

1920

Three Suggestions Concerning Future Interests

Ernst Freund

Follow this and additional works at: http://chicagounbound.uchicago.edu/journal_articles

 Part of the [Law Commons](#)

Recommended Citation

Ernst Freund, "Three Suggestions Concerning Future Interests," 33 Harvard Law Review 526 (1920).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

THREE SUGGESTIONS CONCERNING FUTURE INTERESTS

I. THE TRANSMISSION OF REMAINDERS

GEORGE GOLLADAY died in 1854, his widow Nancy, who died in 1907, surviving him by over half a century. By his will he gave his real estate to his wife and to her children after her death; "and if the said Nancy Golladay does not have children that will live to inherit said real estate, that said real estate, at the death of Nancy Golladay and her children, fall to Moses Golladay and his heirs." Nancy, then childless, remarried, and had a daughter who died before her mother. No children survived her. Moses Golladay died in 1855, leaving two children, William and Mary. William in 1900 made a warranty deed purporting to convey his interest in the real estate left by the will, and died intestate in 1904, leaving children as his heirs. The Supreme Court of Illinois holds that no title ever vested in William Golladay, the son of the remainderman named in the will, since he died before the life tenant. His children are not estopped by the covenants of his deed, for they do not assert title by descent from him, but as heirs of their grandfather Moses. Had William survived the life tenant, the warranty deed would have transferred the remainder, which in that event would not have passed to others under the terms of the will. Passing as it did to others, his deed conveyed nothing.¹

This decision revives for Illinois, and for contingent remainders; the common-law rule regarding the descent of remainders and reversions, according to which he who claims by descent must make himself heir to him in whom the estate first vested by purchase,² ignoring the qualification added by Watkins that one who exercises acts of ownership shall be regarded as the purchaser of the reversion or remainder.³ The rule that in the descent of a reversion and remainder there is no "mesne heir" but that the one claiming when the expectant estate vests in possession, claims as heir of the original

¹ Golladay v. Knock, 235 Ill. 412, 85 N. E. 649 (1908); KALES, CASES ON FUTURE INTERESTS, 178.

² WATKINS, LAW OF DESCENTS, 118.

³ *Ibid.*, 112, 118.

remainderman or reversioner, is the law in Maryland,⁴ but has been changed by statute in other jurisdictions.⁵

The following remarks are intended to show why the older rule revived in part for Illinois is preferable to the rule which is at present more generally observed.

When a testator creates life estates with remainders, he does one of two things: he either gives property to a designated person or persons, subject to a life provision for some other person, or he makes a life provision and leaves it to be determined by circumstances existing at the end of the life where the property is to go. These two alternatives represent the real difference between vested and contingent remainders; "vested subject to be divested," when applied to an estate in expectancy, is in reality contingent; and the treating of such a remainder as vested subject to be divested, for the purpose of avoiding certain restrictions or liabilities attaching to contingent remainders,⁶ is a mere conventional mode of construction that should not mislead or confuse us. Whenever a testator makes a disposition dependent on circumstances existing at a future time, he seeks to project himself and his will, as far as feasible, to that point of time; if he could, he would only then make his dispositions. It may safely be assumed that he does not intend to benefit persons who would not be the natural beneficiaries of his will were his will made at the later point of time. Results contrary to his presumed interest may, however, easily follow, if remainders are treated as vested, or if contingent remainders are treated as descendible, devisable, or alienable. It will then not infrequently happen that his property at the time to which he desires to project his control will pass to persons who are strangers to him. So in the very common case that the remainderman dying in the life of the life tenant leaves a wife or husband as heir, or that the remainder descends to a child and the child later dies, leaving the other parent

⁴ *Barnitz's Lessee v. Casey*, 7 Cranch (U. S.), 456, 469, 470 (1812); *Buck v. Lantz*, 49 Md. 439 (1878); and in Georgia, *Payne v. Rosser*, 53 Ga. 662 (1875).

⁵ *Cook v. Hammond*, 4 Mason (U. S.), 467 (1827); *Kean's Lessee v. Roe*, 2 Harr. (Del.) 103 (1835); *Hillhouse v. Chester*, 3 Day (Conn.), 166 (1808); *Cote's Appeal*, 79 Pa. St. 235 (1875); *Early v. Early*, 134 N. C. 258, 46 S. E. 503 (1904); *Hicks v. Pegues*, 4 Rich. Eq. (S. C.) 413 (1852). See the citations in note in *KALES, CASES ON FUTURE INTERESTS*, 184.

⁶ Nonalienability: *Blanchard v. Blanchard*, 1 Allen (Mass.), 223 (1861); 5 *GRAY, CASES ON PROPERTY*, 2 ed., 77; destructibility: *Doe v. Martin*, 4 T. R. 39 (1790); 5 *GRAY, CASES ON PROPERTY*, 2 ed., 55.

as its heir. To avoid this result, the Supreme Court of Illinois has in several cases interpreted a remainder not only as contingent, but as contingent upon the remainderman outliving the life tenant. So in the common form of limitation "to my wife for life, upon her death to my children, and if any of my children die leaving issue either before me or before my wife, then the issue of the child so dying shall take the share which the parent would have taken if living at her death," the children take remainders contingent upon their surviving the wife,⁷ with the result that if a child leaves husband or wife, but no issue, the husband or wife will take nothing. In most states there is probably no hard and fast rule preventing courts from seizing upon slight forms of expression to read a contingent remainder as contingent upon the contingent remainderman surviving the life tenant, and particularly the provision in favor of his issue, should he die before the life tenant, will aid that construction. The trouble is that such a construction would aid the testator's scheme only if he had made express provision for issue of the contingent remainderman, for normally the testator desires that a contingent provision for a relative should inure to the benefit of the latter's children should he die prior to the happening of the contingency. The rule in *Golladay v. Knock* is an additional aid in carrying out the testator's presumable intent, for while it lets in the son of the contingent remainderman, it does not let in either the son's wife or the son's mother, should the son die before the interest vests in possession. If, however, the testator's presumable intent is to shut out all those who are strangers to his blood, the rule of *Golladay v. Knock* does not go far enough, for it lets in the contingent remainderman's wife, so far as she is her husband's heir. The shutting out of all strangers requires either an explicit appropriate provision or a statute.

An abstract direction inserted in a will that a remainder shall not, while it is still an interest in expectancy, pass to strangers, would of course be futile; a testator can neither alter the legal course of descent nor render property inalienable. The only common-law exception to this rule is the estate tail. At common law a remainder in tail will prevent the property from passing out of the stock

⁷ *Cummings v. Hamilton*, 220 Ill. 480, 77 N. E. 264 (1906); *KALES, CASES ON FUTURE INTERESTS*, 175; *People v. Byrd*, 253 Ill. 223, 97 N. E. 293 (1912); *KALES, ibid.*, 477.

by any testamentary act; and before the remainder has vested in possession, the remainderman in tail cannot dispose of his interest (by common recovery or its statutory substitute) without the concurrence of the life tenant. In this country the entail legislation of the state where the land is situated will have to be carefully examined, and in most states it will be found that the remainder in tail is not available for the testator's purpose. In any event it would not serve in case of personal property.

What the testator can do is to create alternative contingent limitations. This is what the Supreme Court of Illinois did for the testator in *Golladay v. Knock*. It construed the contingent remainder in fee as a remainder in the alternative to the person named or to his heirs at the time of the vesting of the possession. Under the facts of that case the construction operated to exclude the stranger claiming under the nonsurviving heir of the remainderman. Had the remainderman, however, died leaving no children, but a widow surviving the life tenant, she would under the law of descent of Illinois have been the heir to the extent of one half of the property. The form of limitation "to B or his heirs" is therefore not adequate. The proper form is: *to A for life, remainder to B and his heirs, or if B dies during the life of the life tenant, to such heirs of B as would be also heirs of my own, had I died immediately after the life tenant.*

If this form is substituted for "to A for life, remainder to B and his heirs" (instead of for: to A for life, remainder to B *or* his heirs), the testator should bear in mind that he turns a vested into a contingent remainder, and that the latter may violate the rule against perpetuities where the former would not. That simply means that a testator, intent upon pushing his tying-up scheme to the furthest limits, will encounter legal obstacles of one sort or another. In the ordinary case of life estates confined to the first generation, the testator has his free choice between vested and contingent provisions following the life estate, and the natural desire of keeping remainders from passing to strangers can be given full effect.

The difficulty arising from the rule against perpetuities would be avoided by a statutory rule for the transmission of remainders. The rule would be substantially as follows: "A remainder given to a relative shall before it vests in possession be transmissible by intestacy, will, or gift in the nature of a provision, to such heirs of the

remainderman only as would be also heirs of the original testator or donor had he lived until after the death of the life tenant. This rule shall apply by analogy to personal property and to executory limitations." This rule would, in accordance with the presumed intent of the giver, exclude also the adopted child of the remainderman.

A gift in remainder not to a relative may well be left to explicit testamentary provision, if testator desires to keep it in the stock of the donee. If a statutory provision were deemed desirable, it would have to restrict transmission to descendants of the remainderman.

The suggested rule would not touch alienation *inter vivos* except where it is a gift in the nature of a provision. In so far as speculative dispositions are considered undesirable, they may be left to any existing restrictive rules, and they would in any event be effectually discouraged by the risk purchasers would run of not outliving the life tenant; a disposition in the ordinary course of business or management, however, which may be effected by remaindermen joining with life tenants, so far as it is possible now, ought not to be rendered impossible, but on the contrary facilities should be created where they are now lacking.

A rule restricting the transmissibility of remainders would in a manner revive the policy of the doctrine of "last seized" in the common law of descent. So long as the law did not recognize husband or wife as possible heirs, and so long as here was a rule forbidding the passing of property from the paternal to the maternal stock and *vice versa*, that doctrine had an extremely limited application. The rule now suggested would in one sense be of much wider application, for it would include devise as well as descent, and personal as well as real property, but it would recognize, as the common law recognized, that so long as a person has a merely expectant or future interest in property, the expectancy is not an asset to which persons having no blood connection with the source of the property have any equitable claim. If it be suggested that the rule would operate harshly with respect to a widow, let it be remembered that dower presupposes seisin, and that the law makes no provision for the widow of a son dying before his father, out of the father's estate, while it makes such provision for the issue of the son.

2. THE SEPARABILITY OF LIMITATIONS

Gray, in *The Rule Against Perpetuities*, says:

"Very often, indeed generally, a future contingency which is too remote may in fact happen within the limits prescribed by the Rule against Perpetuities, and a gift conditioned on such a contingency may be put into one of two classes according as the contingency happens or does not happen within those limits; but unless this division into classes is made by the donor, the law will not make it for him, and the gift will be bad altogether."⁸ And he illustrates: "Thus a gift to B. if no child of A. reaches twenty-five is bad, although A. dies without children; while if the gift over had been if A. dies without children, or if his children all die under twenty-five, then on A.'s death without children, the gift over would have taken effect."⁹

The rule may be English law; but it is submitted that it is a most unreasonable rule. The rule should be that if a remote limitation not only in its terms logically includes a valid limitation, but also leaves no doubt whatever as to what the valid limitation thus included is, and the valid limitation plainly carries out the testator's intent, the valid limitation will be given effect.

To apply this rule, not only should, in the instance given by Gray, the gift over be given effect if A died without children, but also if his children all died under twenty-one. "To the unborn son of A., but if he dies under twenty-five, over" — clearly includes: but if he dies under twenty-four, under twenty-three, under twenty-two, or under twenty-one; and if he dies under twenty-one, the gift over is valid. If he dies over twenty-one, the gift, unless it can be saved on some other principle, is invalid, because remotely taken away from him, and therefore remains in him. There cannot be the slightest difficulty of validating a limitation under the circumstances indicated. It is conceded that there is no sense in the English rule. Jessel, M. R., says: "This is a question of authorities." "The law is purely technical."¹⁰ Why should American courts follow such a rule? Simply from that sense of reverence which, as has been happily said, is always at the service of the incomprehensible. The English Real Property Commissioners recommended a change

⁸ § 331.

⁹ § 332.

¹⁰ *Miles v. Harford*, 12 Ch. D. 691, 703, 704 (1879); quoted, GRAY, *THE RULE AGAINST PERPETUITIES*, § 349, note.

of the rule by statute, but it can be changed by the simple process of logical reasoning.¹¹

The rule may be put in this way: If I am promised more than can be validly promised, I am at least entitled to as much as can be validly promised if it can be separated from the excess. In New York a person having wife or children may not give by will to charity more than one half of his estate; should he give all, is not the charity entitled to one half? The law expressly so provides, but any court would give this construction to the statute. An option unlimited in time was held void in *London & S. W. R. Co. v. Gomm*.¹² The option there was bargained for in 1865; it was sought to be exercised in 1880, *i. e.*, within sixteen years. In *Barton v. Thaw*,¹³ the option was sought to be exercised after thirty years. The option would have been good if in terms limited to twenty-one years; why should it not have been sustained for that period? It is not convincing to answer that the courts cannot arbitrarily fix upon twenty-one years, since the parties might have stipulated for a life in being plus twenty-one years. Business transactions, particularly where a corporation is concerned, are normally measured by years and not by lives, and the reasonable period for which powers of sale unlimited in time are sustained is twenty-one years.

In some classes of cases it may be doubtful whether the court should cut down rather than annul. If I have bargained for more than I can validly take, I may be entitled to less, but I am not necessarily required to take less, and this works both ways, if the transaction is a two-sided one. If a lease is good only for twenty-one years, the question whether a ninety-nine year lease should be sustained for twenty-one years must depend upon a variety of circumstances, the amount of rental, covenants, etc. In a sense a court in such a case must speculate as to intent, and this the English courts seem averse to doing, while American courts are more liberal. It is true that the Supreme Court of the United States has a rule similar to the English rule now under discussion against separating the valid from the invalid aspects of a statute where both aspects are covered by the same phrase;¹⁴ but in these cases

¹¹ See GRAY, *ibid.*, p. 600, note 3.

¹² 20 Ch. D. 562 (1881).

¹³ 246 Pa. 348, 92 Atl. 312 (1914).

¹⁴ *United States v. Reese*, 92 U. S. 214 (1875); *Trademark Cases*, 100 U. S. 82 (1879); *Employer's Liability Cases*, 207 U. S. 463 (1908).

the court was justified in refusing to give to a legislative policy effect in a more restricted field of application than Congress had specified. The rule is not one of mechanical operation, and where a statute contains in different clauses valid and invalid provisions, courts regularly inquire into the presumable legislative intent. It seems that in England, where a testator separates his gift into parts, and then gives part under valid, part under invalid limitations, the valid part is sustained without question,¹⁵ whereas an American court will ask whether by reason of the entirety of the testator's scheme the invalid part does not also vitiate the valid.¹⁶ The American rule is sensible, although it cannot be applied without speculating as to testator's intent.

The conclusion must be in favor of a judicial power of cutting down unlimited or excessive periods to the permissible limit. The trouble with the doctrine of separable limitations is the failure to distinguish between that which is matter of clear logical implication and that which is not. It is common sense to assert that a gift over upon dying under twenty-five may be sustained as a gift over upon dying under twenty-one; it does not follow that a gift to an unborn person at twenty-five can be sustained as a gift to an unborn person at twenty-one. When Sir William Grant suggested¹⁷ that it might have been as well if the courts had held a limitation transgressing the limits to be void only for the excess where that excess could be clearly ascertained, he lent some countenance to a theory of cutting down which certainly cannot be supported as a mere matter of logic. A gift at twenty-one is not logically included in a gift at twenty-five, because the former is a larger gift, and the more is not included in the less.

Is it possible to sustain the gift to the unborn son of A at twenty-five by making it read as follows: "to the unborn son at twenty-five if he reaches that age within twenty-one years from his father's death"? This is clearly included in the contingency of his reaching twenty-five at any time. The usual objection to this method of validation is that the law permits the selection of any life as a "criterion" life. If Herbert Spencer could by his will postpone the ultimate vesting of interests to the death of the last survivor of

¹⁵ *Cattlin v. Brown*, 11 Hare, 372 (1853).

¹⁶ *Barrett v. Barrett*, 255 Ill. 332, 99 N. E. 625 (1912).

¹⁷ *Leake v. Robinson*, 2 Meriv. 363 (1817).

the descendants of Queen Victoria living at his death, why should not a similar implication be made in favor of every will? The objection is specious, and it can be readily understood why, with the latitude permitted by the law as to the selection of criterion lives, the cutting down process suggested might have appeared to the courts to be too conjectural.

Still in practically every case the criterion life naturally suggests itself. "To the unborn son of A at twenty-five;" not only would A's life be the one to be naturally selected, but it is also the normal expectation that A will not die until his children are four years old. It would be a simple matter to frame a rule to the effect that any gift to unborn persons at an age older than twenty-one shall be construed as implying the condition that such age shall be reached within twenty-one years from the death of the parent (if a relative of the testator), through whom they are related to the testator. It would not have been impossible for the courts to imply such a condition; it would certainly be possible for the legislature to imply it without in any way altering the substance of testator's gift. Such an implied condition would also save many gifts to classes now held invalid. It would be a more satisfactory way of saving them than through construction. I do not subscribe to the rule that "every provision in a will or settlement is to be construed as if the Rule [against Perpetuities] did not exist, and then to the provision so construed the Rule is to be remorselessly applied."¹⁸ If this is the rule of the English law, it is an unreasonable rule which American courts should be slow to follow. However, if a gift to a class under ordinary rules of construction violates the rule against perpetuities, it is a very dubious remedy to save the gift by cutting down the class; for this means benefiting some members of the class at the expense of others, while the invalidity of the entire gift may let in all the members of the class as heirs or next of kin. In which way the most equitable result will be reached may depend entirely upon circumstances unforeseeable at the time of testator's death. The choice is therefore between adhering to established rules or permitting the courts to speculate upon probabilities, and the established rule is preferable. But I am inclined to think that the courts should have the right to limit a class to the members existing at testator's death, notwithstanding a postponed period of distribution, where the

¹⁸ GRAY, *THE RULE AGAINST PERPETUITIES*, 2 ed., § 629.

admission of possible additional class members would produce invalidity, and where by reason of the age of parents the testator may be presumed to have contemplated no additional members. Of course, if the rule is altered so as to admit additional members of the class without any risk of invalidity, so much the better.

Wherever reasonable construction can save a gift which, under purely technical rules of construction, violates the rule against perpetuities, the gift ought to be saved. If the law is now otherwise, it ought to be changed; if the English law is otherwise and is nineteenth-century law, it should not be followed. But an alteration of the rule so as to make it operative only for the excess of a gift above the permissible limit will probably be found to be an impossibility. The result would be an arbitrary enlargement of gifts quite outside of testator's intent. The illustrations given in Gray, sections 886-893, will make this clear. The only method of cutting down limitations is upon the theory of severability, and that method ought to be applied more liberally than it is.

Even under the law as it stands it is open to a testator to guard against the construction that has proved fatal to so many wills. The following provision would serve the purpose:

"All limitations in this will contained shall be deemed to be conditioned upon their taking effect as vested interests or estates in possession or remainder within twenty-one years from the death of the last survivor of the beneficiaries named in this will [or of the descendants of my parents]¹⁹ who shall be living at my death."

3. THE POLICY AGAINST REMOTENESS

Most of the highly developed systems of law have some policy against perpetuities; but in the systems other than that of the common law it is a policy confined to testamentary or family settlements of property made for successive generations, and to dispositions in mortmain. The common law of England alone formulates the policy as a general rule of the law of property. However, not only does the rule find its common application in family settlements, but as soon as we pass beyond these we encounter uncertainty, if not confusion. Confined to family settlements, the

¹⁹ The words in brackets would operate to save gifts to grandchildren, nephews or nieces, and grand-nephews or grand-nieces whose parents are not beneficiaries under the will.

question whether the rule is one against remoteness or one against inalienability is of little practical importance, for remote limitations normally result in inalienability, and inalienability was undoubtedly the inconvenience against which the rule was primarily directed. When we come to other arrangements involving remoteness, the remote interest is normally alienable, or at least releasable, and we search laboriously for a reason that will explain why a remote option is against public policy. Professor Gray suggests, that property that is liable to be divested by a remote contingency is not apt to be used to the best advantage of the community.²⁰ This is true only if we understand "remotely contingent" as meaning contingent for a period lasting until a remote time, not if it means contingent at a remote time; yet the rule applies also in the latter sense, although it is clear that an option exercisable only at the end of fifty years leaves the property freer than an option exercisable at the end of twenty-one years.

In a family settlement we are also ordinarily relieved from making a distinction between vested and contingent, for remote limitations are normally affected by the chances of birth and death, and hence contingent; but in a remote option the difference between vested and contingent becomes extremely fine.²¹ In *Woodall v. Clifton*²² the court, in holding a remote option void, does not refer to the difference between vested and contingent, but merely to all executory limitations other than those subsequent to an estate tail.

According to Gray,²³ a devise to A and his heirs, to begin from a day fifty years after the testator's death, is too remote, although admittedly there is nothing contingent about it. What other than a technical reason can be given for such a rule? It can be defeated by a slight change of form, for the validity of a devise to A and his heirs subject to a term of fifty years given to my executors, is unquestioned.

A devise to A and his heirs, to begin from a day fifty years after my death, is a form of disposition that is not likely to occur. A similar devise to an institution or charity is less improbable and deserves consideration. There may be a sound legal policy against remotely effective dispositions; if so, such policy should not be

²⁰ GRAY, *THE RULE AGAINST PERPETUITIES*, 2 ed., § 603 f.

²¹ *Ibid.*, § 230 a and b; *Barton v. Thaw*, 246 Pa. 348, 357, 92 Atl. 312 (1914).

²² [1905] 2 Ch. 257.

²³ GRAY, *THE RULE AGAINST PERPETUITIES*, 2 ed., § 201, note.

bound by the technicalities of the rule against perpetuities. There should be a clear realization of the substantial difference between vested and contingent; between a rule of property and a rule of contract, and between individual and corporate transactions.

Assuming a devise to some university to begin after fifty years to be void for remoteness, the same would be true of a bequest of a library, the same of a fund consisting of securities, whether already existing or directed to be set aside. How about a legacy of \$10,000? The rule against perpetuities is a rule of property, not of contract.²⁴ A promise to pay \$10,000 fifty years after my death would generally be regarded as good. It may be said that a promise is a pure obligation, while a legacy is enforceable in equity and can be collected by making the residuary legatee refund after the executor has paid him. But in this respect the position of the creditor is even better than that of the legatee. The effect of the law of administration of decedent's estates is to transform every pure obligation after the death of the obligor into an obligation of a specific fund, namely, the estate left by the obligor. In reason, therefore, legacies and promises to pay should stand on the same footing as far as the question of remoteness is concerned. The difference between property and contract breaks down.

We are not prepared to declare a promise payable fifty years after the death of the promisor to be void; for that would nullify every promise to pay at a time later than twenty-one years from date, considering that it is not certain that the promisor will live for an hour after making the promise. We should therefore be prepared to sustain also a legacy payable fifty years after death.

Practically, under the law of administration, the executor would have to make the same provision in both cases. He would have to set apart a sum sufficient to produce in fifty years the required amount. That would be equivalent to setting aside a fund for accumulation. A question would arise under statutes against accumulations: can a thing be done by indirection which cannot be done directly? In England the Thellusson Act makes in this respect a distinction between debts and ordinary legacies, permitting accumulations for the payment of the former; but in America debts and legacies would generally be subject to the same rule. Assuming that accumulation is not forbidden by law, may the legatee or

²⁴ *Worthing Corporation v. Heather*, [1906] 2 Ch. 532.

creditor on general principles demand immediate payment of the sum, which by accumulation would produce the amount of his claim, considering that he represents the only interest that is to be protected? The law of Illinois gives every holder of a nonaccrued claim after the death of the debtor the right to immediate payment on deduction of an appropriate discount. A legacy payable thirty years after testator's death was sustained in Illinois as a vested interest;²⁵ but there the interest was given with the principal and directed to be paid annually, and the court refused to enter upon the question of the postponed payment of the principal.²⁶ It thus appears that the postponed or remote promise has its problems and difficulties, and the striking fact is that they apply to legacies and to debts alike. No similar difficulty would arise in case of a gift of a library or a gift of a piece of land, to become effective fifty years after death. In other words, where remoteness creates embarrassment, we have no clear rule against remoteness, while we have one where it serves little purpose. What do we gain by asserting the rule as a rule of property and denying it as a rule of contract? It would be better to have no rule at all against remote executory interests which are free from any contingency.

The importance of any such rule is much diminished by the fact that remoteness without some element of contingency is of infrequent occurrence outside of corporate transactions. An individual promise to pay at a time beyond the period of the rule against perpetuities is even more rare than a legacy remotely postponed without any contingency. But we approach a much more practical question when we come to consider contingent promises. A covenant for title and an indemnity bond are obligations of common occurrence; they are apt to be made for contingencies without limit of time, and it has never been suggested that the rule against perpetuities should apply to them.

But how does such an obligation operate after the death of the obligor? That depends upon the state of the law of the administration of decedent's estates with regard to contingent claims against the estate. And here we enter upon a somewhat obscure field. Under the English law the executor is normally liable indefinitely;²⁷ he can discharge himself by refusing to pay legacies

²⁵ *O'Hare v. Johnston*, 273 Ill. 458, 113 N. E. 127 (1916).

²⁶ *Ibid.*, 478.

²⁷ But note the application of the Trustee Act, 1888, § 8, sub-sec. 1 (b).

except under order of a court, and the liability then devolves upon legatees or distributees.²⁸ In America the matter is governed in a general way by statutory provisions regarding presentation of claims against the estate, which however frequently neither mention nor fit contingent claims. In some states contingent claims are required to be presented within the brief period prescribed by law (often only one or two years). Such is the law of California.²⁹ This mode of provision will be presently considered. In other states the provisions of law are such that it may well be contended that contingent claims require no presentation, since there is no conceivable method indicated of dealing with them. Illinois is in that category. In that state the executor's liability ceases, the same as in England, after he has distributed under the order of the court.³⁰ It has been said that in Illinois the statute is interpreted to mean that the claim is barred also against the legatees or distributees.³¹ But this seems to be an error. The opinion in *People v. Brooks*³² may seem to lend some countenance to this view; but if the facts of the case are examined as they appear from the Appellate Court Reports,³³ it will be found that the claim was on a guardian's bond and that the infant became of age before the expiration of the period of administration, so that the obligation of the bond was then broken, and the claim should have been presented as a matured or accrued claim against the estate of the surety; failure to present discharged the distributees, and the claim was absolutely barred.

It must frequently happen that a contingent liability first becomes an actual liability long after the obligor's death and after his estate has been distributed to next of kin and legatees. They may therefore for years be liable to a remotely contingent obligation, of the existence of which as likely as not they will be entirely ignorant. If there is a policy against remoteness, it operates with the same force whether it is a question of a liability to incur a pecuniary obligation or of losing some specific property. If there is a rule of law in the latter case, why not in the former? The law

²⁸ *Re King*, [1907] 1 Ch. 72.

²⁹ CODE OF CIV. PROC., §§ 1648, 1651.

³⁰ *Snydacker v. Swan & Co.*, 154 Ill. 220, 40 N. E. 466 (1895).

³¹ Professor Warren in 32 HARV. L. REV. 315, 321, 332.

³² 123 Ill. 246, 14 N. E. 39 (1887).

³³ 15 Ill. App. 570 (1884).

may well permit a person to bind himself contingently for the period of his life or a shorter period, or to bind himself and his estate for a reasonable time; but to bind indefinitely successive generations of beneficiaries by will or intestacy does not seem reasonable.

But can any remedy be suggested that will relieve the situation? If the rule against perpetuities were applicable, it would mean that every contingent liability would have to be expressly limited to a period, the most natural maximum limit of which would be the life of the obligor and twenty-one years thereafter. Under a theory of separability of limitations an unlimited contingent obligation might be reduced to the same limit. A statutory rule establishing a like maximum limit for noncorporate obligations would therefore not seem inappropriate.

Were such a statute proposed, conservative legal sentiment might be expected to protest against so radical an innovation upon the law of warranty and suretyship.

Let us then consider a much more plausible proposition and see how it would operate. In California, and in the states following her legislation, a contingent claim must be presented against the estate of the obligor in due course of administration; otherwise it will be barred. A similar requirement was recently proposed in Illinois in connection with a comprehensive revision of the law of administration but failed to become law. If the claim is presented, the court is in a general way required to make provision for meeting or protecting it, and the claim will be saved in the absence of other arrangements.

Under legislation of this kind the practical result will be in the great majority of cases that the contingent liability will be extinguished at the end of the period prescribed for presenting claims. For contingent claims of the perpetual kind, such as warranties and indemnity assurances, while as yet contingent, are very apt to appear to their holders as unsubstantial; the beneficiaries rarely watch them with any care because they do not expect they will ever have occasion to have recourse to them; hence only in the rarest cases will they be presented. An almost inevitable default will have the practical effect of a limitation. If the contingent claim is presented, the court may require next of kin or legatees to renew the obligation to the extent of the assets received by them respectively. That would at least have the advantage of placing them

on their guard; otherwise the liability would remain as it is now. However, in jurisdictions in which the necessary facilities exist, the court might well consider the transformation of the obligation into an insurance policy, to the acceptance of which in lieu of his personal claim the obligee might be expected to consent readily. Such a course would result in the final extinguishment of all individual liability.

The simple provision requiring the presentation of contingent claims will therefore in normal cases have the effect of reducing the life of such claims to the life of the obligor and a brief period thereafter. In view of this, a direct change of the law to the same effect can hardly be pronounced revolutionary. It would simply serve to express the true nature and function of contingent obligations. If they are not by their terms or by the nature of the subject matter limited to brief periods, they should be treated as purely personal liabilities. If conditions call for indefinite or perpetual warranties or indemnities, that need should be met by corporate insurance or suretyship.

Ernst Freund.

UNIVERSITY OF CHICAGO.