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FUTURE INTERESTS—SEPARATION OF VALID INTERESTS FROM INTERESTS WHICH ARE VOID BECAUSE OF THE RULE AGAINST PERPETUITIES

The problem of the separation of limitations which are valid under the Rule against Perpetuities from those which are void because of the Rule is suggested in the recent case, *Tolman v. Reeve.* By her will and codicil the testatrix (T) devised homestead property in trust for her sons, A and B. Upon the death of the sons without lawful issue or at the death of all of the children before reaching twenty-one, the homestead was to be given to T's niece and her heirs in fee simple. If B should die leaving a widow and children, however, they were to occupy the house as long as they desired. Upon these facts there was a possibility of violation of the Rule against Perpetuities. That is to say, B, who was unmarried at T's death, might marry a woman not born at T's death, or if married, his present wife might die and he might still marry a woman unborn at T's death. In those events the period of time would run beyond lives in being and twenty-one years, and the devise over could not take effect. The Supreme Court of Illinois held that the devise did not violate the Rule against Perpetuities for two reasons. First, B's widow, if any (for B was unmarried at T's death) would not acquire an estate but only the right to occupy the premises; the fee vested, therefore, in the niece upon the death of the sons without issue or with issue who did not reach twenty-one, subject to the right of B's widow to live on the property. Secondly, the will expressly provided that if any of its provisions should become susceptible of an interpretation creating an estate of longer duration than is permitted by law, such provision should be revoked as to the period of time beyond that fixed by law, and such estate should continue for not longer than twenty-one years after the death of certain named persons living at the time of T's death. The effect of this provision was clearly to prevent an unintentional violation of the Rule against Perpetuities by a revocation of such void parts of the will.

Unfortunately few testators anticipate the operation of the Rule, and such language of revocation is rare. Where a part of the will is void because of the Rule, the courts are left to decide whether the actual intention of the testator will better be given effect by separating valid provisions which take effect within the period allowed by the Rule from those which are void or by holding the whole disposition void and allowing the estate to go to his heirs-at-law.

The view is stated by Professor Gray: "If future interests created by any instrument are avoided by the Rule against Perpetui-

1 393 Ill. 272, 65 N. E. 2d 815, 822-823 (1946).
ties, the prior interests become what they would have been had the limitation of the future estates been omitted from the instrument."

This doctrine of separation is approved by Professor Leach, Scott, and Simes, and is the weight of authority. The principle involved, as set forth in Liggert v. Fidelity & Columbia Trust Co., is that the estate progresses to the point at which the Rule begins to operate, and a fee is given to the person then entitled to take under the statutes of descent and distribution. So, life estates which are valid in themselves are not destroyed by a remainder which is void for remoteness.

The rule above mentioned is illustrated by Security Trust Co. v. Cooling. In that case the testator gave interests in trust income to his widow for life; and on the widow's death, he gave it to his two sons equally for themselves for life. Upon the death of either or both of the sons, leaving issue, the income was given in further trust to the issue of each son so dying for life. On the death of the issue (the grandchildren of the testator), the corpus was to be freed of trust and to be paid to their issue (the testator's great-grandchildren) absolutely. In holding the life estates valid, the Court of Chancery of Delaware said that there may be cases where valid and invalid provisions cannot be separated, but that the rule is different in the case of "mere consecutive and successive interests, though contingent, when subsequent remote interests violate the [sic] rule against perpetuities."

The rule stated by Professor Gray seems to be sound. By making a will the testator has intended that his property should pass in a certain way. In order to effectuate his intention, so much of the will should be held valid as it is possible to hold valid. Where there is doubt whether or not the testator would have permitted the valid provisions to stand, the question should be resolved in favor of their

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3 Leach, Perpetuities in a Nutshell (1938) 51 Harv. L. Rev. 638, 656-657.
5 2 Simes, Law of Future Interests (1936) secs. 529, 530.
6 Chenoweth v. Bullitt, 224 Ky. 698, 716-718, 6 S. W. 2d 1061, 1069 (1923); McGill v. Trust Company of New Jersey, 94 N. J. Eq. 657, 121 Atl. 760, 766-767 (1923).
7 274 Ky. 387, 398, 118 S.W. 2d 720, 725 (1938).
8 Wilmington Trust Co. v. Wilmington Trust Co., 21 Del. Ch. 102, 180 Atl. 597 (1935); Quinlan v. Wickman, 233 Ill. 39, 84 N. E. 38 (1908); Letcher's Trustee v. Letcher, 302 Ky. 448, 194 S.W. 2d 984 (1946); Lovering v. Worthington, 106 Mass. 86 (1870); In re Lockhart's Estate, 267 Pa. 390, 111 Atl. 254 (1920); Love v. Love, — S. C. —, 38 S. E. 2d 231 (1946).
9 42 A. 2d 784 (Del. Ch. 1945).
10 Id. at 789.
11 See In re Phelps' Estate, 182 Cal. 752, 190 Pac. 17, 18 (1920); Burr v. Tierney, 99 Conn. 647, 122 Atl. 454, 457 (1923); Lovering v. Worthington, 106 Mass. 86, 88 (1870).
validity. To hold otherwise would amount to indulging in specula-
tion as to his intention and at his expense.\(^2\)

The view which has been here stated is in harmony with analo-
gous applications of law. For example, the construction of a statute
which will make it constitutional will be adopted rather than the
opposite construction; and the courts will refrain from deciding the
issue of constitutionality until it arises directly.\(^3\) Likewise, in the
law of future interests, a void remainder or executory interest will
not invalidate prior and otherwise valid estates;\(^4\) and a valid alter-
native contingency will be given effect at the time when it happens.\(^5\)
So, in a situation just the reverse of the above examples, valid in-
dependent limitations following void ones are now held to be valid
in England.\(^6\)

The problem of separability also arises in the case of class gifts.
For example, T leaves his property to his son, A, for life, with a re-
mainder to such of T's grandchildren as reach twenty-five years of
age. When T dies, there is one grandchild, G, who is twenty-five;
but A is still living. In Leake v. Robinson,\(^7\) it was held that the gift
failed altogether; but in that case there was a direction that the
shares of the grandchildren were to be paid when they should reach
twenty-five. The proposal of Professor Leach is that all grand-
children who are twenty-five at the death of T should take their
shares.\(^8\) Especially would this view seem to be correct where there
is no language of futurity in the gift and where survivorship until
twenty-five is not made a condition precedent to vesting in interest.
Suppose, however, that G is not twenty-five at T's death but is only
twenty-four. Professor Simes argues that although G may live one
more year and the class will then close, still G may die before reach-
ing twenty-five.\(^9\) Then it may be more than twenty-one years be-
fore any other grandchild will reach twenty-five. Where A, the
parent, is living, there is a possibility of there being grandchildren
born after the death of T. The problem is, did T want all of his
grandchildren to share equally, or did he want so much of his will to

\(^{12}\) For reasoning to this effect, see Wilmington Trust Co. v. Wil-
mington Trust Co., 21 Del. Ch. 102, 180 Atl. 597, 602 (1935). Also
see 2 SIMES, op. cit. supra note 5, sec. 529.

\(^1\) Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 346-

\(^2\) Beall v. Wilson, 146 Ky. 646, 143 S.W. 55 (1912); First Uni-
versalist Society v. Boland, 155 Mass. 171, 29 N. E. 524 (1892); Brat-
tle Square Church v. Grant, 3 Gray 142 (Mass. 1855).

\(^3\) Quinlan v. Wickman, 233 Ill. 39, 84 N. E. 38 (1908); Gray v.
Whittemore, 192 Mass. 367, 78 N. E. 422 (1909); In re Schwamm's
Estate, 53 N. Y. S. 2d 554 (1945).

\(^4\) In re Coleman, (1936) 1 Ch. 523; In re Canning's Will Trusts,
(1936) 1 Ch. 309.


\(^6\) Leach, Rule against Perpetuities and Gifts to Classes (1938) 51
HARV. L. REV. 1329, 1330, 1346–1351.

\(^7\) 2 SIMES, op. cit. supra note 5, sec. 528.
stand as it is possible to hold to be valid? In the case of his own grandchildren, the statutes of descent and distribution will reach a more desirable result in many cases; but where the grandchildren are those of another person, all of them who are living at the death of T should take their shares.

On the other hand the courts of Illinois and Pennsylvania in particular have often shown what Professor Leach calls a "punitive spirit." The rule which is applied there and in a few other jurisdictions to reach such decisions is that where there are valid and void provisions of an instrument which are so connected together as to constitute an entire scheme for the disposition of the estate so that the intention of the testator or maker would be defeated if any portion were stricken, or that manifest injustice would result to the beneficiaries by such division, then all of the provisions or trusts, as the case may be, must be construed as a whole. Accordingly the provisions of the will must stand or fall together. This rule does not appear faulty in itself; and Professor Simes writes that "if it may reasonably be inferred that the testator would have preferred to die intestate rather than have his will take effect with the void clause left out, then the whole will should be held void."

The real error in Illinois and Pennsylvania has appeared in the application of the rule to the facts of particular cases. For example, in Barrett v. Barrett, the testator gave his property in trust for the payment of income to his widow for life, then to his sons, and afterwards to his grandchildren for life; the corpus of the estate was to be divided among his great-grandchildren. It was held that the life estates, although valid under the Rule against Perpetuities, were destroyed, since the testator was presumed to have in mind an entire scheme for the disposition of his property. The Court said that a part of the disposition could not be rejected without making a new will for him; and the courts are powerless to perform that act. A dictum indicated, however, that provisions or trusts which are independent of each other and valid within themselves may be sustained. The facts of the Barrett case are not essentially different from those of the Cooling case cited above. The result of the Barrett case is clearly wrong because the testator would certainly have wanted his immediate family to take under his will. If his purpose in creating the life estates was to prevent his widow or his sons from disposing of his property unwisely or to safeguard the interests of his great-

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20 Leach, op. cit. supra note 3, at 657.
21 Barrett v. Barrett, 255 Ill. 332, 99 N. E. 625, 628 (1912). In California, a similar test is laid down: In re Estate of Whitney, 176 Cal. 12, 19, 167 Pac. 399, 402 (1917).
22 Simes, op. cit. supra note 5, at 405, sec 529. In Kentucky, where life estates are generally held to be valid, the rule is stated. Ford v. Yost, 300 Ky. 764, 766-767, 190 S.W. 2d 21, 22-23 (1945).
23 Id. at 3, 99 N. E. 628 at 628.
grandchildren, the life estates should still have been upheld. They would bring the property two steps closer to them (by preventing the alienation of the property for the period of the life estates), and then in all probability their parents would provide for them. If not, the great-grandchildren would take from their parents under an intestacy. The Barrett case is a striking example of punishing the testator for making a will which violates the Rule against Perpetuities.

In Pennsylvania, some of the cases have reached the same result as the former case. In Geissler v. Reading Trust Co., the facts were similar to those of the Cooling case; but all of the interests were held to fail. (There was a devise in trust which provided for the payment of income to the testator’s children for life and then to the grandchildren for life, with a remainder to the great-grandchildren.) In Ledwith v. Hurst, also, life interests were given to the testator’s wife and daughter, to his grandchildren, and to the daughter’s descendants without limit. When the prior life interests were terminated, the estate was to be given to charities in fee. The Court held that the prior gifts were void and that the gift over, being a perpetuity, was invalid. Thus the life tenants might have taken life estates under the will, and their heirs-at-law would have taken the remainder by inheritance. However, the prior interests failed. The result would not have differed if the prior interests had been sustained save that the identity of the ultimate heirs would be determinable only after the death of the life tenants. The latter decision does not necessarily further the intention of the testator because the life estates might have continued ad infinitum to the descendants of the daughter if it were not for the Rule against Perpetuities. The gift to the charities appears to have been the incidental part of the will. In both of these Pennsylvania cases, the prior estates might well have been held valid.

Several cases in Illinois and Pennsylvania have held the prior interests to be valid. Nevitt v. Woodburn (Illinois) and In re Whitman’s Estate (Pennsylvania) and other cases have practically the same facts as Barrett v. Barrett, Geissier v. Reading Trust Co., and Ledwith v. Hurst; but the holdings are exactly the opposite. The

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23 By the fact that the testator provides for life estates, it may be said that he would rather have his family or others take life estates than immediate fees under the statutes of descent and distribution. The argument for this view is presented in Note (1925) 38 Harv. L. Rev. 379, 383.


26 190 Ill. 263, 60 N. E. 500 (1901).


28 In fact, Nevitt v. Woodburn is a much stronger case than the Cooling case, for instance. In the former case, the limitation over was not given to the testator’s own grandchildren or great-grand-
two former cases which separate valid and void provisions of an instrument and allow prior valid interests to take effect afford a sound basis for future decisions in those two states.

The principle which is so often applied, namely, the principle that the testator has intended a general scheme of disposition, even though such intent is not evident, seems to be correctly applied in cases of a different kind. It is believed that there are cases where valid and invalid interests should not be separated where a strange result would be reached by so doing. For example, in Benedict v. Webb, the testator left his estate in trust for the payment of income to his widow for life and to his children until the youngest should reach twenty-one years of age. Two-thirds of the principal was then to be divided among his children in the following manner: the shares of the two sons were to be paid to them at once, and the shares of the daughters were to be held in trust for the payment of income to them for life. Further, on the death of any daughter, her share was to go to her issue. Because of the New York statute prohibiting suspension for more than two lives, the Court of Appeals held that as to one of the daughters who was of age the gift was void. The reason was that the minoritics of her brother and sisters caused a suspension for two lives until they reached their respective majorities. Until that time, her life was a third one. It was presumed that if the testator had known that one of his children could not receive her share, he would have made a different disposition of his property, because his will evidenced the same regard for all of his children.

In Reid v. Voorhees, the testator's personal property was given to the children of his sister, and his real property was given to his brother's children after the termination of a thirty year period during which the income from rents was to be paid to all of the nephews and nieces. The whole limitation was correctly held to be invalid because in the opinion of the Court the testator meant to treat similarly all of his nephews and nieces. In the Reid case, the testator had no children; and the statute of descent and distribution reached a more desirable result, since his nephews and nieces took equally as his heirs-at-law. In those cases it can be said that the reasonable inference is that the testator would have preferred to die intestate rather than to have had only a part of the devisees take his property.

In conclusion it is submitted that where the later provisions of an instrument violate the Rule against Perpetuities, the valid preceding part should stand and all interests should take effect up to the point

children, but was given to collateral kindred. In the Note (1925) 38 Harv. L. Rev. 379, 383, it is stated that there is a weaker case for separability where the void gift over is to strangers. Yet the Illinois court correctly held prior life estates to be valid in that case.

98 N. Y. 460 (1885).
216 Ill. 236, 74 N. E. 804 (1905).
where the Rule begins to operate. Yet if there is a reasonable inference that the testator intended to create a general scheme of disposition, or if an unintended inequality would result from sustaining the earlier and otherwise valid interests created, all of the provisions should fall together, the result being that the estate would pass under the statutes of descent and distribution. Attorneys and draughtsmen should keep in mind the case of Tolman v. Reeve, since it counteracts the argument that if the testator had known of the Rule against Perpetuities, he would have made a measurably different will. If he expressly provides that no limitation should violate the Rule against Perpetuities, it cannot possibly be said that the courts are violating his intention by validating so much of the will as meets the test of the Rule. The insertion of such a provision would save much litigation and would come very close to effectuating the true intention of the testator in practically every case.

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