SMU Law Review

Volume 21 | Issue 4 Article 5

1967

Perpetuities in Texas, 1950-1967

Lennart V. Larson

PERPETUITIES IN TEXAS, 1950-1967

by

*Lennart V. Larson**

AN EXAMINATION of the Rule Against Perpetuities cases in Texas in the last seventeen years[1] reveals no startling developments, but does indicate an important trend toward less strict applications.

I. SUMMARY OF THE RULE

The Texas Constitution declares that "[p]erpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed, nor shall the law of primogenitures or entailments ever be in force in this State."[2] The "perpetuities" denounced by the constitution are those made null and void by the common law Rule.[3]

An oft-quoted statement of the Rule is that a "perpetuity . . . [is] a limitation which takes the subject-matter of the perpetuity out of commerce for a period of time greater than a life or lives in being, and 21 years thereafter, plus the ordinary period of gestation."[4] Certainly, the prime reason for the Rule is to assure that alienation of full fee title of specific property should not be obstructed for longer than the indicated period because of the existence of a contingent interest. But the quoted statement needs elucidation if one is to understand how the Rule affects the many types of interests in property which are possible in the common law system.

The Rule Against Perpetuities has no operation on present, possessory interests in land or personal property. Nor does it operate on common law reversions or vested remainders. Because fees tail are prohibited by the constitutional provision quoted earlier,[5] remainders in Texas always follow upon life estates. A remainder estate may be for life or in fee simple. If the remainderman is an identified person and no condition precedent to vesting or enjoyment is stated other than the natural termination of the preceding estate, the remainder is vested. The Rule Against Perpetuities is not concerned with it.

A reversion exists where a grantor (or testator) owns a fee simple estate (or absolute interest in personal property) and creates a life estate, or succession of life estates, but does not dispose of the entire fee simple (or absolute interest). The reversion is vested in the grantor (or testator's

* B.S., J.D., University of Washington; S.J.D., University of Michigan. Professor of Law, Southern Methodist University.

[1] Larson, *Perpetuities in Texas*, 28 TEXAS L. REV. 519 (1950).

[2] TEX. CONST. art. I, § 26.

[3] Hunt v. Carroll, 157 S.W.2d 429, 436 (Tex. Civ. App. 1941), *error dismissed*, 140 Tex. 424, 168 S.W.2d 238 (1943); *see* Note, *Indestructible Trusts and the Rule Against Perpetuities*, 7 TEXAS L. REV. 434, 435 (1929).

[4] Neely v. Brogdon, 239 S.W. 192, 193 (Tex. Comm'n App. 1922), *aff'g* 214 S.W. 614 (Tex. Civ. App. 1919).

[5] Reilly v. Huff, 335 S.W.2d 275 (Tex. Civ. App. 1960) (language creating fee tail at common law construed as creating fee simple).

devisees or heirs), and the Rule does not affect it. The same is true where a reversion exists by virtue of a grant of less than a life estate. Possibilities of reverter and rights of re-entry for condition broken, reserved in fee simple conveyances, are not true reversions. But, while they are contingent in nature and may become vested estates at remote dates, they are excepted from the operation of the Rule Against Perpetuities.[6] The reason is that these interests were recognized as valid long before the Rule was developed.

Contingent remainders are, of course, subject to the Rule. A contingent remainder must become vested in right, if ever it becomes vested, within a period measured by lives in being at the time the remainder was created plus twenty-one years and any appropriate periods of gestation. The fact that the remainder may never become vested is immaterial. What is important is that if it does become vested it must do so within the period stated. The date from which the period is measured is the date when the instrument creating the remainder becomes effective. A deed is effective when delivered, a will when the testator dies.

Future estates, springing and shifting, not conforming to common law notions of remainders, came into being after the Statute of Uses (1536) and the Statute of Wills (1540). Indeed, it was these interests which moved the English courts to develop the Rule Against Perpetuities.[7] An executory limitation (springing or shifting estate) is invalid under the Rule unless it must vest in right within the same period indicated for contingent remainders. There is authority for a further requirement—that the estate must vest in possession within the stated period. But this aspect of the Rule is uncertain and is vulnerable to criticism.[8]

In the modern day, trust instruments probably give rise to more questions concerning perpetuities than do conveyances and devises of legal estates. In general, beneficial interests in trusts are subject to the same strictures of the Rule Against Perpetuities as are the corresponding legal interests. An additional restriction has developed, arising out of the possibility that a trust may last too long, even though all interests, legal and equitable, are vested. For instance, *A* may transfer property to *B* in trust to pay income to *C* forever. *B*'s legal title is vested, as is *C*'s beneficial title. Eventually, successor trustees will have to be appointed, and *C*'s beneficial title will be inherited, devised or aliened. But none of these eventualities renders *B*'s or *C*'s estates other than vested. The rule against remoteness of vesting is not violated. Nevertheless, it is thought that the Rule Against

[6] W. BURBY, REAL PROPERTY § 187 (3d ed. 1965); L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS §§ 1238, 1239 (2d ed. 1956).

[7] The Duke of Norfolk's Case, 2 Swans. 454, 36 Eng. Rep. 690, 3 Chan. Cas. 40, 22 Eng. Rep. 955 (1682).

[8] Consider these examples: (a) *A* conveys Blackacre to *C* and his heirs, effective fifty years from the date of the transaction; and (b) *A* conveys Blackacre to *B* and his heirs, but after fifty years the fee simple is to shift to *C* and his heirs. The traditional view is that *C*'s interest in either conveyance is invalid from the outset. By definition, an executory interest is not vested until it becomes possessory. R. GRAY, THE RULE AGAINST PERPETUITIES § 201 (3d ed. 1915); L. SIMES & A. SMITH, *supra* note 6, § 1236; Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638, 648 (1938). The view of the *Restatement* is that *C*'s interests should be upheld. 4 RESTATEMENT OF PROPERTY §§ 370, 374 (1944).

Perpetuities includes some type of inhibition against excessive duration of a private trust.[9] Possibly the limiting period is lives in being at the time the trust was created plus twenty-one years and appropriate periods of gestation. Or possibly all interests must become vested within the stated period, and thereafter the trust may continue for an added "reasonable" period.

II. Charitable and Honorary Trusts

A charitable trust may have indefinite duration. In *Rissman v. Lanning*[10] devises of property to the State Board of Control to use the income forever in the operation of the state's orphans' homes were held to create a charitable trust. The court said that the constitutional prohibition against perpetuities did not apply. A similar result was reached in *First Church of Christ, Scientist v. Snowden*,[11] where real property was devised in perpetual trust to pay the net income to a church. While a charitable trust may last indefinitely, the vesting of the charitable gift must take place within the period of the Rule Against Perpetuities.[12]

Carr v. Jones[13] is to be contrasted with the *Rissman* case. There testatrix bequeathed the residue of her estate in trust (1) to provide for the maintenance and operation of a public garden and (2) to establish and maintain a park, garden or other memorial for her father. The first purpose was charitable, but the second was private in character. Because no restriction was imposed as to the proportion of funds to be expended for one purpose or the other, the entire trust was held to fail. The trust was treated as private, and fell because of its indefinite duration.

In *Ellis v. Andrews*[14] testatrix directed that certain funds be expended to put a concrete curb around her and her husband's grave and also to place footmarkers there. If there were sufficient funds similar expenditures were to be made on her parents' grave. "Any funds remaining on hand after the above named expenditures to be made shall be used by my said executor in the maintenance and upkeep of the cemetery lot of me and my deceased husband."[15] Heirs challenged the expenditure of the funds as directed, but the court could not see that property was being taken out of commerce for a period greater than lives in being and twenty-one years. The will "clothed the executor with discretionary power as to a reasonable time to perform the work required and how to keep the grave."[16] An earlier case[17] was distinguished in that there money was to be deposited in a bank and the interest was to be used in perpetuity for the maintenance

[9] 4 Restatement of Property §§ 378, 381 (1944); 1 A. Scott, Trusts § 62.10 (2d ed. 1939); L. Simes & A. Smith, *supra* note 6, § 1217.

[10] 276 S.W.2d 356 (Tex. Civ. App. 1955) *error ref. n.r.e.*

[11] 276 S.W.2d 571 (Tex. Civ. App. 1955) *error ref. n.r.e.*

[12] Where gifts over to charities follow invalid gifts to private beneficiaries, all gifts fail. Atkinson v. Kettler, 383 S.W.2d 557 (1964), *aff'g* 372 S.W.2d 704 (Tex. Civ. App. 1963).

[13] 403 S.W.2d 181 (Tex. Civ. App. 1966) *error ref. n.r.e.*

[14] 324 S.W.2d 917 (Tex. Civ. App. 1954) *error ref. n.r.e.*

[15] *Id.* at 920.

[16] *Id.* at 921.

[17] McIlvain v. Hockaday, 81 S.W. 54 (Tex. Civ. App. 1904) *error ref.*

of a private monument. The *Ellis* case is an instance of an honorary trust having a limited duration.

III. Easements, Building Restrictions, Miscellaneous

In *Phillips Petroleum Co. v. Lovell*[18] Hunt granted an easement to defendant oil company to lay and remove pipelines and to run telephone and telegraph lines over his half-section of land. Defendant agreed to pay fifty cents a rod for any pipelines laid and to reimburse Hunt for damages done in exercising the easement. This grant was made in 1944 and was superseded by a more complete grant in 1956. Pipelines were laid in 1944 and 1950. In 1962 defendant installed another line. Proper tenders of payment were made before and after the installation, but were refused. Plaintiffs, suing for a successor of Hunt, were unsuccessful in their challenge of defendant's right to install the new line. The court of civil appeals held that multiple line grants had been made and that defendant oil company was vested with a perpetual "expansible easement." "We . . . hold the rights granted to construct 'each separate line so laid' conveyed a present right, a conveyance in praesenti, to lay a pipeline, or pipelines at any time or times, just as the instrument provided, and that the provision for payment in the future for the subsequent line or lines is not subject to the rule against perpetuities."[19]

Williams v. Humble Pipe Line Co.[20] is in accord with the *Lovell* case and sustained the right of a partial assignee of the original grantee to make use of an old pipeline and to install a new one. (The grant included the right to assign in whole or in part.) In both the *Lovell* and *Williams* opinions comment was made that the right to install new pipelines was not an option to acquire new servitudes. The right to install new pipelines was a part of the easement created in the original grant.

Perpetual easements are common enough and have long been known to the common law. If the easement is appurtenant, the dominant landowner has an incorporeal interest in the servient landowner's tract. The interest is vested, and no violation of the Rule Against Perpetuities occurs. The same may be said of perpetual easements in gross: the servient tract is burdened, and the owner of the easement has a present, vested right of user.

Restrictive covenants create present, vested incorporeal rights in dominant landowners and are present burdens on servient landowners. The rights attach to land, and the burdens are imposed on land. The restrictions may be perpetual or for a limited number of years. In any event, future, contingent interests are not involved, and the Rule Against Perpetuities has no operation.

State v. Reese[21] was a land condemnation proceeding in which the state appealed because the trial court had refused to allow building re-

[18] 392 S.W.2d 748 (Tex. Civ. App. 1965) *error ref. n.r.e.*
[19] *Id.* at 751.
[20] 417 S.W.2d 453 (Tex. Civ. App. 1967).
[21] 374 S.W.2d 686 (Tex. Civ. App. 1964).

strictions into evidence. Appellees asserted that the restrictions violated the Rule Against Perpetuities. The restrictions were "perpetual" but could be changed or eliminated after 1951 if seventy-five per cent of the owners of the restricted lots desired to do so. The court held that no violation of the Rule was shown and that the restrictions should have been admitted into evidence. "A restriction may be valid although unlimited in point of time."[22]

In *Cornett v. City of Houston*[23] restrictive covenants were enforced although they had twenty-five years' duration and were automatically renewed for fifteen years unless two years before the twenty-five years expired, owners of fifty per cent of the front footage of the affected land released the restrictions.

The parallel between easements and restrictive covenants seems clear. Both create present, vested nonpossessory interests, and the Rule Against Perpetuities has no operation.

Norris v. Patterson[24] was a suit by plaintiff to have an absolute deed declared a mortgage which had been paid in full. Plaintiff obtained judgment in the trial court. It appeared that the grantee in the deed took possession of the premises and promised to apply rents to the mortgage debt. On appeal, defendants contended that the lack of agreement as to how much rent would be applied to the debt made it possible that the mortgage would never be paid off. Therefore, argued defendants, the mortgage was a violation of the Rule Against Perpetuities, and the absolute deed could not be negated. The court of appeals answered: "The rule against perpetuities does not apply except where restraint of alienation is involved. Neither by statute nor common law is there any application of the rule to mortgages. There is no alienation of title involved in a mortgage and neither is there involved any restraint upon alienation of title."[25] The court went on to say that in any event, where no time of payment is specified in a mortgage, a reasonable time will be presumed and allowed. On the finding that a mortgage was intended, the presumption that the parties agreed to pay off the debt in a reasonable time seems entirely justified. Surely, the grantee did not intend to accept a permanent mortgage.

IV. Options

An option to purchase an interest in land is specifically enforceable in

[22] *Id.* at 688.

[23] 404 S.W.2d 602 (Tex. Civ. App. 1966).

[24] 261 S.W.2d 758 (Tex. Civ. App. 1953) *error ref. n.r.e.*

[25] *Id.* at 763. In Machann v. Machann, 269 S.W.2d 826 (Tex. Civ. App. 1954) *error ref. n.r.e.*, a case involving a similar point, the defense of the Rule Against Perpetuities seems to have been a grasping at straws. Plaintiff, his two sisters, his mother and defendant brother agreed to put their eighty-acre farm in the names of the two sisters and brother. The farm was to be managed and eventually sold, but in the meantime the income was to be paid to the mother. The proceeds of the sale of the farm were to be divided equally among the brothers and sisters. Deeds were executed, and later the sisters conveyed their titles to defendant brother. The mother died, and the farm was sold for $6,000. Plaintiff sued for his one-quarter share and obtained judgment. This was affirmed on appeal. Defendant set up the Rule Against Perpetuities. The court of civil appeals said the Rule had no application. "The agreement of the parties . . . in the case at bar was an agreement to sell property and divide the proceeds. There was no restraint of sale whatever for any period of time . . . ." *Id.* at 829.

equity when the conditions of the contract are met. The optionee has a type of contingent future interest in a particular tract, and the policy of the Rule Against Perpetuities extends to it. Free alienability of land would be impaired if options to purchase of indefinite duration were enforced.

Several option cases have been decided by the Texas courts in recent years. In *Mattern v. Herzog*[26] testatrix devised land to nine children equally. The will, being a joint one with her husband (who predeceased her), provided that "our son Chris Mattern shall have the right to purchase from each of the other children their interest in said real estate for the sum of $45.00 per acre, and in making such purchase from said other children our said son Chris Mattern shall be entitled to deduct from the price of $45.00 per acre such sums of money as he may have advanced to us during our lifetimes."[27] Chris had lived with his parents, had taken care of them and had advanced about $2,237 in the form of supplies and services. After his mother's death, he sought to enforce the option. Several of the children refused to sell their interests and sued to clear their titles. The Texas Supreme Court ruled that Chris had an enforceable option.

It was clear that if Chris' option was limited to his lifetime, it did not violate the Rule Against Perpetuities. The possibility existed, however, that Chris might have died soon after his mother did, and his devisees or heirs might have made a claim. The supreme court said:

> We think it can reasonably be said from the nature of the instrument, the wording employed therein and the circumstances surrounding the execution of the will, that the makers intended that the option given to Chris Mattern should be exercised within a reasonable time. We do not construe the clause as one which attempts to preserve the claim of Chris Mattern against the estate of the survivor for an indefinite time, nor as giving him, his heirs and assigns an option which would extend beyond the period of time allowed by law for the due administration of the estate of Monika Mattern and the settlement of claims against said estate.[28]

The court went on to observe that options are not usually intended to have indefinite duration. No unreasonable restraint on alienation was shown, but the court did "not wish to be understood as intimating that any option is valid if the time for the exercise thereof is within the period prescribed by the rule against perpetuities."[29] The conclusion was that the option, "limited as it is to a reasonable period of time, is not a socially undesirable device."[30]

Two justices dissented, taking a "hard" view of the operation of the Rule Against Perpetuities. The option might be exercised by Chris' heirs or devisees at a remote date, and "a 'reasonable time' may never be read into a will that by possibility would permit a future estate to vest beyond the perpetuity period. Once it is determined that by possibility the future in-

[26] 367 S.W.2d 312 (1963), *rev'g* 359 S.W.2d 86 (Tex. Civ. App. 1962).
[27] *Id.* at 313-14.
[28] *Id.* at 318.
[29] *Id.* at 319.
[30] *Id.* at 320.

terest might not vest within the perpetuity period, inquiry ceases, intention becomes unimportant, and reasonableness affords no relief."[31]

King v. Brevard[32] involved a lease for two years in which lessor agreed not to sell during the first year, "and then . . . [lessee] shall have an option at the agreed price of $65.00 per acre after that period."[33] After a year the lessee sued to enforce his option. Defendant lessor won a summary judgment in the trial court, but on appeal the case was reversed and remanded for trial. *Mattern v. Herzog* was cited by the court in rejecting defendant's argument that the Rule Against Perpetuities invalidated the option. The court stated that, when the words do not compel it, an option contract would not be construed "to run for an indefinite time and thus destroy the validity of the option provision."[34]

Hallman v. Safeway Stores, Inc.[35] is a case from the United States Court of Appeals for the Fifth Circuit in which an option for the purchase of land was enforced. The provisions for exercising the option and tendering the purchase price were definite and gave rise to no problems as to rights arising at some remote date. In passing, the court stated: "Under Texas law the test used to determine whether a contract (including an option to purchase) in which no fixed time for performance of a provision thereunder is stated, violates the law against perpetuities is one of 'reasonable time.' If no time is agreed upon by the parties a reasonable time will be implied."[36]

In *Mahan v. Brader*[37] a contract for the reassignment of an oil and gas lease was enforced. Under the contract plaintiff had assigned various leases to Belfort Oil Company, reserving royalties and options. Belfort Oil Company agreed to reassign the leasehold interest or part thereof "(c) In the event production shall be procured, but Belfort shall deem the operation of any well unprofitable, *either during the term of the lease or thereafter.*"[38] Defendant succeeded to Belfort's rights and obligations, and plaintiff sued to compel reassignment of a lease which contained one abandoned well. Plaintiff had a judgment in the trial court, and the court of civil appeals affirmed. Defendant contended that the italicized expression created a perpetuity. The court found the provision "no more than a reversionary clause as is usually found in contracts pertaining to oil and gas leases between landowners and oil men, as well as between assignees and assignors of oil and gas leases."[39] The phrase "or thereafter," which might have caused difficulty, was held to be surplusage.

The court was probably correct in regarding the right to reassignment

[31] *Id.* at 321.
[32] 378 S.W.2d 681 (Tex. Civ. App. 1964) *error ref. n.r.e.*
[33] *Id.* at 683.
[34] *Id.* at 686. In Trustees of Casa View Assembly of God Church v. Williams, 414 S.W.2d 697 (Tex. Civ. App. 1967), an alleged option to repurchase a one-acre tract was held too indefinite for enforcement. The court stated that if the proof had been more certain, the Rule Against Perpetuities would not have been violated because the duration of the option was limited to the life of the optionor. A construction would be chosen which upheld the option.
[35] 368 F.2d 400 (5th Cir. 1966).
[36] *Id.* at 404.
[37] 242 S.W.2d 941 (Tex. Civ. App. 1951).
[38] *Id.* at 945.
[39] *Id.*

as a type of reversionary right. The right was the same as if the assignment of the lease had been made on a condition subsequent or on a special limitation. Rights of re-entry and possibilities of reverter can be engrafted on grants of fees simple, and the same would seem to be true of grants of lesser estates. The purpose of the reassignment clause was to allow the plaintiff the opportunity to preserve his investment by taking over the lease and making it productive.

An option agreement concerning oil interests to be acquired in the future within a certain area was the subject of litigation in *Courseview, Inc. v. Phillips Petroleum Co.*[40] Under the contract plaintiff's assignors agreed to sell at cost to defendant oil companies a three-quarter interest in any royalty, mineral interest or fee title purchased in the "Chocolate Bayou Prospect Area," and defendants agreed likewise to sell to plaintiff's assignors a one-quarter interest in any interests purchased. Plaintiff sued for specific performance of the agreement and an accounting. A verdict was instructed for defendants in the trial court, but the case was reversed and remanded for trial on appeal. The court of civil appeals did not consider that the Rule Against Perpetuities was breached, even though the obligations under the contract had indefinite duration. "Paragraph 7, of the 1939 contract, upon its face, appears to create no rights in any real property at all, but simply gives to the grantee therein a property right, contingent upon the purchase of royalties, mineral interests, or fee titles, in the Chocolate Bayou area in Brazoria County."[41]

The Rule Against Perpetuities is viewed as striking down future interests created by a person in property which he owns at the time. It is not viewed as inhibiting contractual undertakings having to do with property to be acquired in the future, particularly where performance under the contract is due promptly after the property is acquired. In the instant case the agreement had no effect on alienability of property in the Chocolate Bayou Prospect Area not owned by either party. If either party acquired an interest within the area, the effect of the agreement was to give the other party a right to a fractional part on payment of its cost. Presumably the right would have to be exercised within a reasonable time. The court's conclusion that the Rule Against Perpetuities did not invalidate the agreement seems sound.

V. Future Estates

The Rule Against Perpetuities was developed primarily in cases where grantors and testators created successive estates in real and personal property. These cases still constitute the main source for litigation under the Rule. While most of the cases present familiar situations, difficult problems are frequently encountered.

It is clear that a disposition of property to a grantee for life and then to his heirs "from person to person through successive generations in

[40] 258 S.W.2d 391 (Tex. Civ. App. 1953) *error ref. n.r.e.*
[41] *Id.* at 393.

regular succession" would violate the Rule Against Perpetuities.[42] The remainders after the life estate are contingent because their successive takers are not identified, and the possibility (not to mention the great likelihood) exists that vesting will take place after the period allowed by the Rule. To go to the other extreme, it is clear that an estate is valid if it vests during or at the termination of a life in being when the instrument creating the estate took effect,[43] or within twenty-one years after the instrument took effect.[44]

In *Zahn v. National Bank of Commerce*[45] testatrix directed that a 652-acre tract of land not be sold for two years after her death. "If at end of that time no oil or minerals have been found thereon, same is to be sold to the best advantage without oil and mineral rights—said oil and mineral rights to be put in trust with the . . . Bank . . . for the following named persons, who are my cousins, their heirs and assigns forever . . . ."[46] The will went on to direct that the "proceeds from the sale of said land shall be equally divided between those who are alive at my death share and share alike as follows . . . [cousins listed]."[47] Executor Bank sued for construction of the will and a declaratory judgment. The court of civil appeals held that title to the land passed to the Bank at testatrix' death. No express disposition was made if oil or minerals were found within two years, and in this event testatrix' heirs were entitled to the land absolutely. The cousins named were beneficiaries only if oil or minerals were not found in the two-year period. In this event the surface rights were to be sold and the proceeds divided among the cousins. The oil and mineral rights were to be retained by the Bank as trustee for the cousins.

The court then dealt with the question of the duration of the trust of the oil and mineral rights. Stating that a construction should be adopted

[42] *See* Gardner v. Dillard, 258 S.W.2d 93, 95 (Tex. Civ. App. 1953) *error ref. See also* Reilly v. Huff, 335 S.W.2d 275 (Tex. Civ. App. 1960).

[43] Donald v. Troxell, 346 S.W.2d 398 (Tex. Civ. App. 1961) *error ref. n.r.e.* (Testatrix devised property to her daughter for her life "with remainder at her death to any child or children of her body or their descendants, and if there be none, then such remainder to go . . . [to testatrix' ten brothers and sisters]." *Id.* at 399.); First Church of Christ, Scientist v. Snowden, 276 S.W.2d 571 (Tex. Civ. App. 1955) *error ref. n.r.e.* (see text accompanying note 11 *supra*); Roberts v. Chisum, 238 S.W.2d 822 (Tex. Civ. App. 1951) (Testator devised land to his granddaughter, "provided that at the death of the . . . [granddaughter], if she leave no heirs, said land . . . shall become the property of the William A. Chisum heirs." *Id.* at 823. The court held that the granddaughter had a fee simple subject to defeasance if she died without surviving descendants. The Chisum heirs had a future estate, a contingent, shifting fee. The court said, "In any event, the title will finally and absolutely vest either in the 'heirs' of Mrs. Roberts or the heirs of William A. Chisum, not later than the termination of lives in being, at the creation of such estate, that is, the lives of Mrs. Roberts and William A. Chisum." *Id.* at 825. Query, whether the granddaughter could not convey her defeasible fee, which would become absolute if she died with descendants surviving.).

[44] Singer v. Singer, 150 Tex. 115, 237 S.W.2d 600 (1951). Testator devised all his property in trust, and his executors had discretion to keep the property intact for ten years. Monthly income was to be paid to each of six children. If a child died with surviving descendants, his portion of the estate, and any portion distributed to him of which he was still possessed, passed to his descendants. If he died without surviving descendants, his portion, and any portion of which he was still possessed within twenty-one years of testator's death, passed to the other children and their descendants. After ten years, distribution was to be made of the estate. "Such division and distribution shall be made within such time as the Executors shall deem within good business judgment." *Id.* at 604. The assumption of the court was that the sale, partition and distribution of the estate would occur well within the period of the Rule Against Perpetuities.

[45] 328 S.W.2d 783 (Tex. Civ. App. 1959) *error ref. n.r.e.*

[46] *Id.* at 786.

[47] *Id.*

that would uphold the trust rather than invalidate it, the court held that the trust lasted no longer than the lives of the cousins. The phrase "and assigns" was regarded as indicating that the cousins could transfer their interests, and the word "forever" was not regarded as creating gifts to successive generations. Finally, the court held that the trust was "dry or passive" and that the cousins could terminate the trust and insist on conveyance of their fractional interests in the oil and minerals. In sum, all interests were held to vest in right and possession within a two-year period, and the trust was indestructible for this period only.

The question of indefinite duration of a trust was less satisfactorily handled in *Kelly v. Womack*.[48] A 400-acre tract of land was conveyed in trust by deeds in 1919 and 1930. Some twenty-three beneficiaries (relatives of the grantors) were named, with different fractional interests. Through the years the land was listed for sale and rentals were collected. Net income was divided among the beneficiaries. Eventually the trustees sold the land to plaintiff, who sued the beneficiaries or their descendants to clear the title. The district court and court of appeals held that the trust was invalid under the Rule Against Perpetuities. The supreme court reversed, however, and the trust was upheld, along with plaintiff's deed.

The court stated that it was immaterial that possession and enjoyment were postponed, so long as the beneficiaries' interests were vested in a proper time. Here the beneficiaries were vested in right when the conveyances in trust were made. "They had the fixed right of future enjoyment upon the termination of the trust."[49] The court did "not want to be understood as holding that a perpetual trust does not violate the constitutional inhibition."[50] But the court was "of the opinion that even though no limitation of time was imposed upon the trustees, the intention of the grantor would clearly indicate, and the law would imply, that they were to be given a reasonable time in which to carry out their obligations. What that reasonable time would be would involve all the facts and circumstances."[51]

Perhaps the construction can be supported that a trust has limited duration where all beneficiaries are named, the entire equitable interest is vested in them, and nothing is said about how long the trust should last. Perhaps only positive terms prescribing excessive duration should cause the trust to fail. But the construction that a trust has "reasonable" duration leaves much uncertainty. In the *Kelly* case the question remains whether the trust was indestructible for a period of years less than twenty-one, or during the beneficiaries' lives, or for some period beyond their lives.

In *Schmidt v. Schmidt*[52] land was put in trust by a father and nine of his ten children. This was in 1938, and a son was made trustee. The term of the trust was twenty-five years, and all parties to the deed were to receive shares of the net income. On deaths of the parties, "our interests . . . shall be vested in said trustee until the expiration of the term hereof . . .

[48] 153 Tex. 371, 268 S.W.2d 903 (1954), *rev'g* 261 S.W.2d 599 (Tex. Civ. App. 1953).
[49] *Id.* at 376, 268 S.W.2d at 905.
[50] *Id.* at 377, 268 S.W.2d at 906.
[51] *Id.* at 378, 268 S.W.2d at 907.
[52] 261 S.W.2d 892 (Tex. Civ. App. 1953) *error ref.*

and the said trustee acting hereunder shall account to our heirs, executors, administrators and assigns, the same as though we were still living."[53] The father died in 1950, devising his interest in the trust to his surviving heirs. A successor trustee sued for construction of the deed of trust and will. The court of appeals, reversing the judgment below, held that the conveyance in trust and will provisions were valid.

The court declared that the trustee received legal title to the land for twenty-five years and that the beneficiaries under the trust had vested interests in the entire equitable title. The court stated that, apart from the rule of construction favoring early vesting of estates, "we feel that a careful analysis of the instrument indicates no intention on the part of grantors ever to divest themselves of the beneficial title to their property. On the other hand, the beneficial or equitable title was retained by them to be freely devised, alienated or inherited by their heirs, subject only to the trust which they created."[54] Further, "it cannot be said that an estate which is descendible, devisable or alienable is taken out of commerce within the meaning of the recognized definition of a perpetuity heretofore stated."[55]

One can readily agree that all beneficial interests were vested when the trust was created. The question still remains, can a private trust be established for a period in excess of lives in being plus twenty-one years? Would the trust have been upheld if its duration had been fifty years?

Rekdahl v. Long[56] was a will contest in which a trust of considerable complexity was considered. Testatrix devised all her property in trust, and her son was the principal life beneficiary. At testatrix' death the son had three children between the ages of twenty-eight and thirty-four. Under the will certain priorities were established in the income from the trust. First, the son was to receive $200 a month, and more if needed to maintain his customary standard of living. Second, a sister and a brother of testatrix were to receive income up to the amount of $150 a month. Third, accumulation of income above these amounts was to continue until $25,000 was had, which was to be held in reserve for the previously mentioned beneficiaries. Fourth, another accumulation was to be made until $10,000 was had, which was to be held for the benefit of testatrix' and her deceased husband's brothers and sisters. Fifth, the son was to receive the rest of the income.

Payment of income was to continue after the son died. His wife was to receive one-quarter of the income and his children and their issue by representation were to receive three-quarters. If the wife predeceased the son, all the income was to be paid to the children or their issue by right of representation. Payments to a child were to terminate when he reached thirty-five years of age, and his share was to be divided among younger children and their issue. The trust was to end when the son was dead and all children had reached the age of thirty-five. At this time all principal and

[53] *Id.* at 894.
[54] *Id.* at 898.
[55] *Id.*
[56] 417 S.W.2d 387 (1967), *aff'g* 407 S.W.2d 339 (Tex. Civ. App. 1966).

income were to be distributed among the children and their issue by right of representation.

The son sued the trustee and sought a declaration that the trust violated the Rule Against Perpetuities. The supreme court affirmed judgments below that the trust was valid. The court recognized that if the right to the corpus of the trust did not vest until plaintiff's youngest child reached thirty-five, the Rule was violated. The court explained: "This woud happen in the event Aramis [son] left a surviving child, born after the death of testatrix, and who lived to be over twenty-one years plus ten months of age and outlived any of the other children of Aramis Rekdahl or the issue of deceased children of Aramis surviving him who were living at the time of testatrix' death. This is true because under this contention the trust could not be distributed until this surviving child became thirty-five years old, and it is contended title would not vest in children or issue of deceased children of Aramis until that time."[57]

The court cited *Rust v. Rust*[58] as supporting a construction of early vesting and quoted from *Kelly v. Womack* that it "is immaterial that full possession and enjoyment of the property is postponed beyond the period of a life or lives in being and twenty-one years thereafter with the ordinary period of gestation added."[59] The court stated:

> Our holding is that the beneficial title to the trust estate vested in Aramis Rekdahl for his life, with remainder in his surviving children and the surviving issue of any child of Aramis who has predeceased him. In the event any of Aramis' children were deceased at the time of his death, the surviving issue of such deceased child took the portion to which such deceased child would have been entitled if alive at that time. Possession and enjoyment of the takers of the trust properties is postponed until distribution.[60]

The court rejected the argument that the only provision for ultimate vesting of interests in the trust property was contained in the direction to divide and distribute at the termination of the trust. The rule of construction known as the "divide and pay over rule" was said to have little vitality in modern law and to have been disapproved by Texas courts.[61]

Four justices dissented. Justice Steakley (joined by Justices Calvert and Greenhill) was of the opinion that vesting did not occur until plaintiff's youngest child reached thirty-five years of age. He argued for the application of "equitable approximation" and a reduction of the offending period to twenty-one years, a solution supported by some legal writers, courts and legislatures.[62] Justice Norvell agreed that the vesting of rights in the principal came too late but was not disposed to use "the expedient of knocking off a few years" in order to save the trust.

The only case in recent years in which important provisions of a grant

---

[57] *Id.* at 391.

[58] 147 Tex. 181, 214 S.W.2d 462 (1948).

[59] 153 Tex. 371, 375, 268 S.W.2d 903, 905 (1954). The case is discussed in text accompanying note 48 *supra.*

[60] 417 S.W.2d 387, 394 (Tex. 1967).

[61] *Id.* The court cited Crowley v. Vaughan, 347 S.W.2d 12 (Tex. Civ. App. 1961) *error ref.*

[62] 417 S.W.2d 387, 396 (Tex. 1967).

or devise were struck down because of the Rule Against Perpetuities is *Atkinson v. Kettler*.[63] Testatrix, a California resident, made a holographic will and directed that all her property, including a 3,300-acre ranch in Texas, be put in trust. A Dallas bank was named executor and trustee. Testatrix was survived by a former husband and two children (and three grandchildren). In the first part of her will (referred to as the "General Trust") testatrix directed that all the income from her estate should be divided equally among her children and her former husband. If a daughter died, her share of the income was to be divided among her children or "any other blood issue."[64] When the husband died, his share was to go to his sister, and when she died, the share was "to be divided equally between any direct blood issue heirs of mine still living."[65] Special trust provisions followed with respect to the ranch. Testatrix specified that "it must never be sold."[66] The income from the ranch was to be divided "equally between my direct blood heirs as long as there is a blood heir of mine living— . . . [my former husband and his sister] as long as they live—When the time comes that there are no blood heirs of mine from the issue of my own children—their children—I want the income from the ranch to be divided equally between any blood issue of . . . [two children of the husband's sister]."[67] When the blood issue of testatrix' daughters and of the sister-in-law ran out, the income was to go to the Salvation Army, and if it disbanded the ranch was to go to the state of Texas.

The executor sued for construction of the will and a declaratory judgment. The court of appeals was clear that where testatrix used the words, "direct blood," "heirs," "blood heirs," "issue," "blood issue," and "direct blood issue," she meant lineal descendants and not just children. The court was of the opinion that testatrix "intended to remove the ranch property from commerce as long as there was a lineal descendant of her still living."[68] Vesting of title was not certain within the period of the Rule Against Perpetuities. Accordingly, the trust of the ranch property was invalid. The sister-in-law's claim to a life estate in one-third of the ranch was rejected because the testatrix' intent would be distorted if this beneficiary were favored over the others.

The court went on to consider the "General Trust" provisions and concluded that they applied to the ranch property. Hence the two daughters and the sister-in-law (the former husband having died) were entitled to life estates in undivided thirds of the ranch. The remainder to the descendants beyond the daughters' children was void for remoteness. But there was no question that the testatrix intended that the grandchildren should have the benefit of income payments. "While it is true that there is no specific gift over of the corpus of the estate provided for by the testatrix, the law will presume that the testatrix intended the gift of the

[63] 372 S.W.2d 704 (Tex. Civ. App. 1963), *aff'd*, 383 S.W.2d 557 (1964).
[64] *Id.* at 709.
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.* at 712.

corpus to follow the gift of the income."[69] Thus the court allowed the grandchildren to take remainder interests in fee after the life estates of their mothers and the sister-in-law.

When the case came up to the Texas Supreme Court, a settlement had been reached among all parties in a California court of general jurisdiction. For this reason the case was remanded for judgment in accordance with the settlement. The court agreed with the lower court that the gifts to the Salvation Army and the state of Texas were void for remoteness. Definite indication was made, however, that the court would not have agreed that the ranch was subject to the "General Trust" provisions.[70]

VI. Conclusion

The noticeable trend in the Texas cases is the effort made to uphold future interests, whether created by will or *inter vivos* conveyance. If the language is susceptible of construction causing an interest to vest within the period of the Rule Against Perpetuities, that construction will be chosen as against one that leads to invalidation of the interest. Persons and events will be excluded from the meaning of language if the result will be to preclude possibilities that would invalidate a future interest under the Rule.

Interpretation of language with an eye open to consequences under the Rule Against Perpetuities is justified by the pre-eminent consideration of trying to carry out the grantor's or testator's intention. A close approximation to the grantor's or testator's intention is achieved, where interpretation without regard for consequences would lead to complete defeat of that intention. The Rule Against Perpetuities is not subverted by an interpretation which keeps a future interest within its bounds. The Rule still has inhibiting effect on the creation of future interests and has nullifying effect where no reasonable construction of language can save an interest.

Part and parcel of the preference for a construction upholding the creation of a future interest is the bias found in Texas cases in favor of early vesting. Holdings have been made that postponement of possession and enjoyment is immaterial under the Rule Against Perpetuities so long as the right to a future interest has become vested in a proper time.[71] To the extent that this means that common law remainders and executory limitations (springing and shifting interests) are put under the same restrictions, a sound advance has been made in the development of the Rule. No good argument can be made today for distinguishing between the two types of interests in requiring vesting in possession within the period of the Rule.

Still, the requirement of vesting in right within the period of the Rule

[69] *Id.* at 716.

[70] "The Ranch-Trust is a trust separate and distinct from the general trust. Therefore the terms and provisions of the general trust which make disposition of the income from the entire estate are not to be considered as affecting the ranch property." 383 S.W.2d 561 (Tex. 1964).

[71] Rekdahl v. Long, 417 S.W.2d 387 (Tex. 1967); Kelly v. Womack, 153 Tex. 371, 375, 268 S.W.2d 903, 905 (1954); Rust v. Rust, 147 Tex. 181, 189, 211 S.W.2d 262, 267 (1948).

does not fully solve the problem of perpetuities in trust cases. Distribution of the principal may be postponed, and the trust may be set up to last many years. Some limitation of duration is needed because separation of legal and beneficial title for long periods is an indirect restraint on alienation even though the parties to a trust have vested interests.

None of the cases discussed involved a right of re-entry for condition broken or a possibility of reverter. Note was taken that the Rule Against Perpetuities does not affect these interests. But it is high time that something be done about this immunity. Covenants restricting use are enforced only where the plaintiff owns land to which the benefit of the covenants attach. And covenants become unenforceable when circumstances change or other equitable reasons appear. The same rules should be applied to conditions or special limitations attached to grants of fees. Where the conditions or special limitations are not related to the use of land retained by the grantor, the Rule Against Perpetuities should operate. The desire of a grantor to create the possibility of a windfall for remote heirs or assignees is no justification for the restraint of alienation suffered where these interests are upheld.

The Rule Against Perpetuities is one of great complexity. Legislative modifications should be essayed only after careful study. It may be that the courts are the best institution for improving the Rule, meeting problems one at a time and weighing the policy of the Rule and the intention of the grantor or testator.