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

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

² *Ibid.*, at 24.

³ Herzog, *supra*, at 301.

clearly referred to a case in which life estates were limited in undivided shares, with a suspension of the vesting of the fee⁴ as to each share until death of all life tenants. The use of the term "life tenant of the share" would limit my statement to a case involving undivided shares. The case stated by Mr. Herzog does not involve concurrent life estates at any stage. I would not have supposed at the time I wrote my original comment on *Corwin v. Rheims* that the court would hold Mr. Herzog's hypothetical case to violate the rule against perpetuities. Certainly it has been held in prior decisions that such limitations were valid under the rule.⁵

The statement which I have quoted at length from my prior discussion was an attempt to state the rule actually applied in the *Rheims* case, rather than an attempt to predict how the court might apply the rule against perpetuities to other cases of different character. In *Corwin v. Rheims* the court actually did hold that the only life which could be considered as a measure of the period of suspension of vesting was the life of the first life tenant of the share. It refused to admit that the lives of other persons contingently interested in the share could be used. What theory of a rule against perpetuities the court had in mind, I could not say. It may have been the court's theory that disinterested lives could not be used in measuring the period of the rule, the court overlooking the fact that the limitations in the case actually used only interested lives; or it may have been the theory that only lives of persons having *vested* interests in the share could be used; or the theory may have been quite different from either of these propositions.

Mr. Herzog is puzzled by the following statement in the opinion in the *Rheims* case:

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.⁶

He observes, "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 of that survivor."⁷ That observation is undoubtedly true. The statement quoted from the opinion, however, must be interpreted in its context. Immediately following the prior quotation appears this statement:

⁴ The expression "vesting of the fee" is used here and elsewhere in this comment as a matter of convenience. Actually, in the *Rheims* case, the final limitation was not of the fee, but the point is immaterial to the present discussion.

⁵ *Branson v. Bailey*, 246 Ill. 490, 92 N.E. 940 (1910); see *Barrett v. Barrett*, 255 Ill. 332, 337-38, 99 N.E. 625, 627 (1912).

⁶ 61 N.E. 2d 40, 48 (1945).

⁷ Herzog, *supra*, at 304.

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*.⁸

When the court made the statement first quoted, it assumed that William Hanley was the only life that could be considered so far as his share was concerned. If he should not be the survivor of the three life tenants, persons qualifying as his heirs at the death of said survivor might be persons born more than twenty-one years after the death of the only life in being which could be considered—*i.e.*, his life. The quoted passages taken together make clear the court's thesis that as to William's share, all interests therein limited must vest, if at all, within his life and twenty-one years thereafter.⁹

For the purposes of the present discussion the limitations in the *Rheims* case may be simplified to this model: to A, B and C for their lives, in equal shares; with contingent cross-remainders for life of the survivor as among the several shares; and a final limitation over of all shares in fee at the death of the survivor of the original life tenants, to persons not ascertainable until death of said survivor. In my prior comment on the case, my entire discussion of the perpetuity problem was restricted to limitations of substantially the type above described. I pointed out that in *Madison v. Larmon*¹⁰ limitations of this substantial kind had been held not to violate the rule against perpetuities. I then stated the case of *Addicks v. Addicks*,¹¹ and cited other cases,¹² all of the same general type, pointing out that in these cases no question had been raised as to remoteness. It was my purpose to indicate that limitations of this type were not uncommon, and that the decision in the *Rheims* case might have more far-reaching effect than would appear on casual reading. At that time I made no attempt to explore all the possible consequences of that decision.

⁸ 61 N.E. 2d 40, 49 (1945). (Italics added.)

⁹ I have previously commented on the undue emphasis which the court placed upon the time of birth of persons ultimately qualifying as heirs of the life tenants. Schnebly, *op. cit. supra*, note 1, at 22. Mr. Herzog has also commented on this point. It is obvious that if William's life is the only life that can be considered in respect to his share, and the remainder is so limited that it may vest in a person born more than twenty-one years after his death, the remainder is too remote; but, on the same premise, it would also be too remote if it could vest more than twenty-one years after his death in a person born during his life but after the date of the conveyance.

¹⁰ 170 Ill. 65, 48 N.E. 556 (1897). Another decision holding this type of limitation valid is *Dwyer v. Cahill*, 228 Ill. 617, 81 N.E. 1142 (1907); cf. *Hale v. Hale*, 125 Ill. 399, 17 N.E. 470 (1888).

¹¹ 266 Ill. 349, 107 N.E. 877 (1920) (cross-remainders for life implied).

¹² *Kramer v. Sangamon Loan Co.*, 293 Ill. 553, 127 N.E. 877 (1920) (cross-remainders for life implied); *Martin v. Casner*, 383 Ill. 260, 48 N.E. 2d 944 (1943) (cross-remainders for life expressed).

I do not think that the decision in *Hayden v. McNamee*,¹³ which Mr. Herzog has discussed at some length, throws much new light on the subject. For the purposes of this discussion the facts of that case may be stated as follows: a testator devised a farm to his son William for life; on the death of William, to his surviving issue in fee; if he should die without surviving issue, then an undivided share in the farm to Philip for life; on the death of Philip, his share to his children living at the death of the testator, to hold for their lives; and on the death of any child of Philip, his share to his surviving issue in fee. It may be noted that at the death of the testator, William took a life estate in the whole farm; and Philip, a contingent remainder for life in an undivided share—contingent because of the prior limitation to the issue of William. On the death of William without surviving issue, Philip took a present life estate in a share, and his two children living at the death of the testator took vested remainders for their lives in the same share. Philip was the first life tenant of a share. No cross-remainders for life were limited as to any of the shares; each share was limited to pass immediately upon the death of a life tenant without respect to whether the life tenant of another share was still living. In this respect the case differs from the *Rheims* case, where the shares were all limited over at the death of the survivor of the original life tenants, and cross-remainders for life were limited. The factual situation in the *McNamee* case was by no means new or unusual. In earlier cases of substantially the same type, the court had held that all limitations were valid under the rule against perpetuities.¹⁴ In the *McNamee* case the rule was not mentioned. Mr. Herzog would like to infer from this fact that the court did not consider the rule applicable. Such an inference, however, is not wholly satisfying.

Whether the logic of the decision in the *Rheims* case would require the court to hold in the *McNamee* case, and in other cases of that type, that the final limitation of the fee is void, is difficult to say, since there is no logic apparent in the *Rheims* case. To apply to limitations of an undivided share in property a different rule against perpetuities than would be applied to limitations of the whole property is such an inexplicable deviation from the common law rule that there can be but little basis for a safe prediction as to future holdings.

I have previously indicated my doubt whether, in cases not involving undivided shares, the court will hold that the future interests must vest

¹³ 63 N.E. 2d 876 (Ill., 1945).

¹⁴ *Branson v. Bailey*, 246 Ill. 490, 92 N.E. 940 (1910); *Wood v. Wood*, 276 Ill. 164, 114 N.E. 549 (1916).

not later than twenty-one years after the death of the first life tenant of the share. That such a holding would be opposed to practically the unanimous common law authority would probably be apparent. The future danger of the *Rheims* decision will most likely be present in cases involving undivided shares. Several possible courses of judicial action may be suggested. (1) The court may overrule the *Rheims* case completely. This is the result for which we should hope. (2) The court may limit the *Rheims* decision strictly to its facts, i.e., to cases where concurrent life estates are limited, with contingent cross-remainders for life, with a gift over of the the whole property in fee at the death of the last survivor of the original life tenants, such gift being contingent until death of said survivor. This restriction of the *Rheims* case would result in decisions sustaining the limitations in cases like the *McNamee* case. (3) Conceivably the court might hold that even where *vested* cross-remainders for life¹⁵ are limited as among the shares, only the life of the first life tenant of the share can be used as a measure of the period of suspension of vesting. The vested character of cross-remainders for life may easily be overlooked. The limitation over of all shares at the death of the survivor of the original life tenants might make this case look very much like the *Rheims* case. (4) It is conceivable that the court might hold that in any case of a division into shares, even where no cross-remainders for life are limited, and where each share is limited to pass independently of other shares, the life of the first life tenant of the share is the only life that can be used. This extreme view of the matter would be fatal to the limitations in the *McNamee* case. It might seem doubtful whether the court would go this far, in view of the contrary authority heretofore cited. It must be remembered, however, that the *Rheims* decision was squarely opposed to one of the most elaborate decisions on the application of the rule against perpetuities that can be found in the Illinois reports.¹⁶ It is possible that a distinction might be taken which would permit the use of the life of a remainderman who has taken a *vested* interest at the effective date of the conveyance. It might be difficult to explain, where two successive life estates are vested at the date of the conveyance, why one life can be used but not the other.¹⁷

¹⁵ Where land is conveyed to two or more persons for their lives, in equal shares, with a provision that on the death of any one the survivors or survivor shall have the enjoyment of the whole until the death of the last survivor, the cross-remainders for life are vested. See Simes, *Law of Future Interests* § 435 (1936). The factor making the cross-remainders contingent in the *Rheims* case was the prior limitation to the issue of the original life tenants.

¹⁶ *Madison v. Larmon*, 170 Ill. 65, 48 N.E. 556 (1897).

¹⁷ The situation is illustrated by these limitations: devise to A of an undivided share for life; remainder to his children living at the death of the testator, for their lives; at the death of any child, his share to his surviving issue. A takes a life estate in possession at the

It may appear that the distinctions above discussed are tenuous. With this opinion I should agree. The principal purpose of this comment, in fact, is to demonstrate the futility of any attempt to evolve a logical set of rules out of the decision in the *Rheims* case.

Mr. Herzog suggests two theories on which he thinks the actual result of the *Rheims* case might be supported, and in a footnote mentions four other possibilities. I believe he concedes that there is little, if anything, in the opinion of the case to indicate that the court had any of these theories in mind. I have never been impressed with the utility of explaining away a bad decision on grounds that do not appear in the opinion. I shall, however, comment briefly on the two theories that Mr. Herzog has discussed in detail. The first theory depends upon the clause restraining alienation, which is barely mentioned in the statement of facts in the case, and to which there is no further reference. Mr. Herzog has quoted this restraint clause from the abstract of record on file in the case. It purports to create a restraint of the disabling type against the beneficiaries named and their heirs. Mr. Herzog suggests, if I understand him correctly, that this broad restraint makes impossible any kind of transfer by a beneficiary, and must mean, therefore, that the testator intended to create an indefinite series of life estates extending over a period of ninety-one years, each succeeding life tenant taking as a remainderman under the will, and not as an heir of his predecessor. He concludes that such a series of life estates would violate the rule against perpetuities, with the result that the entire gift would fail. He concedes that he has found no authority to support this construction of the testator's intent. While this is an interesting suggestion, I think it is clear that the authority is all against it. There have been numerous cases in which a testator has devised land with a sweeping restraint designed to produce perpetual inalienability, or at least inalienability extending far beyond the period of the rule against perpetuities. In all the cases of this type that have come to my notice the courts have held that the restraints were void, and that the devisees took *in fee*.¹⁸ The restraints were not construed to manifest an intent to create a series of life estates, all of which would fail according to Mr. Herzog's suggestion. His

death of the testator, and his children then living take vested remainders for their lives. The limitation of the fee to the surviving issue of a child is not too remote if the life of the child can be used to measure the period. Cf. *Wood v. Wood*, 276 Ill. 164, 114 N.E. 549 (1916).

¹⁸ *Early v. Tayloe*, 219 N.C. 363, 13 S.E. 2d 609 (1941); *Williams v. McPherson*, 216 N.C. 565, 5 S.E. 2d 830 (1939); *Saffold v. Wright*, 228 Ky. 594, 15 S.W. 2d 456 (1929); *Courts v. Courts' Guardian*, 230 Ky. 141, 18 S.W. 2d 957 (1929); *Sparr v. Kidder*, 265 Pa. 61, 108 Atl. 204 (1919); *Hacker v. Hacker*, 153 App. Div. 270, 138 N.Y. Supp. 194 (1912); *Ogle v. Burmister*, 146 Iowa 33, 124 N.W. 758 (1910); *Ernst v. Shinkle*, 95 Ky. 608, 26 S.W. 813 (1894); *McDowell v. Brown*, 21 Mo. 57 (1855).

suggestion, logically applied, would seem to result in the conclusion that where the restraint is limited to the life of a conveyee, but is otherwise absolute, an intent is manifested to restrict the conveyee to a life estate. Any such conclusion based on the mere presence of the restraint is opposed to practically the unanimous authority on the point.¹⁹

Mr. Herzog's second suggestion for supporting the decision in the *Rheims* case is that the trusts created were to last for too long a period of time (ninety-one years), and were therefore void. The problem here involved is a difficult one, which cannot be discussed at length in this comment. It is generally conceded that the rule against perpetuities has no application to the duration of a trust,²⁰ but only to the vesting of the equitable future interests limited thereunder. If all such interests must vest within the time of the rule, the trust may continue for a hundred years so far as the rule is concerned. There have been several cases in Illinois in which trusts have been upheld even though they might continue for a period in excess of lives in being at the time of their creation and twenty-one years thereafter.²¹ It was declared in *Armstrong v. Barber*²² that a trust of an absolute equitable interest could be made indestructible for a period of not to exceed lives in being and twenty-one years, that limitation on duration being based on an analogy to the rule against perpetuities; that if by the terms of its creation a trust might continue for longer than said period, the trust was not void, but merely terminable at the suit of a beneficiary who was sui juris.²³ It must be understood that the term "absolute" normally refers to an equitable fee in land or a corresponding interest in personal property; and that the term "indestructible" means nonterminable. It has been said in some Illinois cases that such a trust is void, but it is doubtful if these statements should be taken literally.²⁴

¹⁹ *Bowen v. John*, 201 Ill. 292, 66 N.E. 357 (1903). No doubt the presence of language of restraint may under certain circumstances indicate the intent to create a life estate. I have discussed this problem in *Schnebly, Restraints upon the Alienation of Legal Interests*, 44 Yale L. J. 1380 et seq. (1935). See also *ibid.*, 1405-6.

²⁰ *Gray, Rule against Perpetuities* § 236 (4th ed., 1942); *Scott, Trusts* § 62.10 (1939); *Bogert, Trusts and Trustees* §§ 214, 218 (1935).

²¹ See *Kales, Estates, Future Interests, Restraints and Illegal Conditions in Illinois* §§ 658-59 (1920); *Carey and Schuyler, Illinois Law of Future Interests* §§ 478-80 (1941); *Bogert, op. cit. supra*, note 20, at § 218.

²² 239 Ill. 389, 88 N.E. 246 (1909).

²³ 239 Ill. 389, 403, 88 N.E. 246, 251.

²⁴ *Bigelow v. Cady*, 171 Ill. 229, 48 N.E. 974 (1897) has often been cited for the proposition that such a trust is void. As to one beneficiary, at least, the trust there involved was not a trust of an absolute interest. The decision seems to have gone on the broader proposition that no trust was valid if it might continue for a period longer than the period of the rule against

It should be noted that in the *Rheims* case the equitable interests were not absolute at the time the trust was created, since successive equitable life estates were limited. Not, at least, until the death of the last survivor of the original life tenants could the equitable interests be regarded as absolute, and it is doubtful whether they became absolute even then, since they did not amount to an equitable fee.²⁵ To hold such a trust void from the time of its creation would be outrageous. There may be a public policy which forbids the perpetual separation of legal and equitable titles where all equitable interests are absolute and indefeasible. That policy may require that some time limitation be imposed upon the duration of an indestructible trust of an absolute interest. Surely, however, that policy does not require that the trust should be held wholly void, and the settlor's intention defeated entirely. It would be sufficient to hold that whenever a trust acquires the character above described, and its duration has not been expressly limited to lives in being and twenty-one years, it becomes terminable, as suggested in *Armstrong v. Barber*.

I wish that I could believe that the decision in the *Rheims* case will prove to be as innocuous as Mr. Herzog seems to think. I am of the opinion that until this decision is expressly and completely overruled it will continue to be a source of uncertainty and confusion. The present discussion may be taken as evidence of that proposition. It is to be hoped that the court will recognize the unfortunate consequences of the decision and decisively overrule it at the first opportunity.

perpetuities. This broader proposition has not been accepted by subsequent decisions. See authorities cited in note 21, *supra*. In *Van Epps v. Arbuckle*, 332 Ill. 551, 164 N.E. 1 (1928), a beneficiary with an absolute interest sued for termination of the trust. The court's statement that the trust was "void" probably meant no more than that termination should be decreed. The ground of the decision in *City Nat. Bank v. White*, 337 Ill. 442, 169 N.E. 197 (1929) is not clear. It may have been that the equitable interests limited under the trust were void for remoteness. In *Wechter v. Chicago Title & Tr. Co.*, 385 Ill. 111, 52 N.E. 2d 157 (1944) the court held valid a trust for ninety-nine years. The equitable interests under this trust were absolute, and the trust was terminable only on consent of three-fourths of the twelve hundred and seventy-five beneficiaries.

²⁵ On death of the last survivor of the original life tenants, the heirs of the life tenants were given the beneficial interest for the remainder of the trust term. Since the trust deed conveyed the lessor's reversion for the period of the lease only, no beneficial interest could be an equitable fee.