

CHAPTER 3

Future Interests

GUY NEWHALL

§3.1. Modification of the Rule Against Perpetuities. Although the Rule Against Perpetuities may still have economic and socially desirable functions to perform under present-day conditions, it is generally agreed that the Rule has been overburdened with technicalities. Such aspects of the Rule as the doctrine of prospective hypothetical validity and the exception of possibilities of reverter and powers of termination have been the subject of much criticism.¹

The profession has sought clarification and modification of the Rule to relieve it of some of its most objectionable qualities. These aims have been accomplished to some extent by legislation² this year, with the adding of a new chapter to the General Laws, Chapter 184A, titled "The Rule Against Perpetuities."³

The new law applies to both legal and equitable estates, and is to be construed so as not to invalidate or modify any limitation which would have been valid prior to the time the new statute takes effect. Certain of the sections are set out here in full, as a summary would be inadequate.

Section 1 reads as follows:

In applying the rule against perpetuities to an interest in real or personal property limited to take effect at or after the termination of one or more life estates in, or lives of, persons in being when the period of said rule commences to run, the validity of the interest shall be determined on the basis of facts existing at the termination of such one or more life estates or lives. In this sec-

GUY NEWHALL is engaged in private law practice in Lynn, Massachusetts. He is the author of *Settlement of Estates and Fiduciary Law in Massachusetts* (now in its third edition, 1937), and *Future Interests and the Rule Against Perpetuities in Massachusetts* (now in its third edition, 1951).

§3.1. ¹ See the forceful indictment by Professor Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 Harv. L. Rev. 721 (1952).

² Acts of 1954, c. 641.

³ For a more detailed treatment of the new legislation, see Leach, *The Rule Against Perpetuities — The New Act and Revised Notes*, 39 Mass. L.Q., No. 3, p. 15 (1954); Leach, *Perpetuities Legislation*, Massachusetts Style, 67 Harv. L. Rev. 1349 (1954).

tion an interest which must terminate not later than the death of one or more persons is a "life estate" even though it may terminate at an earlier time.

This section can best be explained by a simple illustration. Suppose a testator who is survived by a spinster sister, aged ninety, and some nephews and nieces (children of deceased brothers and sisters) creates a trust to pay the income to the sister for life, and after her death to his nephews and nieces for their lives, with remainders on the death of the survivor of the nephews and nieces to their issue then living. If all the nephews and nieces are lives in being, the remainder interests will be valid. Under the strict construction of the Rule against Perpetuities, however, the ninety-year-old spinster sister must be deemed capable of marrying and having children after the testator's death. This would render the ultimate remainder interests too remote, as the nephews and nieces would not all be lives in being. This limitation is substantially the same as the one before the Court in *Worcester County Trust Company v. Marble*,⁴ where the Court concluded that the testator meant to benefit only those nephews and nieces living at the date of his death. The new statute would make the remainder interests valid, because on the death of the sister it would appear that no other nephews and nieces had in fact been born. Therefore, those in existence were lives in being. Many other illustrations along the same line could be given. The point is that at the end of the life estates, if it appears that the remainder interests do not actually violate the Rule, they are saved by the statute. The New Hampshire Supreme Court arbitrarily adopted this rule in a recent case, *Merchants National Bank v. Curtis*.⁵

The meaning of the last sentence of this section may not be clear at first glance. A typical illustration would be a trust to pay the income to the testator's wife as long as she remained his widow.

Section 2 of the chapter reads as follows:

If an interest in real or personal property would violate the rule against perpetuities as modified by section one because such interest is contingent upon any person attaining or failing to attain an age in excess of twenty-one, the age contingency shall be reduced to twenty-one as to all persons subject to the same age contingency.

A simple illustration of this would be as follows: A testator provides that his estate shall be held in trust and the income accumulated and the trust funds ultimately divided among those of his grandchildren who should reach the age of thirty. Under the old rule this would be void if at the death of the survivor of his children there were any grandchildren under nine years of age. This section cures that by pro-

⁴ 316 Mass. 294, 55 N.E.2d 446 (1944).

⁵ 98 N.H. 225, 97 A.2d 207 (1953).

viding that the limit of thirty shall be automatically reduced to twenty-one. Again this result was accomplished by the New Hampshire Supreme Court by an arbitrary ruling in the case of *Edgerly v. Barker*.⁶

The effective date of the statute is January 1, 1955. The law applies only to "inter vivos instruments taking effect after that date, to wills where the testator dies after January first, nineteen hundred and fifty-five, and to appointments made after the effective date of this act, including appointments by inter vivos instruments or wills under powers created before said effective date."⁷

§3.2. Rights of entry for condition broken and rights of reverter after determinable fees. The new chapter also changes the law under which rights of reverter after a determinable fee and rights of entry for condition broken can travel down through the centuries, with the result that at no time can a good title to the real estate be given. This unfortunate situation arose from early decisions of the Supreme Judicial Court to the effect that these rights were not subject to the Rule against Perpetuities.¹ The new statute provides that unless such rights are specifically limited so as to take effect, if at all, within the limits of the Rule against Perpetuities, they shall be subject to an arbitrary limitation of thirty years; and if the contingency which is to divest the title does not happen within said thirty years, the title remains absolute and the future right or condition ceases to exist.

The statute does not apply to a case where both the fee simple determinable and the succeeding interest, or both the fee simple and the right of entry are for public, charitable, or religious purposes.² Likewise it does not apply to a deed or gift of the Commonwealth or any political subdivision.

§3.3. Charitable trust held valid, although operation not immediately practicable — Cy pres. A charitable trust should not be declared invalid simply because present conditions would make it impracticable to carry out the specific intent of the testator. In *Ford v. Rockland Trust Company*¹ the will gave the testator's home to his brother for life and on his death to the town of Rockland "to be used as a home for aged women." If the town did not accept it, the property was to go to the bank, to be held on the trusts of the residuary clause. The residue was bequeathed to the bank in trust to pay the income to the brother for life and on his death to use the income for the home for aged women. The brother died in 1942. The town then voted not to accept the trust. The bank later sold the property under license

⁶ 66 N.H. 434, 31 Atl. 900 (1891).

⁷ Acts of 1954, c. 641, §2.

§3.2. ¹ *Brown v. Independent Baptist Church of Woburn*, 325 Mass. 645, 91 N.E.2d 992 (1950); *First Universalist Society of North Adams v. Boland*, 155 Mass. 171, 29 N.E. 524, 15 L.R.A. 231 (1892); *Tobey v. Moore*, 130 Mass. 448 (1881); *French v. Old South Society in Boston*, 106 Mass. 479 (1871).

² G.L., c. 184A, §3, inserted by Acts of 1954, c. 641.

§3.3. ¹ 1954 Mass. Adv. Sh. 27, 116 N.E.2d 669.

of court and added the proceeds to the trust fund. On the death of the brother the trust amounted to \$14,230.77. On December 31, 1951, with the proceeds of the sale, appreciation of assets, and accumulated income, it amounted to \$30,550.14. Nothing had been done by the trustee toward establishing the home. The maintenance of a home was expensive; the town had closed its infirmary because of lack of patients and on account of old age assistance; and an existing home for aged women had been liquidated in 1942 because there was no longer a need for such a home, there having been no applicants for several years.

The heirs of the testator filed a petition to have the fund turned over to them on the ground that the trust had failed. The probate judge dismissed the petition and decreed that the bank held the fund for the uses and purposes set forth in the will.

The Supreme Judicial Court held that while the establishment of a home for aged women is at present impracticable, the trust had not failed. The bequest was a valid public charity. The testator had a manifest intent to benefit the class of persons designated. His idea to have his home used was subordinate to his general intent.

Although the question of cy pres was not raised, the benefits of the charity should be made available within a reasonable time for the class designated. If either the Attorney General or the bank should within sixty days amend its answer and ask that the fund be administered cy pres, the case is to be remanded to the Probate Court for consideration.

§3.4. Enforcement of charitable trust by another charity having a contingent interest in fund. In another interesting case before the Supreme Judicial Court in 1954, *Trustees of Dartmouth College v. Quincy*,¹ the issue was raised as to the right of a private interest, here a remainderman, to question whether or not a public charity was being properly administered. To summarize the facts in the case: In 1870 a fund was bequeathed to the City of Quincy to establish a Female Institute. If Quincy did not accept it or failed to comply with the terms of the gift, the fund was to revert to Dartmouth College. In 1951 the Trustees of Dartmouth College brought proceedings for a declaratory judgment to determine whether Quincy was performing its obligations. The city filed a demurrer on the ground that Dartmouth College had no standing to bring the petition.

The Court held that while ordinarily it is the exclusive function of the Attorney General to enforce public charitable trusts, in this case Dartmouth had a special interest in the maintenance of the fund and could maintain its petition.

§3.5. Meaning of the phrase "or their heirs by right of representation." The word "heirs" and the phrase "by right of representation" have given the courts many difficult problems of construction in the

§3.4. ¹ 1954 Mass. Adv. Sh. 243, 118 N.E.2d 89.

past. The two came together in *Sweeney v. Kennard*,¹ where the will created a trust for the benefit of the testator's son George. On George's death, if he died without issue (as he did), the trust was to continue for the benefit of his wife during her life. On her death the trust fund was to be divided equally between the testator's other two sons, Byron and John, "or their heirs by right of representation." George died in 1916, and his widow Ethel in 1951. Between those dates John died, leaving a widow Evelyn, two daughters, and a son Henry, who died shortly after his father. Also Byron died between those dates, leaving a widow, who died in 1953, and two daughters, both living. The case arose on a petition for instructions by the trustees as to how the principal should be distributed on the death of George's widow. The particular question at issue was the meaning of the phrase "or their heirs by right of representation."

The Court held that the estate should be divided one half to the statutory heirs of John and the other one half to the statutory heirs of Byron, determined as of the dates of their deaths. The Court said that the word "heirs" in this case did not mean issue, but meant heirs and was not limited to heirs by blood, and that the use of the phrase "by right of representation" was intended to take care of the possibility that the heirs might be in different degrees of descent. In this case there was both real and personal property, and the Court said that where a will gives both realty and personalty to the heirs of a person, the gift is to those entitled to that person's real estate by descent, and that such heirs are determined, as a general rule, as of the time of that person's death.

§3.6. Life tenancy and the right to "use" the property. Another example of unnecessary ambiguity in the use of terms was presented in *Hinkley v. Clarkson*.¹ There the draftsmen created the problem by using the following language in a bequest: "All the rest and residue of my estate of whatever nature and wherever situated I give, devise and bequeath to my brother . . . with the right to *use* the property during his lifetime, and on his death to be divided equally among my nieces and nephews." (Emphasis supplied.)

The question was, of course, the extent of the interest of the brother. Had he a life estate with a right only to the income during his life, or had he a right also to invade the corpus for his "use" during life?

The Court held, first, that the words created only a life estate, and second, that the "use" of the property given by the will was the right to the income only, and not the right to alienate or consume it. The Court distinguished the case from those where the gift-over is of what may remain at the death of the life tenant.

In the last two cases discussed the problems were created for the courts when the lawyers involved did not use care in draftsmanship.

§3.5. ¹ 1954 Mass. Adv. Sh. 603, 120 N.E.2d 910.

§3.6. ¹ 1954 Mass. Adv. Sh. 515, 120 N.E.2d 285.

It may seem strange that lawyers will take great pains to cover very remote possibilities of ambiguity in expressing the grant, as here — “I give, devise and bequeath” — and then will leave very broad ambiguities in the actual creation of the gift. Certainly these cases illustrate that it is as much the lawyer’s professional duty to make an effort to avoid litigation as it is his duty to represent clients before the bar. This SURVEY is intended to aid as much in the former as in the latter.