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In 1620 the Court of King's Bench held that an executory interest limited upon a freehold estate was indestructible.[1] Having recognized such an indestructible interest, the courts then decided that this principle should not be allowed to go too far toward tying-up property. Thus in 1682 in the now famous *Duke of Norfolk's Case*[2] the character of the modern rule against perpetuities as a rule which prohibited remotely contingent future interests was first clearly laid down. As stated by Professor Gray the rule is: "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."[3] How does this fundamental rule of property law affect modern versions of oil and gas leases?

Technically, the rule is applied only to the *vesting* of a future interest although many courts loosely apply the rule to such related problems as the permissible duration of private trusts and the permissible period of suspension of the absolute power of alienation. The situation is further clouded by the application of statutes in various states. The scope of this paper will be limited mainly to the application of the rule in its technical sense.

The application of the rule to oil and gas leases arises chiefly from the theory of vesting pronounced in the early case of *Venture Oil Co. v. Fretts.*[4] It was there determined that an oil and gas lessee obtained no vested interest under the lease itself until oil or gas is discovered.[5] This principle naturally led to the contention that interests vested by certain types of oil gas leases were void as violative of the rule against perpetuities.

Assuming the soundness of such theory, it appears that the following types of leases would violate the rule: (1) a lease of the "no term" type used in connection with an "unless" drilling clause,[6] and (2) a lease which uses the "unless" drilling clause in connection with a term of more than twenty-one years. In either of these cases it is possible that the vesting of the lessee's interest on the discovery of oil can be postponed for a period

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[1] Pells v. Brown, Cro. Jac. 590, 79 Eng. Rep. 504 (1620).

[2] 3 Ch. Cas. 1, 22 Eng. Rep. 931 (1682).

[3] Gray, RULE AGAINST PERPETUITIES (4th ed., 1942) sec. 201.

[4] 152 Pa. 451, 25 Atl. 732 (1893).

[5] The court said: "The title (in any oil lease) is inchoate, and for purposes of exploration only until oil is found. If it is not found, no estate vests in the lessee, and his title, whatever it is, ends when the unsuccessful search is abandoned. If oil is found, then the right to produce becomes a vested right * * *".

[6] i.e., a provision that if the lessee does not drill within a specified time, the lease is to terminate, unless the lessee pays certain sums periodically in advance to keep the lease alive.

beyond lives in being plus twenty-one years for, under such leases, the lessee may delay drilling indefinitely by the payment of a periodic rental. The lessee thus has what amounts to a perpetual option to drill or not to drill, and perpetual options are generally held to violate the rule.[7]

The validity of the "no term" lease was first questioned under the rule against perpetuities in *Wilson v. Reserve Gas Co.*,[8] where the court held that the rule was not violated by a lease for a period of five years and as much longer as either oil or gas was produced, with the further stipulation that the lessee could pay a yearly rental indefinitely in lieu of drilling. The court reasoned that there was nothing in the lease to deny the lessor an implied right to terminate the lease upon reasonable notice. This is clearly unsound and the great weight of modern authority refuses to imply a condition in a lease against delay in development in direct contravention of an express provision providing for such delay.[9]

Recent Decisions Side-Step Issue

The rule pronounced in the *Venture Oil* case [10] has, however, been generally repudiated in recent decisions, and the present tendency is to hold that immediately upon the execution of an oil and gas lease some sort of estate or interest vests in the lessee,[11] thus side-stepping the problem raised by the *Venture Oil* decision.

Another question arises in connection with leases providing for perpetual renewal. Such a covenant, in the absence of a statutory prohibition, is generally held valid on the theory that it is a part of the lessee's present interest,[12] and so there is no remote vesting.

Thus the universal provision for a primary term and as "long thereafter as either oil or gas is or can be produced from any well on said land" is no longer subject to question in most jurisdictions.[13]

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[7] Starcher Bros. v. Duty, 61 W. Va. 371, 56 S. E. 527 (1907) (action for specific performance); Eastman Marble Co. v. Vermont Marble Co., 236 Mass. 138, 128 N. E. 177 (1920) (action for damages). The effect of these cases is that neither an action for damages nor an action for specific performance may be maintained on a perpetual option. See also 162 ALR 581.

[8] 78 W. Va. 329, 88 S. E. 1075 (1916).

[9] Summers, THE LAW OF OIL AND GAS (perm. ed., 1942) sec. 397 and numerous cases cited therein.

[10] Note 4, *supra*.

[11] Rosson v. Bennett, Tex. Civ. App. 1927, 294 S. W. 660; Summers, THE LAW OF OIL AND GAS (perm. ed., 1942) sec. 171.

[12] Thaw v. Gaffney, 75 W. Va. 229, 83 S. E. 983, 3 A.L.R. 495 (1914); Becker v. Submarine Oil Co., 55 Cal. App. 698, 204 Pac. 245 (1924); 3 A.L.R. 498; 39 A.L.R. 280; 162 A.L.R. 1147; Contra: Morrison v. Rossignol, 5 Cal. 64 (1855).

[13] Weber v. Texas Co., 83 F. (2d) 807 (C.C.A., 1936), *cert. denied*, 299 U. S. 561, 57 S. St. 23, 81 L. Ed. 413, where the court said that an option given to lessee to purchase lessor's royalty rights whenever during the duration of such a lease the lessor should offer the same for sale "was within neither the purpose nor the reason for the rule" against perpetuities. However, note the contentions raised in Lloyd's Estate v. Mullen Tractor & Equipment Co., infra Note 18.

Some decisions have construed an oil and gas lease to constitute a *profit a' prendre,* and in such case the rule does not usually apply since a profit is generally a present interest in property.[14] If, however, the profit is to vest at a future date, the rule is applicable.

Several recent cases have presented various facets of the problem. In *Francis v. Superior Oil Co.*[15] the lease provided that it should remain in force for five years from the time when the lessee could legally enter and drill, and so long thereafter as oil or gas was produced on such land. At the time of the execution of the lease, a city ordinance prohibited drilling on the land in question. The court sustained the lease against the contention that it was void for remoteness and that it violated a statute prohibiting suspension of the power of alienation for more than twenty-one years. The court first held that the lessee had obtained a present interest immediately upon execution of the lease in the nature of a *profit a' prendre* and laid much stress on the fact that the parties must have contemplated removal of the restriction within a reasonable time, or, if not, a termination of the lease obligations. In fact, the restriction was lifted within a few months and the property was drilled. This latter reasoning seems tenuous in view of the clear principle that an instrument said to create a perpetuity is to be construed as of the time of its effective date, and if any possibility of remoteness exists under the facts on such date, the interest is void regardless of the intentions of the parties.[16] In this case it was very possible at the time the lease was executed that the ordinance would not be repealed within a period of twenty-one years,[17] and it appears clear from the terms of the lease that the removal of the prohibition on drilling was a condition precedent to the inception of the lessee's interest. Even though a profit is usually not within the scope of the rule, the creation of a profit to vest beyond the period of twenty-one years would come within its condemnation.

But The Rule Cannot Be Ignored

Another interesting case which, although upholding the lease in issue, indicates that the rule against perpetuities cannot be entirely ignored as far as oil and gas leases are concerned arose in Mississippi in 1941.[18] In a suit to cancel a lease, the issue in the *Venture Oil* and *Wilson* cases was again presented. The lease provided for a term of five years from the date of execution and "as much longer as oil, gas or either of them shall be produced from

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[14] Gray, RULE AGAINST PERPETUITIES (4th ed., 1942) sec. 279.

[15] 102 F. (2d) 732 (C.C.A. Okla., 1939).

[16] Miller v. Weston, 67 Colo. 534, 189 Pac. 610 (1920) where the court said: "the rule against perpetuities is no rule at all unless the condition required to satisfy it is absolutely certain to take place within lives in being plus twenty-one years."

[17] If there are no measuring lives, then the period is twenty-one years. Closset v. Burtchaell, 112 Ore. 585, 230 Pac. 554 (1924).

[18] Lloyd's Estate v. Mullen Tractor & Equipment Co., 192 Miss. 62, 4 So. (2d) 282 (1941).

said lands by the lessee in paying quantities." The lessee had the option to postpone development indefinitely by payment of annual rental and exercised such option for several years. Cancellation was denied on appeal. The court relied on the general propositions mentioned above that at all times there were persons in being who could join to convey the fee, hence no restraint upon alienation could exist, and that the rule against perpetuities was not violated since "whatever interest was acquired by the lessee * * * by virtue of the lease in question was conveyed to him to take effect *in praesenti.*" However, the fact that this case arose so recently suggests the possibility that such leases may still be open to attack in other jurisdictions.

The present use of pooling agreements in connection with scientific development programs gives rise to another possible application of the rule against perpetuities. Present-day oil and gas leases frequently contain a clause which gives to the lessee power to pool "at any time" for development purposes all or any part of the leased land with adjacent lands owned by third persons. Such leases further stipulate that payment of royalties on production from the pooled area will be made to the respective owners in proportion to acreage ownership and that production from any part of the pooled acreage will satisfy rental, drilling and *habendum* clause obligations of all leases within the pooled area. Such clauses may be attacked under the rule since they give to the lessee a virtually unlimited power to create new property interests in third persons in the land so leased at any time in the future. In the only case found in which this issue has been litigated the result was far from conclusive. The Supreme Court of Oklahoma upheld such a clause in *Imes et al. v. Globe Oil & Refining Co. et al.*[19] by construing the phrase "at any time" to mean a reasonable time on the assumption that such was the obvious intention of the parties. Therefore, the lessee's interest was not too remote. As pointed out above by reference to *Miller v. Weston,*[20] this type of reasoning is unsatisfactory since the rule against perpetuities is not one of construction, but, on the contrary, is a strict rule of law to be strictly applied. It is suggested that the holding in this case should be questioned and that the practical answer is to limit the time during which the leased land may be pooled to a period of less than twenty-one years. This would eliminate questions regarding the possible remoteness of such pooling clauses. It should be noted that a similar problem may arise in connection with clauses permitting the lessee to unitize the land.

In conclusion, it may be stated that the rule should be carefully considered in drafting leases which have the effect and purpose of postponing development for an indefinite period or of giving the lessee power to place the land in a pool or unit at any time in the indefinite future. Although many questions appear to be settled, the applicability of the rule to oil and gas interests has not been raised in a number of important oil producing states, and the possibility of vexatious litigation still remains.

[19] 184 Okla. 79, 84 P. (2d) 1106 (1938).
[20] Note 16, *supra.*