

January 1962

Perpetuities

Thompson G. Marsh

Follow this and additional works at: <https://digitalcommons.du.edu/dlr>

Recommended Citation

Thompson G. Marsh, Perpetuities, 39 Dicta 123 (1962).

This Article is brought to you for free and open access by the Denver Law Review at Digital Commons @ DU. It has been accepted for inclusion in Denver Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

CASE COMMENTS

PERPETUITIES

The otherwise orthodox opinion in *Rocky Mountain Fuel Co. v. Heflin*¹ is marred by an inaccurate statement of the rule against perpetuities. The court says, "The common law rule against perpetuities is recognized in Colorado. *Barry v. Newton*, 130 Colo. 106, 273 P.2d 735. It is a rule which invalidates interests limited to vest upon events not certain to occur within 21 years of some life in being at the creation of the interest."² It will be observed that the crucial phrase, "if at all," is omitted. This is a harmless mistake in this particular case, but such inaccurate wording may be perpetuated until it comes to be mistaken for the rule. This danger is especially strong because the court cites *Barry v. Newton*, where the same mistake was made.³

That the mistake is serious was evidenced a few years ago, when a committee of the Denver Bar Association considered resorting to the legislature in order to secure an accurate statement of the rule. Several district courts, overlooking the phrase, "if at all," had held void for remoteness, such valid dispositions as "to A and his heirs, but if B marries, then to B and his heirs." It could not be said that the marriage of B was an "event certain to occur within 21 years after some life in being at the creation of the interest." It might never occur, and therefore under the rule applied by those district courts, and under the rule as stated in *Barry* and in the instant case, the interest to B was held to be void for remoteness.

An accurate statement of the rule would have led to the conclusion that the interest of B was valid. The rule should be stated as follows: "No interest is good, unless it must vest, *if at all*, not later than twenty-one years after some life in being at the creation of the interest."⁴ In the example given, B's marriage *if it happens at all*, will happen within his own life, and therefore the interest given to him must vest, *if at all*, within the limit set by the rule.

There is nothing in any Colorado opinion to indicate that the court intends to establish a rule more strict than the common law rule against perpetuities, but there is danger that such a consequence may result from repeated inadvertence.

Thompson G. Marsh*

1 366 P.2d 577 (Colo. 1961).

2 *Id.* at 580.

3 *Barry v. Newton* is criticized for this omission of "if at all" in 32 DICTA 7, 12 (1955).

4 (Emphasis added.) Gray, *The Rule Against Perpetuities* § 201 (4th ed. 1942); King, *Future Interests in Colorado* 90 (1950); *American Law of Property* § 24.1 (1952); Simes & Smith, *The Law of Future Interests* § 1222 (2d ed. 1956).

* Professor of Law, University of Denver College of Law.