

NOTES

THE RESULT WHEN ONE OF TWO ALTERNATIVE CONTINGENT REMAINDERS IS VOID

INTRODUCTION

Under the rule against perpetuities, a limitation is void unless it is certain that the estate will vest, if it is ever to vest at all, within the period required by the rule. If there is any possibility that the event upon which the estate is limited may occur after that time, the limitation is too remote. However, a devise is sometimes limited to take effect upon the happening of either of two alternative contingencies. One of these may be such that it could occur subsequent to the period of time allowed by the rule against perpetuities, although the other is one which must occur within that period, if it is to occur at all. It is the purpose of this note to consider under what circumstances such alternative contingencies are separable and to discover the effect of the invalidity of one provision upon the validity of the other.

ALTERNATIVE CONTINGENT REMAINDERS

Although it is well established that a remainder cannot be limited after a fee, estates may be limited so that the remainder will go to one of two persons upon the occurrence of a certain contingency. These future estates are called alternative remainders or remainders with a double aspect.¹ If through the happening of the requisite condition, the first remainder vests, the other remainder fails entirely. The second remainder vests only if the first fails. In order for the second remainder to be valid, both alternative remainders must be contingent.² The second remain-

1. In the vast majority of the cases, the alternative remainders are remainders in fee; however, they could also be valid alternative remainders in fee tail or for life.

2. In the leading case of *Luddington v. Kime*, 1 Ld. Raym. 203, 91 Eng. Rep. 1031 (1697), there was a devise to A for life, remainder to his male issue in fee simple, remainder over to B if A should die without male issue. These remainders were alternative, and only one could vest. The vesting of one and the defeat of the other were to take place at the death of A. If the remainder to B had been limited upon a different contingency which would have caused vesting at a later time, or if the limitation to A's issue had been vested, the remainder to B would have been a remainder limited after a fee.

der is necessarily contingent, and if the first is vested, the second could take effect only by defeating or destroying the first. The first remainder's being vested would make the second a remainder limited after a fee, and thus void as a common law remainder, although good as an executory limitation.³ Accordingly, the great weight of American authority is to the effect that when there are limitations in the alternative and the first is to an ascertained person and in form unconditional, followed by a condition subsequent in form, the first limitation is a vested remainder and the second is an executory interest.⁴

On the other hand, limitations in the alternative with a condition precedent in form attached are construed by many courts as contingent remainders in the alternative,⁵ in accordance with *Luddington v. Kime*. However, even in such circumstances some courts regard the first limitation as a vested remainder, if at all possible, because of the tendency to construe remainders as vested rather than contingent.⁶ In so doing, the courts disregard the fact that the condition is precedent in form and hold that it is

3. *Beckley v. Leffingwell*, 57 Conn. 163 (1888); *Mercantile Bank of New York v. Ballard's Assignee*, 83 Ky. 481 (1885); *Yocum v. Siler*, 160 Mo. 281, 61 S.W. 208 (1901); *Green v. Head*, 54 Misc. 454, 104 N.Y. Supp. 383 (Sup. Ct. 1907); *Taylor v. Taylor*, 63 Pa. 481 (1870); *Doe d. Herbert v. Selby*, 2 B. & C. 926, 107 Eng. Rep. 626 (1824); *Goodright d. Docking, v. Dunham*, 1 Doug. 264, 99 Eng. Rep. 173 (1779); *Luddington v. Kime*, 1 Ld. Raym. 203, 91 Eng. Rep. 1031 (1697).

4. *Sumpter v. Carter*, 115 Ga. 893, 42 S.E. 324 (1902); *Hudgens v. Wilkins*, 77 Ga. 555 (1886); *Bailey v. Strahan*, 314 Ill. 213, 145 N.E. 359 (1924); *Calvert v. Calvert*, 297 Ill. 22, 130 N.E. 347 (1921); *Strickland v. Strickland*, 271 Ill. 614, 111 N.E. 592 (1916); *Northern Trust Co. v. Wheaton*, 249 Ill. 606, 94 N.E. 980 (1911); *Taylor v. Stephens*, 165 Ind. 200, 74 N.E. 980 (1905); *Callison v. Morris*, 123 Iowa 297, 98 N.W. 780 (1904); *Mercantile Bank of New York v. Ballard's Assignee*, 83 Ky. 481 (1885); *Wilson v. Pichon*, 162 Md. 199, 159 Atl. 766 (1932); *Blanchard v. Blanchard*, 83 Mass. (1 Allen) 223 (1861); *Howell v. Gifford*, 64 N.J. Eq. 180, 53 Atl. 1074 (Ch. 1903); *Ziegler v. Love*, 185 N.C. 40, 115 S.E. 887 (1923); *Walker v. Alverson*, 87 S.C. 55, 68 S.E. 966 (1910); *Rutledge v. Fishburne*, 66 S.C. 155, 44 S.E. 564 (1903); *Haynsworth v. Haynsworth*, 12 Rich. Eq. 114 (S.C. 1860).

5. *Smith v. Chester*, 272 Ill. 428, 112 N.E. 325 (1916); *Dickey v. Citizen's State Bank of Fairmont*, 180 N.E. 36 (Ind. App. 1932); *Webber v. Jones*, 94 Me. 429, 47 Atl. 903 (1900); *Lewis v. Payne*, 113 Md. 127, 77 Atl. 321 (1910); *Lambertson v. Case*, 245 Mich. 208, 228 N.W. 182 (1928); *May v. May*, 209 App. Div. 22, 204 N.Y. Supp. 408 (2nd Dept. 1924); *McCreary v. Coggeshall*, 74 S.C. 42, 53 S.E. 978 (1906); *In re Field's Estate*, 101 Vt. 242, 143 Atl. 280 (1928).

6. *Bowman v. Long*, 123 Ga. 242 (1857); *Cockey v. Cockey*, 141 Md. 373 118 Atl. 850 (1922); *Schockley v. Homer*, 87 Neb. 146, 127 N.W. 145 (1910); *Seabrook v. Gregg*, 2 S.C. 68 (1870); *Rivers v. Tripp*, 4 Rich. Eq. 276 (S.C. 1852).

in fact subsequent. Nevertheless, the court's finding that the first limitation is to unascertained persons will always make the remainders contingent.⁷

THE GENERAL RULE AND ITS DEVELOPMENT

In instances where an estate is limited on alternative contingencies, one within and one beyond the period allowed by the rule against perpetuities, courts have almost uniformly held that the invalidity of one provision does not affect the validity of the other. However, many courts have used language to the effect that in the aforementioned circumstances the validity of the provision not void for remoteness depends upon the happening of the event,⁸ *i.e.*, whether the contingency does happen which is not invalid for remoteness. This language of the courts about the happening of the event leads to some possibility of confusion about whether the validity of the contingency not void for remoteness may be determined prior to the happening of the event—at the time of the testator's death rather than at the termination of the prior estate, for example. This language results from a confusion of two problems: first, the validity of the limitation; second, whether the gift will vest. The limitation upon the valid contingency is valid from the effective date of the will, although it must await the occurrence of the condition precedent to its vesting, like every other contingent limitation, and possibly may never vest.

Illustrative of this confusion of language is the statement of the rule made in *Jackson v. Phillips*⁹ by Gray, J.:

But if the testator distinctly makes his gift over to depend upon what is sometimes called an alternative contingency, or upon either of two contingencies, one of which may be too remote and the other cannot be, its validity depends upon the event. . . .

7. *Friedman v. Friedman*, 283 Ill. 383, 119 N.E. 321 (1918); *Ruddell v. Wren*, 208 Ill. 508, 70 N.E. 751 (1904); *Wunderlich v. Bleyle*, 96 N.J. Eq. 135, 125 Atl. 386 (Ch. 1924); *Whitesides v. Cooper*, 115 N.C. 570, 20 S.E. 295 (1894); *In re Long's Estate*, 225 Pa. 39, 73 Atl. 981 (1909); *Allison v. Allison's Executors*, 101 Va. 537, 44 S.E. 904 (1903).

8. *Monarski v. Greb*, 407 Ill. 281, 95 N.E.2d 433 (1950); *Springfield Safe Deposit & Trust Co. v. Ireland*, 167 N.E. 261 (Mass. 1929); *Jackson v. Phillips*, 96 Mass. (14 Allen) 539 (1867); *Brookover v. Grimm*, 118 W. Va. 227, 190 S.E. 697 (1937); *In re Davies & Kent's Contract*, 2 Ch. 35 (1910).

9. 96 Mass. (14 Allen) 539 (1867).

The case of *Quinlan v. Wickman*¹⁰ illustrates why the language in the aforementioned case is somewhat misleading. This case involved a will which bequeathed trust money in the hands of the trustee to the testatrix' daughter on two contingencies, one depending on the death of another daughter without leaving any children, and the other depending on the death of the last surviving child of such daughter before any of her children reached the age of thirty years. The plaintiffs alleged that the will, in attempting to dispose of the property in trust, was violative of the rule against perpetuities and thus an ineffective devise. They claimed that upon the death of the testatrix her four children, her only heirs at law, became seised in fee, as tenants in common. However, the court held that the first limitation was lawful even though the second was invalid for remoteness. Accordingly, when the court said that the gift "will take effect or not according to the event," the court referred to the vesting of the gift and not to its validity. The gift upon the valid contingency is valid from the effective date of the will, even though its vesting depends upon the happening of the condition precedent to its vesting. Moreover, there is the possibility that the event will never happen, and, if it does not, the remainder will simply fail like any other contingent remainder.

ENGLISH PRECEDENTS

When the gift was made on two contingencies, stated in the alternative, the earliest English cases that dealt with the question treated it as two gifts for purposes of the rule against perpetuities, and one contingency was held valid and the other invalid. These earlier decisions properly tended to construe the gifts separately, when it could be done.¹¹

A leading English case on this question of alternative contingent limitations and a good example of the application of this rule was *Goring v. Howard*.¹² Personal property was given to trustees to hold to A for life, and after his death to his children

10. 233 Ill. 39, 84 N.E. 38 (1908).

11. *Leake v. Robinson*, 2 Mar. 363, 35 Eng. Rep. 979 (1817); *Crompe v. Barrow*, 4 Ves. 681, 31 Eng. Rep. 351 (1799); *Porter v. Bradley*, 3 T.R. 143, 100 Eng. Rep. 500 (1789); *Marsh v. Marsh*, 1 Bro. C.C. 293, 28 Eng. Rep. 1140 (1783); *Longhead v. Phelps*, 2 Black. W. 704, 96 Eng. Rep. 414 (1770).

12. 16 Sim. 395, 60 Eng. Rep. 926 (1848).

on their reaching twenty-five, and in case none of A's sons reached twenty-five or if A died without issue living at his death, then over. Although the gift limited on A's son's not reaching twenty-five was clearly void, the gift over on A's dying without issue at his death was held good. Here the whole gift was not void for remoteness. The contingencies in this case were separable. Upon the happening of the valid contingency—A's dying without issue—the gift over took effect.

Other English cases with analogous factual situations have said the rule is clearly settled that when one of two alternative contingent limitations is too remote, and the other is capable of taking effect, the court will simply disregard the invalid limitation.¹³

DEVELOPMENT OF THE RULE BY AMERICAN DECISIONS

Although the problem was discussed in a dictum to *Dunlap v. Dunlap*,¹⁴ the first American case dealing directly with the problem was *Armstrong v. Armstrong*.¹⁵ The latter case involved a gift by will to A for life, and after his death to his children, but in case A die without issue at the time of his death or such issue themselves die without issue, then over. It happened that the devisee did die without leaving issue at his death. The court here set out the rule that,

Where a limitation is made to take effect on two alternative events or contingencies with a double aspect, one of which is too remote, and the other valid, as being within the prescribed limits, although it is void so far as it depends upon the remote event, it will be allowed to take effect on the alternative one.¹⁶

Since the first event, *i.e.*, the death of A without issue, must necessarily have happened, if at all, within the prescribed period, the gift over was clearly valid, and would vest when that event happened. If, however, the first taker had died leaving issue, the gift over would have failed since the second event—the death of

13. *Bullock v. Bullock*, 1 Ch. 493 (1915); *In re Davies & Kent's Contract*, 2 Ch. 35 (1910); *In Re Bowles*, 1 Ch. 371 (1905); *Goodier v. Johnson*, 18 Ch. D. 441 (1881); *Miles v. Harford*, 12 Ch. D. 691 (1879); *Cambridge v. Rous*, 25 Beav. 409, 414, 53 Eng. Rep. 693, 756 (1858); *Goring v. Howard*, 16 Sim. 395, 60 Eng. Rep. 926 (1848); *Minter v. Wraith*, 13 Sim. 52, 60 Eng. Rep. 21 (1842).

14. 4 S.C. Eq. (4 Desauss.) 305 (1812).

15. 53 Ky. (14 Monroe) 333 (1854).

16. *Id.* at 346.

such issue without issue—was one that might not have happened within the prescribed limits of the rule against perpetuities.

Soon afterward, other American cases arose in which the testator had provided for limitations based on alternative contingencies. In these, the testators themselves had separated the events so as to make the gift over take effect on the happening of either of two events. The courts then had no difficulty allowing the valid alternative limitation to stand.¹⁷ Typical of the results achieved in the great majority of the cases was the holding in *Jackson v. Phillips*.¹⁸ There the court concluded:

But if the testator distinctly makes his gift over to depend upon what is sometimes called an alternative contingency, or upon either of two contingencies, one of which may be too remote and the other cannot be, its validity depends upon the event; or, in other words, if he gives the estate over on one contingency which must happen, if at all, within the limit of the rule, and that contingency does happen, the validity of the distinct gift over in that event will not be affected by the consideration that upon a different contingency which might or might not happen within the lawful limit, he makes a disposition of his estate, which would be void for remoteness.¹⁹

The rule was again recognized in the leading case of *Moroney v. Haas*,²⁰ where there was a devise of income in trust to A for life, and then to her children or their issue until her youngest child was twenty years of age, when the devised property was to be divided among the living issue. However, in case A left no children or issue of a deceased child surviving her, or in case no surviving child attained the age of twenty-five years and all should die without issue, the property held in trust was to go over. Applying the aforementioned rule, the Supreme Court of Illinois held that the former, valid provision was separable from and not affected by the latter, invalid one and could thus be given effect.

17. *Perkins v. Fisher*, 59 Fed. 801 (4th Cir. 1894); *Halsey v. Goddard*, 86 Fed. 25 (C.C.D.R.I. 1898); *Attorney General v. Wallace's Devises*, 46 Ky. (7 Monroe) 611 (1847); *Seaver v. Fitzgerald*, 141 Mass. 401, 6 N.E. 73 (1885); *Jackson v. Phillips*, 96 Mass. (14 Allen) 539 (1867); *Ackerman's Administrators v. Vreeland's Executor*, 14 N.J. Eq. 23 (1861); *Schettler v. Smith*, 2 Hand 328 (N.Y. 1869); *Fowler v. Depau*, 26 Barb. 224 (N.Y. 1857).

18. 96 Mass. (14 Allen) 539 (1867).

19. *Id.* at 572.

20. 277 Ill. 467, 115 N.E. 648 (1917).

In *Re Trevor*²¹ the New York Court of Appeals rather dramatically explained the operation and purpose of the doctrine previously discussed:

The will is to be read in the light of what has happened, not so much for the purpose of determining its validity as for the purpose of seeing clearly by such light what is possible in the way of separating the good from the bad. In thus construing the will, the court does not perform a radical operation to remove a malignant growth when either the disease or the operation will take the life out of the testamentary document. The irritation of invalidity has produced not a cancer, but, at worst, an epidermal callosity which may be harmlessly eliminated. A pencil may be drawn through the objectionable alternative provisions of the will which postpone vesting beyond the end of a second life. A perfectly good and workable will remains.²²

The case of *Springfield Safe Deposit and Trust Co. v. Ireland*²³ presents a most unusual factual situation. Here the testator established by a will, dated May 17, 1881, a trust of all his estate, the net income to go to his only child, A, for life. At A's death the income was to go in equal shares to her children then living, the lawful issue of any child then deceased to take his parent's share by representation. In the month of January, 1922, or if A had not died by that time in the first January after the death of A, the principal was to go to her then living children and the lawful issue of any of her deceased children as tenants in common. However, if none of her children or grandchildren were alive at that time, then over. The testator thus had undertaken to provide for any other children that A might possibly have. The testator died in 1891. When A died in 1928, she left surviving her only one son, who was born before the death of the testator.

It may be seen that the remainder was to vest in the month of January, 1922 in case A was dead; however, if A lived beyond January, 1922, then the estate would vest in the first January after her decease, a period not more than twelve months from the death of A. In effect, the gift over would thus vest within a life or lives in being and twelve months at the latest and would not be too remote. It must be noted, however, that the limitation

21. 239 N.Y. 6, 145 N.E. 66, *reargument denied without opinion*, 239 N.Y. 579, 147 N.E. 203 (1924).

22. *Id.* at 18, 145 N.E. at 69.

23. 167 N.E. 261 (Mass. 1929).

which vests the estate at the earlier period, January, 1922, is held invalid as a violation of the rule against perpetuities.²⁴ This rule, which was created to prevent remoteness in vesting, thus operates in this case so that the limitation which in point of time vests the estate at an earlier period is void for remoteness.²⁵ In contrast, cases considered thus far held the alternative contingency vesting the estate at the earlier period to be valid and the limitation vesting the estate at the more remote period to be invalid because of remoteness. Also, this case is important because it demonstrates that where an estate is limited on alternative contingencies, one within and one beyond the period allowed by the rule for the vesting of estates, the rule that holds that the valid one not to be voided by the invalid one applies not only to alternative contingent remainders but also applies to a subsequent limitation that takes effect by cutting off a prior one, *i.e.*, an executory limitation. In the instant case, the limitation over took effect as a springing executory devise, since, upon the death of the life tenant, her heir had to wait until the January thereafter when the legal title in fee vested in him and the trust discharged.²⁶

The rule has had general application in this country. The bulk of the later American cases, as well as the earlier ones considered, have uniformly held that contingencies may be split so as to give effect to the valid one when the testator himself separates the limitation to take effect on the happening of either of two events.²⁷ The very few cases that have held otherwise seem

24. A limitation violates the rule against perpetuities unless it is certain at the time of the death of the testator that the estate will vest within the period required by the rule. If, by any possibility, the event upon which the estate is limited may occur after that time, the limitation is too remote. In the instant case, there was a possibility that A might give birth to a child soon after the testator's death. A and her first son might then have died soon after the death of the testator in 1891. If their deaths had occurred before January 1901 and the child born after the testator's death lived until January, 1922, the interest of this child would not have vested within 21 years after a life or lives in being at the death of the testator. Thus, that limitation is void because of the possibility of vesting at too remote a time.

25. Comment, 10 B.U.L. Rev. 256, 257 (1930).

26. *Id.* at 261.

27. *In re Sahlender's Estate*, 201 P.2d 69, 89 Cal. App.2d 329 (1948); *In re Heard's Estate*, 146 P.2d 725 (Cal. App. 1944), *aff'd* 25 Cal.2d 322, 153 P.2d 553 (1944); *Congregational Home Missionary Society v. Thames Bank & Trust Co. of Norwich*, 127 Conn. 1, 14 A.2d 626 (1940); *Comstock v. Bridgeport Trust Co.*, 106 Conn. 514, 138 Atl. 440 (1927); *Brooks Bank & Trust Co. v. Beers*, 120 Conn. 477, 181 Atl. 391 (1935); *Thresher's*

to be erroneous decisions in which the courts failed to separate provisions which were clearly separable.²⁸

CONSIDERATIONS THAT AFFECT THE APPLICATION OF THE RULE

Important considerations in determining whether the valid alternative contingent limitation or valid alternative provision of a trust can be separated from the invalid and prevent the whole from being cut down are: whether the invalid provision is such an integral part of a general scheme that a separation would destroy the testator's intent that these dispositions be a part of the whole,²⁹ and whether or not a separation would result in an unjust distribution of the estate.³⁰ In applying these rules, the court does not discover and effectuate the intent of the testator but actually carries out within the law what he presumably would have wished in a situation he never contemplated.³¹ Thus, courts have reasoned that the valid provision will be upheld only if the valid alternative limitations can be separated from the invalid ones and be given effect without doing violence to the intention

Appeal, 74 Conn. 40, 49 Atl. 861 (1901); *Monarski v. Greb*, 407 Ill. 281, 95 N.E.2d 433 (1950); *Quinlan v. Wickman*, 233 Ill. 39, 84 N.E. 38 (1908); *Springfield Safe Deposit & Trust Co. v. Ireland*, 268 Mass. 62, 167 N.E. 261 (1929); *Brown v. Wright*, 194 Mass. 540, 80 N.E. 612 (1907); *Stone v. Bradlee*, 183 Mass. 165, 66 N.E. 708 (1903); *Gettins v. Grand Rapids Trust Co.*, 249 Mich. 238, 228 N.W. 703 (1930); *In re Johnson's Will*, 233 App. Div. 55, 253 N.Y. Supp. 241 (4th Dept. 1931); *In re Trevor*, 239 N.Y. 6, 145 N.E. 66, *reargument denied without opinion*, 239 N.Y. 579, 147 N.E. 203 (1924); *In re Schwamm's Estate*, 53 N.Y.S.2d 654 (Surr. Ct. 1945); *In re Horton's Will*, 175 Misc. 542, 24 N.Y.S.2d 278 (Surr. Ct. 1940); *In re Chamber's Will*, 167 Misc. 843, 4 N.Y.S.2d 875 (Surr. Ct. 1938); *In re Von Deilen's Will*, 154 Misc. 877, 278 N.Y. Supp. 689 (Surr. Ct. 1935); *In re Bernuth*, 127 Misc. 705 217 N.Y. Supp. 633 (Surr. Ct. 1926); *In re Griscom's Estate*, 333 Pa. 422, 9 A.2d 344 (1939); *In re Whitman's Estate*, 248 Pa. 285, 93 Atl. 1062 (1915); *Brookover v. Grimm*, 118 W. Va. 227, 190 S.E. 697 (1937).

28. In *Donohue v. McNichol*, 61 Pa. 73 (1869), the court, by way of dicta, erroneously failed to separate clearly distinct alternative limitations and indicated that the valid provisions also would be void for remoteness. In *Brooker v. Brooker*, 130 Tex. 27, 106 S.W.2d 247 (1937), the court failed to separate provisions that were clearly separable. *McCreery v. Johnston*, 90 W. Va. 80, 110 S.E. 464 (1922) involved a situation where there were two separate gifts over, one of which was too remote. The court on dubious authority held both gifts over invalid on the ground that the testator would have wished both gifts or neither to take effect.

29. *Rong v. Haller*, 109 Minn. 191, 123 N.W. 471 (1909); *Tilden v. Green*, 130 N.Y. 29, 50, 28 N.E. 880, 883 (1891); *Lilley's Estate*, 272 Pa. 143, 116 Atl. 392 (1922).

30. *Lepard v. Clapp*, 80 Conn. 29, 66 Atl. 780 (1907); *Benedict v. Webb*, 98 N.Y. 460 (1885).

31. *Blake v. Hawkins*, 98 U.S. 315 (1878); *Hewitt v. Green*, 77 N.J. Eq. 345, 77 Atl. 25 (Ch. 1910).

of the testator and destroying his scheme for the disposition of his property.³² Accordingly, only in the situations where the will constitutes one testamentary scheme will the valid alternative contingency be held void, since to do otherwise would either violate the testator's intention or produce obvious injustice.

In many instances it is helpful to consider the objects of the gift and the persons who would take in the event of total or partial intestacy. Thus, if the void alternative contingent limitation is in favor of persons who would be the testator's heirs or next of kin, the other, valid provisions may be sustained without substantial change in the plan of disposition intended.³³ There is a weaker case for separation if the illegal gift over is to strangers or distant relatives, and the result of separation would be to vest this property in the testator's heirs or next of kin.³⁴ It must be remembered that in these cases the general standard prevalent throughout is the prevention of unjust distribution. Thus, even in the latter situation the court is not defeating the presumable intent of the testator as it might if it declared an intestacy as to the whole and divided it according to the statutes of distribution. In general, it may be said that where a separation or split of contingencies will give children or other descendants, intended to take a limited estate under a will, that estate plus an interest in fee to their issue or survivors, most courts presume that the testator would prefer this separability of alternative contingencies to a complete intestacy.³⁵

RULE OF SEPARABLE LIMITATIONS —

WHERE TESTATOR HAS NOT SEPARATED CONTINGENCIES

Up to now, consideration has been directed at situations where the instrument provides for a future disposition of the

32. In the cases of *Thorne v. Continental National Bank*, 305 Ill. App. 222, 27 N.E.2d 302 (1940); *Easton v. Hall*, 323 Ill. 397, 410, 154 N.E. 216, 220 (1926); and *Letcher's Trustee v. Letcher*, 302 Ky. 448, 194 S.W.2d (1946), the alternative limitations were held inseparable.

33. *Quinlan v. Wickman*, 233 Ill. 39, 84 N.E. 38 (1908); and *Lawrence v. Smith*, 163 Ill. 149, 45 N.E. 259 (1896) seem to indicate the Illinois rule is that where there is an invalid alternative limitation, if the prior estates are given to particular heirs, their interests are separable, but if the prior estates are given to all those who would ultimately take as heirs, there is a complete intestacy.

34. *Thompson v. Thompson*, 55 How. Pr. 494 (N.Y. 1876).

35. *In re Trevor*, 239 N.Y. 6, 145 N.E. 66, *reargument denied without opinion*, 239 N.Y. 579, 147 N.E. 203 (1924); *Tiers v. Tiers*, 98 N.Y. 568 (1885). *Contra: In re Whitney's Estate*, 176 Cal. 12, 167 Pac. 309 (1917).

property by making alternative limitations, one of which is invalid for remoteness of vesting and the other valid. On the other hand, there are situations where the testator has not expressed both contingencies.³⁶ In such circumstances, the English cases that are precedents for the American decisions have refused to take the next logical step forward. They will not imply alternative contingencies even where it is evident that the testator intended such a division. Unless the division of contingencies is expressly made by the donor, the gift will be altogether invalid.³⁷ Courts will not split the contingencies for the testator where he did not do so himself, even though it may well be that he contemplated such a separation.

A much cited English case on this point is *Proctor v. The Bishop of Bath and Wells*.³⁸ Here there was a disposition to the first son of A who should be bred a clergyman, and if A had no such son, then over. A never had a son, but even if one had been born, he could have taken holy orders any time during his life—which might well have been more than twenty-one years after the death of A. The court recognized that the limitation encompassed two events, namely, if no son were ever born, or that being born, he did not take holy orders. It is apparent that the first contingency alone would be perfectly good. The court, however, held that it could not divide the limitation and that the devise over was also void since it depended on the same event. Thus, it may be seen that the rule is not based on presumed intent but is really a question of the words used in the instrument.

36. An explanation by way of example is in order here. If a testator should devise his realty to A for life with remainder in fee to the first son of A who should become a law professor, but if A has no such son, then to B in fee, the gift to B would be void for remoteness, even though A died without ever having had any son at all. B's gift would have been valid if the testator had separated the contingencies by saying that B takes if none of A's sons becomes a law professor or if A has no son. According to the rule of separable limitations, the courts will not separate if the testator failed to do so.

37. *In re Norton*, 2 Ch. 27 (1911); *Hancock v. Watson* A.C. 14 (1902); *In re Bence*, 3 Ch. 242 (1891); *In re Harvey*, 39 Ch. D. 289 (1888); *Re Thatcher's Trusts*, 26 Beav. 365, 53 Eng. Rep. 939 (1859); *Dungannon v. Smith*, 12 Cl. & Fin. 546, 8 Eng. Rep. 1523 (1845); *Proctor v. The Bishop of Bath and Wells*, 2 Bl. H. 358, 126 Eng. Rep. 594 (1794); 2 SIMES, LAW OF FUTURE INTERESTS 392 (1st ed. 1936).

38. 2 Bl. H. 358, 126 Eng. Rep. 594 (1794).

Again, *In re Hancock*,³⁹ a leading English case, illustrates the principle. In this situation there was a bequest of personalty in trust for A for life, and on her death in trust for her children upon attaining twenty-five, if sons, or upon attaining twenty-one, or marriage, if daughters, but in default of such issue, then over. A died without having had a son. It was held that the gift over was not separable and was too remote. As Williams, L. J. declares in this case:

When a testator, having made a gift, has not divided it into two gifts or alternative gifts, the law generally will not do it for him merely because the contingency upon which the gift is to take effect is, so to speak, a compound contingency, capable of being divided into two events.⁴⁰

Thus, according to the cases considered, it seems that the English courts will not hold a gift over made in words setting out only one event to be made into two events, although it may consist very reasonably of two contingencies, unless the testator has himself expressed both contingencies. Why do the courts persist in refusing to split the contingencies when the testator has neglected to do so? The rule has been called a purely technical one and a question of authorities.⁴¹ Nevertheless, courts have tried to justify the rule by assertions that the phraseology of a will should not be altered in order to put a construction upon it that will obviate the difficulties arising out of the rule against perpetuities. As has been expressed in *Dungannon v. Smith*,⁴² by such a mode of construction any devise that is void for remoteness because it may take effect more than twenty-one years beyond lives in being, although it may also take effect within that period, may be interpreted as a devise upon the happening of an event within the period allowed by the rule against perpetuities. The devise would be lawful in such a case. In fact, as has been stated, if the courts could split every contingency for the purposes of applying the rule against perpetuities,

. . . the only case where a contingency would be wholly bad would be one which by its terms precluded any event except one which necessarily would take place beyond the period of the rule⁴³

39. 1 Ch. 482 (1901).

40. *Id.* at 495.

41. *Miles v. Harford*, L.R. 12 Ch. Div. 691 (1879).

42. 12 Cl. & Fin. 546, 8 Eng. Rep. 1523 (1845).

43. 2 SIMES, *op. cit. supra* note 37, at 393.

The rule that the law will not split a gift if the testator has not himself done so was adopted early by the American courts.⁴⁴ Accordingly, the point was made in *Gray v. Whittemore*,⁴⁵ where in English authorities are discussed, that where the testator has made a gift in words expressing only one contingency, though depending upon a dual event or compound contingency, the courts will not split this up into two contingencies, one good and one bad, and sustain the limitation on the ground that the good contingency has taken place.

A case of particular interest on this proposition is that of *In re Wilcox*⁴⁶ where it was provided that the income from a trust was to go to A for life, the income then to go to A's issue during their minority and the principal to be divided among them at their maturity, but if A died without issue who should attain twenty-one, then over. The court held that a will cannot be said to provide for alternative dispositions of personalty, where the alternative is only in the sense that every gift over may be said to be alternative—on non-occurrence of the contingency on which the gift is dependent. However, the intention—a fundamental factor in construing a will⁴⁷ was apparent that the contingent remainderman should take in the event that the life tenant die without issue, as well as in the event that she die with issue surviving who fail to attain the age of twenty-one. This case is an excellent example of the unjustness of the rule that courts will not imply alternative contingent limitations even where it is evident that the testator intended such division if the division into contingencies is not made by the testator himself. In this case the invalid contingency never occurred,⁴⁸ but the court refused to recognize the valid contin-

44. *Gray v. Whittemore*, 192 Mass. 367, 78 N.E. 422 (1906); *In re Rong's Estate*, 109 Minn. 191, 123 N.W. 471 (1909); *In re Perkins' Estate*, 245 N.Y. 478, 157 N.E. 750 (1927); *In re Wilcox*, 194 N.Y. 288, 87 N.E. 497 (1909).

45. 192 Mass. 367, 78 N.E. 422 (1906).

46. 194 N.Y. 288, 87 N.E. 497 (1909).

47. *Lyman v. Sohler*, 266 Mass. 4, 164 N.E. 460 (1929); *In re Olmstead's Will*, 131 Misc. 238, 226 N.Y. Supp. 637 (Surr. Ct. 1928).

48. The limitation over in the will on the death of all issue of A before attaining twenty-one was invalid according to the New York statute, which provided that a contingent limitation of a remainder in personal property to be lawful must be such as necessarily would occur within two lives in being at the testator's death. This limitation might suspend the absolute ownership of personal property during lives not in being at the testator's death.

gency (not expressed in words) and declared the gift void. As has been contended by Bartlett, J. in the dissenting opinion in *Re Wilcox*, to refuse to give effect to the intent unless the testator has specifically made the gift over to the same person twice, once on the death of the life tenant without issue who attain the age of twenty-one, and again on the death of the life tenant without issue, though the second necessarily includes the first, is a senseless requirement involving faulty, redundant composition and wording.⁴⁹ It is submitted that the rule should be that, if a limitation void for remoteness not only in its terms logically includes a valid limitation, but leaves it obvious as to what that valid limitation means, and the valid limitation seems to carry out the testator's intent, that limitation should be given effect.

EXCEPTIONS WHEREIN CONTINGENCIES ARE DIVIDED BY THE COURT

There are a few cases which contravene the authorities holding that they will not split the contingencies where the testator has not expressly separated them. A notable exception to the general rule is the case of *Doe d. Evers v. Challis*.⁵⁰ Here there was a devise of land to A for life, and on her death to any sons she might have who might live to the age of twenty-three and to any daughters who might attain twenty-one; and if A died without leaving any sons who attained twenty-three or any daughters who attained twenty-one, then over. A died without having any children. Here there was a single expression of two contingencies, and the gift over on one event (A's dying without any children at all) would take effect as a true remainder, while on the other (A's having neither sons who reached twenty-three nor daughters who reached twenty-one) as an executory devise. It was held that the gift over took effect as a remainder on the death of A and that the vesting of the remainder could not be voided by the invalid executory devises in the same instrument. Thus, it may be stated that if a gift over will take effect on one event as a contingent remainder and on another as an executory devise, it may be valid as creating a remainder even though it would have been an invalid executory

49. 194 N.Y. 288, 87 N.E. 497 (1909).

50. 7 H.L. Cas. 531 (1859).

devise.⁵¹ This case can be distinguished from the case of *Proctor v. The Bishop of Bath and Wells*, for in that case it was not possible for the limitation over to operate as a remainder,⁵² since there was no particular estate there that could support a remainder. However, the doctrine of *Evers v. Challis* does not apply to interests in personalty or equitable interests.⁵³ "Only where one contingency would make it a destructible interest and the other would not is this rule of splitting contingencies employed,⁵⁴ and neither equitable interests nor interests in personalty are destructible. For the same reason, where contingent remainders are indestructible, the doctrine would seem not to apply."⁵⁵

Few authorities in the United States have departed from the doctrine that the court will not split contingencies where the testator has failed to separate them expressly. Nevertheless, in *Edgerly v. Barker*,⁵⁶ a well-reasoned case, there was a departure from the weight of authority. The testator, after providing for his own children, provided that when the youngest of his grandchildren, born and unborn, should arrive at the age of forty years the residue of the estate should be theirs. The court concluded that the invalidity of the devise to the grandchildren in that form, as violating the rule against perpetuities, would not defeat the devise to them, but, under the doctrine of *cy pres*, the estate would be allowed to vest in them when the youngest reached the age of twenty-one years. In this case and in cases following it, the courts seem to hold that where the specific intention of a testator is defeated on account of the rule against perpetuities, effect must be given to such alternative disposition as the testator would have made, if he had known of the invalidity of his limitation.⁵⁷

51. GRAY, RULE AGAINST PERPETUITIES § 339 (4th ed. 1942).

52. *Ibid.*

53. *Hancock v. Watson*, A.C. 14 (1902); *In re Hancock*, 1 Ch. 482 (1901); *Re Thatcher's Trusts*, 26 Beav. 365, 53 Eng. Rep. 939 (1859); GRAY, *op. cit. supra* note 51, § 339.

54. 2 SIMES, *op. cit. supra* note 37, at 396.

55. *Ibid.*

56. 66 N.H. 434, 31 Atl. 900 (1891).

57. *Lyons v. Bradley*, 168 Ala. 505, 53 So. 244 (1910); *Hussey v. Sargent*, 116 Ky. 53, 75 S.W. 211 (1903); *Edgerly v. Barker*, 66 N.H. 434, 31 Atl. 900 (1891).

CONCLUSION

Often, testators, in their desire to provide for their children and even grandchildren, include in the disposition of their property provisions in violation of the rule against perpetuities. This disposition often takes the form of an estate limited on alternative contingent limitations, one within and one beyond the period allowed by the rule against perpetuities. In such circumstances, the courts usually split the contingencies and uphold the valid provision while striking out the invalid one. If the instrument is considered in its entirety, striking out the invalid alternative limitations does not usually result in such a destruction of the testator's testamentary scheme that valid alternative contingent limitations may not stand. In the great majority of cases, the legal alternative limitation may be separated from the illegal without doing injustice to the testator's main purpose, and his intent may thus be achieved to the extent that the law will permit. Also, even though the testator fails to split the alternative contingent limitations in situations where it is evident that the testator meant such a division, the courts should imply them. Application of the old, highly technical and unjust rule makes for faulty, excess wording and works to defeat the intent of testators and settlers.

IRVING M. MALNIK.