

COMMENT

CORWIN v. RHEIMS AND THE RULE AGAINST PERPETUITIES

CHARLES E. HERZOG*

It is hazarded as a guess that no decision of the Supreme Court of Illinois in recent years has disturbed property lawyers so profoundly as that in *Corwin v. Rheims*.¹ Accepted at its apparent face value, it means that hundreds, and probably thousands, of Illinois trusts under wills and trust agreements which were drawn within the limits of, and in full reliance upon, the rule against perpetuities² as laid down by Gray³ and many earlier Illinois cases,⁴ are invalid in whole or in part. Some justification for the guess is that the opinion induced Professor Schnebly, of the University of Illinois College of Law, to write an article in which he analyzed the case and criticised it severely.⁵ Since Professor Schnebly's article was written, however, the Illinois Supreme Court has handed down its opinion in *Hayden v. McNamee*,⁶ which is believed to throw considerable light on the scope and meaning of the earlier case. The importance of the question involved and the decision in the later case seem to warrant further consideration of the *Corwin* case.

The thesis of this paper is that *Corwin v. Rheims*, in the light of *Hayden v. McNamee* and the earlier Illinois cases, does not make new law or re-define the rule against perpetuities; in other words, that the case is without significance so far as the rule, in the strict sense as taught by Gray, is concerned.

I

Professor Schnebly's conclusion as to what the *Corwin* case stands for affords a good starting place for present purposes. After considering the perpetuities aspect of the decision, he concludes as follows:

* Member of the Illinois Bar. ¹ 390 Ill. 205, 61 N.E. 2d 40 (1945), Gunn, J., dissenting.

² Hereinafter sometimes referred to as the rule.

³ Gray, Rule Against Perpetuities (4th ed., 1942).

⁴ Some of these cases are discussed in Part IV, *infra*.

⁵ Schnebly, The Decision in *Corwin v. Rheims*, 34 Ill. Bar J. 21 (1945). Professor Schnebly's article discussed other questions in the case. The present paper will be confined to the perpetuities aspect of the decision.

⁶ 392 Ill. 99, 63 N.E. 2d 876 (1945).

The decision of the court would seem to mean not merely that a disinterested life cannot be used as a measure of the period of suspension, but that only the life of the first life tenant of the share can be used.⁷

Elsewhere in the article he shows that any such decision is clearly wrong both on principle and in the light of previous decisions of the same court.⁸ If in truth the case means what he says it does, then the supposed worries of property lawyers are amply justified. It means that a testator cannot leave property to his wife for life, and upon her death to his daughter for her life, and then upon the daughter's death to her children absolutely, for that disposition would involve two successive life estates and hence would be invalid. Not only does such a dispositive scheme not violate the traditional rule but it, or some variant not essentially different, reflects the desires of many a testator, especially where his children are daughters or where there are tax advantages in not having his property pass through one or more unnecessary estates. The testamentary scheme supposed could hardly have been thought by the court to violate the rule. Such a result would be mischievous, to say the least. Moreover, that the court did not have in mind the rule asserted by Professor Schnebly seems clear when one considers its other decisions and particularly that in *Hayden v. McNamee*. Before turning to the other cases, it is desirable to take a close look at *Corwin v. Rheims*.

II

The *Corwin* case arose in this way: In 1893, Mary E. Hanley by deed in trust conveyed to Daniel A. Loring, Sr., "and to his successors and assigns forever in trust," certain real estate in Chicago, subject to a lease by which the real estate had been demised for a term of ninety-nine years beginning in 1885. By the terms of the deed it was provided:⁹

That during the lifetime of Maude Hanley, Dora Blodgett . . . and William A. Hanley [who were the children of the grantor] the said Daniel A. Loring, Sr., or his successors . . . shall collect all the rents and income of the said property and after paying all necessary legal expenses to pay the balance of the net income to the said Maude Hanley, Dora Blodgett and William A. Hanley, in equal monthly payments, share and share alike.

And in the event of the death of any one of the said beneficiaries leaving lawful issue, the share of such deceased beneficiary to go to said issue in equal shares. . . .

And in the event of the death of any one of the said beneficiaries without leaving lawful issue then the share of such deceased beneficiary to be equally divided between the survivor or survivors.¹⁰

⁷ Schnebly, *op. cit. supra*, note 5, at 24.

⁸ *Ibid.*, at 23, 24.

⁹ The opinion quotes only one or two passages from the deed. The following quotations are from the instrument as set out in the Abstract of Record, pp. 18-21 (case no. 28210).

¹⁰ The two sentences last quoted were read by the court as follows: ". . . if any child should die leaving lawful issue, the share of such deceased child should go to such lawful issue in equal

And it is hereby further provided that the said beneficiaries herein named or their legal heirs shall not assign, mortgage or in any manner encumber their respective shares of the income herein provided by this Trust Deed, during the term of the aforesaid lease. . . .

And in the event of the death of all three of said beneficiaries, then the income of said property is to be divided equally among the legal heirs of said beneficiaries by said Trustee or his successors. . . .

The settlor did not make any provision for disposition of the fee.¹¹

After giving the original trustee the power to sell the real estate, the deed named successor trustees and provided that they were appointed . . . for the purpose only of collecting the net income of said property and to pay the same to the said beneficiaries in the manner hereinbefore provided during the term of said lease; and nothing herein contained shall be construed as giving any power to the [successor trustees] to sell, mortgage or in any way encumber the said property during the continuance of the aforesaid lease.¹²

Mary E. Hanley died intestate in 1909 leaving her children, Maude, Dora, and William, as her only heirs. William died intestate and childless in 1919 leaving Maude and Dora as his only heirs. Dora died intestate and childless in 1922 leaving Maude as her sole heir. Maude died childless in 1942 leaving Rheims as her sole heir and leaving a will by which she devised one-fourth of the real estate in question to Rheims and three-fourths to other persons.

After Maude's death the successor trustees brought a suit for instructions. Rheims contended that she, as the sole heir of Maude, Dora, and William, was entitled to all the real estate in the trust; the other devisees asserted that the real estate passed by Maude's will, and that in consequence they were entitled to three-quarters and Rheims one-quarter of the property.

The chancellor decreed that the property was effectively devised by Maude's will. The Supreme Court affirmed the decree. The reasoning of the court was that the 1893 deed violated the rule, that the invalid limitations were inseparable from the dispositive scheme as a whole, that the deed was therefore ineffective and void, that the realty passed to Maude by intestate succession, and that it was effectively disposed of by her will. It is the first link in this chain of reasoning that requires analysis.

Beginning with a quotation of Gray's statement of the rule and a reference to the traditional view that the settlor's intention must first be

shares and if any child should die without leaving lawful issue, then such share should go to the surviving children of the settlor." 390 Ill. 205, 209, 61 N.E. 2d 40, 43 (1945).

¹¹ In 1917, the three children made another deed in trust which purported to dispose of the corpus. That deed was held ineffective for reasons outside the scope of this paper.

¹² Abstract of Record, p. 21.

ascertained without regard to the rule and then the rule applied to the instrument as so construed, the court continued by saying that the settlor intended "to dispose of each one-third on a distinct basis" and not to make "a gift to them as a class." The court then found that Mary E. Hanley intended the "legal heirs" of Maude, Dora, and William to be determined at the death of the survivor of them. With the settlor's intention thus established, the court applied the rule and found it was violated. Its reasoning on the point is contained in the following paragraph of its opinion:

Since the point of time for determining the legal heirs of the two who died first is postponed until the death of the survivor of the three, it is pertinent to see whether the gifts over to the legal heirs of the two were to vest upon a condition that might not happen within the life or lives in being when the trust was created and twenty-one years thereafter. It is clear that the estate in the income which would vest in the legal heirs of the survivor would not be within the rule against perpetuities, but the situation is different as to the legal heirs of the other two. As to the two who died first, their legal heirs were not determinable until the survivor of the three children died. It is not a case where a gift to a class may open up to admit after-born children, for here there is no one who can qualify as a member of the class until the time when the class is to be determined, that is, at the death of the survivor. It was possible that a person qualifying as a legal heir at the death of the survivor was born more than twenty-one years after the death of life or lives in being when the trust was created. This possibility is fully demonstrated by the facts surrounding the share of William A. Hanley. He died in 1919, which was 26 years after the trust was created. As to his share, his death was the end of the life in being when the estate was created. However, if he had left issue born to him after the trust was created and such issue died after he was deceased, leaving a child born more than 21 years after the death of William A. Hanley, then the vesting of the title would be beyond the period embodied in the rule.¹³

This paragraph, by itself, does not show a violation of the rule as traditionally understood. The gift over to heirs clearly had to take effect (had to vest) upon the death of the survivor of Maude, Dora, and William, all of whom were in being at the time of the grant and named in the deed. The conclusion that the heirs of the three children were to be determined at the time of the death of the survivor of them has no effect whatever so far as the rule is concerned, since those heirs were to be ascertained and were to take indefeasibly upon the end of one of three lives in being when the gift to heirs was made. The fact that three lives in being were to come to an end before the heirs could take seems unimportant, as traditionally it should be, because the court expressly recognizes that the period of the rule may be measured by "lives in being when the trust was created." The possibility that a child of William unborn at the time of the grant, or

¹³ 390 Ill. 205, 222-23, 61 N.E. 2d 40, 48, 49 (1945). Mr. Justice Gunn's dissent was based on this phase of the case. *Ibid.*, at 229 and 51.

an unborn child of that unborn child, might have taken is without significance, since any such unborn child would have to have taken upon the death of a person in being at the creation of the trust. The accepted view is that the time of the birth of a taker has no bearing on the application of the rule, if he can take only if he is in being within twenty-one years after one or more lives in being.¹⁴ The statement of the court that "a person qualifying as a legal heir at the death of the survivor" might have been "born more than twenty-one years after the death of live or *lives* in being when the trust was created"¹⁵ is difficult to follow. Anyone who could qualify as an heir upon the death of the survivor of the three children must, of necessity, have been born within the life-time of that survivor.¹⁶

III

*Hayden v. McNamee*¹⁷ was a suit to partition a parcel of land called the "Glissman farm," which had been devised by the will of Daniel M. O'Neil in an unusual manner. The testator had eleven children, all of whom survived him. He had owned a large amount of real estate, and he devised a specific parcel to each child and the heirs of his or her body; in the case of the Glissman farm the devise was "To my son, William D. O'Neil and the heirs of his body." The will further provided that each child was to have a life estate and upon his death the land was to go to his children then living and to the issue of any deceased children, and that if no issue of the body of the testator's child survived that child the fee was to pass to the testator's children who were then living. However, in the case of two of the testator's children, Philip and Margaret, after their respective life estates the parcels of land were to go to such of their children (the testator's grandchildren) as were living at the testator's death, for their lives, and upon the death of any of those grandchildren, his share of the land was to go to his children surviving at his death, or to his brothers and sisters, or their issue, if he died without issue surviving him, or to the testator's children, or their issue, if such grandchild had no brother or sister and if there were no issue of a deceased brother or sister. There was a request that the testator's children should not sell or mortgage the land

¹⁴ Gray, *op. cit. supra*, note 3, at § 232, and cases cited in notes 21-26, *infra*.

¹⁵ Italics added.

¹⁶ Mr. Justice Gunn, in his dissenting opinion, uses much the same argument. In addition, he contends that the gift to the issue of a child of the settlor was final, that the entire remaining interest in the particular share of income vested in the issue, and that as to that share there was no gift over to heirs upon the death of the survivor of the three children. 390 Ill. 205, 231, 61 N.E. 2d 40, 52 (1945).

¹⁷ 392 Ill. 99, 63 N.E. 2d 876 (1945).

during their respective lives. In addition, the testator made his children, as joint tenants, trustees of all the land devised "for the purposes of preserving the contingent remainders created in said land for the benefit of the children and issue of my children," with directions which in effect required the trustees to take steps to prevent mergers or premature destruction of any life estate under the will.

Margaret, the first of the testator's children to die, was survived by her daughter, Lucille, who was in being at the testator's death. William, the life tenant of the Glissman farm, died without issue. Philip died after William and left two surviving children, Daniel and Ethel, who were both living when the testator died. One of the questions for decision was whether Lucille, Daniel, and Ethel, who were the children of Margaret and Philip, as to whom the will made the special provisions referred to above, took fee or life interests in the Glissman farm. The court held that the interests of Lucille, Daniel, and Ethel in the Glissman farm were limited to life estates and directed that the partition suit proceed on that basis.

It will be observed from the foregoing summary of the case that the court expressly recognized and upheld the following limitations with respect to the Glissman farm: to William for life and then to Lucille, Daniel, and Ethel for their respective lives, remainder in fee over upon their deaths. Even more is implicit in the decision: Philip was a life tenant following William's death, and his life estate was followed by life estates in his two children, Daniel and Ethel, so that the court in truth upheld successive life estates to William, Philip, and then concurrently to Daniel and Ethel. It is submitted that no such result could ever have been reached if *Corwin v. Rheims* stands for the proposition that only the life of the first taker can be used as the measure in applying the rule.

Nowhere in its opinion does the court refer to the rule. Thus it might be reasoned that no question of validity under the rule was raised by the parties and hence was not before the court. An answer to this argument is that the will ties up real estate for so long that one of the first questions that must cross the mind of any lawyer reading it is: Does the will raise a perpetuities question? It is the kind of question that the court would undoubtedly have raised on its own motion, even though not argued by the parties.¹⁸ The provision for trustees to preserve contingent remainders was in itself so unusual as to cause any Illinois lawyer to consider the whole testamentary scheme very carefully. That the court had not overlooked the perpetuities problem is indicated by the following sentence ear-

¹⁸ Compare Kales, *Estates, Future Interests, Restraints and Illegal Conditions in Illinois* § 704 (2d ed., 1920).

ly in its opinion: "It is a cardinal rule for the construction of wills that the intention of the testator shall be ascertained, and such intention, when ascertained, must be given effect *if that can be done without violating some rule of law or public policy.*"¹⁹ In giving effect to the testator's intention, therefore, the court must have been satisfied itself that no rule of law was violated in so doing. Moreover, the portions of the will quoted in the opinion indicate that the draftsman understood and applied the rule in the traditional sense. Indeed, the will may be said to bristle with an awareness of the perpetuities problem. It is beyond belief that the court, in such circumstances, could have overlooked the question. Finally, if the court had laid down a new rule against perpetuities in so recent a case as *Corwin v. Rheims*,²⁰ it is inconceivable that it would not have grasped the excellent opportunity offered by the *Hayden* case to apply that rule and give it further currency. Its silence on the question, in itself, is strong evidence that the rule is as it has always been in the past.

IV

For many years the Illinois Supreme Court has followed and applied the rule in accordance, generally, with the teachings of Gray. In *Madison v. Larmon*²¹ legal life estates in real property were devised, in twenty-nine shares, to seventeen named children and grandchildren of the testator. The shares of a child were upon his death to go to his named children for their lives. Upon the death of any of the named grandchildren without issue then living, his share was to go to all his brothers and sisters for their lives. Upon the death of a grandchild leaving issue then living, such issue were to have their parent's share until the death of the named children and grandchildren of the testator. The remainder in fee was devised, upon the death of the testator's named children and grandchildren, to all his grandchildren then living and to the living issue of any deceased grandchild. The court held that none of these limitations violated the rule since each of them had to take effect within some life in being at the testator's death.

In a later case²² land was devised in trust to pay the net income to the testator's three daughters, share and share alike, and the survivors of

¹⁹ 392 Ill. 99, 105, 63 N.E. 2d 876, 879 (1945). (Italics added.)

²⁰ The opinion was filed March 21, 1945; a rehearing was denied May 21, 1945.

²¹ 170 Ill. 65, 48 N.E. 556 (1897), referred to in dissenting opinion of Mr. Justice Gunn in *Corwin v. Rheims*, 390 Ill. 205, 230, 61 N.E. 2d 40, 52 (1945), and in *Schnebly*, op. cit. supra, note 5, at 23.

²² *Dwyer v. Cahill*, 228 Ill. 617, 81 N.E. 1142 (1907).

them. Upon the death of a daughter her share was to be paid to her children, if she left a child or children. Upon the death of the survivor of the daughters, the land was to be sold and the proceeds were to be distributed to the testator's grandchildren and to the issue of any grandchild then dead. The court held that those limitations did not violate the rule.

A similar construction was made of a will wherein the testator gave his property, including his real estate, to his sons subject to the following charges: after providing for the method of determination of the "net amount of [his] estate," he gave to each of his three daughters for their lives, by separate clauses of his will, a stated percentage of one-sixth of the "net amount." Upon the death of a named daughter, he gave an amount equal to one-sixth of the "net amount" to her issue living at her death "and to the child or children then living of any such issue who may be dead," to be paid to any child of the daughter when he should reach twenty-one or to the issue of a deceased child when the parent would have attained the age of twenty-one had he lived. By separate clauses, identical provisions were made for the other two named daughters. If a daughter died leaving no surviving descendants or if she should die "without leaving any descendant who shall take the bequest made in its behalf," there was a provision for an increase of the shares of the remaining daughters. Upon a bill for construction of the will, it was contended that there were violations of the rule. The court rejected the contention, holding the rule was not violated because every gift had to take effect within a life in being and twenty-one years.²³

In *Carlberg v. State Savings Bank*²⁴ several parcels of real estate were devised separately to the testator's children, the limitations under each of the several clauses of the will being as follows: to the child for life, at his death to his issue or to his heirs if the child predeceased the testator, subject to a life estate in the child's spouse; or if he died without leaving a descendant surviving him, the real estate was to pass as part of the testator's residuary estate, subject to an estate in the deceased child's spouse until remarriage or death. By the residuary clause, the testator gave the residue to a trustee with directions to pay it to testator's grandchildren as they became of age, and further provided:

Such interest shall not vest in any of my said grandchildren until they arrive at the age of majority, and should any of my grandchildren die leaving issue, then such issue shall take the part the parent would have taken if living, and to be paid to such issue as they shall arrive at the age of majority, respectively.

²³ *Comstock v. Redmond*, 252 Ill. 522, 96 N.E. 1073 (1911).

²⁴ 312 Ill. 181, 143 N.E. 441 (1924).

The plaintiffs urged that the gifts to spouses and to the grandchildren of the testator and their descendants violated the rule. The court held that none of the limitations transgressed the rule.

These and other cases²⁵ show that the Illinois Supreme Court has regularly applied the rule as it is traditionally understood to limitations not essentially different from those in the 1893 deed. As recently as 1944, for example, the rule as laid down by Gray was recognized.²⁶ In the light of this background it is difficult to believe that the court thought it was establishing new law. Indeed, as has been seen, the court in the *Corwin* case clearly believed it was simply applying established law to the facts before it. This leads to the next inquiry: Can the decision be explained within the framework of accepted legal principles?

V

Corwin v. Rheims can be rationalized on either one of two theories.

First.—It will be recalled that the deed provided "that the said beneficiaries herein named *or their legal heirs* shall not assign, mortgage or in any manner encumber their respective shares of the income herein provided by this Trust Deed, during the term of the aforesaid lease."²⁷ This provision appears to be a form of spendthrift clause, and such clauses, in so far as they are limited to persons whose interests must vest within the period of the rule, are commonly used and are valid in Illinois²⁸ and in other jurisdictions.²⁹ However, the provision of the deed in question is extraordinary in that it imposes a restraint on alienation not only by the settlor's three children, but by their heirs as well, for the duration of the trust.³⁰ If the clause means what it literally says, Rheims, as the sole heir of the settlor's three children, not only could not sell her interest but could not dispose of the income by will, since that would be an assignment. If so, the interest in the income would have passed to her heirs, as the successive heirs of the settlor's children, by intestate succession, and the same kind of devolution would continue until the end of the trust. In other words, each successive heir or group of heirs would take not from his or their immediate ancestor but under the deed. They would take as successive purchasers of the income. If this construction is correct, the effect of the

²⁵ *Wills v. Southwell*, 334 Ill. 448, 166 N.E. 70 (1929); *Tolman v. Reeves*, 65 N.E. 2d 815 (Ill., 1946).

²⁶ *Wechter v. Chicago Title & Trust Co.*, 385 Ill. 111, 126, 52 N.E. 2d 157, 164 (1944).

²⁷ Abstract of Record, p. 21. (Italics added.)

²⁸ *Hopkinson v. Swaim*, 284 Ill. 11, 119 N.E. 985 (1918); *Steib v. Whitehead*, 111 Ill. 247 (1884).

²⁹ *Griswold, Spendthrift Trusts*, c. 2 (1936).

³⁰ Such a provision does not seem to have come before the courts. *Ibid.*, at §§ 290-96.

spendthrift clause was to create a series of life estates over a period of ninety-one years, that is, for the duration of the trusts.³¹

That a series of life estates of this kind violates the rule, is clear upon principle and under the authorities.³² In *Foley v. Nalley*³³ land was devised to the testator's widow for life, with directions to pay taxes and expenses and to keep up cemetery lots out of the income,

and after her death her legal heirs are to have the possession, control, use and income of said farm . . . and further it is my will and desire that the same obligations and requirements shall entail on their legal heirs from generation to generation so long as they may have heirs to represent them.

The court said:

It is clear on the most casual reading of this clause of the will that the testator did not attempt to vest the fee in anybody but sought to retain the title to the land in his own estate, giving the use, under the conditions mentioned, first to the widow, then to her heirs-at-law and then to their heirs-at-law, and so on *ad infinitum* so long as the heirs of Lucinda Hodge had heirs to represent them. Such a provision is, of course, impossible of legal execution and violates the rule against perpetuities. This appears to be conceded.³⁴

As a result of the spendthrift clause, the effect of the 1893 deed in trust in the *Corwin* case was the same as that of the will construed in the *Foley* decision, except that in the *Corwin* case the last life estate was to come to an end in ninety-one years. It requires no argument to show that, so far as the rule is concerned, a term of ninety-one years does not differ from the court's "*ad infinitum*" in *Foley v. Nalley*.

There are at least two weaknesses in this theory. The first is that the construction advanced above may be improper. Admittedly no case has been found to support it.³⁵ And yet it is difficult to see what other legal effect the spendthrift provision might be given in this particular case. The second weakness is that the court did not rely on any such argument; indeed, did not even mention the existence of the spendthrift clause in its opinion. In consequence, this first theory of rationalization must be classed as speculation.

Second.—The trusts under the 1893 deed were invalid because they were to last for too long a period, i.e., for a flat term of ninety-one years.

³¹ Griswold says that Gray "seemed to think of a gift subject to a restraint on alienation as analogous to a series of successive gifts" (citing Gray, *Restraints on Alienation* § 272d [2d ed., 1895]) and that Gray thereafter "expressed a contrary view" in the second and third editions of the *Rule against Perpetuities*. *Ibid.*, at § 292.

³² Gray, *op. cit. supra*, note 3, c. 11.

³³ 351 Ill. 194, 184 N.E. 316 (1933).

³⁴ *Ibid.*, at 197 and 317.

³⁵ But see *Bunn v. Butler*, 300 Ill. 269, 133 N.E. 246 (1921); *Butler v. Huestis*, 68 Ill. 594 (1873); *Aetna Life Ins. Co. v. Hoppin*, 249 Ill. 406, 94 N.E. 669 (1911).

Although the law is far from settled, and the conclusions of the text writers thereon are quite unsatisfactory,³⁶ there are some cases in Illinois which seem to support the theory that the trusts under the 1893 deed were void because of their duration.

In *Bigelow v. Cady*³⁷ land was devised to an executrix and her successors, in effect "for all time to come," with directions to divide the annual income into four shares and to pay one such share to each of the testator's three named children and to the testator's widow. Upon the death of a taker, his or her share was to go to his or her heirs, if any; and if none, then to the testator's remaining heirs and their heirs forever. No provision was made for the disposition of the land itself or its proceeds. The court held that the land passed by intestate succession to the testator's heirs and was subject to partition by them. The reason assigned for the holding was that the will violated the rule against perpetuities because there was no provision for the vesting of title to the land itself and because of the provision for appointment of executors "for all time to come." The essential similarity between this and the *Corwin* case, in the limitations and in the result, is remarkable, and in the latter case the court might well have relied on the *Bigelow* case as a precedent. Gray explains the *Bigelow* decision on the basis of the rule in Shelley's case and regrets "the inaccurate language of the Court as to the Rule against Perpetuities."³⁸ In discussing the case Kales also refers to the rule in Shelley's case and approves the holding that "the attempt to create of an absolute and indefeasible interest, which should last forever," was void.³⁹

In a more recent case⁴⁰ trusts under a will were held void because distribution was not to be made until a debt was paid and thereafter the trustees were given discretion to "postpone such distribution to such future date as they may deem expedient." The court said:

The trust was of unlimited duration. . . . It seems clear that the devise to the trustees to distribute being without limitation as to time is void. . . . The devisees had a right to have the unlawful trust terminated. . . .⁴¹

³⁶ See Kales, *op. cit. supra*, note 18, at §§ 658-61; 1 Bogert, *Trusts and Trustees* § 218 (1935); Carey and Schuyler, *Illinois Law of Future Interests* § 478 (1941).

³⁷ 171 Ill. 229, 48 N.E. 974 (1897).

³⁸ Gray, *op. cit. supra*, note 3, at § 237-3.

³⁹ Kales, *op. cit. supra*, note 18, at § 659. Since in the *Corwin* case the heirs were to be determined on the death of the survivor of the three children and only income was involved, the rule in Shelley's case has no application.

⁴⁰ *Van Epps v. Arbuckle*, 332 Ill. 551, 164 N.E. 1 (1928).

⁴¹ Compare *Wagner v. Wagner*, 244 Ill. 101, 91 N.E. 66 (1910), where the will provided that "The trusts hereby created shall terminate in the discretion of the trustees or their successors," and it was held that the trusts were valid because the provision had reference to termination while testator's sons were living.

Previously the Illinois court had indicated that the rule applicable to the duration of trusts involved the same period as that prescribed by the rule against perpetuities:

Where a testator by his will creates a trust and fixes the duration thereof, his direction will, if not in violation of the rule against perpetuities, be given effect and the trust will continue for the time indicated. . . .⁴²

In another case⁴³ the court expressed some doubt whether trusts could be created for a period of thirty years.

In *Armstrong v. Barber*⁴⁴ the will provided that the property was to be held in trust for ten years from the probate of the will. The court, although it did not decide the question, observed:

Once such trusts are permitted, it follows that there must be some limits to the length of time they can be made to last. It is suggested in *Gray on Perpetuities* . . . that it is perhaps likely that the same period as that prescribed by the rule against perpetuities should be taken, but the author adds that it is open to the courts to adopt some other period, if found advisable.⁴⁵

These cases tend to establish the proposition that an indestructible trust cannot be made to last for a greater period than one measured by lives in being and twenty-one years. They also indicate that a trust of that kind which extends beyond that period may be void. If these propositions truly reflect the law, then the result of the *Corwin* case is fully explicable by their application to the facts of that case, for there was a clear possibility, not to say probability, that the trusts under the 1893 deed would last more than twenty-one years after lives in being. Nor is this rationale wholly without support in the opinion: "The chancellor held

⁴² *Kohtz v. Eldred*, 208 Ill. 60, 72, 69 N.E. 900, 903 (1904).

⁴³ *O'Hare v. Johnston*, 273 Ill. 458, 478, 113 N.E. 127, 134 (1916).

⁴⁴ 239 Ill. 389, 88 N.E. 246 (1909).

⁴⁵ *Ibid.*, at 403 and 250. Compare *Mettler v. Warner*, 243 Ill. 600, 90 N.E. 1099 (1910), where the court upheld trusts which were to last from the testator's death until "fifteen (15) years after the first day of the next month of March after the date when this . . . will . . . is admitted to probate."

Cf. *Wechter v. Chicago Title & Trust Co.*, 385 Ill. 111, 52 N.E. 2d 157 (1944), where a land trust which was co-terminous with a ninety-nine year lease was held not to violate the rule against perpetuities or to create an unlawful restraint on alienation. The court refused expressly to follow *Kales' view* (*Kales*, op. cit. supra, note 18, at § 658) that trusts of this kind should be limited in duration to lives in being and twenty-one years. The reason assigned for the decision was that "the trust could be terminated at any time by action of the trustee and three-fourths of the shareholders." To similar effect is *Hart v. Seymour*, 147 Ill. 598, 35 N.E. 246 (1893), where a trust agreement creating what appears to have been a business trust was upheld, even though it contained no provision limiting duration, because there were "persons in being at the creation of [the] estate, capable of conveying an immediate and absolute estate in fee in possession." These cases are clearly distinguishable from *Corwin v. Rheims*, in that the 1893 deed withheld power of sale from successor trustees and restrained alienation by the named beneficiaries and their heirs.

that the settlor intended the trust to continue for the duration of the lease."⁴⁶ The court then proceeded to show why the construction was proper, but having done so it drew no conclusion from its finding; rather, it turned abruptly to the "further question . . . whether the estates . . . violated the rule against perpetuities."⁴⁷

It is admitted that this theory does not account for the language used by the court and quoted earlier in this paper.⁴⁸ It is also conceded that the court did not cite or rely on any case touching upon the question of the duration of trusts. And yet when the case as a whole is considered in light of the foregoing discussion neither what the court said nor other possible theories come as near to explaining the case as does this theory.⁴⁹

VI

There are five factors which are relevant to a determination of the significance of the *Corwin v. Rheims* decision:

1. The court in *Corwin v. Rheims* expressly indicated it was applying Gray's rule to the facts before it.
2. It expressly recognized the possibility of using *lives* in being as the measure of the rule.
3. In *Hayden v. McNamee*, decided after the *Corwin* case, the court upheld limitations which would have been bad had the *Corwin* case actually modified the rule.

⁴⁶ 390 Ill. 205, 219, 61 N.E. 2d 40, 47 (1945). Mr. Justice Gunn also disagreed on this point. *Ibid.*, at 229 and 51.

⁴⁷ *Ibid.*, at 220 and 47.

⁴⁸ See text accompanying note 13 *supra*.

⁴⁹ Other possible theories include: (1) The court consciously modified the rule because such modification was socially desirable. The opinion contains no hint of such a purpose, and the court has shown little tendency in the past to pioneer in development of the law. (2) The court simply misapplied the rule to the facts before it. One difficulty with letting the matter rest on this explanation is that it leaves the practitioner completely in the air as to the effect of the case as a precedent. (3) It might be argued that the case represents an application of the principle that a gift following a limitation bad for remoteness is itself invalid. *Quinlan v. Wickman*, 233 Ill. 39, 84 N.E. 38 (1908); *Kales*, *op. cit. supra*, note 18, at § 710. Aside from questions as to the soundness of the principle (see *Gray*, *op. cit. supra*, note 3, at §§ 247-50), the gifts preceding the limitation to "legal heirs" were not too remote because they had to take effect within lives in being. (4) The most interesting explanation of the result and some of the court's language is that the court applied the rule in *Whitby v. Mitchell*, 44 Ch. Div. 85 (1890), that, independently of the rule against perpetuities, a gift to an unborn child of an unborn person is void. In *Whitby v. Mitchell* the court relied in part on a dictum of Lord St. Leonards in *Monypenny v. Dering*, 2 D. M. & G. 145 (1852), and in *Quinlan v. Wickman*, *supra*, the Illinois court cited the *Monypenny* case with approval, but on another point. Were it not for the *Hayden* case this rationale might be regarded as fairly persuasive, despite the facts that the rule was abolished in England by a statute enacted in 1925, that the very existence of the rule was denied most vigorously by Gray, and that it is said never to have been law in the United States. See *Gray*, *op. cit. supra*, note 3, at §§ 133, 191-99, 287-95, 298.1-98.9, 931-47; 2 *Simes*, *Law of Future Interests* §§ 486-88 (1936).

4. The earlier cases show that limitations essentially similar to those in the *Corwin* case do not violate the rule.

5. The decision can be rationalized either on the basis that successive life estates were created by the 1893 deed or that the trusts under it were void because they were to last for too long a period.

In view of these considerations it is submitted that the rule against perpetuities, as heretofore understood and applied, is still in full force and effect in Illinois and that it has not been changed or modified by the *Corwin* case. It is, therefore, to be expected that, as occasions arise, the court will either ignore the *Corwin* case or will distinguish its supposed rule out of existence.

CORWIN v. RHEIMS—FURTHER COMMENT

MERRILL I. SCHNEBLY*

Mr. Herzog and I agree that the decision in *Corwin v. Rheims* cannot be supported in so far as it depends upon an application of the rule against perpetuities. It seems, however, that Mr. Herzog is of the opinion that I drew unduly broad inferences from the decision.

In my prior discussion of this case,¹ I said:

Even if it were the rule that measuring lives must be lives of persons who take an interest in the subject matter of the limitations, that requirement would actually have been satisfied in the *Rheims* Case. Since each share was limited over on death of the original life beneficiary without surviving issue to the surviving life beneficiaries of the other shares, each of the original life beneficiaries actually had a contingent future interest in all other shares. The decision of the court would seem to mean not merely that a disinterested life cannot be used as a measure of the period of suspension, but that only the life of the first life tenant of the share can be used.²

After having quoted the last sentence only from the above excerpt, Mr. Herzog says:

If in truth the case means what he says it does, then the supposed worries of property lawyers are amply justified. It means that a testator cannot leave property to his wife for life, and upon her death to his daughter for her life, and then upon the daughter's death to her children absolutely, for that disposition would involve two successive life estates and hence would be invalid.³

Surely not even the single sentence that Mr. Herzog quoted from my article would lead to the conclusion that he has stated. My statement

* Professor of Law, University of Illinois.

¹ Schnebly, *The Decision in Corwin v. Rheims*, 34 Ill. Bar J. 21 (1945).

² *Ibid.*, at 24.

³ Herzog, *supra*, at 301.