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## OKLAHOMA PERPETUITIES AND SUCH

By *Garrett Logan\**

### I

#### INTRODUCTION

The right to dispose of property is not absolute.

It long has been and still is the law that sound public policy requires the free transferability of property and frowns on its withdrawal from the channels of commerce. To effectuate that policy, court decisions and legislative enactments have imposed restrictions on the right of disposition.

These have to do with time periods within which estates must vest, or options must be exercised, and beyond which income of trusts may not be accumulated; the time during which the absolute power of alienation may be suspended; and some restraints on alienation are prohibited. In a broad sense, all these constitute the rule against perpetuities. In a strict sense, the rule concerns only the time within which estates must vest, sometimes referred to as the rule against remoteness of vesting.<sup>1</sup>

Invalidity may be the result of violation of the restrictions.

Perpetuities and kindred problems may lurk in any form

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<sup>1</sup> According to *Phillips v. Chambers*, 174 Okla. 407, 51 P.2d 303 (1935), followed in *Le Force v. Bullard*, 454 P.2d 297 (Okla. 1969), the rule in the broad sense includes restrictions as to (1) remoteness of vesting, (2) restraints on alienation, and (3) suspension of alienation, and (1) is the rule in the strict sense.

of property disposition, including wills, deeds, options and trusts. They often are present in dispositions to a class (such as issue, children, grandchildren, nieces and nephews) in which the individual takers are not designated by name, and a preceding estate or interest is created; or in dispositions to named persons on attaining stated ages; or in options with no limit on the time in which they may be exercised; or in trust provisions for the accumulation of income; or in instances in which the estate created is of such a nature that there are not existing persons who by joining together may convey the entire title; or in prohibitions against alienation by donee or grantee. The enumeration is not all-inclusive.

Oklahoma perpetuities law has had the attention of eminent writers.<sup>2</sup> The last comprehensive article was written in 1953.<sup>3</sup>

Decisions of the Supreme Court of Oklahoma during the last eighteen years seem to warrant a current look at Oklahoma law and to require revision of some earlier views. Among other decisions, *Melcher v. Camp*,<sup>4</sup> decided in 1967, has had a marked impact, furnishes answers to several previously unsettled questions, and well may be a landmark case.

This article discusses the law of Oklahoma concerning the rule against perpetuities in the broad sense, with these exclusions: business trusts, charitable trusts; pension, retirement

<sup>2</sup> RESTATEMENT OF PROPERTY, Div. IV, appendix following § 449, ch. B, § 66-71 (1944); *id.*, special note 3, at 2135-36 (1944); 6 AMERICAN LAW OF PROPERTY, § 25.77-81 (1952); Kuntz, *The Rule Against Perpetuities and Mineral Interests*, 8 OKLA. L. REV. 183 (1955) (discussing among other cases, *Francis v. Superior Oil Co.*, 102 F.2d 732 (10th Cir. 1939)).

<sup>3</sup> Browder, *Perpetuities in Oklahoma*, 6 OKLA. L. REV. 1 (1953). Several questions raised by Browder are answered by the later cases.

<sup>4</sup> 435 P.2d 107 (Okla. 1967).

and profit-sharing plans, and trusts for the furtherance of public functions.<sup>5</sup>

The format will consist in a statement of general rules and consideration in detail of numerous cases. References to authorities elsewhere are not encyclopedic.

## II

### THE RULE AGAINST REMOTENESS OF VESTING

#### 1. *Source and Separate Nature*

The Oklahoma Constitution declares "Perpetuities . . . are contrary to the genius of a free government and shall never be allowed . . . ."<sup>6</sup>

An Oklahoma statute provides "The common law, as modified by constitutional and statutory law, judicial decisions and the condition and wants of the people, shall remain in force in aid of the general Statutes of Oklahoma . . . ."<sup>7</sup>

<sup>5</sup> For statutory treatment of the excluded subjects, see OKLA. STAT. tit. 60, § 172 (1961) (business trusts limited to 21 years or period of life or lives in being at creation of the trust); *id.*, § 175.47 (1961) (no limit on suspension of power of alienation for charitable trusts); *id.*, § 176 et seq. (1961) (trusts for furtherance of public functions may exist for term of duration of the beneficiary); *id.*, §§ 326, 327 (1961) (pension, retirement and profit-sharing plans not construed to violate perpetuities rules or restraints on alienation); OKLA. STAT. tit. 62, § 651 et seq. (1961) (Local Industrial Development Act, public trusts authorized).

<sup>6</sup> OKLA. CONST. art. 2, § 32. This section has been a ground for decisions that perpetual franchises cannot be granted to public utilities. *See, e.g.,* City of Okmulgee v. Okmulgee Gas Co., 140 Okla. 88, 282 P. 640 (1930) (and several companion cases); *Hawks v. Hamill*, 288 U. S. 52 (1930).

<sup>7</sup> OKLA. STAT. tit. 12, § 2 (1961). Although a part of the chapter on civil procedure, this statute is effective in perpetuities situations. *Phillips v. Chambers*, 174 Okla. 407, 51 P.2d 303 (1935).

The common law rule against remoteness of vesting has always been in force in this State.

In the early case of *McLaughlin v. Yingling*,<sup>8</sup> the court said: "It seems clear that the statute, *supra*, is declaratory of the rule at common law", but no pertinent statute is cited anywhere in the opinion.

Scholars and some courts have opined that some of the 1890 statutes on real property, particularly those with reference to suspension of the power of alienation,<sup>9</sup> and a section of the Oklahoma Trust Act as to suspension of the power of alienation,<sup>10</sup> are statutes on perpetuities and made effective in Oklahoma the common law rule as to remoteness of vesting.<sup>11</sup> This at least impliedly posed the question of whether the statutes modify the rule.

*Melcher v. Camp*<sup>12</sup> requires revision of these views. It teaches that the common law rule as to remoteness of vesting is in force by virtue of statutes concerning suspension of the power of alienation; that the mention of statute in *McLaughlin* was inadvertent and was in fact a reference to the Constitution; and that rules as to suspension of the power of alienation are entirely separate from the rule against perpetuities, although associated with it.

The case was decided "upon the application of the common

<sup>8</sup> 90 Okla. 159, 213 P. 552 (1923).

<sup>9</sup> OKLA. STAT. tit. 60, § 21-43 (1961); *id.*, §§ 237, 238.

<sup>10</sup> OKLA. STAT. tit. 60, § 175.47 (1961).

<sup>11</sup> Authorities cited *supra*, notes 2 and 3; *Morgan v. Griffith Realty Co.*, 192 F.2d 597, (10th Cir.), *cert. denied*, 343 U.S. 934 (1951); *In re Walker's Estate*, 179 Okla. 442, 66 P.2d 88 (1937); *Phillips v. Chambers*, 174 Okla. 407, 51 P.2d 303 (1935). The dissenting opinion in *Malone v. Herndon*, 197 Okla. 26, 168 P.2d 272, 279-80 (1946), states the statutes supercede or modify the common law rule. *Browder, supra*, note 3 was concerned about the question.

<sup>12</sup> 435 P.2d 107 (Okla. 1967).

law rule . . . in its classical meaning." The court found that rule "extant in this State from ratification of Art. 2, Sec. 32, Oklahoma Constitution."<sup>13</sup>

All this is of more than academic interest. It definitely establishes which rule is in force. It excludes statutory modification of the rule. It means invalidity may arise out of violation of the rule against remoteness of vesting or out of violation of the rule against suspension of the power of alienation.

Later discussion will point out other clarifications of the law which emanate from the decision.

## 2. *The General Rule As To Time Periods For Vesting*

*Barnes v. Barnes*,<sup>14</sup> says:

The rule against perpetuities is usually stated as prohibiting the creation of future interests or estates which by possibility may not become vested within a life or lives then in being plus twenty-one years, together with the period of gestation when the inclusion of the latter is necessary to cover cases of posthumous birth . . . . Such rule, however, is concerned only with the remoteness of vesting of contingent future interests and not with their duration or termination . . . 'A vested interest does not necessarily include a right to the possession, and if an interest is vested it is not subject to the rule, however remote may be the time when it may come into possession.'

Other Oklahoma cases are substantially to the same effect.<sup>15</sup>

*Melcher v. Camp*,<sup>16</sup> which, as previously noted, holds the common law rule is in force in Oklahoma, states the rule in two parts, with a different time period for each part, thus:

No interest is good unless it must vest, if at all,

<sup>13</sup> *Id.* at 112.

<sup>14</sup> 280 P.2d 996, 999 (Okla. 1955).

<sup>15</sup> *E.g.*, *In re Walker's Estate*, 179 Okla. 442, 66 P.2d 88 (1937).

<sup>16</sup> 435 P.2d 107 (Okla. 1967).

not later than twenty-one years after some life in being at the creation of the interest.<sup>17</sup>

and

Apart from a resort to lives in being as the standard for measuring the period of time for the postponement of the vesting of a future estate, the only definite period permitted . . . is a term not exceeding 21 years.<sup>18</sup>

Notwithstanding the statement in the *McLaughlin* case above quoted in *Melcher*, and perhaps because of the then view that the Oklahoma rule might be based on statutes, there was doubt of existence of a period "in gross" apart from a life or lives in being situation.<sup>19</sup> *Melcher* removes that doubt. There is a period in gross.

Now, according to *Barnes*,<sup>20</sup> the period of gestation may be added to the "lives in being plus 21 years." In *Melcher*, although not mentioned in the opinion, such a period is included in a syllabus by the court, which becomes a part of Oklahoma law, although not necessary to the decision.<sup>21</sup> Its inclusion in that syllabus and in *Barnes* is in accord with usual statements of the rule.<sup>22</sup>

Furthermore, Oklahoma statutes on wills and on contracts provide that a child conceived, but not born, is deemed to be an existing person so far as may be necessary for its interest

<sup>17</sup> *Id.* at 111, quoting GRAY, THE RULE AGAINST PERPETUITIES, 191 (4th ed. 1942).

<sup>18</sup> *Id.* at 111, quoting *McLaughlin v. Yingling*, 90 Okla. 159, 170, 213 P. 552, 564 (1923).

<sup>19</sup> For example, see *Browder*, *supra* note 3, at 6; *Kuntz*, *supra* note 2, at 184.

<sup>20</sup> 280 P.2d at 999.

<sup>21</sup> *City of Altus v. Martin*, 268 P.2d 228, 234 (Okla. 1954).

<sup>22</sup> RESTATEMENT OF PROPERTY, § 374 (1944); 6 AMERICAN LAW OF PROPERTY, § 24.12-.15 (1952).

in the event of its subsequent birth, and appear to be codifications of the common law.<sup>23</sup>

The conclusion must be that the period of gestation may be tacked on to the twenty-one years after a life or lives in being.

Yet to be decided squarely is whether the rule against remoteness of vesting applies in all events to personal property. *Melcher* seems to say the rule applies to personality, "especially where there is a relationship between the personal property and some real property interest."<sup>24</sup> Some earlier cases, ruling that OKLA. STAT. tit. 60, § 175.47 (1961) was a perpetuities statute, indicate, by way of dictum, that the rule applies to personality.<sup>25</sup> In other cases, both realty and personality were involved, but there was no decision on the precise point here discussed.<sup>26</sup>

### 3. *The Duration of Trusts.*

Whether the rule against remoteness of vesting fixes the maximum term or duration of a trust, if all interests vest within the prescribed period, is an open question.

OKLA. STAT. tit. 60, § 172, limiting the duration of trusts to twenty-one years or the period of the life or lives of the beneficiary or beneficiaries in being at the creation of the trust, was enacted in 1919.<sup>27</sup> The adoption of The Oklahoma

<sup>23</sup> OKLA. STAT. tit 84, § 173 (1961); OKLA. STAT. tit. 15, § 15 (1961).

<sup>24</sup> 435 P.2d at 112.

<sup>25</sup> *Morgan v. Griffith Realty Co.*, 192 F.2d 597 (10th Cir.), *cert. denied*, 343 U.S. 934 (1951); *Greenshields v. Warren Pet. Corp.*, 248 F.2d 61 (10th Cir.), *cert. denied*, 355 U.S. 907 (1957). The statute mentions both realty and personalty, but applies only to trusts and is not a perpetuities statute (*Melcher*), so the dicta are not persuasive.

<sup>26</sup> *E.g.*, *McLaughlin v. Yingling*, 90 Okla. 159, 213 P.2d 552 (1923); *Barnes v. Barnes*, 280 P.2d 996 (Okla. 1955).

<sup>27</sup> Law of March 22, 1919, ch. 16 (1919) OKLA. SESS. LAW: 30.



Trust Act in 1941,<sup>28</sup> by implication repealed it as to personal trusts.<sup>29</sup> A 1949 amendment provides the section shall apply only to business trusts.<sup>30</sup>

Pre-1941 decisions, insofar as they are based on the statute in its original form, are to be construed accordingly. However, those decisions and the statute as first enacted govern the duration of presently existing trusts which became effective prior to enactment of The Oklahoma Trust Act.<sup>31</sup>

There is now no Oklahoma statute expressly fixing the maximum term or duration of a personal trust.<sup>32</sup>

It has been said elsewhere, but not without dissent, that a trust is not invalid under the common law rule against perpetuities merely because its duration may exceed lives in being and twenty-one years if all interests vest within that period.<sup>33</sup>

<sup>28</sup> OKLA. STAT. tit. 60, § 131 et seq.

<sup>29</sup> See *Barnes v. Barnes*, 280 P.2d 996, 1000 (Okla. 1955).

<sup>30</sup> Law of May 31, 1949, tit. 60, ch. 4 § 1 (1949) OKLA. SESS. LAWS 412.

<sup>31</sup> *Smith v. Smith*, 336 P.2d 355 (Okla. 1959); Cf. *Franklin v. Margay Oil Corp.*, 194 Okla. 519, 153 P.2d 486 (1944) (as to vested rights). See generally OKLA. STAT. tit. 60 § 175.33 (1961) (applicability of The Oklahoma Trust Act to trusts existing at the time of its enactment).

<sup>32</sup> According to *Melcher v. Camp*, 435 P.2d 107 (1967), OKLA. STAT. tit. 60, §§ 31, 34 (1961) do not apply to trusts and although § 175.47 does apply to trusts, it is not a perpetuities statute. Further, as later discussed, the fangs of 175.47 may be drawn by conferring upon the trustee a power of sale. *Pipkin v. Pipkin*, 370 P.2d 826 (Okla. 1962). Some earlier views which disagree with the textual statement did not have the benefit of *Melcher* and *Pipkin*. See RESTATEMENT OF PROPERTY, Appendix, ch. B, Sec. 71 fol. Sec. 449 (1944); 6 AMERICAN LAW OF PROPERTY, § 25.78 (1952).

<sup>33</sup> RESTATEMENT OF TRUSTS (SECOND), Appendix, Sec. 62, comment *n* at 135 (1957); I SCOTT ON TRUSTS, § 62.10 at 543 (2d ed. 1956); BOGERT, TRUSTS AND TRUSTEES, § 218 (2d ed. 1965); *McClary v. McClary*, 134 F.2d 455; (10th Cir. 1943) (Texas law applied).

Even if all interests are vested, considerations of public policy could result in a court-imposed limit on duration.<sup>34</sup> The Oklahoma Supreme Court has not dealt with the question apart from interpreting Section 172, which is no longer applicable. General statements, as in *Barnes*, that the rule against perpetuities is concerned with vesting and not with duration or termination of estates are not deemed to be decisive. The court has also observed that a perpetual trust cannot be created.<sup>35</sup>

Until The Supreme Court of Oklahoma rules on the precise point, it may be wise draftmanship to provide for termination of a trust not later than lives in being plus twenty-one years.

#### 4. Absolute Vesting Required

To satisfy the rule, estates or interests *must* vest absolutely and unconditionally within the prescribed period. A vesting which may re-open to let in those born after expiration of the period does not meet the rule's requirement.<sup>36</sup>

Further, it is not enough that the interest *may* vest within the prescribed period, if there is a possibility of a later vesting.

The rule must be applied even if there is a possibility that the estate would vest beyond the period

<sup>34</sup> Such a holding might be based on the rule against perpetuities or the broader concept of "social restrictions" which is usually keyed to the time period of the rule against perpetuities. BOGERT, TRUSTS AND TRUSTEES, § 218 at 560-64 (2d ed. 1965); 4 RESTATEMENT OF PROPERTY, Div. IV at 2119 (1944). *Smith v. Smith*, 336 P.2d 355, 363 (Okla. 1959) (Observes that a will provision for continuance of administration proceedings for a long period, such as 30 years, might be against public policy.) See also I SCOTT ON TRUSTS, § 62.10 at 544 (2d ed. 1956).

<sup>35</sup> *Smith v. Smith*, 336 P.2d 355 (Okla. 1959).

<sup>36</sup> *McLaughlin v. Yingling*, 90 Okla. 159, 213 P. 552 (1923).

prescribed by the rule; and probabilities or improbabilities of the time of such future vesting are unimportant and immaterial. If under any possible contingency which may arise the vesting of the future estate will take place beyond the life of one in being at the date of testator's death, plus twenty-one years, the attempted conveyance or disposition is void.<sup>37</sup>

Obviously, the decision as to validity is to be made as of the date of the disposition and not as of some later date. This must mean that the "wait and see" doctrine, which permits consideration of an actual vesting at or before the time of the trial or a postponement of decision until the time of vesting may be determined,<sup>38</sup> is no part of Oklahoma law.

A trustee's power of sale may create a contingency in some respects, but does not prevent absolute vesting.<sup>39</sup>

##### 5. *Lives In Being*

The Supreme Court of Oklahoma has not had occasion to explore fully the "life or lives in being" concept. Authorities elsewhere are in agreement as to general principles. Measuring lives must be indicated in the instrument, but need not be pointed out specifically. They may be designated however, and need not be those who take any interest in the property, subject to the limitation that they must be neither so numerous nor so situated that evidence of their deaths is likely to be unreasonably difficult to obtain.<sup>40</sup>

<sup>37</sup> *In re Walker's Estate*, 179 Okla. 442, 66 P.2d 88 (1937). See also *Melcher v. Camp*, 435 P.2d 107 (Okla. 1967); *Barnes v. Barnes*, 280 P.2d 996 (Okla. 1955) ("by possibility"); *McLaughlin v. Yingling*, 90 Okla. 159, 213 P. 552 (1923).

<sup>38</sup> For a more complete statement of the doctrine, see BOGERT, *TRUSTS AND TRUSTEES*, § 213 at 484-86 (2d Ed. 1965).

<sup>39</sup> *Franklin v. Margay Oil Corp.*, 194 Okla. 519, 153 P.2d 486 (1944).

<sup>40</sup> 6 *AMERICAN LAW OF PROPERTY*, § 24.13 (1952); *RESTATEMENT OF PROPERTY*, § 374, comment j (1944); 70 *C.J.S. Perpetuities* § 4 (b) at 579 (1951).

### 6. *Strict or Liberal Construction?*

According to *McLaughlin*,<sup>41</sup> the instrument is to be construed as if the rule against remoteness of vesting did not exist, "and then . . . apply the rule rigorously, in complete disregard of the wishes and intentions of the testator or grantor . . . although to do so violates the testator's intention as determined by the court." And also: "The rule against perpetuities is not a rule of construction, but a positive mandate of law, to be obeyed irrespective of the question of intention."<sup>42</sup>

*In re Street's Estate*,<sup>43</sup> the court was not impressed or persuaded by arguments as to what the testator had in mind.

Significantly, *Melcher* relies heavily on *McLaughlin*, omits mention of numerous earlier cases, and reiterates by quotation *McLaughlin's* statement that the rule against perpetuities is not a rule of construction, but a positive mandate of law, to be obeyed irrespective of the question of intention.<sup>44</sup> It refused to follow *Weber v. Texas Co.*,<sup>45</sup> which appears to have applied a liberal construction rule.<sup>46</sup>

However, these cases do not tell the whole story. As above noted, the first order of business is to construe the document as if the perpetuities rule did not exist (although often done with a weather eye on the perpetuities problem). Here, within narrow limits, liberality is permitted by the cases. Their basic premise: the cardinal rule is to ascertain and give effect to intent, if the intent does not attempt to effect what the law forbids, so a construction resulting in validity must be preferred to one resulting in invalidity.<sup>47</sup>

<sup>41</sup> 90 Okla. 159, 213 P. 552 (1923).

<sup>42</sup> *Id.* at 564. There are similar statements in *Morgan v. Griffith Realty Co.*, 192 F.2d 597, *cert. denied*, 343 U.S. 934 (1951).

<sup>43</sup> 138 Okla. 115, 280 P. 413 (1929).

<sup>44</sup> 435 P.2d at 111.

<sup>45</sup> 83 F. 2d 807 (5th Cir. 1936).

<sup>46</sup> 435 P. 2d at 115.

<sup>47</sup> This is a statutory general rule as to wills and contracts. OKLA. STAT. tit. 84, § 151, et seq. (1961), which received short shrift in *In re Street's Estate*, 138 Okla. 115, 280 P. 413 (1929); OKLA. STAT. tit. 15, § 159 (1961).

Testator created a trust to pay income to seven named beneficiaries. If any of them died without issue, the property was to be divided among the survivors at the end of twenty-five years, but if any died with issue his or her share should go to such issue at the end of twenty-five years. There was a possibility all of the seven might die within a year or so after testator died, and so the 25 year period might be more than lives in being plus twenty-one years. That contingency, said the court, never occurred to the testator, was not provided for, should it occur the trust would terminate as a matter of law, and so the will was valid. Without spelling out the reason, the court ruled that its construction rendered *McLaughlin* and other cases inapplicable.<sup>48</sup> Of this, more anon.

A different situation was presented in *Barnes v. Barnes*.<sup>49</sup> An undivided interest in testator's property was devised to Lee G. Barnes, "Lee G. Barnes share to be held in trust by Louie T. Barnes and paid to him Fifty Dollars per month until all his share is paid." The will was silent as to disposition on Lee's death. Invalidity was urged on the ground that if Lee's interest did not vest immediately there was nothing to indicate when, if ever, it would vest, and the trust must continue throughout all eternity in violation of the rule against perpetuities. Not so, said the court. If Lee died before receiving all his share of the estate, the purpose of the trust ceased and it terminated by operation of law, and in any event the trust terminated at his death. The *Cunningham* case was cited as authority. Further, the decision was that Lee's interest was vested and only the right to possession was postponed.

<sup>48</sup> *Cunningham v. Fidelity Nat. Bank*, 186 Okla. 429, 98 P.2d 57 (1940). *Munger v. Elliott*, 187 Okla. 19, 100 P.2d 876 (1940) follows this case, although the only asserted ground of invalidity was "suspension of alienation". Further, apart from the "cardinal rule", intent may be a factor in the "rule of convenience." See *In re Walker's Estate*, 179 Okla. 442, 66 P.2d 88 (1937) (discussed *infra*, subdivision 7).

<sup>49</sup> 280 P.2d 996 (1955).

In *Smith v. Smith*,<sup>50</sup> testator gave to a son and a daughter 1/6th each of the net income from his estate, with a "reverter" clause that in the event either or both died "such sixth interest to revert to the surviving member or members of my family," but if none survived, to nearest blood relations. The court observed that if the reverter clause applied to the income interest only there was no limit on the length of time during which the income interest could be separated from the right to possession, and further "if property is devised to one person, but charged with the duty of paying a fractional part of the income to another," an express trust was created, the duration of which was limited by OKLA. STAT. tit. 60, § 172 (1961).<sup>51</sup> The court found ambiguity as to whether the testator intended the reverter clause to apply to the income interest only, the result of which would be invalidity, or to the fee interest, the result of which would be validity. It resolved the ambiguity in favor of validity.

From these cases, two rules of construction may be deduced. One is strict and the other is liberal to a limited extent.

The rule against remoteness of vesting must be rigorously applied if the document shows on its face that the creator of the interest obviously envisioned and by clear language provided for an invalidating contingency or for vesting at too remote a date. Intent is disregarded. That is *McLaughlin, Street* and *Melcher*.

On the other hand, the doctrine of preferential construction in favor of validity may be applied if the instrument is silent concerning an invalidating contingency, or the possibility of vesting at too remote a date, or if there is ambiguity. Intent is recognized unless it would give effect to what the law forbids. That is *Cunningham, Barns* and *Smith*.

<sup>50</sup> 336 P.2d 355 (Okla. 1959).

<sup>51</sup> *Id* at 360-61.

*Smith v. Smith*<sup>52</sup> states the rule in a slightly different form:

Thus, if under one construction a bequest would become an illegal perpetuity while under another construction it would be valid and operative, the latter mode must be preferred. But when the language of the provisions of a will is plain and unambiguous, courts are not permitted to wrest it from its natural import in order to save it from condemnation.<sup>53</sup>

Thus the Oklahoma cases may live together in harmony. They preclude court revision of express language, such as cutting back to 21 years a period stated to be more than 21 years, in order to avoid invalidity.<sup>54</sup>

#### 7. Applications of the Rule—

##### *Time of Vesting*

A number of cases concern gifts to a class on termination of a preceding particular estate or interest, such as, for example, a life estate. Several Oklahoma wills statutes are pertinent.<sup>55</sup> It may be said generally that there is validity only

<sup>52</sup> 336 P.2d 335 (Okla. 1959).

<sup>53</sup> Id. at 361, quoting, 57 AM. JUR. WILLS, § 1126 (1948).

<sup>54</sup> See *Carter v. Berry*, 243 Miss. 356, 140 So. 2d 843, 95 A.L.R.2d 791 (1962) (especially subdivision III of the opinion, which in effect rewrites the instrument by reducing a longer period to 21 years).

<sup>55</sup> OKLA. STAT. tit. 84, §§ 170, 171, 175 (1961) provide as follows:  
Sec. 170: Words in a will referring to death or survivorship, simply, relate to the time of the testator's death, unless possession is actually postponed, when they must be referred to the time of possession.

Sec. 171: A testamentary disposition to a class includes every person answering the description at the testator's death, but when the possession is postponed to a future period, it includes also all the persons coming within the description before the time to which the possession is postponed.

Sec. 175: Testamentary dispositions, including devises

if the class closes, i. e., all its members can be ascertained, not later than 21 years after some life in being at the creation of the interest, plus the period of gestation.

The *Cunningham, Barnes, and Smith* cases are analyzed in subdivision 6, supra.

In *McLaughlin v. Yingling*,<sup>56</sup> a will provided that on termination of preceding interests and if testator's daughter died without issue, the residue should go to nieces and nephews as a class, not to take effect until the youngest arrived at age twenty-two. That was one year too many. Further, testator's father survived and there was a possibility of birth of children to him, who in turn might have children who would attain age twenty-two later than a period of lives in being plus twenty-one years. The court ruled that even if there was any vesting prior to distribution it was not absolute but defeasible, not satisfying the rule's requirement, that the interests vested absolutely only at the time for distribution, and the disposition was invalid in its entirety. Note that the class did not close within the prescribed period. There was no mention of the wills statutes above set out.

*In re Street's Estate*,<sup>57</sup> the devise was to trustee to pay income to the widow and children, on their death to grand-

and bequests to a person on attaining majority, are presumed to vest at the testator's death.

Absent postponing language, devises and bequests vest in the devisees and legatees immediately on testator's death, subject to probate court control for the purposes of administration, and may be conveyed or transferred immediately. *Ware v. Beach*, 322 P.2d 635, cert. denied, 358 U.S. 819 (1958); *Ward v. Okla. Tax Comm.*, 322 P.2d 172, 176 (1957); *Parks v. Lefeber*, 162 Okla. 265, 20 P.2d 179 (1933); Cf. *Landy v. First Nat'l. Bank*, 368 P.2d 987 (Okla. 1962); OKLA. STAT. tit. 58, § 644 (1961).

<sup>56</sup> 90 Okla. 159, 213 P. 552 (1923).

<sup>57</sup> 138 Okla. 115, 280 P. 413 (1929).



children, and when all grandchildren had died, the property was to be sold and the proceeds divided among their heirs. Among other statutes, what is now OKLA. STAT. tit. 84, § 171 (1961) was quoted. The court said, with reference to final disposition, there was a class susceptible of unborn additions. It cited statutes on suspension of the power of alienation, the duration of trusts, and as well the *McLaughlin* case. This devise seems to run head on into the prohibitions of all three. The exact ground of decision is not clear. The court finally concluded "said provision is void as offending the rule against perpetuities."<sup>58</sup> It impliedly, but necessarily, held that vesting occurred at the time for distribution.

Devises, in trust or otherwise, to one for life, remainder to the issue of the life tenant, or if there be none, remainder to issue of the life tenant's sisters, are valid. If the life tenant leaves no issue and even if his sisters survive him, the remainder vests in the sister's issue as they were at the life tenant's death. (Of course, if the life tenant left issue, the remainder vested in them at his death). Issue born to the sisters after the life tenant's death would be excluded. So held in *In re Walker's Estate*.<sup>59</sup> The court said:

This was in accordance with the spirit if not the letter of . . . [Okla. Stat. tit. 84 §§ 170, 171 (1961)] and the well established rule of law that if a contrary intention does not clearly appear, an interest will always

<sup>58</sup> *Id.* at 118, 280 P. at 415.

<sup>59</sup> 179 Okla. 442, 66 P.2d 88 (1937). In a deed from a wife to her husband to hold for the duration of their marriage and then to go to the wife's children or the children of any deceased child, the remainder vested in the children on the husband's death and there was no violation of the rule against perpetuities. *Beatty v. Miley*, 204 Okla. 634, 233 P.2d 269 (1951). There is a remark, *obiter*, in *Hein v. Hein*, 431 P.2d 316, 320 (Okla. 1967) that in the devise of a life estate to a son, remainder to his children, the remainder vests at the testator's death and not at the life tenant's death. The rule against perpetuities was not involved.

be construed to vest at the earliest possible time consistent with the testator's intention.<sup>60</sup>

At first blush, this may appear to be contrary to other expositions of the rule against remoteness of vesting. Yet, although the court did not mention it, the "rule of convenience" supports its decision. One statement of the rule is the "justification for excluding the later born . . . is that otherwise the distribution which was directed to take effect at A's death would have to be postponed, since it would be impossible to ascertain how many persons might become members of the class thereafter."<sup>61</sup> Observe, also, that on the life tenant's death possession should, as a practical matter, vest in someone. That would have to be the issue of the sisters in being at the life tenant's death. In that view, OKLA. STAT. tit. 84, §§ 170, 171 (1961) would not cause postponement of the time for closing the class. Regardless of all this, the decision is correct. All testator's children were "lives in being" and even if the remainder vested at the sisters' deaths the vesting would be not later than twenty-one years after lives in being.

*Malone v. Herndon*,<sup>62</sup> has to do with a different situation. In pertinent part, the will gave a life estate to Wayne Lee Maxwell under a trust and directed that if he died with issue the trust estate should be "paid over, delivered and conveyed to such issue living at the time of said payment, delivery or conveyance." In a terse paragraph the court held the will did not violate the rule against perpetuities and did not extend the trust after Wayne's death, but only provided who should receive it at the time of "payment, delivery and conveyance." There was a vigorous dissent.

<sup>60</sup> 179 Okla. at 448, 66 P.2d at 95.

<sup>61</sup> II SCOTT, TRUSTS, § 127.4 at 926 (2d ed. 1956). See also 5 AMERICAN LAW OF PROPERTY, § 22.41 (1952); BOGERT, TRUSTS AND TRUSTEES, § 182 at 224 (2d ed. 1965); RESTATEMENT OF PROPERTY, § 295 (1944).

<sup>62</sup> 197 Okla. 26, 168 P.2d 272 (1946).

It is arguable that between Wayne's death and the time for payment there might by death be changes in those who constituted "issue" and vesting could not occur until time for payment. By possibility, the time of payment could be after expiration of lives in being plus twenty-one years. That may be a bit far-fetched, but it could occur. Elsewhere, there is a conflict of authority as to whether a gift or trust to vest or take effect on probate of a will, or on the distribution of an estate, violates the remote vesting rule.<sup>63</sup>

The decision in *Franklin v. Margay Oil Corp.*<sup>64</sup> rests upon interpretation of OKLA. STAT. tit. 60, § 172 (1961) previously considered and § 175.47, prohibiting suspension of the absolute power of alienation for a longer period than during the life or lives of beneficiaries of the trust in being at its creation and twenty-one years thereafter. It holds valid a trust for the benefit of a widow for life, daughter for life, with remainder to the issue of the daughter. At the date of trial, the daughter had one child. The decision was that the remainder vested in that child, subject to be re-opened to let in after-born children, and that the interests vested immediately on testator's death. Of course the class would close on the daughter's death. In any event, there would be a vesting within lives in being and 21 years, so the common law rule would not be violated. It is reasonable to suppose *Franklin* may be authority in cases involving the rule against remoteness of vesting.

There is a paucity of Oklahoma authority as to the time of vesting of distributions to be made or to become effective at attained ages, whether to a class or to named individuals. *McLaughlin*, above considered, where the disposition was to a class, seems to be the only case in which the rule against

<sup>63</sup> BOGERT, TRUSTS AND TRUSTEES, § 213 at 477 (2d ed. 1965) (collects some cases going both ways, and indicates the modern view favors validity.)

<sup>64</sup> 194 Okla. 519, 153 P.2d 486 (1944).

remoteness of vesting was applied. It holds vesting occurs only at the time of distribution, that is, upon attainment of the stated age. In *Munger v. Elliott*,<sup>65</sup> there was a trust to continue until the youngest grandchild should reach the age of twenty-one years. Both parties conceded there was no vesting prior to termination of the trust. The case turned on "suspension of alienation" rather than the rule against remoteness of vesting.

Two other cases are of interest, although in neither of them was the rule against remoteness of vesting raised or considered. A conveyance in trust until the youngest of grantor's named children arrive at age 18, at which time the property should go to the surviving children, but if none, to the grantee, created an interest contingent on survivorship which did not vest until the youngest child attained age eighteen.<sup>66</sup> A testamentary trust for named persons providing that as each arrives at age thirty-five, and not before, his portion shall be transferred, but if he dies before receiving it and leaves lineal descendants the trust is to continue until they arrive at age thirty-five, creates only a contingent interest in the named beneficiaries.<sup>67</sup>

In these cases, income apparently was not payable to the beneficiaries before they reached the specified age. Had it been so payable, that might indicate vesting before the age was reached. Also, much depends on the exact language of the instrument which in some instances may constitute an absolute and immediate gift with only a postponement of enjoyment.<sup>68</sup>

<sup>65</sup> 187 Okla. 19, 100 P.2d 876 (1940).

<sup>66</sup> *O'Connor v. Arnold*, 155 Okla. 295, 9 P.2d 25 (1932).

<sup>67</sup> *Crews v. Oven*, 159 F.2d 780 (10th Cir. 1947). It is interesting to speculate on the result had the perpetuities question been presented. A life in being plus more than 21 years?

<sup>68</sup> II SCOTT, TRUSTS, § 128.8 at 958 (2d ed. 1956); RESTATEMENT OF PROPERTY, § 258, comments *a*, *c*, *f* and *h* (1944). Annot. 155 A.L.R. 698 (1945).

About all that can be said now is that such dispositions appear to vest only on attainment of the specified age, but there may be further development of Oklahoma law on the subject.

The rule against remoteness of vesting applies to the time within which options are to be exercised, with one possible exception.

A lease covenant granting an option for perpetual renewal is valid because, it is said, the covenant to renew constitutes a part of the lessee's present interest and, insofar as questions of remoteness are concerned the estate for years with right to renew is substantially a fee.<sup>69</sup> So considered, this may not be an exception to the rule.

In *Melcher v. Camp*,<sup>70</sup> an oil and gas lease was granted covering the upper 5500 feet of certain described property. A separate agreement between lessors (first parties) and lessee (second party) provided:

The parties further mutually agree that in the event first parties shall at any time have an opportunity to lease the oil, gas and other mineral rights below 5500 feet, second party is to be given a five day option of acquiring such lease himself on the same terms and conditions offered to first parties.<sup>71</sup>

Analyzing this option, the opinion declares the only connections between the lease on the upper 5500 feet and the contemplated lease below 5500 feet are that the premises are vertically contiguous and each requires use of a portion of the surface for exploration; the contemplated lease would not be a renewal of the lease on the upper 5500 feet, but would be another lease for exploration of different premises (this dis-

<sup>69</sup> *Tipton v. North*, 185 Okla. 365, 92 P.2d 364 (1939), followed in *Wallace v. Williams*, 313 P.2d 784 (Okla. 1957).

<sup>70</sup> 435 P.2d 107 (Okla. 1957).

<sup>71</sup> *Id.* at 109.

poses of *Tipton v. North*,<sup>72</sup> not mentioned in the opinion); and the option pertained to a time which might never occur. The effect of the option was to fetter first parties' right to sell a lease to whomever they might choose. Acknowledging that merely personal contracts are not subject to the rule against perpetuities, the court held that provisions for acquisition of future leases are within the rule, and that a contract for an ordinary oil and gas lease to vest in futuro creates an interest in reality sufficient to invoke it. Declaring that the common law rule against remoteness of vesting is in force in this State, the court decided the option was void as a violation of that rule. It refused to limit the decision to so-called pre-emptive options such as the one involved in this case and said "ordinary options" were included in its condemnation. And so an option without limit as to the time for its exercise is void.

*Morgan v. Griffith Realty Co.*<sup>73</sup> is cited with approval in *Melcher*. The repurchase option was exercisable if the grantee abandoned its intention to construct a theatre on the property. "And the abandonment of that intention might never take place", so the option was void as a violation of the rule against perpetuities.

*Greenshields v. Warren Petroleum Corp.*<sup>74</sup> must suffer a different fate. A contract for sale of natural gas to be produced from certain described lands included the grant of an option, unlimited as to the time for its exercise, to purchase gas to be produced from after-acquired properties. Although recognizing that this granted an interest in the after-acquired leases, the court held it did not violate the rule against perpetuities. Precedents in point were not cited. With all due respect, the Court's reasoning is faulty. The citation of Section 399, *Re-*

<sup>72</sup> 185 Okla. 365, 92 P.2d 364 (1939).

<sup>73</sup> 192 F.2d 597 (10th Cir.), *cert. denied*, 343 U.S. 934 (1951).

<sup>74</sup> 248 F.2d 61 (10th Cir. 1957), *cert. denied*, 355 U.S. 907 (1957).

*statement of Property*<sup>75</sup> seems to be inept, since the seller in the gas contract, at the time of its execution, owned no interest in the property to be subsequently acquired. And almost certainly the case cannot survive *Melcher*.

#### 8. *Consequences of Violation of the Rule.*

Transgression! What are the consequences under Oklahoma law?

Invalidity has been adjudged in just four cases—*McLaughlin*, *Street*, *Morgan*, and *Melcher*. These few cases furnish only a few answers.

A disposition is in violation of the rule against remoteness if vesting is void. The four cases agree on this.

A void codicil leaves the original will in force.<sup>76</sup>

By implication only, a void option is deleted without affecting validity of other portions of a deed or contract.<sup>77</sup>

<sup>75</sup> RESTATEMENT OF PROPERTY, § 399 (1944) provides:

When the limitation of an easement, or the attempted creation of an interest in land by covenant, is not within one of the rules stated in Secs. 370 . . . 371 . . . and 394 (option to repurchase reserved to conveyor), then the attempted interest in land is not invalid under the rule against perpetuities, even though

(a) it can continue for a period longer than the maximum period described in Sec. 374; and

(b) it can result in the acquisition of property or the payment of one or more sums of money on the occurrence of events not certain to occur within the maximum period described in Sec. 374.

<sup>76</sup> *In re Street's Estate*, 138 Okla. 115, 280 P. 413 (1929).

<sup>77</sup> *Morgan v. Griffith Realty Co.*, 192 F.2d 597 (10th Cir.), cert. denied, 343 U.S. 934 (1951), in which two documents executed substantially at the same time were considered together. In *Melcher v. Camp*, 435 P.2d 107 (Okla. 1967), the lease and option concerned separate properties. Apparently, the validity of the lease was conceded by all parties.

*McLaughlin v. Yingling*,<sup>78</sup> is not very helpful. The widow attacked the will on the grounds that paragraph 8 — a bequest to nieces and nephews, not to take effect until the youngest arrived at the age of 22 years — was void, and that the will attempted to convey away from her more than two-thirds of the estate (which was contrary to the “forced heir” statute then in force). The appeal was from a judgment in three cases which had been consolidated in the district court, two of them being appeals from the county court and the third being a case originally filed in the district court. In one of the county court cases, by both findings of fact and conclusions of law, the court declared that paragraph 8 offended the rule against perpetuities, that the elimination of that paragraph destroyed the general scheme of testator’s disposal of his estate and therefore the entire will failed.<sup>79</sup> The Oklahoma Supreme Court did not rule on this point. It said that paragraph 8 did offend the rule against perpetuities, “. . . but we think the will is absolutely void as to the surviving wife . . . in that it bequeaths more than two-thirds of his property away from the wife . . . which is prohibited by the” forced heir statute.

And that is about all of the Oklahoma law on the consequences of violating the rule against remoteness of vesting.

<sup>78</sup> 90 Okla. 159, 213 P. 552 (1923).

<sup>79</sup> The forced heir statute limits the quantum of property one spouse may will away from the other. The exact amount has been changed by amendment from time to time. The present statute is OKLA. STAT. tit. 84, § 44 (1961). If the limit is exceeded, the surviving spouse takes under the law of intestate succession, absent an election to take under the will. If no such election, will provisions for the surviving spouse are in effect deleted, but all other portions of the will remain in force unless the deletion destroys the manifest plan of the testator for disposition of his estate. Not to chase the rabbit too far, see *Bank of Commerce v. Trigg*, 138 Okla. 216, 280 P. 563 (1929); *In re Walker’s Estate*, 179 Okla. 442, 66 P.2d 88 (1937); *Long v. Drumright*, 375 P.2d 953 (Okla. 1962).



## III

TRUSTS FOR ACCUMULATIONS  
OF INCOME

It is not unusual for trusts to require or permit accumulations for various periods of time, with payment over at a later date or dates. Conceivably, the rule against perpetuities or some kindred rule might impose time limits on the accumulations.

If the analysis which follows is correct, in Oklahoma the entire subject is covered by statutes which are almost unique. What the law may be elsewhere need not be considered.

The pertinent statutes are OKLA. STAT. tit. 60, §§ 175.23E, 175.25 (1961).<sup>80</sup>

Section 175.23E authorizes a court to relieve a trustee from duties and restrictions which would otherwise be placed upon him by the Trust Act. Section 175.25 covers spendthrift trusts and related matters, including trust income. A case indirectly involving time limits for the accumulation of incomes is of substantial import as to origin and construction of these statutes.

In *First National Bank of Enid v. Clark*<sup>81</sup> the trial court ordered a trustee to pay to plaintiff accrued and accruing child support money "out of the first income hereafter to said trust estate", the debtor being De Albert Lewis. The trust authorized the trustee, in its uncontrolled discretion, to pay to Lewis, out of income and corpus, such sums as it saw fit for his benefit; at his death such discretionary payments were to be made to his sons, at whose death the trust was to terminate and any remaining estate was to be distributed to named charities. The Trustee had not allotted

<sup>80</sup> The ensuing discussion states the substance of the statutes, hence they are not here set out at length.

<sup>81</sup> 402 P.2d 248 (Okla. 1965).

any income to Lewis. The decision of the trial court was reversed because the secondary beneficiaries and remaindermen were not made parties.

The court noted that Section 175.25 is not a part of the Uniform Trust Act but was taken from a Louisiana statute<sup>82</sup> which had not been construed in that state, and that authorities from other jurisdictions and decisions under the Uniform Act were of "little assistance." It pointed out that if income was not used for Lewis' benefit, a greater sum would be available for the sons or the residuary beneficiaries. Of course, that has to do with accumulation of income. It also found that involved here was both a spendthrift trust and a discretionary trust. Finally, the court ruled that any income the trustee allotted to Lewis could be taken to satisfy the judgment, and clearly held that in a proceeding with proper parties, the court might require the trustee to make income available, referring to Section 175.23E. It is therefore apparent that in Oklahoma a trustee may be required to disgorge income rather than accumulate, even though the instrument itself gives him discretion in that regard.

Under Section 175.25 the trust may be discretionary, or it may require payment of income to the beneficiary or beneficiaries.

In a discretionary trust, the provisions of the Act apply to any sums the trustee (or other person who may exercise discretion) determines shall be paid to or for the beneficiary (Subparagraph E).

If the trust requires payment of income to the beneficiaries, all of it is subject to claims for support of a husband, wife or child of the beneficiary and necessary services or supplies furnished the beneficiary.<sup>83</sup> In other cases, income in excess of \$5,000.00 per year is subject to creditor's

<sup>82</sup> LA. REV. STAT. ANN. App., § 9 (1923).

<sup>83</sup> OKLA. STAT. tit. 60, § 175.25(A) (1) (1961).

claims and is alienable by the beneficiary,<sup>84</sup> and the aggregate of all income under all trusts is to be considered in determining the rights of creditors and assignees.<sup>85</sup> Thus no provision for accumulation of income will be effective against the claims mentioned in Section 175.25(A) (1), but except for such claims, total accumulations of \$5,000.00 annually are permitted under one or more trusts for one beneficiary, and any provision for accumulations of more than \$5,000.00 is unenforceable as to the excess.

These further conclusions as to Oklahoma law may be drawn from the cited statutes and *Clark*.<sup>86</sup>

1. The statutes declare the public policy of the State and make inapplicable common law rules and the reasoning on which they are based. It may even be said the statutes recognize the validity of criticism of such rules and reasoning.

2. In an appropriate proceeding, a court may modify or change trust provisions of the nature here considered.

3. The statutory scheme is complete. It imposes no time limits on accumulations of income and none should be implied. Court proceedings under Section 175.23E are a sufficient safety valve.

One small dragon remains.

OKLA. STAT. tit. 60 140 (1961) provides:

Where a trust is created to receive the rents and profits of real property, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum that may be necessary for the education and support of the person for whose benefit the trust is created, is liable to the

<sup>84</sup> *Id.* § 175.25(A) (2).

<sup>85</sup> *Id.*, § 175.25(C).

<sup>86</sup> 402 P.2d 248 (Okla. 1965).

claims of the creditors of such person, in the same manner as personal property which cannot be reached by execution.

The correct view is that this section was repealed by The Oklahoma Trust Act, and particularly by Section 175.25.<sup>87</sup> Even if it was not, the words "and no valid direction for accumulation is given" force resort to Section 175.25 and the practical result is the same as if the section had been repealed.

#### IV

#### FETTERS ON ALIENATION

Under this heading two separate rules as to fetters on alienation will be considered. They are (1) the rule against suspension of the power of alienation and (2) restraints on alienation.

The power of alienation is suspended if the estate created is of such a nature that there are not at all times persons in being who by joining can convey the fee or absolute title.<sup>88</sup> There is a restraint on alienation if the instrument conveying or creating vested interests contains prohibitions against their disposition by the donee or grantee.

And of these in their order.

##### 1. *Suspension of the Power of Alienation*

Several sections of Title 60, OKLA. STAT. (1961) have to do with suspension of the power of alienation.

Section 31, enacted in 1890:

The absolute power of alienation cannot be suspended by any limitation or condition whatever, for

<sup>87</sup> See Comment, *Trusts, Spendthrift Trusts in Oklahoma*, 14 OKLA. L. REV. 233 (1961); BOGERT, TRUSTS AND TRUSTEES, § 222 at 661 (2d ed. 1965).

<sup>88</sup> See *Tipton v. North*, 185 Okla. 365, 92 P.2d 364, 368 (1939).

a longer period than during the continuance of the lives of persons in being at the creation of the limitation or condition, except as provided in Section . . . 34. Section 34, enacted in 1890:

A contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited die under the age of twenty-one years, or upon any other contingency by which the estate of such persons may be determined before they attain majority.

These two sections are in the chapter on estates in real property. Other statutes have some bearing.<sup>89</sup>

Section 175.47, enacted in 1941 as part of The Oklahoma Trust Act, in pertinent part:

The absolute power of alienation of real and personal property, or either of them, shall not be suspended by any limitations or conditions whatever for a longer period than during the continuance of a life or lives of the beneficiaries in being at the creation of the estate and twenty-one years thereafter

. . .

These statutes and the rule against remoteness of vesting differ in material respects. Time periods are not identical. Section 175.47 the measuring lives are limited to the life or lives of the beneficiaries in being at the creation of the estate. However, vesting of interests is of consequence in both statutes and the rule.

<sup>89</sup> OKLA. STAT. tit. 60, § 237 (1961):

The period during which the absolute right of alienation may be suspended by an instrument in execution of a power, must be computed, not from the date of the instrument, but from the time of the creation of the power. *id.*,

Sec. 238 (1961):

No estate or interest can be given or limited to any person, by an instrument in execution of a power, which could not have been given or limited at the time of the creation of the power.

The fields for the operation of these statutes are, for the first time, clearly delineated in *Melcher v. Camp*.<sup>90</sup> Section 31 relates only to real property interests. Section 175.47 covers both realty and personalty, applies only to trusts, and repeals Section 31 insofar as trusts are concerned, so since 1941 Section 31 has not been applicable to trusts. It should follow that Section 33,<sup>91</sup> an explanation or definition of the language of Section 31, has been repealed, although that Section is not mentioned in *Melcher*.

From all this, a logical deduction is that there is no statute as to suspension of the power of alienation of personalty not held in trust. Whether there may be a court-imposed limit on the grounds of public policy is for future decision.

There is no suspension of the power of alienation if there are at all times in being persons who by joining can convey the fee.

So a perpetual lease, or a lease with a covenant for perpetual renewal does not suspend the power of alienation.<sup>92</sup> The landlord and tenant, by joining, can convey the fee.

"The absolute ownership of a term of years cannot be suspended for a longer period than the absolute power of alienation can be suspended in respect of a fee."<sup>93</sup>

A testamentary trust directed payment of income to testator's son and to the children of a deceased son, the trust to continue until the youngest child of the deceased son

<sup>90</sup> 435 P.2d 107 (Okla. 1967).

<sup>91</sup> OKLA. STAT. tit. 60, § 33 (1961):

The suspension of all power to alienate the subject of the trust, other than a power to exchange it for other property to be held upon the same trust, or to sell it and reinvest the proceeds to be held under the same trust, is a suspension of the power of alienation within the meaning of the second preceding section.

<sup>92</sup> *Tipton v. North*, 185 Okla. 365, 92 P.2d 364 (1932).

<sup>93</sup> OKLA. STAT. tit. 60 § 32 (1961).

reached the age of twenty-one years, with final distribution to the son and "to my grandchildren living," and so on, mentioning "my grandchildren" several times. The cotention was that the trust was in violation of OKLA. STAT. tit. 60, §§ 31, 32, 33 (1961) because "my grandchildren" included children who might be later born to the son. Following the "cardinal rule" of *Cunningham*,<sup>94</sup> the court held that testator did not contemplate the possibility of children being born to the surviving son, and did not attempt to provide for them, but only for the children of the deceased son. The children of the latter were in being at testator's death and the youngest would attain age 21 within the statutory period, hence the trust was valid. The decision is correct and is supported by a later case that an ambiguity will be resolved in favor of validity.<sup>95</sup>

A devise to testator's children of undivided interests in a life estate, with remainder in fee limited on each of the interests to the surviving issue of each tenant for life, but if none, over in fee to testator's surviving children, creates contingent remainders and a valid suspension of the power of alienation.<sup>96</sup> The court said:

A remainder in fee limited to the children or the heirs of the life tenant's body, though such heirs be unborn at the time of the grant, is recognized by statute as a valid grant. Sec. 11766, O.S. 1931, 60 Okl. St. Ann. § 41. A remainder made contingent upon the failure of such heirs cannot vest until such failure becomes a settled fact. The latter is a contingent remainder and may not vest until failure of surviving issue of the life tenant becomes certain. Sec.

<sup>94</sup> 186 Okla. 429, 98 P.2d 57 (1940).

<sup>95</sup> *Munger v. Elliott*, 187 Okla. 19, 100 P.2d 876 (1940). The later case is *Smith v. Smith*, 336 P.2d 355 (Okla. 1959) (Discussed *supra* II, subd. 6).

<sup>96</sup> *Waldon v. Baker*, 184 Okla. 492, 88 P.2d 352 (1939). Compare the facts here with those in *In re Walker's Estate*, 179 Okla. 442, 66 P. 2d 88 (1937) (Discussed *supra* II, subd. 7).

11759, O. S. 1931, 60 Okl. St. Ann. § 34. Through the fee simple title is never in abeyance, the power of alienation may be suspended in the manner above stated. Sec. 11756, O.S. 1931, 60 Okl. St. Ann. § 31; Sec. 11759, supra. The will in the instant case accomplished that end. As to each of the testator's children and his or her particular life interest, the remainder in fee limited upon each of said interests to their respective surviving issue, and over to the other of said children in default of such issue, was not in any event a vested remainder, but suspended the power of alienation in any manner that would tend to deprive potential remaindermen of their rights under the grant.<sup>97</sup>

Perhaps any interest or estate in realty permitted or authorized by OKLA. STAT. tit. 60, §§ 21 et seq. (1961) does not involve an invalid suspension of the power of alienation. That seems to be the end result of the decision.

Of the several cases discussed in Section II, supra, *Franklin v. Margay Oil Corp.*<sup>98</sup> hold not only that the rule against remoteness of vesting was not violated, but also that there was no invalid suspension of the power of alienation. *In re Street's Estate*<sup>100</sup> may hold there was an invalid suspension, although the grounds for the decision are not clear. The facts in these cases are set out in the preceding discussion.

Insofar as trusts are concerned, the 1962 decision in *Pipkin v. Pipkin*<sup>101</sup> makes an important contribution to the law. Mentioning Section 31 of the statutes, but not Section 175.47, the decision is that no suspension of alienation results from a trust which confers upon the trustee an absolute power of sale. This was prior to *Melcher's* ruling that Sec-

<sup>97</sup> 184 Okla. at 494, 88 P.2d at 354.

<sup>98</sup> 194 Okla. 519, 153 P.2d 486 (1944).

<sup>99</sup> 280 P.2d 996 (1955).

<sup>100</sup> 138 Okla. 115, 280 P. 413 (1929).

<sup>101</sup> 370 P.2d 826 (Okla. 1962).



tion 175.47 and not Section 31 governs as to trusts, but the reasoning is applicable to both statutes. Each piece of property held in trust is freely transferable and is not withdrawn from the channels of commerce in that it is alienable under the power of sale, and so also as to the proceeds to be held in trust. That should satisfy public policy requirements.<sup>102</sup> Note that Section 33 of the statutes, previously mentioned, must be considered as repealed by The Oklahoma Trust Act. If not, *Pipkin* makes it inapplicable. As might be expected, some decisions in other jurisdictions are contrary to the *Pipkin* doctrine.<sup>103</sup> *Pipkin* is basically sound.

Suppose a trust does not confer upon the trustee a power of sale, but neither does it expressly or impliedly prohibit sale. In these circumstances a section of The Oklahoma Trust Act<sup>104</sup> authorizes the trustee "to sell real or personal property at public auction or at private sale for cash, or upon credit secured by lien upon the property sold . . . ." Is *Pipkin* applicable? If it is, very little is left for Section 175.47 to chew on.

The case is criticized, I think unjustly, by one writer.<sup>105</sup>

<sup>102</sup> Emphasizing free transferability, a power of sale may include the power to convey lesser interests. *Franklin v. Margay Oil Corp.*, 194 Okla. 519, 153 P.2d 486 (1944); (oil or gas lease) *Parks v. Central Life Assurance Society*, 181 Okla. 638, 75 P. 2d 1111 (1938) (mortgage). Since adoption of The Oklahoma Trust Act in 1941, in the absence of contrary or limiting provisions in the trust agreement, or an order of court, the trustee has broad powers of disposition, including sale. OKLA. STAT. tit. 60, § 175.24 (1961).

<sup>103</sup> See discussion, BOGERT, TRUSTS AND TRUSTEES, § 219 at 587-89 (2d ed. 1965).

<sup>104</sup> OKLA. STAT. tit. 60, § 175.24B (1961).

<sup>105</sup> Note, 17 OKLA. L. REV. 438 (1964), (admits a "proper result" was reached). If, as charged, *Pipkin* sins in speaking of restraints on alienation instead of suspension of the power of alienation, it is one of a crowd which blurs the terminology. See *Cunningham v. Fidelity National Bank*,

Neither contingent remainders or irrevocable trusts are destructible by action or consent of those who, at the time, hold all present but not all future interests in the property.<sup>106</sup> In such instances there are not persons in being who by joining can convey the fee or the entire interest.

A somewhat inconsequential exception may exist under a statute concerning the revocation of trusts.<sup>107</sup> The interest which a beneficiary takes by descent has been broadly construed. For example, it applies to interests under a provision for distribution to a named person on attaining a stated age, but if he sooner dies, as appointed by his will, or if no will, to his issue, but if no will and no issue, to trustors' heirs at law.<sup>108</sup> By its terms, the statute permits revocation only during the lifetime of the trustor. The provision as to spendthrift trusts has been virtually eliminated by the decisions.

186 Okla. 429, 98 P.2d 57 (1940), and *Tipton v. North*, 185 Okla. 365, 92 P.2d 364 (1939) as examples. It is also strange to fault the Court, as the writer does, for failure to write a treatise on questions which it doubtless thought were not necessary to its decision.

<sup>106</sup> *Browder, Perpetuities in Oklahoma*, 6 OKLA. L. REV. 1, 8 (1953); 6 OKLA. L. REV. 103 (1953); 2 OKLA. L. REV. 514 (1949); *Hill v. Hill*, 49 Okla. 424, 152 P.1122 (1915), *subsequent opinion*, 54 Okla. 441, 153 P. 1185 (1916).

<sup>107</sup> OKLA. STAT. tit. 60, § 175.41 (1961):

Any trust may be revoked by the trustor upon the written consent of all living persons having vested or contingent interest therein. The term "contingent interest", as used in this Section, shall include an interest which a beneficiary may take by purchase, and exclude any interest which a beneficiary may take by descent. Provided further that this Section shall not apply to a spendthrift trust unless same is created by the trustor for his own benefit.

<sup>108</sup> *Hurst v. Kravis*, 333 P.2d 314 (Okla. 1958); *Hurst v. Taubman*, 275 P.2d 877 (Okla. 1954); *Dunnett v. First National Bank & Trust Co. of Tulsa*, 184 Okla. 82, 85 P.2d 281 (1938). See also *Atchison v. Dietrich*, 315 P.2d 265 (Okla. 1957).

In some circumstances, in the exercise of its general equitable powers, a court may order a sale of property in which there are contingent interests, including interests of the unborn as well as the living, with the proceeds to be held for distribution under court order.<sup>109</sup> Later-enacted statutes are to the same effect.<sup>110</sup> Do you want to conjure with that? Power of sale? Destructibility?

## 2. *Restraints on Alienation*

With some exceptions, the restraint of alienation of a vested interest or a legal estate in fee, though to continue for a limited time, is void. Only the restraint is invalid. The document of transfer remains in force in all other respects.

Statutes are said to be the basis for Oklahoma law on this subject.<sup>111</sup> The chapter on interpretation of contracts states that particular clauses of a contract are subject to its general intent, repugnancy must be reconciled, if possible, and words which are wholly inconsistent with the nature of the contract or with the main intention of the parties are to be rejected.<sup>112</sup> These statutes appear to be nothing more than codifications of common law rules. There may be room for resort to the common law should the need arise.

*Stone v. Easter*<sup>113</sup> rejected as inoperative this provision in a deed to realty:

Provided, that said second party shall not sell, transfer or alienate said premises until she has attained the age of forty (40) years.

<sup>109</sup> *Whitten v. Whitten*, 203 Okla. 196, 219 P.2d 228 (1950).

<sup>110</sup> OKLA. STAT. tit. 12, § 1147.1 et seq. (1961).

<sup>111</sup> *Berry v. Cooley*, 188 Okla. 426, 428, 109 P.2d 1081, 1084 (1941): "Regardless of what the common law on the subject may be, present day decisions . . . are based upon statutes . . . ."

<sup>112</sup> OKLA. STAT. tit. 15, §§ 166, 168, 169 (1961).

<sup>113</sup> 93 Okla. 68, 219 P. 653 (1923).

The Court refused to make any distinction between an unqualified restraint and one for a limited time, said conveyance of the fee was wholly incompatible with the restraint, and observed there were no apt words making the estate conveyed either defeasible or conditional. Among other authorities, the statutes on interpretation of contracts were cited.

It is within the realm of possibility that the scrivener of a later deed was aware of *Easter's* comments about lack of apt words making the estate either defeasible or conditional. A deed was written with this clause:

Provided, the land described herein shall not be sold or in any way incumbered for the period of fifteen years from this date, and in case any attempt to sell or in any way incumber, or suffer the same to be done, the title shall revert to the grantor or his heirs or assigns.

In ensuing litigation, *Easter* was cited and the provision was ruled to be void.<sup>114</sup>

Also, where a testamentary trust in effect conveyed to trustees the absolute title to realty, wholly ineffectual was a direction that the trustees were not to sell or dispose of the land until such time as "it is clearly demonstrated that there is no oil or gas in or under said lands."<sup>115</sup>

*Berry v. Cooley*<sup>116</sup> may stand as an exception, or the basis for an exception, to the foregoing rules. Three documents were involved: a property settlement between husband and wife, a deed from husband to wife, and a decree of divorce. The first provided the husband should convey realty to the wife in full settlement of the wife's claims for alimony and support money, but if the wife should remarry, the realty should become the property of the children, and there were

<sup>114</sup> *Crookum v. Ketchum*, 174 Okla. 468, 50 P.2d 710 (1935).

<sup>115</sup> *Riley v. Collier*, 111 Okla. 130, 238 P. 491 (1925).

<sup>116</sup> 188 Okla. 426, 109 P.2d 1081 (1941).

restraints on alienation by the wife. The contract was set out in full in the divorce decree and approved by the court and the wife was enjoined from encumbering or disposing of the land in any manner contrary to the agreement. The husband executed a quitclaim deed to the wife, reference being made to the settlement agreement and divorce decree. Question: were the restraints on alienation by the wife enforceable? The court said "Yes". The decision is clearly correct. The reasoning which led to it is interesting. Limitation on the grant to the wife in favor of the children was not repugnant to the contract of conveyance or the intention of the parties. The court gave effect to all the provisions of all the documents involved. Very well. But referring to *Easter and Crookum*, the court said they:

are based upon deeds where the grantor by the purported restriction was not attempting to fulfill a legal duty resting upon him. The restriction . . . was inserted merely at the whim, caprice or personal choice of the grantor and not in the performance of a legal obligation.<sup>117</sup>

And there may be the exception.

There may be another exception which permits a restriction against conveyance to a designated person or perhaps to a class. Several Oklahoma cases sustain covenants in a plat or deed that the property shall not be conveyed to persons of African descent.<sup>118</sup> These were knocked out by a decision of the Supreme Court of the United States on constitutional grounds.<sup>119</sup> If that objection is surmounted,

<sup>117</sup> *Id.* at 428, 109 P.2d at 1084.

<sup>118</sup> *Lyons v. Wallen*, 191 Okla. 567, 133 P.2d 555 (1943); *Hemsley v. Sage*, 194 Okla. 669, 154 P.2d 577 (1945); *Schwartz v. Hubbard*, 198 Okla. 194, 177 P.2d 117 (1947); *Hawkins v. Whayne*, 198 Okla. 400, 179 P.2d 138 (1947).

<sup>119</sup> *Shelley v. Kraemer*, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1947).

it may be that a restriction against conveyance to a designated individual or individuals, or perhaps even to a class, is valid.

The Oklahoma Trust Act authorizes some restraints on alienation by the beneficiaries of a trust.

To a limited extent, an income beneficiary may be restrained from disposing of trust income. See Section III, *supra*, "Trusts for Accumulations of Income."

There are other permissible restrictions concerning principal.

OKLA. STAT. tit. 60, § 175.25D (1961):

The right of any beneficiary of a trust to receive the principal of the trust or any part of it, presently or in the future, shall not be alienable and shall not be subject to the claims of his creditors.

if there is appropriate language in the trust instrument.

Such restraints will be enforced by the courts.<sup>120</sup>

No Oklahoma case has been found which decides whether, aside from restrictions on trust beneficiaries, these rules are applicable to personalty dispositions.

## V

### CONCLUSION

In the last several years Oklahoma law as to perpetuities and kindred subjects has been clarified in important respects.

<sup>120</sup> Keaton v. Stephenson, 206 Okla. 32, 240 P.2d 1088 (1952) (restraint on alienation of income); Frensley v. Frensley, 177 Okla. 221, 58 P.2d 307 (1936) (construing statutes in force before enactment of The Oklahoma Trust Act.). Cf. First National Bank of Enid v. Clark, 402 P.2d 248 (Okla. 1965) (discussed in III, *supra*).

However, numerous questions have not been answered and remain for future decision, including:

1. Does the rule against remoteness of vesting apply in all events to personality?

2. Does the rule against remoteness of vesting fix the maximum duration of a trust if all interests vest within the prescribed period, and if it does not, may there be a court-imposed time limit?

3. What is the full extent of the "life or lives in being" concept?

4. When does a disposition to named persons on attaining specified ages vest?

5. To what extent does violation of the rules invalidate the document of transfer?

6. Is there any prohibition against suspension of the power of alienation of personality not held in trust?

7. Does a trustee's statutory power of sale render inapplicable the rule as to suspension of the power of alienation?

8. Are there circumstances under which there may be a valid restraint on alienation to designated persons, or perhaps to a class?

9. Is the rule as to restraints on alienation applicable to personality not held in trust?

10. Are trusts for accumulation of income governed solely by statute?

The curious may find in this article other unanswered questions. And certainly there may be in the future questions and problems not now envisioned.