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Property: Contingent Commencement Date of Term in Lease Violates Rule against Perpetuities

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PROPERTY: CONTINGENT COMMENCEMENT DATE OF TERM IN LEASE VIOLATES RULE AGAINST PERPETUITIES

"To hold that under modern economic conditions there is even a bare possibility that a landlord and tenant . . . would ever wait over 21 years for their lease to take effect, is unrealistic, fantastic and even absurd. After all, there has to be some common sense in the rulings of courts."

These words by Mr. Justic Bray appeared in his dissenting opinion in *Haggerty v. City of Oakland.*[1]

The plaintiff, a taxpayer in this case, sought to have a lease made by the Board of Port Commissioners of the City of Oakland declared invalid. The lease involved a portion of the Jack London Square area and required the board to have a convention and banquet building constructed on the premises. The term of the lease was to commence upon completion of the building, construction of which was to be pursued with "due diligence." The plaintiff argued that the lease was a violation of the rule against perpetuities[2] because the commencement of the term was indefinite and uncertain and therefore might occur after the prescribed period of 21 years.[3] The District Court of Appeal reversed the judgment of the lower court and agreed with the plaintiff's contention.

The court, in reaching its decision, reasoned that since construction is subject to "many possible delays" there is at least a *bare possibility* that the interest would not vest within the prescribed period.[4]

Defendant City of Oakland contended that the building was to be constructed with *due diligence,* which meant that it was to be done within a reasonable time. Twenty-one years, it alleged, could not be a "reasonable time." Therefore, if the reasonable time were exceeded, the purpose of the contracting parties would be frustrated and the lease would fail. Thus the lease would vest or fail within the allowable period. The court answered that such an argument, though ingenious and deceptively simple, was unsound. "The rule itself contains no exceptions, and the courts should not create them. . . ."[5]

From this answer it would appear that the court failed to note the implication of the defendant's argument. It was not calling for the recognition of any exception. If the lease would vest or fail within the allowable period as contended, the rule simply would not be violated.[6] The argument merits an inquiry to ascertain whether the implication can be substantiated on the facts.

The defendant's interpretation of the facts, that the lease contains an inherent limitation of a reasonable time, appears valid. Provisions similar to *due diligence* have been construed to mean performance within a "reasonable time."[7] But the defendant's contention that an unreasonable delay would result in frustration

[1] 161 Cal. App. 2d...., 326 P.2d 957 (1958).

[2] CAL. CIV. CODE § 715.2: "No interest in real or personal property shall be good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest and any period of gestation involved in the situation to which the limitation applies. . . ."

[3] If the time within which a contingency must occur is not tied to a life in being, the period allowed for vesting is 21 years from the interest's creation. See Estate of McCollum, 43 Cal. App. 2d 313, 316, 110 P.2d 721, 723 (1941).

[4] 161 Cal. App. 2d...., 326 P.2d 957, 965 (1958).

[5] *Id.* at ...., 326 P.2d at 966.

[6] SIMES & SMITH, FUTURE INTERESTS § 1231 (2d ed. 1956).

[7] 17 C.J.S. *Contracts* § 360 (1939).

thereby terminating the lease is not conclusive as frustration is to be determined on the facts of each particular case.[8] The certainty required by the rule would not be satisfied. However, if the building were not completed within 21 years surely *some* remedy would arise, the exercise of which would have the effect of destroying the contingent lease interest. In building and construction cases, where parties to a contract fail to specify a time within which work is to be done, the law fixes a reasonable time.[9] And the general rule is that if one fails to complete the work within the specified time[10] or a reasonable time[11] an option arises in the other party to rescind or sue for damages. Under appropriate conditions, perhaps even specific performance would lie whereby the interest would vest. The point carried by this discussion is that at the end of a reasonable time, there would exist in the lessee a power to cause the interest to *vest or fail.* This point raises the further question of whether such a *power* can be made a basis for voiding the rule's application.

While the question does not appear to have been answered on its facts, it has been answered upon its reasoning. Mainly, that a power held by one to *cause an interest to vest* after the lapse of a reasonable time, when such time is construed to be within 21 years, has averted the rule's application.[12]

Illustrative of the cases which so hold is *Harrison v. Kamp.*[13] A trustee was given a general power of sale of realty but a definite time for its exercise was not prescribed. The plaintiff sought to have the trust agreement declared invalid as there was no specific date for termination of the trust and that therefore the rule against perpetuities was violated. The court held that since a court of equity could compel the sale within a reasonable time,[14] which would be within 21 years, the rule did not apply. What this case says in effect is that since an interested party's rights in this type situation may be upheld by a court of equity through its power to compel a sale or effectuate a *vesting* of an interest within 21 years, the rule is not applicable.

Since the existence of a power to cause an interest to *vest* will avoid the rule, then the existence of a power to cause an interest to *fail* should likewise avoid the rule. This reasoning leaves two possibilities heretofore excluded. First, the lessee may sit on his rights. Second, there is a lack of any apparent remedy to the lessor to set aside the lease in the event that the lessee does sit on his rights.

Should the lessee sit on his rights, it is true that there would be a technical violation of the rule for it cannot then be said that the interest would be *certain to fail.* However, this possibility did not affect the result in the trustee case even though it cannot be said that the sale there would be certain to transpire. The reason why such possibility need not be controlling becomes apparent in the discussion of the next point.

The lack of any remedy in the lessor, in the event that the lessee would sit on his rights, to destroy the contingent lease interest is seemingly the greatest difficulty to overcome in considering the proposed argument. Here it would appear

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[8] Glen Falls Indem. Co. v. Perscallo, 96 Cal. App. 2d 799, 216 P.2d 567 (1950).

[9] Roughton v. Brookings Lumber & Box Co., 26 Cal. App. 752, 148 P. 539 (1915).

[10] Stephens v. Weyl-Zuckerman & Co., 33 Cal. App. 566, 165 P. 975 (1917).

[11] American Type Founders' Co. v. Packer, 130 Cal. 459, 62 P. 744 (1900).

[12] SIMES & SMITH, FUTURE INTERESTS, § 1228 (2d ed. 1956).

[13] 395 Ill. 11, 69 N.E. 2d 261 (1946).

[14] *Accord,* Estate of Pforr, 144 Cal. 121, 77 P. 825 (1904).