uncertain event, is to have a property interest in the land, which is remote and thus subject to the rule against perpetuities, and if such contract is to be upheld as not being obnoxious to the rule, it must be upheld on such a basis as previously suggested and not on the ground that the interest created is "conveyable," "vendable," and "alienable," and hence not in violation of the rule against perpetuities.

Herbert Shelton Sanger, Jr.

Torts—Prenatal Injuries—Child's Right to Recover

As a result of an automobile collision, a passenger in vehicle *A* gave birth prematurely to a child, who lived only four hours. The child's representative brought actions against the driver of vehicle *B* to recover damages for pain and agony suffered by the child, who was assumed to be viable, and for her allegedly wrongful death. *Held*, affirmed. A foetus which has reached that period of prenatal maturity where it is capable of independent life apart from its mother is a person. If such a child is injured, it is entitled, after its birth,