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remedy for challenging the illegality of imprisonment. A proceeding under the act is commenced by filing a petition with the clerk of the court in which conviction took place. The petition should contain all facts, records or other evidence supporting its allegations. It should clearly state the relief desired and any previous proceedings that the petitioner has taken to secure relief from his conviction. Perhaps the most distinctive feature of the act is the wide discretion which the court may exercise in each case.<sup>24</sup> Not only would adoption of such a procedure avoid much confusion and unnecessary expense, but by examining each case in light of its peculiar circumstances, the rights of the individual will be preserved.

ANDREW W. McTHEMIA, JR.

### APPLICABILITY OF THE RULE AGAINST PERPETUITIES TO COMMERCIAL LEASES

The Rule against Perpetuities is today virtually the same rule that gradually crystallized between 1682 and 1833.<sup>1</sup> Recently, however, there has been a tendency to mitigate the full rigor of the rule in commercial transactions, a tendency that may have important implications in the law of future interests.

An example is to be found in the decision of the Court of Appeals for the District of Columbia in *Isen v. Giant Food, Inc.*,<sup>2</sup> in which the plaintiff sought specific performance or damages for an alleged breach of a contract to make a lease. The contract stipulated that Isen would purchase certain land<sup>3</sup> when it had been zoned for commercial pur-

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that the Act had disrupted the efficient procedure of criminal appeals in that convicted persons abused the orderly process of the judicial system. The Maryland act, Md. Ann. Code art. 27 §§ 645A-645J (supp. 1961), is commented on in 19 Md. L. Rev. 233 (1959). The Oregon statute is found in Ore. Rev. Stat. §§ 138.500-138.680 (1959).

Illinois and North Carolina have enacted statutes providing for post-conviction proceedings, but they are so at variance with the Uniform Act that they cannot be considered substantial adoptions thereof. Ill. Ann. Stat. ch. 38 §§ 826-832 (Smith-Hurd 1961) and N.C. Gen. Stat. §§ 15-217-15-222 (1959).

For a discussion of these and other remedies provided in the different states see Note, State Post-Conviction Remedies, 61 Colum. L. Rev. 681 (1961).

<sup>24</sup>"If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings, and any supplementary orders as to arraignment, retrial, custody, bail, discharge, correction of sentence, or other matters that may be necessary and proper." Uniform Post Conviction Procedure Act § 7.

<sup>1</sup>Morris & Leach, *The Rule Against Perpetuities* 11 (1956).

<sup>2</sup>295 F.2d 136 (D.C. Cir. 1961).

<sup>3</sup>Isen owned contracts to purchase this land from others at the time of execution of the contract to lease.

poses and that within twenty days after this acquisition the parties would execute a lease for a supermarket to be constructed by Isen on the premises. Isen acquired the land, which had been zoned for commercial purposes, but Giant Food refused to enter into the lease arrangement. The trial court granted a summary judgment in favor of Giant Food on the ground that the contract violated the rule against perpetuities.

The Court of Appeals for the District of Columbia reversed the decision of the lower court. The court recognized that the rule against perpetuities applies to the interests in land created by contracts to lease but found that the time limitation of the rule<sup>4</sup> was not violated in this case. The appellate court reached this conclusion by reading into the contract an implied term that the zoning change was to be obtained within a reasonable time. As so interpreted, the contract would lapse long before the rule against perpetuities could be violated by a failure to obtain a zoning change.

Since the real estate involved was in Virginia, the court undertook to apply the Virginia rule against perpetuities.<sup>5</sup> For the Virginia rule, the court relied on *Burruss v. Baldwin*,<sup>6</sup> in which the Virginia Supreme Court of Appeals said: "Any executory interest which by possibility, may not take effect until after lives in being and twenty-one years and ten months, is *ipso facto* and *ad initio* void."<sup>7</sup> This quotation indicates that Virginia strictly applies the common law rule against perpetuities.<sup>8</sup>

The problem faced by the court in the principal case was twofold: firstly, whether the interest created by the contract to make a lease is susceptible of application of the rule against perpetuities; and secondly, whether, if the rule is applicable, the interest sought to be created was invalidated by the rule.

In its decision that the interest created by the contract to make a lease was subject to the rule against perpetuities, the court was in accord with the weight of authority. A contract that raises an equi-

<sup>4</sup>One expression of the rule is as follows: "When no life in being forms any part of the period of suspension or postponement of the time when the estate or interest is to become vested, the limit of time under the rule against perpetuities is twenty-one years." *Murphy v. Johnston*, 190 Ga. 23, 8 S.E.2d 23, 26 (1940).

<sup>5</sup>295 F.2d at 137.

<sup>6</sup>199 Va. 883, 103 S.E.2d 249 (1958).

<sup>7</sup>Id. at 887, 103 S.E.2d at 252.

<sup>8</sup>See *Claiborne v. Wilson*, 168 Va. 469, 474, 192 S.E. 585, 586 (1937); *Skeen v. Clinchfield Coal Corp.*, 137 Va. 397, 119 S.E. 89, 90 (1923); *Griffith v. Thompson*, 28 Va. (1 Leigh) 321, 329 (1829); 1 *Minor*, *Real Property* § 811 (2d ed. 1928). But see Note, *The Rule Against Perpetuities in Virginia*, 41 Va. L. Rev. 842, 860 (1955).

table right in property, which the obligee can enforce by specific performance<sup>9</sup> is generally held to be subject to the rule against perpetuities.<sup>10</sup> But, the court's decision that the interest was not invalidated by the rule against perpetuities due to the application of the reasonable time concept implicit in all contracts appears to be a departure from the orthodox approach to this question. The orthodox approach would be to apply the property rule exclusively, *i.e.*, the strict rule against perpetuities without any consideration of the contract rules which might serve as limitations upon the applicable property rules.<sup>11</sup>

An example of the orthodox view may be found in the decision of the California District Court of Appeals in *Haggarty v. City of Oakland*,<sup>12</sup> in which a leasehold interest which, by terms of the lease, was not to vest until the completion of a building at an uncertain future time was held invalid as being in violation of the rule against perpetuities. The majority of the California court rejected the "reasonable time" approach as "unsound" and "deceptively simple."<sup>13</sup> The court stated that it creates an exception to the application of the rule against perpetuities, and exceptions, no matter how innocuous, ought not to be allowed. Contract law was rejected as a factor in determining the validity of the property interest created by the lease agreement.<sup>14</sup>

The principal case, involving a lease to commence in the future,<sup>15</sup>

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<sup>9</sup>Contracts to make a lease may be specifically enforced, *Norman Co. v. Du Pont Co.*, 12 Del. Ch. 155, 108 Atl. 743 (1920); *Louis K. Liggett Co. v. Rose*, 152 Md. 146, 136 Atl. 651 (1927); *New York Produce Exch. Safe Deposit Co. v. New York Produce Exch. Co.*, 208 App. Div. 421, 203 N.Y. Supp. 648 (1st Dep't 1924); 5 Corbin, Contracts § 1143 at 641 (1951). See also 4 Williston, Contracts § 945 at 2643 (rev. ed. 1936).

<sup>10</sup>*First Nat'l Bank & Trust Co. v. Purcell*, 244 S.W.2d 458, 461 (Ky. 1951); *Kershner v. Hurlburt*, 277 S.W.2d 619, 626 (Mo. 1955); *First Huntington Nat'l Bank v. Gideon Broh Realty Co.*, 139 W. Va. 130, 79 S.E.2d 675 (1953); *West Virginia-Pittsburgh Coal Co. v. Strong*, 129 W. Va. 832, 42 S.E.2d 46 (1947).

<sup>11</sup>Rules as to remoteness of vesting apply to land interests created by contract the same as those created by limitation. *London & So. W. Ry. v. Gomm*, 20 Ch. D. 562 (C.A. 1889). See *First Huntington Nat'l Bank v. Gideon Broh Realty Co.*, 139 W. Va. 130, 79 S.E.2d 675, 687 (1953). But see *Hill v. State Box Co.*, 114 Cal. App. 2d 44, 249 P.2d 903 (Dist. Ct. App. 1952).

<sup>12</sup>161 Cal. App. 2d 407, 326 P.2d 957 (Dist. Ct. App. 1958).

<sup>13</sup>326 P.2d at 966.

<sup>14</sup>*Ibid.*

<sup>15</sup>There have been cases, however, which have used this reasonable time approach concerning other types of interests. See, e.g., *Belfield v. Booth*, 63 Conn. 299, 27 Atl. 585 (1893); *Coit v. Comstock*, 51 Conn. 352 (1884); *Brandenburg v. Thorndike*, 139 Mass. 102, 103, 28 N.E. 575, 576 (1885).

adopts the modern approach which has been advocated by several writers<sup>16</sup> and the dissenting opinion in the *Haggarty* case.<sup>17</sup>

It has been generally held that the rule against perpetuities is a rule of law and not a rule of construction.<sup>18</sup> The *Restatement of Property*, however, says that when a conveyance is susceptible of two possible constructions, only one of which violates the rule against perpetuities, the court may choose the construction that does not violate it.<sup>19</sup> Gray similarly recognizes that a real ambiguity in the words of the parties may lead to construing the contract so as not to violate the rule.<sup>20</sup> The *Restatement* rule in this context lends support to the modern view, mitigating the harsh result reached by strict application of the orthodox view of the rule against perpetuities.

The "wait and see" doctrine<sup>21</sup> which has been urged by Professor Leach,<sup>22</sup> discredited by others,<sup>23</sup> and occasionally adopted by state legislatures,<sup>24</sup> would also support the result in the *Isen* case. Under the "wait and see" doctrine the court waits to see if the contingency will happen so that the interest will vest if the contingency occurs within the time limit prescribed by the rule against perpetuities. The interest will be upheld if it vests during the prescribed time and struck down if it does not. Under the common law rule against perpetuities the future interest is either validated or invalidated as of the time of its creation, and vesting in fact within the limits of the rule is immaterial.<sup>25</sup> The chief objection to the "wait and see" doctrine is that land may be tied up for any period within that allowed by the rule against

<sup>16</sup>Berg, Long-Term Options and Rule Against Perpetuities, 37 Calif. L. Rev. 235, 419 (1949); 47 Calif. L. Rev. 197 (1959).

<sup>17</sup>326 P.2d at 966.

<sup>18</sup>Equitable Trust Co. v. Snader, 17 Del. Ch. 203, 161 Atl. 712, 714 (1930); Burruss v. Baldwin, 199 Va. 883, 103 S.E.2d 249 (1958); Shenandoah Valley Nat'l Bank v. Taylor, 192 Va. 135, 63 S.E.2d 786 (1951); Rose v. Rose, 191 Va. 171, 60 S.E.2d 45 (1950); Brookover v. Grimm, 118 W.Va. 227, 190 S.E. 697 (1937).

<sup>19</sup>Restatement, Property § 243, comment n (1940).

<sup>20</sup>Gray, The Rule Against Perpetuities § 633 (4th ed. 1942).

<sup>21</sup>So named by Professor W. Barton Leach. Simes & Smith, Future Interests § 1230, at 127 (2d ed. 1956).

<sup>22</sup>Leach, Perpetuities Reform by Legislation, 70 L.Q. Rev. 478 (1954); Leach, Perpetuities in Perspective: Ending the Rule's Reign of Terror, 65 Harv. L. Rev. 721 (1952); Leach, Perpetuities Legislation, Massachusetts Style, 67 Harv. L. Rev. 1349 (1954).

<sup>23</sup>Schuyler, Should the Rule against Perpetuities Discard its Vest?, 56 Mich. L. Rev. 683 (1958); Simes, Is the Rule against Perpetuities Doomed? The Wait and See Doctrine, 52 Mich. L. Rev. 179 (1953); Simes & Smith, Future Interests § 1230 (2d ed. 1956).

<sup>24</sup>See, e.g., Conn. Gen. Stat. Rev. § 45-95 (1958); Mass. Gen. Laws Ch. 184A (1954); Me. Laws Ch. 244 (1955); Vt. Stat. Ann. tit. 27, §§ 502-503 (1959).

<sup>25</sup>Gray, The Rule Against Perpetuities § 214 n.1 (4th ed. 1942).

perpetuities, since there is always the possibility of a vesting as a valid interest at the last minute.<sup>26</sup> The doctrine seems to encourage arrangements restricting alienability.<sup>27</sup>

The important distinguishing feature between the "reasonable time" and the "wait and see" doctrines is that under the former the interest either vests or lapses within a reasonable time after the contract is made, which will ordinarily be long before the rule runs. It would seem that this distinction would make the reasonable time doctrine the better one of the two considering the public policy against remote vesting of future interests.

The reasonable time doctrine as applied by the court in the *Isen* case has the effect of exempting from the rule against perpetuities a large majority of contracts concerning the sale or lease of a future interest in land where the performance date is uncertain. This doctrine seems to answer the objections to the orthodox approach of applying the rule against perpetuities "remorselessly"<sup>28</sup> to any property interest susceptible to its application. Contracts in which the parties clearly intended the interest created to vest, if at all, within a reasonable time will be upheld; and unscrupulous parties who would invoke the rule's application merely to avoid an obligation imposed upon them by their contract will fail.<sup>29</sup> It is arguable, though, that the reasonable time doctrine offends the basic purpose of the rule, *i.e.*, the prevention of remote vesting of future estates in land.<sup>30</sup> Courts would be relieved of the burden placed upon them by this litigation if parties would draft such contracts so as clearly to comply with the rule against perpetuities. The rule of the *Isen* case does not encourage this.

The rule against perpetuities is admittedly an "ancient common law rule of property"<sup>31</sup> but its basic purpose to prevent remoteness of vesting of future interests in land remains valid in modern society<sup>32</sup> Any exception naturally tends to weaken the rule.<sup>33</sup> A decision which

<sup>26</sup>Simes & Smith, *Future Interests* § 1230 (2d ed. 1956).

<sup>27</sup>*Ibid.*

<sup>28</sup>*Shenandoah Valley Nat'l Bank v. Taylor*, 192 Va. 135, 142, 63 S.E.2d 786, 790 (1951); Gray, *The Rule Against Perpetuities* § 629 (4th ed. 1942).

<sup>29</sup>But see Gray, *The Rule Against Perpetuities* § 330.3 (4th ed. 1942).

<sup>30</sup>*Id.* at § 2.

<sup>31</sup>Schuyler, *Should the Rule Against Perpetuities Discard its Vest?*, 56 Mich. L. Rev. 683, 688 (1958).

<sup>32</sup>See Gray, *The Rule Against Perpetuities* § 268 (4th ed. 1942); Morris & Leach *The Rule Against Perpetuities* 17 (1956).

<sup>33</sup>*Haggarty v. City of Oakland*, 161 Cal. App. 2d 407, 326 P. 2d 957 (Dist. Ct. App. 1958).