Just When We Thought We Understood the Rule Against Perpetuities [*Jason Oil Co., LLC v. Littler*, 446 P.3d 1058 (Kan. 2019).]

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I. INTRODUCTION

The rule against perpetuities ("Rule") "precludes the creation of any future interest in property which does not necessarily vest within twenty-one years after a life or lives presently in being, plus the period of gestation, where gestation is, in fact, taking place."[1] The Kansas Supreme Court employs a simple test when applying the Rule: based on the facts existing at the time an interest is granted, is it possible the interest will vest later than a life or lives in being plus twenty-one years?[2] If it is possible, the conveyance violates the Rule and the interest is invalid.[3]

A more difficult inquiry is whether an interest is of the type subject to the Rule. Generally speaking, unvested interests are subject to the Rule while vested interests are not.[4] For example, an executory interest is an unvested interest subject to the Rule.[5] Conversely, present possessory interests benefitting from current use and enjoyment are not subject to the Rule.[6] The case of *Jason Oil Co. v. Littler*[7] illustrates the difficulty in determining whether or not the Rule applies to a particular interest.[8] In *Littler*, Judge Johnson held that although the grantee's interest was a springing executory interest normally subject to the Rule, the Rule did not apply for public policy reasons.[9] The court made the correct decision. As

1. *Singer Co. v. Makad, Inc.*, 518 P.2d 493, 496 (Kan. 1973).
2. *In re* Estate of Freeman, 404 P.2d 222, 228 (Kan. 1965) ("It is a sufficient violation of the rule if an interest might possibly vest beyond the period permitted.").
3. *Id.*
4. Jason Oil Co. v. Littler, 446 P.3d 1058, 1064 (Kan. 2019). "The distinction between vested and contingent interests is of great importance as concerns the rule against perpetuities, for a true *vested* interest is never obnoxious to the rule, while a *contingent* interest not only may be, but often is." McEwen v. Enoch, 204 P.2d 736, 739 (Kan. 1949).
5. *Littler*, 446 P.3d at 1064.
6. *See id.* at 1063.
7. *Id.* at 1058.
8. *Id.* at 1059.
9. *Id.* at 1068. An executory interest is an interest that is not vested and is therefore subject to the Rule. Nelson v. Kring, 592 P.2d 438, 442 (Kan. 1979).

this Comment will discuss, applying the Rule in *Littler* would have been inequitable at best. However, the court stopped short; it is time Kansas abolishes the Rule entirely.

II. BACKGROUND

A. Jason Oil Co. v. Littler

On December 30, 1967, Frank E. Littler ("Grantor") conveyed two tracts of real estate in Rush County, Kansas to Franklin and Elaine Littler ("Littler Grantee") and Ruby and George Myers ("Myers Grantee").[10] Both conveyances contained the following language:

> EXCEPT AND SUBJECT TO: Grantor saves and excepts all oil, gas and other minerals in and under or that may be produced from said land for a period of 20 years or as long thereafter as oil and/or gas and/or other minerals may be produced therefrom and thereunder.[11]

In 2016, Jason Oil Company filed its amended petition quieting title to the two tracts—alleging that the successors to both the Littler Grantee and the Myers Grantee "own all of the oil, gas, and other minerals in and under the property."[12] The Grantor's heirs answered, claiming the Grantees' mineral interests were springing executory interests "subject to and invalidated by the Rule."[13]

The district court granted summary judgment to the Grantees.[14] The court reasoned that the Grantor's intent was clear and that a grantor's intent should be given priority over all other rules when construing conveyances.[15] Mistakenly, the district court analyzed whether the Grantor's present possessory interest—not the Grantees' future interest—violated the Rule.[16] The Grantor's heirs appealed, and their motion to transfer to the Kansas Supreme Court was granted.[17]

B. Legal Background

The Rule began as a product of the common law.[18] Kansas's adoption of the Uniform Statutory Rule Against Perpetuities ("USRAP") codified

10. *Littler*, 446 P.3d at 1060.
11. *Id.*
12. *Id.*
13. *Id.* "The term mineral interest means an interest in and to oil and gas in and under the land and constitutes present ownership of an interest in real property." Shepard v. John Hancock Mut. Life Ins. Co., 368 P.2d 19, 24 (Kan. 1962).
14. *Littler*, 446 P.3d at 1061.
15. *Id.*
16. *Id.* at 1063.
17. *Id.* at 1061.
18. Rucker v. Delay, 289 P.3d 1166, 1170 (Kan. 2012).

and somewhat modified the Rule.[19] However, the USRAP only applies to property interests created after its adoption in 1992.[20] Thus, the common law Rule applies to property interests created before 1992, such as the interest at issue in *Littler*.[21]

Essentially, the Rule was created to "prevent the practice of tying up family property for generations" and to prevent other forms of restraints on alienation.[22] The modern trend, however, "is to temper the rule if possible where its harsh application would obstruct or do violence to an intended scheme of property disposition."[23] In other words, courts have refused to apply the Rule in certain circumstances. For example, in *ConocoPhillips Co. v. Koopmann*,[24] the Texas Supreme Court cited alienability when refusing to apply the Rule to a similar interest as the interest in *Littler*.[25] In declining to apply the Rule, the court explained the purpose of the Rule, which is to prevent the taking of property out of trade or commerce for perpetual periods of time.[26] The court stated that not applying the Rule would be consistent with the purpose of the Rule and would actually facilitate the property's alienability.[27] In Kansas, however, whether or not the Rule applied to the *Littler* conveyance was an issue of first impression.[28]

III. COURT'S DECISION

The Kansas Supreme Court agreed with the Grantor's heirs' first contention that the district court erred when it analyzed whether the Grantor's interest violated the Rule.[29] The court reasoned that before the

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19. KAN. STAT. ANN. §§ 59-3401–3408 (2019); *Rucker*, 289 P.3d at 1170. The Uniform Statutory Rule Against Perpetuities ("USRAP") states: "A nonvested property interest is invalid unless: (1) When the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive; or (2) the interest either vests or terminates within 90 years after its creation." KAN. STAT. ANN. § 59-3401.

20. *Littler*, 446 P.3d at 1062 (citing KAN. STAT. ANN. § 59-3405(a)).

21. *See id.* (citing KAN. STAT. ANN. § 59-3405(a)).

22. *See id.* at 1066 (quoting Barnhart v. McKinney, 682 P.2d 112, 117 (Kan. 1984)).

> The rule against perpetuities springs from considerations of public policy. The underlying reason for and purpose of the rule is to avoid fettering real property with future interests dependent upon contingencies unduly remote which isolate the property and exclude it from commerce and development for long periods of time, thus working an indirect restraint upon alienation, which is regarded at common law as a public evil.

First Nat'l Bank & Trust Co. v. Sidwell Corp., 678 P.2d 118, 127 (Kan. 1984) (quoting Weber v. Tex. Co., 83 F.2d 807, 808 (5th Cir. 1936)).

23. *Singer Co. v. Makad, Inc.*, 518 P.2d 493, 497 (Kan. 1973).

24. 547 S.W.3d 858 (Tex. 2018).

25. ConocoPhillips Co. v. Koopmann, 547 S.W.3d 858, 869 (Tex. 2018). Texas has adopted the common law Rule providing that "no interest is valid unless it must vest, if at all, within twenty-one years after the death of some life or lives in being at the time of the conveyance." *Id.* at 867.

26. *Id.* at 869; *see supra* note 22 and accompanying text.

27. *Koopman*, 547 S.W.3d at 869.

28. Jason Oil Co. v. Littler, 446 P.3d 1058, 1061 (Kan. 2019).

29. *Id.* at 1062. "The interest was not a reversion, but rather it was a present, vested interest to which the Rule is simply inapplicable." *Id.* at 1063. "A present interest is an ownership interest in

1967 conveyances, the Grantor possessed all incidents of ownership, and after the conveyances, the Grantor continued to possess all the incidents of ownership.[30] Thus, the Grantor's interest was a present interest which remained vested even after the conveyances and was not subject to the Rule.[31]

Instead of analyzing the Grantor's present interest, the district court "should have analyzed the future interests Grantor conveyed to the Grantees."[32] These future interests purport to give the Grantees "full possession and use of the mineral interest following the expiration or termination" of the Grantor's present interest.[33] By the terms of the grant, the earliest date that the Grantees' interests could have vested was December 20, 1987, which was the expiration date of the Grantor's twenty-year term.[34] However, under the terms of the grant, the Grantor would retain possession of the minerals "as long thereafter as oil and/or gas and/or other minerals may be produced therefrom and thereunder."[35] Because it is possible that oil and gas could be produced from each tract "for more than 21 years after the death of the last of the Grantor's heirs or Grantees' heirs," the Grantees' interests violate the Rule.[36]

The problem for the Grantor's heirs, however, is that the Kansas Supreme Court, like the Texas Supreme Court in *Koopmann*, has adopted a policy of limiting the Rule's application to circumstances involving restrictions on the alienability of property.[37] In opposition, the Grantor's heirs argued that the Rule should be applied "remorselessly," without regard to alienability or the intent of the parties.[38] The Kansas Supreme Court rejected this argument, continuing its limited application of the Rule in situations where alienability is at issue.[39] And, in this case, applying the

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property that entitles the owner to possession or enjoyment of the property." RESTATEMENT (THIRD) OF PROP. § 24.1 (AM. LAW INST. 2011).

30. *Littler*, 446 P.3d at 1063.

31. *Id.* Generally, the incidents of ownership include the right to possession, use and enjoyment, legal title, alienation, and the right to sell or dispose of the property. Cent. Kan. Power Co. v. State Corp. Comm'n, 561 P.2d 779, 788 (Kan. 1977).

32. *Littler*, 446 P.3d at 1062. "A future interest is an ownership interest in property that does not currently entitle the owner to possession or enjoyment of the property. The owner's right to possession or enjoyment is postponed until some time in the future and may be contingent or vested." RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 25.1 (AM. LAW INST. 2011).

33. *Littler*, 446 P.3d at 1063.

34. *Id.*

35. *Id.* at 1060.

36. *Id.* at 1063.

37. *Id.* at 1066; ConocoPhillips Co. v. Koopman, 547 S.W.3d 858, 869 (Tex. 2018).

38. *Littler*, 446 P.3d at 1066. "The remorseless construction and the infectious invalidity rule was followed at one time by most courts recognizing the rule against perpetuities. If there was a possibility that any part of a devise might vest beyond the period permitted the entire devise was stricken down." *In re* Estate of Freeman, 404 P.2d 222, 229 (Kan. 1965). However, the Kansas Supreme Court has never followed England's remorseless construction application. *Id.* at 230.

39. *Littler*, 446 P.3d at 1066.

Rule "would result in the Grantor's heirs holding the mineral interests in the real estate in perpetuity."[40] In other words, applying the Rule would actually cause issues with alienability.[41]

In declining to apply the Rule, Judge Johnson referenced both commentary from an oil and gas treatise and the *Koopman* case in which the Texas Supreme Court refused to apply the Rule.[42] Judge Johnson was also concerned with the impact that the Rule's application would have on the oil and gas industry.[43] Amici curiae pointed out that the type of conveyance at issue in *Littler* is very common in the oil and gas industry and many property owners rely on similarly worded deeds.[44]

IV. COMMENTARY

The conveyance in *Littler* clearly violated the Rule.[45] Mineral interests are interests in real property.[46] Real property interests are subject to the Rule.[47] As the court noted, there was a possibility that oil and gas could be found under either tract and such tract would continue to produce long after the death of either the Grantor's or Grantees' heirs.[48] Further, the court agreed with the Grantor's heirs that the Grantees' interest was a springing executory interest, which is normally subject to the Rule.[49] Thus, the only possible way to avoid the inequitable result of stripping the Grantees' heirs of their interest was simply refusing to apply the Rule. While the court arrived at the correct result, the decision does not provide much guidance going forward. In *Littler*, the court had the benefit of hindsight, but if a suit is brought immediately post-conveyance, the Rule's effect on alienation will be less clear.

Instead of living in this perpetual gray area of whether or not the Rule applies, Kansas should abolish the Rule entirely. Although the Rule was

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40. *Id.*
41. *Id.*
42. *Id.* at 1067.

> [D]efeasible term interests serve a useful social purpose, whether reserved or granted. The term interest, as compared with a perpetual interest, tends to remove title complications when the land is no longer productive of oil or gas. This simplification of title promotes alienability of land, which is one purpose served by the Rule against Perpetuities. We believe, therefore, that the courts should simply exempt interests following granted or reserved defeasible term interests from the Rule, on the straightforward basis that they serve social and commercial convenience and do not offend the policy of the Rule Against Perpetuities.

2 PATRICK H. MARTIN & BRUCE M. KRAMER, WILLIAMS & MEYERS: OIL AND GAS LAW § 335 (2018).

43. *Littler*, 446 P.3d at 1067.
44. Brief of *Amicus Curiae* Eastern Kansas Oil & Gas Association (EKOGA) at 11, *Littler*, 446 P.3d 1058 (No. 118387).
45. *Id.* at 1063.
46. Kumberg v. Kumberg, 659 P.2d 823, 830 (Kan. 1993).
47. Rucker v. Delay, 289 P.3d 1166, 1169 (Kan. 2012).
48. *Littler*, 446 P.3d at 1063.
49. *Id.* at 1065.

not formally abolished in *Littler*, the Kansas legislature now has the opportunity to act and follow the lead of other states that have abolished the Rule. For example, Idaho statutorily abolished the Rule, stating there is "no rule against perpetuities applicable to real or personal property."[50] Similarly, the South Dakota legislature enacted a statute stating that the "common-law rule against perpetuities is not in force in this state."[51] Other states have taken less drastic measures at weakening the Rule's effect, such as the "wait-and-see" approach which "permits waiting for some period to determine whether" an interest vests.[52] Instead of possible events invalidating a conveyance, the wait-and-see approach is measured by actual events.[53] While not completely abolishing the Rule, the wait-and-see approach strips the Rule of some of its force. It is time Kansas decides to abolish or reform the Rule in order to provide some guidance on when an interest should be invalidated.

V. CONCLUSION

It is hard to deny that the *Littler* court made the correct decision in refusing to apply the Rule.[54] Judge Johnson's decision highlights the purpose of the Rule by limiting the Rule's application to circumstances where a particular conveyance would cause a restraint on alienation.[55] Arguably, however, the decision makes the Rule's application even more confusing. It is not clear when a conveyance causes a restriction on alienation. In *Littler*, for example, the Grantees' interests may not have vested for fifty, seventy-five, or even 100 years.[56] If allowing a future interest to have that long of life does not cause a restraint on alienation, it is hard to imagine an interest that would. This Comment proposes that the Rule has tormented law students and practitioners long enough and the best thing to do is simply abolish the Rule once and for all. Because the *Littler* court refused such drastic action, the buck has been passed to the Kansas legislature.

50. IDAHO CODE § 55-111 (2012).
51. S.D. CODIFIED LAWS § 43-5-8 (2004).
52. Felix B. Chang, *Asymmetries in the Generation and Transmission of Wealth*, 79 OHIO ST. L.J. 73, 94 (2018).
53. OHIO REV. CODE ANN. § 2131.08 (2013).
54. *Littler*, 446 P.3d at 1068.
55. *Id.*
56. *See id.* at 1063.