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. Littler7 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

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"). 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.

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." The Grantor’s heirs answered, claiming the Grantees’ mineral interests were springing executory interests “subject to and invalidated by the Rule.”

The district court granted summary judgment to the Grantees. 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. Mistakenly, the district court analyzed whether the Grantor’s present possessory interest—not the Grantees’ future interest—violated the Rule. The Grantor’s heirs appealed, and their motion to transfer to the Kansas Supreme Court was granted.

**B. Legal Background**

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

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11. *Id.*
12. *Id.*
15. *Id.*
16. *Id.* at 1063.
17. *Id.* at 1061.
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and somewhat modified the Rule. However, the USRAP only applies to property interests created after its adoption in 1992. Thus, the common law Rule applies to property interests created before 1992, such as the interest at issue in Littler.

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. 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.” In other words, courts have refused to apply the Rule in certain circumstances. For example, in ConocoPhillips Co. v. Koopmann, the Texas Supreme Court cited alienability when refusing to apply the Rule to a similar interest as the interest in Littler. 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. 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. In Kansas, however, whether or not the Rule applied to the Littler conveyance was an issue of first impression.

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. The court reasoned that before the

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)).
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.
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. Thus, the Grantor’s interest was a present interest which remained vested even after the conveyances and was not subject to the Rule.

Instead of analyzing the Grantor’s present interest, the district court “should have analyzed the future interests Grantor conveyed to the Grantees.” 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. 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. 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.” 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.

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. In opposition, the Grantor’s heirs argued that the Rule should be applied “remorselessly,” without regard to alienability or the intent of the parties. The Kansas Supreme Court rejected this argument, continuing its limited application of the Rule in situations where alienability is at issue. And, in this case, applying the
Rule “would result in the Grantor’s heirs holding the mineral interests in the real estate in perpetuity.” In other words, applying the Rule would actually cause issues with alienability.

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. Judge Johnson was also concerned with the impact that the Rule’s application would have on the oil and gas industry. 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.

IV. COMMENTARY

The conveyance in Littler clearly violated the Rule. Mineral interests are interests in real property. Real property interests are subject to the Rule. 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. 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. 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

40. Id.
41. Id.
42. Id. at 1067.
43. Id.
44. Id. at 1063.
45. Id. at 1064.
47. Littler, 446 P.3d at 1063.
48. Id. at 1065.
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.” Similar, the South Dakota legislature enacted a statute stating that the “common-law rule against perpetuities is not in force in this state.” 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. Instead of possible events invalidating a conveyance, the wait-and-see approach is measured by actual events. 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. 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. 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. 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).
53. OHIO REV. CODE ANN. § 2131.08 (2013).
54. *Littler*, 446 P.3d at 1068.
55. Id.
56. See id. at 1063.