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BARRY v. NEWTON — PERPETUITIES — CONTINGENT REMAINDERS — "IF AT ALL"*

By THOMPSON G. MARSH†

The deed said, "In the event that the wall . . . shall at any time be rebuilt, . . . thereupon title to the rear . . . strip hereinabove reserved shall immediately and without further conveyance . . . pass to the then owner of Lot eleven . . ."[1]

The court said, "The claimed interest is an executory interest . . ."[2] and held it void for remoteness.

So far, so good; but the court after having decided that the interest was executory, went on to say, by way of dictum, "The rule against perpetuities is applicable to contingent remainders . . . The usual effect of the rule against perpetuities is to prohibit or invalidate attempts to create by limitation, whether executory or by way of remainder, future interests or estates, the vesting of which is postponed beyond the prescribed period."[3]

This is a very clear statement of a proposition that is, as a matter of fact, not so clearly established.

Kales says, "The Rule against Perpetuities did not commence its development until 1680, when the *Duke of Norfolk's* case was decided . . . The common law contingent remainder, which was subject to the common law rule of destructibility, had existed for over two centuries before the *Duke of Norfolk's* case. There is some opinion to the effect that the Rule against Perpetuities never applied to such remainders. The moment, however, that the rule of destructibility is partially abrogated, as it was by the Contingent Remainders Act of 1845, the contingent remainder ceases to be the common law interest which it was before, because it may, under such act, take effect as a springing executory interest after the termination of the proceding estate of free-hold. Under these circumstances the Rule against Perpetuities is appropriately applied to it. The recent English cases, which appear to hold that contingent remainders are subject to the Rule against Perpetuities (citing *In re Frost* [4] and *In re Ashforth's Trusts* [5]) were decided with reference to contingent remainders to which the English Contingent Remainders Act of 1845, at least, applied. They do not, therefore, sustain the proposition that the Rule against Perpetuities would apply to the common law contingent remainder which continued to be fully subject to the rule of destructibility."[6]

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* 273 P. 2d 375, 1953-1954 C.B.A. Adv. Sh. 18.

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[1] Barry v. Newton, *supra*, p. 738.

[2] *Id.*, p. 740.

[3] *Id.*, p. 740.

[4] 43 Ch. Div. 246.

[5] 21 T.L.R. 329 (1905).

[6] Kales, Estates, Future Interests and Illegal Conditions in Illinois (1920), No. 662.

Gray says, "Whether contingent remainders are subject to the Rule against Perpetuities has been much discussed. As the Rule governs all shifting and springing uses and executory devises, and all contingent limitations of personal property, whether in the form of remainders or not, it seems very desirable that contingent remainders should be subject to the Rule also. Some reasons have, however, been suggested for exempting legal contingent remainders from the operation of the Rule against Perpetuities . . . [Then, after seventeen pages of discussion] . . . It has now been determined that the Rule does apply to them. *Re Frost. Re Ashforth. Whitby v. Von Luedecke.*"[7] It is to be noticed that the first two of these cases are those which Kales has cited and has distinguished as dealing with remainders to which the English Contingent Remainders Act of 1845 applied. The same is true of *Whitby v. Von Luedecke,*[8] which dealt with interests created in 1877.

Simes says, "It has sometimes been argued that the rule should not be applied to legal contingent remainders in land . . . [after two pages of discussion] . . . In England the question has become one of purely academic interest by the passage of the Law of Property Act of 1925 . . . but prior to that time such authority as existed tended in that direction [i.e., toward the applicability of the Rule]. In the United States, while the courts do not discuss the point, cases may be found where contingent remainders have been held void under the rule, and such is doubtless the law."[9] Here Simes cites seven cases, each of which will be briefly commented upon.

1. *Owsley v. Harrison.*[10] The will of Carter H. Harrison provided that the residue of his estate be kept together for two years after his death, and then, "After the expiration of said period of two years, all of my estate . . . not disposed of as hereinabove directed, shall be divided into four equal . . . shares . . .: One of such shares I bequeath to each of my four children who may at the time be alive. If either of my four children shall prior to that time have died . . . etc . . ." It is plain, because of the two year gap between the death of the testator and the creation of the interests which the court held to be void for remoteness, that all those interests were executory, and were not remainders of any sort because there was no prior estate of freehold to support them.

2. *Ryan v. Beshk.*[11] Edward J. Ryan devised land to Delia for the term of her natural life, and "Upon the death . . . of . . . Delia, I hereby give to . . . James . . . Michael . . . Margaret . . . and Helen . . ., if they be living at the death of [Delia], or in the event of the death of all or any of said persons mentioned I give . . . his or her . . . share intended for him or her who has died

[7] Gray, The Rule Against Perpetuities, 4th Ed. (1942), pp. 316-333.
[8] (1906) 1 Ch. 783.
[9] Simes, The Law of Future Interests (1936), No. 505.
[10] 60 N.E. 89, 190 Ill. 235 (1901).
[11] 170 N.E. 699, 339 Ill. 45 (1930).

before the death . . . of . . . Delia, to his or her executor or administrator to be applied by such as if the same had formed part of the estate of such person . . . at his or her decease . . ." The decision, holding the gifts to the personal representatives to be void for remoteness has been criticized by Gray as "an obvious slip in an otherwise excellent opinion. All the shares vested at the termination of the life estate. The vesting of the interests of the legatees or next of kin of a deceased remainderman did not depend on the existence of an executor of administrator."

Even if it be conceded, in accordance with the court's inaccurate assumption, that a gift to a personal representative is not deemed to have vested at the death of the decedent but only upon appointment of the personal representative, the case still is not authority for the point for which it has been cited because it falls squarely within the rule of *Doe d. Evers v. Challis*,[12] namely, that "where a devise over contains two contingencies which are in their nature divisible, and one of which can operate as a remainder, they may . . . be divided though included in one expression . . ." in the case of *Ryan v. Beshk* the gift to the personal representatives of the named persons who might die before Delia does contain two such contingencies: One, that the personal representative be appointed during the continuation of Delia's life estate, in which event the gift to the personal representative would be valid as a common law remainder and would vest before the termination of the life estate; the other contingency is that the personal representative not be appointed during the continuation of Delia's life estate, in which event the gift to the personal representative necessarily would be executory because of the gap between the termination of the life estate and the appointment of the personal representative. In other words, this was a case in which orthodox rules called for separability by construction, and in which, as a consequence of such separation, the only remote gift if any, would have been executory.

3. *Graham v. Whitridge*.[13] The will of George Brown set up a trust and provided, "In case . . . Grace . . . shall not leave living at her death, . . . any descendant . . . then . . . the said Trustees . . . shall continue to hold . . . to and for such of my other descendants . . . in such proportions, and for . . . such . . . Estates . . . as . . . said . . . Grace . . . may . . . appoint . . ." The court says, "The question which this state of facts presents, and which we are therefore called on to decide, is this, namely: Is the will of [Grace] a valid execution of the power of appointment contained in the will of . . . George Brown? . . . Are the limitations . . . as made in . . . [Grace's] will void for remoteness under the rule against perpetuities?" Obviously the court was dealing only with interests created by the exercise of a power of appointment,

[12] 18 Q.B. 231, 7 H.L. Cas. 531 (1850, 1859).
[13] 57 A. 609, 99 Md. 248, 66 L.R.A. 408 (1904).

and such interests are always executory according to the orthodox theory of powers.

4. *Lockridge v. Mace.*[14] Thomas J. Lockridge devised land "unto my children now born, and which may hereafter be born, and to the issue of their bodies, as a life-estate only, to said two generations, . . . and upon the death of my grandchildren the title in fee-simple . . . is to vest absolutely in my great grandchildren . . ."

The court held that "The remainder in fee to the grandchildren . . . [is] . . . void", but it is to be noticed that it based its holding in part upon the Rule in *Whitby v. Mitchell.*[15] "The heart of this cause is involved in this question: Does the third clause violate the rule respecting perpetuities? . . . Touching this point of perpetuities, an eminent authority says: 'Still the policy of the law is against clogging the free alienation of estates, and, as will be shown hereafter, it has become an imperative, unyielding rule of law—First, that no estate can be given to the unborn child of an unborn child . . .' 1 Washb. Real Prop. (5th Ed.) . . . 'Thus if an estate were limited to A for life, remainder to his unborn son for life, remainder to the sons of his unborn son, the limitation would be too remote, so far as the grandchildren were concerned, and therefore void.' 2 Washb. Real Prop. p. 760. Charles R. Lockridge at the death of his father, the testator, was seven and one-half years old. The will gave him one-fourth interest in the land for life; the remainder to his unborn children for life; remainder in fee to his unborn grandchildren, i.e., unborn children of unborn children . . ."

5. *Wood v. Griffin.*[16] Simes himself notes this case as, "dictum".

6. *In re Kountz' Estate.*[17] "The question in this case is whether the trust created by the will of testatrix violates the rule against perpetuities . . . By her will . . . Mrs. Kountz . . . devised and bequeathed her residuary estate as follows: . . . 'After the decease of the last of my immediate children, and the lapse of ten years from the date when my youngest grandchild shall have become of age, the principal of the whole estate shall be equally divided among my grandchildren' . . . Beyond doubt . . . the trust was active . . . there is no direct and explicit gift of the principal; it is only implied from the direction to divide . . ." It is obvious that this case does not involve a legal contingent remainder in land, but an equitable interest in the nature of a contingent remainder in a mixed fund.

7. *Geissler v. Reading Trust Co.*[18] "Bill to annul a testa-

[14] 18 S.W. 1145, 109 Mo. 162 (1891).
[15] 42 Ch. Div. 494, 44 Ch. Div. 85 (1890).
[16] 46 N.H. 230 (1865).
[17] 62 A. 1103, 213 Pa. 390, 3 L.R.A. (N.S.) 639, 5 Ann. Cas. 427 (1906).
[18] 101 A. 797, 257 Pa. 329 (1917).

mentary trust . . . Testator's will provided . . . 'After the death of all my children and their children (my grandchildren), then I direct that the above mentioned investments (real estate and securities) . . . shall be divided among all my great-grandchildren . . . per capita . . .' " Held, that "The plaintiffs are entitled to a decree declaring the aforesaid trust . . . void . . ." Another case in which the interest is not a legal remainder in land, but an equitable interest in the nature of a remainder in a mixed fund.

Thus it appears that all of the seven cases cited by Simes in 1936 are, to say the least, inconclusive. In 1951 he states that "Contingent remainders are subject to the rule."[19] and cites four cases. Three of them, *in re Frost, Graham v. Whitridge,* and *Geissler v. Reading Trust Co., supra,* have already been commented upon.

The fourth is *Abiss v. Burney.*[20] ". . . The first question is whether the rules as to remoteness apply to what has been termed an equitable remainder, where the legal estate has been vested in trustees under the same instrument which creates the equitable estate. The second question is, whether the limitation with which we have to deal in this case is an equitable remainder or an executory devise . . ." In addition to holding that the rules as to remoteness do apply to an equitable remainder, the court says, "Of course, if this is a limitation by way of executory devise it is void for remoteness . . . In my opinion, therefore, the gift . . . is an executory limitation, and subject to all the rules with regard to executory limitations . . ."

Simes' next sentence is as follows, "It has sometimes been said that, if contingent remainders in land are destructible, they are not subject to the rule; but it has been held that the rule applies to them." For this final clause there is cited *In re Ashforth, supra,* which has already been commented upon and distinguished in the above quotation from Kales.

In view of the foregoing considerations, the clear dictum in *Barry v. Newton,* on a point that was not mentioned in the briefs, that "The rule against perpetuities is applicable to contingent remainders," invites scrutiny of the authorities which are cited by the court. There are three cases: *Chilcott v. Hart,*[21] and *Madison v. Larmon,*[22] in both of which the interests were held not to be remote, and *Bankers Trust Co. v. Garver,*[23] in which the court was dealing, not with the rule against perpetuities, but with an Iowa statute which provided that "Every disposition of property is void which suspends the absolute power of controlling the same, for a longer period than during the lives of persons then in being, and twenty-one years thereafter." Thus it appears that the cases which the court cites as authority for its unqualified dictum that the rule against perpetuities applies to contingent remainders are

[19] Simes, Handbook on the Law of Future Interests (1951), 378.
[20] L.R. 17 Ch. Div. 211 (1881).
[21] 23 Colo. 40, 45 P. 391, 35 L.R.A. 41 (1896).
[22] 170 Ill. 65, 48 N.E. 556 (1897).
[23] 222 Iowa 196, 268 N.W. 568 (1936).

no more conclusive than are those cited by Gray and by Simes. The doubt expressed by Kales remains.

Another misleading statement in the case of *Barry v. Newton* [24] occurs when the court first states, "The rule against perpetuities is applicable to contingent remainders, and the event on the happening of which the remainder is to vest must be one that is certain to happen within the prescribed period, or the limitation will be bad." It is to be noted and regretted that the all important phrase, "IF AT ALL" is omitted from this statement of the rule, an omission which is cured in this case, by the subsequent statement that, "Under this rule no interest subject to condition precedent is good unless the condition must be fulfilled, if at all, within the period limited by the rule."

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[24] *Supra*, p. 740.