Future Interests in Indiana

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FUTURE INTERESTS IN INDIANA

BERNARD C. GAVIT

INTRODUCTION

Because it seems impossible to select a concise title that will do so, it seems desirable to properly limit the scope of this article by a short introduction. The author started out several years ago to attempt to discover what the Indiana courts had said about the Rule against Perpetuities, and how those courts had interpreted Section 40, Chap. 23, 1 R. S. 1852, p. 238, and Sections 1-3, Chap. 9, 2 R. S. 1852, p. 245. I have gone through the Indiana reports volume by volume, and have digested every case which decides or suggests any question in the field of the law of Future Interests. There are one hundred such cases in the Appellate Court reports, and one hundred and ninety-five in the Supreme Court reports.

Although the search was originally rather limited in its purpose a great many cases were discovered not bearing on the subject of the Rule against Perpetuities and the closely related subject of Restraints on Alienation, but which were interesting, to say the least, and which did discuss and decide questions in the field of Future Interests.

The great mass of the decisions on the subject contain much that is devoted to the question of the proper interpretation of the instrument supposed to create a future interest. It is sometimes difficult to determine where the questions of presumptions

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1 Professor Lewis M. Simes of the College of Law, Ohio State University, very kindly read the manuscript of this article and submitted several criticisms which have been taken advantage of, and the author desires to acknowledge his indebtedness to Mr. Simes for his assistance.

2 See biographical note, p. 544.

1 Sec. 13416, Burns Ann. Ind. Stat. 1926.

and rules of interpretation leave off and questions of the substantive law of Future Interests begin. Partly in view of that difficulty and partly in view of the interest to the profession of at least a collection of all the cases in all of their aspects it has seemed proper to include in this paper almost everything contained in the reports. This leads to a rather incoherent arrangement at times, but it has seemed worth while to give at least a compilation of the Indiana authorities on every phase of the subject which they touch. No discussion or criticism is attempted in parts of the paper because time and space do not permit.

There are a great many problems in connection with the general subject which have not been decided or discussed by the Indiana Courts. The paper is limited in the main to those problems in Future Interests which have actually found their way into the appellate courts of Indiana, or which are suggested by decisions actually made.

It is perhaps well to state at the beginning that the material is really very scanty. Although Indiana has perhaps had its share of litigation over wills and their proper and improper interpretations, few of the wills which have found their way to the appellate courts have presented any very complicated questions. Practically all of the important cases are comparatively recent, and it is obvious that as the wealth of the state increases and is disposed of by will the law of Future Interests will assume a growing importance.

THE RULE AGAINST PERPETUITIES AND RESTRAINTS ON ALIENATION

Section 40, Chap. 23, 1 R. S. 1852, p. 238, provides as follows:

"SUSPENSION OF POWER OF ALIENATION PROHIBITED—Exception. The absolute power of aliening lands shall not be suspended by any limitation or condition whatever, contained in any grant, conveyance or devise, for a longer period than during the existence of a life or any number of lives in being at the creation of the estate conveyed, granted, devised and therein specified, with the exception that a contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the person or persons to whom the first remainder is limited shall die under the age of twenty-one years, or upon any other contingency by which the estate of such person or persons may be determined before they attain their full age."

It is to be noted that this section deals only with land.

Sections 1-3, Chap. 9, 2 R. S. 1852, p. 245, provide as follows:

"HOW LONG OWNERSHIP MAY BE SUSPENDED.—1. No limitation or condition shall suspend the absolute ownership of personal property longer than till the termination of lives in being at the time of the execution of the instrument containing such limitation or condition, or, if in a will, of lives in being at the death of the testator."

"HOW LONG ACCUMULATIONS MAY RUN—2. A provision for the accumulation of interest or income of money or other personal property by any conveyance or will shall be void, except as follows:

First. If the accumulation be directed to commence at any period subsequent to the death of the person executing such instrument, it may be within the time allowed in the first section of this act for the suspension of ownership, and at some time during the minority of the persons for whose benefit it is intended, and must terminate at the expiration of their minority. But a provision for accumulation beyond the minority of such persons shall be void only as respects the time beyond such minority."

It is to be noted that these sections apply only to personal property.

The language of the two statutes is materially different; but there is no case in Indiana which discusses the effect of the difference in the language employed. Apparently it has been assumed that the two statutes were to all intents and purposes the same. And as will be seen in the discussion of the cases hereafter the courts have in practically all of the cases assumed that both statutes are codifications of the principle of the Common Law Rule against Perpetuities. In none of the decided cases in Indiana is there any discussion of the obvious problem as to whether or not the Statutes are directed solely against Restraints on Alienation and do not alter the Common Law Rule against Perpetuities.

Like a good portion of the balance of the Revised Statutes of 1852, the sections quoted above were copied in part from the New York Statute on the subject. The New York Statute provides that every future estate shall be void in its creation which shall suspend the absolute power of alienation for a longer period than during the continuance of two lives in being at the creation of the estate, and that such suspension occurs when there are no persons in being by whom an absolute fee in possession can be conveyed. Michigan has an identical statute.

The New York Statute has been construed as being directed against remoteness of vesting as well as restraints on

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4 Sec. 12171-3 Burns Ann. Ind. Stat. 1926.
5 See Hufswold v. Milligan, 50 Ind. 542 (1874).
alienation.\textsuperscript{8} The Michigan Statute has been construed as merely a rule against inalienability and not against remoteness of vesting, so that the Common Law Rule against Perpetuities is still law in Michigan.\textsuperscript{9}

The Common Law Rule against Perpetuities declared invalid any estate dependent on any limitation or condition, the purpose or possible effect of which was to allow the estate to vest in the future more than twenty-one years after a life or lives in being.\textsuperscript{10} Any number of lives in being were permitted whether they were interested in the estate or not, so long as they were ascertainable.\textsuperscript{11} It is of course possible to have an estate which may not vest within the time allowed, where the property will be alienable by all parties joining in a conveyance; still the remote estate was invalid under the rule, it being a rule directed against the remote vesting of estates, and not against unreasonable restraints on alienation or the use of property.\textsuperscript{12} In a limited sense in some cases the remote vesting of an estate has a restraining influence on alienation; that is, there may be a limitation to unborn children at twenty-one, or some such similar limitation, where persons are not in being who can convey. That, however, is true of any limitation or contingency going to the question as to who is to take (otherwise than as between specified living persons). The restraint is incidental to the contingency, and is not imposed as a restraint upon the devisee's or grantee's power to use or convey the property.

While the Indiana Statutes apparently permit even an absolute restraint on alienation which is properly limited in time, the Common Law prohibited every restraint on alienation except it be trivial, or supported by public policy.\textsuperscript{13}

\textsuperscript{8} In re Wilcox, 194 N. Y. 288, 87 N. E. 497 (1909); in re Perkins Estate, 245 N. Y. 478, 157 N. E. 750 (1927).


\textsuperscript{10} 1. Tiff. Real Prop. 2d Ed., Vol. 1, p. 591; Cadell v. Palmer, H. of L. 1833, 1 Cl. & F. 372. There is some present day dissent from the Rule as thus stated. See, for example, 6 Minn. Law Review, 650.

\textsuperscript{11} Thellueson v. Woodford, H. of L. 1805, 11 Ves. 112.

\textsuperscript{12} Tiff. Real Prop. 2d Ed., Vol. 1, p. 597; Gray, Perpetuities, Sec. 123-200.

\textsuperscript{13} Tiff. Real Prop. 2d Ed., Vol. III, pp. 1279-1328; Langdon v. Ingram, 28 Ind. 360 (1867); Allen v. Craft, 109 Ind. 476 (1886). What was construed to be a partial restraint, (in the nature of a restraint on alienation by partition) has been held valid under the statute. Halstead v. Coen, 31
The Indiana cases on the Rule against Perpetuities, and construing the statutes in question, are very few, so that it is possible, and it seems best, to discuss them each in detail.

There is but one Indiana case on the subject construing an instrument which took effect prior to 1852. That is the case of *Stephens v. Evans*.\(^{14}\) In that case the testator died in 1843 and devised certain real estate to trustees "to the use of S for life and W for life, and to the children of S now living, and hereafter born, as tenants in common in fee simple upon attaining the age of twenty-one, and if any child die intestate and without lawful issue alive, then his share to the cousins of such deceased child and their descendants, the descendants of any deceased cousin taking the share to which their deceased parent would have been entitled if living." The court in that case held that the devise to the cousins was void under the Rule against Perpetuities. The court states the rule as follows:\(^{15}\) "The rule is, that a limitation over by way of executory devise, in order to be valid, must be so made that the estate not only may, but must vest in possession within a life or lives in being and twenty-one years and nine months at the farthest, and if by any possibility, the vesting may be postponed beyond this period, the limitation will be void; and the period from which the rule runs, is the death of the testator." The court is incorrect in saying that the estate must vest "in possession" within the time allowed. It was only necessary that the limitation or contingency must be determined within the time allowed, so that the estate vested.\(^{16}\)

The result of the case is certainly correct. The children of S and W had to be born during lives in being at the death of T, but the estate of the cousins might vest more than twenty-one years after the birth of a child, and the death of S and W. The case is significant in this, all of the children of S and W died during the lifetime of W, so that as events actually occurred the devise to the cousins did vest (if valid) during lives in being. But as the court points out, the rule declares invalid every devise which *may* not vest within the time allowed.

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\(^{14}\) 30 Ind. 39 (1868). In the subsequent case of *Schoni v. Stephens*, 62 Ind. 441 (1878) involving the same will the court adheres to the decision in this case.

\(^{15}\) At p. 51.

\(^{16}\) Tiff. Real Prop. 2d Ed., Vol. 1, p. 593.
The next case in order is that of *Huxford v. Milligan*. This case was decided under the Revised Statutes of 1852. T devised 'to C and B and should either die without issue, then their share to go back to my estate, to be divided equally among my children then living.' B and C both died without issue, but the court held that the will meant an indefinite failure of issue, giving the devises a fee tail at common law, which became a fee simple under the Indiana Statute.

But the court went on to say that being an indefinite failure of issue, the limitation over was void as being too remote, and as being in violation of the statute against perpetuities. Almost without exception the Indiana courts have referred to this statute as being the "Statute against Perpetuities," and it is clear from the opinion in the case under discussion that the court understood the statute to be a declaration of the principle of the Common Law rule against remoteness of vesting. There was certainly no "absolute suspension of the power of aliening lands," within the ordinary meaning of those words. The executory devise was "to my children then living," so that living persons could have joined in a conveyance which would have conveyed a fee. From the most technical point of view there was no suspension of the power of alienation.

This case discusses the applicability of the second portion of the real property Statute against Perpetuities. The first half of the section prohibits the absolute suspension of the power of conveying lands for a longer period than lives in being, and the second half says this: "with the exception that a contingent remainder in fee may be limited on a prior remainder in fee to take effect in the event that the person or persons to whom the first remainder is limited shall die under the age of twenty-one (21) years or upon any other contingency by which the estate of such person or persons may be determined before they attain their full age." This latter portion of the statute is not a part of the statute dealing with personal property. The inclusion of this latter portion of the statute lends some weight to the repeated reference by the courts to the statute as a "statute against

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17 50 Ind. 542 (1874).
18 See 13412, Burns Ann. Ind. Stat. 1926. And this despite the fact that the executory devise over was to persons necessarily in being. In the later case of *Cain v. Robertson*, 27 Ind. App. 198 (1901) a somewhat similar will was construed to mean a definite failure of issue.
19 At p. 546.
20 At p. 549, citing Sec. 40, Chap. 23, I. R. S. 1852.
21 *Outland v. Bowen*, 115 Ind. 150 (1888).
perpetuities,” although the first portion of the statute, as will be seen hereafter, has been given full force and effect as regards the suspension of the power of alienation.

At Common Law, of course, there could not be a contingent remainder in fee upon a prior remainder in fee. Indeed, as is pointed out in the case under discussion, "No remainder can be limited after the grant of an estate in fee simple." It was argued by counsel for the appellees in the case under discussion that the latter portion of the statute made the supposed remainder in that case valid, but the court dismissed the argument with a quotation of the statute saying that the rule had no application in this case; that is, it was not limited to take effect in the event that the person or persons to whom the first remainder was limited should die under twenty-one (21) years of age.

There is but one subsequent case discussing the meaning of the second portion of the statute.

The court dismisses the question as to the personal property feature of the case by saying that "it is clear that if the limitation over of the real estate is void, the attempt to dispose of the personal estate in that manner is also void."

As pointed out above, the court held that the limitation over, being upon an indefinite failure of issue, was in violation of the "Statute against Perpetuities" and, therefore, void. That is, the statute was given effect in this case as a statute against the remote vesting of estates.

There is no discussion by the court of the first portion of the statute. The fact is that the case is decided upon the wrong theory, although a correct result is reached. Obviously the phrase "die without issue" referred to a death during the life of the testator under the commonly accepted interpretation of wills of this character, and the sons having survived the testator, took a fee simple.

The next case decided by the Supreme Court under the statute is the famous case of Fowler v. Duhme. In this case there was a devise of real estate to certain children, no real estate in a certain county to be sold by them for twenty-five (25) years. The court held that the restraint against alienation for twenty-five (25) years was invalid under the statute, being measured in

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22 At p. 549.
24 See, Fowler v. Duhme, 143 Ind. 248 (1895).
25 143 Ind. 248 (1895).
years and not by lives in being. The court states that the weight of authority is against the validity of restraints on alienation, however limited in time, upon the theory that at Common Law the restraint is void for repugnancy.\(^{26}\) The intimation of the court in the case is, however, that an absolute restraint measured by lives in being would be valid under the statute. In this case there was no remote vesting of estates in question, but merely an absolute restraint on alienation, invalid at Common Law, and held to be invalid under the "Statute against Perpetuities."

The next case decided by the Supreme Court is that of \textit{Murphey v. Brown}.\(^{27}\) In this case the testator had made a will where various interests were conditioned upon the happening of certain events at a specified time. He survived that time and certain residuary legatees, who would admittedly have had an executory interest had the testator died on the date of the will, were held to have a vested interest on the death of the testator, all the conditions having been satisfied prior to the actual death of the testator. In this case the court again talks about the "Statute against Perpetuities," but does not cite the statute. The opinion contains this language, which certainly is good law: "A will may be in violation of a statute against perpetuities when executed, and be void for that reason, but events may happen before the death of the testator that will remove all such objectionable features."

The last case decided by the Supreme Court is that of \textit{Quilliam v. Union Trust Company}.\(^{28}\) In that case the testator gave real and personal property to D, for life, then to her children and grandchildren for life, provided real estate was not to be sold for fifty years, and if D died without issue, then the income for fifty years to N, with a direction for division at the end of fifty years. D survived the testator, but died without issue, and N claimed as against the heirs of D. The court held that the fifty year restraint was void, and that D took a fee simple under the doctrines announced in \textit{Huxford v. Milligan}, supra. But the court says this,\(^{29}\) "It would clearly be a limitation over upon an indefinite failure of issue. In that event, it might not take effect until after the period allowed by our statute."\(^{30}\)

\(^{26}\) At p. 291.  
\(^{27}\) 159 Ind. 106 (1902).  
\(^{28}\) 194 Ind. 521 (1923).  
\(^{29}\) At p. 535.  
\(^{30}\) Citing Sec. 3998, Burns Ann. Ind. Stat. 1914, which is now Sec. 13416 Burns Ann. Ind. Stat. 1926.
used indicates that the court viewed the statute as being something more than a statute against restraints on alienation.

But the court also uses this language,\(^3\) "It is admitted that so much of the above will as attempts to suspend the power of alienation of such real estate for the period of fifty years is void, on account of the rule against perpetuities, and the statute prohibiting the suspension of the power of alienation."\(^2\) The latter language definitely indicates that the court thought that the rule against perpetuities was something quite different from the statute! The common law rule against perpetuities would have no application (as far as D's estate was concerned), because the estate given to D was a vested one, and the restraint would be void because of repugnancy. But the language of the case is so contradictory that it is impossible to tell what the court actually thought upon the subject. The fact is that in this case the statute was first applied as a statute against remoteness of vesting, and then as a statute against restraints on alienation!

The Appellate Court had no jurisdiction of this class of cases until after the taking effect of Chapter 247, Acts 1901, p. 565. Consequently there are no cases on the subject in the Appellate Court reports until *Phillips v. Heldt.*\(^3\) In this case T gave his property to his executor in trust to pay the income to certain people and institutions for thirty years, and at the end of that time to sell, and to divide according to directions. Except in two instances where the income from specific property was given to individuals for life the court held the entire scheme invalid under the statutes in question.

The court says this,\(^3\) "The effect of the creation of the trust to continue for thirty years is a suspension of alienation for that period and is invalid because it contravenes the statute of this state against restraints on alienation, and the rule against perpetuities."\(^3\) And a little later the Court says this, "The suspension of the power of alienation in said will is not made to depend upon a life or any number of lives in being, but is fixed for a term of years. The suspension for a term of years, however short, is void. In the will before us there is no express prohibition of alienation for any period, but that such alienation is forbidden is necessarily implied by the creation of a trust

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\(^3\) At p. 528.

\(^2\) Citing the same statute, and *Fowler v. Duhme,* supra.

\(^3\) At p. 395.

\(^3\) Citing the statutes in question and *Fowler v. Duhme,* supra.
in the sixth item of the will, which is to continue for thirty years, and the direction for the sale at the end of thirty years by item twenty-two"—"The remaining items of the will constitute a general scheme to create a trust for thirty years and are therefore invalid under the statute."

All of the estates for thirty years were vested estates.\textsuperscript{36} The amazing result of the case is that under the Court's interpretation of the statute it is impossible in Indiana to create a vested estate for years! As pointed out in the opinion there is no actual restraint on alienation; the beneficiaries were free to sell their estates for years. The fact that legal title was vested in a trustee was immaterial.\textsuperscript{37} The court clearly is confused in its application of the statute to the case in question. The devise over at the end of thirty years may or may not have been invalid under the Rule or Statute against Perpetuities, but that would not effect prior vested estates. They were clearly separable from the subsequent provisions of the will.

The next case decided by the Appellate Court limits the doctrine of Phillips \textit{v. Heldt}, for it is decided in the case of Matlock \textit{v. Lock},\textsuperscript{38} that if the term for years must necessarily expire within a life in being that then there is no violation of the statute. In that case the testator gave to GD, she not to mortgage or encumber until she reaches forty, and if she die before forty then to her children. The court lays no emphasis on the fact that in this case there was no suspension of the \textit{absolute} power of alienation, but only a very limited restraint, but says that in view of the fact that GD had to attain the age of forty during her own lifetime that there was no attempt made to suspend the power of alienation beyond the life of anyone in being. The same doctrine is followed in the case of Vaubel \textit{v. Lang}.\textsuperscript{39}

But the court again confuses the matter by this language:\textsuperscript{40}

"As a test whether the provisions of the will are repugnant to the \textit{statute} against perpetuities, it is pertinent to inquire what rights GD's children would have if she should, for a valuable consideration, sell and convey, to a third party, all of the real estate devised to her, and die before arriving at the age of forty years, leaving such child or children. Under the authorities cited, there is no question that they would be entitled to recover

\textsuperscript{36}Silvers \textit{v. Canary}, 114 Ind. 129.
\textsuperscript{37}Silvers \textit{v. Canary}, 114 Ind. 129.
\textsuperscript{38}38 Ind. App. 281 (1906).
\textsuperscript{39}81 Ind. App. 96 (1923).
\textsuperscript{40}At p. 304.
the estate, if they should timely assert their rights." The court again talks about the "Statute Against Perpetuities." The test it suggests is not very valuable, because it presupposes the determination of the question as to what GD sold.

The next case, Reeder v. Antrim,41 holds invalid under the statute an absolute restraint for ten years. But the court here also talks about the "Statute against Perpetuities."42

The next case is that of Finney v. Brandon.43 In this case G deeded to H and W, in fee, and a later clause provided that in the event of the death or the remarriage of W after the death of H, then the property to revert to the children of H. H dies first leaving children, and W sues to quiet title against them. The court held that W took a fee simple, the second clause in the deed being void for repugnancy, but went on to say that the provision for the children of H was a contingent remainder void under the statute in question, although clearly the limitation over must take effect during a life in being, and the estate over was limited to persons in being.

The court says this,44 "A contingent remainder must take effect in the event that the person or persons to whom the first remainder is limited shall die under the age of twenty-one, or upon some other contingency by which the estate of the first taker attains full age.—Such a contingent remainder (as here) is void, since it is in derogation of the statute prohibiting (sic) alienation." The court's idea here is that there can never be a contingent remainder in fee except under the exception contained in the statute! The limitation over here was to take effect during the life in being so that under a proper interpretation of the statute that portion of the deed was unoffending. The real difficulty was that the limitation over, being a fee on a fee in a deed could only take effect by the use of a trustee as an executory interest.

A supposed contingent remainder in fee on a prior remainder in fee would at common law be void for repugnancy, as a matter of interpretation, and void as a physical impossibility as well. And this being a deed and not a will, and there being no trust created, the supposed executory interest would fail.45

The court seems to think, however, that the statute permits

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41 64 Ind. App. 83 (1915).
42 At p. 94.
43 78 Ind. App. 450 (1922).
44 At p. 455.
45 King v. Rea, 56 Ind. 1, Outland v. Bowen, 115 Ind. 150.
the creation by deed of a contingent remainder in fee on a prior remainder in fee only if limited to take effect during the minority of the first taker. As is suggested hereafter, however, "contingent remainder" in the statute must be construed to mean "executory interest," and if so construed logically, would not validate a contingent remainder in fee on a prior remainder in fee by deed, without a trustee; it cannot well mean two opposite things. But Section 13414, Burns Annotated Indiana Statutes, 1926, which provides that, "A remainder may be limited on a contingency, which, in case it should happen, will operate to abridge or determine the precedent estate," has been construed to allow the creation by deed of a contingent remainder in fee on a prior remainder in fee.46

Construing the two statutes together the result probably is that every legal remainder can take effect as an executory interest, if necessary. But the second part of the "Statute against Perpetuities," goes to the validity of a supposed contingent remainder in fee on a prior remainder in fee, under the doctrine against the remote vesting of estates, and not as to its validity under the law of seisin.

In Edwards v. Bates,47 there was a devise to W for life, to D for life, and if at D's death she leaves lawful issue, then to the lawful issue then living, and if at her death she leaves no lawful issue, then to X, or her children. D dies after X without children and her husband claims as sole heir on the theory that the remainder to the children of X was void under Section 13416 Burns Ann. Ind. Stat. 1926. The court holds that the devise to the children of X was valid, because the children of X took within lives in being. Clearly the case was one where there was no suspension of the power of alienation within the ordinary meaning of that phrase, but there is no discussion on that score in the opinion. It is definitely assumed by the court that had the devise over taken effect later than lives in being that it would have been invalid under the statute. The statute is here again construed to be directed against remoteness of vesting.

The case of Groub v. Blish,48 is quite unique. Here certain stockholders of a corporation contracted to transfer stock to a depository, taking certificates back, the income from the stock to be used in specified ways for a period of nineteen years and eleven

46 McIlhinny v. McIlhinny, 137 Ind. 411 (1893). The result is directly contrary to Finney v. Brandon, supra.
47 79 Ind. App. 578 (1923).
48 (Ind. App.) 152 N. E. 609 (1926).
months. Some of the stockholders later sought to avoid the arrangement upon the ground, among others, that it violated Section 12171, Burns Ann. Ind. Stat. 1926, being an unlawful suspension of the power of alienation of personal property.

The court held that there was no violation of the statute for the reason that all of the parties to the arrangement could join and rescind the contract, the statute applying only where persons were not in being who by joining could convey the entire estate.

In support of its decision the Court cites two New York cases, and no Indiana cases. The New York Statute specifically provides that the test as to whether or not the absolute power of alienation is suspended is whether or not there are persons in being who by joining in a conveyance can convey the entire fee. The Indiana Statute as regards personal property is not directed against the suspension of the power of alienation, but is directed against the suspension of "the absolute ownership of personal property." It may be that the two phrases mean, or could properly be construed to mean, the same thing; but nowhere in any of the cases in Indiana is there the slightest discussion of the difference in this language and that in the statute on real property. In the case in question it is assumed that the statute on personal property is directed against a restraint on the alienation of personal property, but only if the restraint be absolute. There was no suspension of the absolute ownership of the stock; the ownership may have been somewhat divided, but there never has been any policy against that.

It must be obvious that the real property statute and the personal property statute were only directed, and can only be construed to be, against, 1. an absolute restraint on the alienation, disposition or use of property for a period of time measured by anything other than lives in being; 2. the creation of contingent or executory interests which may not vest within lives in being. The short answer to the argument advanced in the case in question to the effect that the arrangement violated the statute is that there was no restraint on anyone's ownership of the property; each was free to sell whatever he had; and there were no contingent or executory interests created by the instrument attacked.

The measure suggested by the court, that the problem could be solved by an answer to the question as to whether or not there were persons in being who by joining in a conveyance...
could convey the entire estate, would seem to be not an infallible measure and creates a new confusion of the subject. It could, of course, well happen that a valid estate could be limited to the unborn children of X who are alive at the death of Z. This measure if always used would logically invalidate every contingent interest where the contingency went as to who was to take, other than specified living persons, even although they were to take during lives in being.

The real theory of the case seems to be that anything short of the suspension of the absolute power of alienation is not a violation of the statute.

The last case on the subject is that of Swain v. Bowers. In this case the testator gave all of his property to a trustee to convert into money, one-half to be held in trust for the children of the two sons of a deceased husband, said grandchildren to have an equal share, whether born before or after the death of the testator, and one-half on similar terms to the children of certain named brothers and sisters of the testator. The will provided that the trustee might pay to the beneficiaries any sum necessary for their education and support and then to pay three-fourths of the share to each when the child became twenty-one (21) years of age, the other one-fourth to be held until the final determination by the trustee that no more children would be born, and upon said determination, then all of the share of each to be given to each beneficiary as he reached twenty-one (21).

The will further provided that upon the death of any of the beneficiaries without issue, or their descendants living, the interest of the deceased beneficiary was to go to the balance of the class. The will was attacked as being void under Section 12171, Burns Ann. Ind. Stat. 1926. The court held that it was a gift to a class which vested at the death of the testator and that, therefore, there was no violation of the statute.

The language of the court indicates quite clearly that the court thought that the Common Law Rule against Perpetuities was still law in Indiana and that the statute in question was merely a statute against restraints on alienation, although practically all of the cases cited by the court in its decision are New York cases, where as has been seen above, the New York courts have construed the New York statute to the effect that the statute superseded the Common Law Rule against Perpetuities.

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50 Decided November 15, 1927, — Ind. App. —, 158 N. E. 598.
The court says\textsuperscript{51} that the Rule against Perpetuities "applies only to future estates which are contingent and has no application to vested estates," and\textsuperscript{52} "The Rule against Perpetuities is satisfied by the vesting of the right to the estate within the limitation of the rule, though the beneficiaries may not then be known," and\textsuperscript{53} "Where the general testamentary scheme of the testator can be carried out without transgressing the Rule against Perpetuities or the statute with respect to restraint on alienation, the provisions of the will carrying out such scheme will be sustained." "As soon as title vests absolutely, suspension of the absolute ownership ceased," citing Illinois cases. And,\textsuperscript{54} "Time of vesting and not time of enjoyment is limited by the statute."

Immediately following these last statements of law, supported principally by Illinois decisions, the court then goes on to the New York rule concerning the test of alienability. "Where there are living parties who have unitedly the entire right of ownership, the statute has no application,"\textsuperscript{55} "There is no suspension of the absolute power of alienation if all persons having interest, present or future, can convey a fee simple. If any interest is inalienable and may remain inalienable for a period longer than provided by the statute, it is void. The statute is not applicable to any interest that is inalienable, though it is a contingent interest and may remain contingent for a period longer than that permitted by the statute for the suspension of the absolute power of alienation." "Each trust in the instant case was in favor of a class and vested in the members of the class upon the death of the persons by whose lives the trust was measured."

The court fails to explain how unborn children could join in conveying. The case is in direct conflict on principle with the case of Phillips v. Heldt.\textsuperscript{56} The case holds that the estates being vested estates were valid under the Common Law Rule against Perpetuities and not within the prohibition of the statute on restraints against alienation. To a greater extent than the language in any other of the previous cases, the language of the court in this case indicates that the Common Law Rule

\textsuperscript{51} At p. 601.
\textsuperscript{52} At p. 602.
\textsuperscript{53} At p. 603.
\textsuperscript{54} At p. 604.
\textsuperscript{55} At p. 604, citing Williams v. Montgomery, 198 N. Y. 519, 33 N. E. 57.
\textsuperscript{56} 33 Ind. App. 388 (1904) discussed above.
against Perpetuities is still law in Indiana and that the personal property statute against restraints on alienation has had no effect upon it.

The language of the case, however, is very indefinite and confusing upon this score. (Among other things, emphasis is several times laid on the fact that the interest of the children vested during lives in being, that is, the lives of their named parents.) It applies decisions decided under the common law rule against perpetuities in Illinois, and cases decided under the Michigan statute and statutes similar to it, which have been held not to be a modified statement of the Common Law Rule against Perpetuities. It also cites cases decided under the New York statutes. As pointed out above, the New York measure of alienability does not permit contingent interests where the contingency goes to the question as to who is to take, except as between specified persons in being, and clearly the rule could not be successfully applied in the case in question for at the death of the testator, although the estate vested in a class because members of the class were then living, persons were not in existence at the time who by joining, could convey.

There could be little argument that the will in question offended the Common Law Rule against Perpetuities because even if the estates were not vested, they would finally vest within lives in being plus twenty-one years. The decision would seem to indicate that any vested estate does not offend the statute in question when given effect as a statute against restraints on alienation. As suggested above, the result of the case is directly contrary to Phillips v. Heldt, supra, which must be considered as overruled by this later decision. It is curious that the court cites in its opinion only three Indiana cases and those merely upon fundamental propositions as to the rules of construction of a will.

If the Common Law Rule against Perpetuities is law in Indiana the case is clearly correctly decided. If the Statute against Perpetuities limits the Common Law Rule to lives in being, the opinion is far from satisfactory. The court fails to discuss the effect of the later clause in the will which provided that if any child died his share was to go to the survivors. And in fact the court says, "If there be a direct gift to a legatee, a direction for payment at the happening of a certain event does not prevent its vesting, and the personal representative of a legatee dying before the event happened is entitled to receive it at the time the

57 See Easton v. Hall, 154 N. E. 216 (Ill. 1926).
legacy was directed to be paid to the legatee, had he lived.” Here, of course, the legacy was payable only if the legatee did live.

As will be seen in the latter portion of this paper, the clause in question under the older Indiana cases ought doubtless to be construed to refer to a death during the lifetime of the testator, but under the more recent Appellate Court cases would doubtless have to be construed to mean a death at any time before distribution, there being sufficient in the language of the will to indicate that intention.

If it be so construed then there is certainly a contingency both as to who is ultimately to take the estate and the amount to be taken. Under the English authorities it would seem that the will would be construed to give no vested estates. Under the Indiana authorities, however, the estate would certainly have to be construed to be vested subject to let in after-born children, and subject to be divested by death without issue before distribution. The divesting might occur subsequent to lives in being. The limitation over to the survivors would be invalid, and the estate of the one who had died would pass to his heirs, unless the provisions of the will be construed to be inseparable.

The case could well be a test case as to the exact effect of the “Statute against Perpetuities,” but as it stands it is an unsatisfactory decision to the effect that the Common Law Rule against Perpetuities is still in force in Indiana.

CONCLUSION

What conclusion can be reached as to the law of Indiana on the Rule against Perpetuities under the statutes under discussion? As stated at the beginning there is no decision or discussion in the cases as to whether the statutes are directly solely against restraints on alienation as such, and do not limit the common law doctrine of the Rule against Perpetuities. But certainly the result of the cases is that the statutes are equally statutory enactments against restraints on

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57a Leake v. Robinson, Ch. 1817, 2 Mer. 363; In re Moseley's Trust, Ch., Ct. of App., H. of L., L. R. 11 Eq. 499, 11 Ch. Div. 555, 5 A. C. 714 (1880).
57b Silvers v. Canary, 114 Ind. 129 (1888); Chambers v. Chambers, 139 Ind. 111 (1894); Goodwin v. Goodwin, 48 Ind. 584 (1874); Miller v. Keggan, 14 Ind. 502 (1860); McCoy v. Houck, 180 Ind. 634 (1913). These cases and others are discussed in the latter part of this paper.
57c See, Tiff. Real Prop. 2d Ed., Vol. 1, Sec. 186.
alienation, and limitations of the Rule against Perpetuities. The
last case decided, *Swain v. Bowers*, supra, seems to decide with-
out discussion of the problem involved that at least as far as per-
sonal property is concerned the Common Law Rule is still in
force in Indiana. The balance of the cases indicate that the
Common Law Rule is completely superseded by the Statutes.
The fact is, however, that there has been no conscious decision
either way.

In the absence of a clear cut decision on the question it is im-
possible to say just what the law of Indiana is. It is submitted
here, however, that the only safe course for a lawyer to pursue is
to assume that any contingent or executory interest which may
not vest within lives in being is invalid under both statutes. It
is also submitted that when the question is presented to the
courts they will so decide. There are three reasons for this
conclusion: first, the statutes have for fifty years been referred
to by the courts of Indiana as the “Statutes against Perpetui-
ties;” second, the statutes are admittedly copied from the New
York statute which has now been so construed; third, the stat-
utes have in fact been so enforced in several cases, and those
cases may create a “rule of property.”

All of the above, of course, is subject to the proviso in the sec-
ond half of the statute dealing with real property, which permits
the creation of a contingent remainder in fee upon a prior re-
mainder in fee, to be determined during the minority of the first
taker. If any lawyer has need for such an estate there would
seem to be no reason why the plain language of the statute
should not be given effect. The purpose of the proviso seems to
be to allow one to create an estate “to X for life, remainder in
fee to his children, but provided the children die under the age
of twenty-one, or provided Z dies while said children are under
the age of twenty-one, leaving children, then to the children of
Z, it being the intention here to create a contingent remainder
in fee within the meaning of Sections 13416 and 13414, Burns’
Ann. Ind. Stat. 1926.” To a very limited extent this portion of
the statute admits of the creation of estates valid under the com-
mon law rule against perpetuities. There is difficulty in the use
of the words “contingent remainder,” but certainly the statute
must be construed to permit what would be an executory interest
under the name of “contingent remainder,” as otherwise this
section of the statute would be without force. The first re-
mainder must always be limited to minors and must be a re-
mainder in fee.
ACCUMULATIONS

At Common Law a direction for accumulation of the income of property was valid for the period allowed by the Rule against Perpetuities. This led to the passage in England of The Theliusson Act, limiting the period within which a direction for accumulation was valid. Section 12172 Burns’ Ann. Ind. Stat. 1926 is quite similar to the English Act but applies only to personal property. It allows, 1. an accumulation to commence at the death of the giver or the execution of the instrument creating the gift, for the benefit of minors, to terminate on the expiration of minority; 2. an accumulation to commence within lives in being and during the minority of the beneficiary, to terminate at the expiration of the minority; 3. if the accumulation is directed to continue beyond minority it is void only as to the period beyond minority.

Under this statute it has been held that an accumulation to unborn grandchildren until twenty-one was void, and that an accumulation not limited to minority is void; and that an accumulation during minority, not limited to persons in being at the death of the testator, or to begin during lives in being, is void. A partial accumulation after payments for the support of minors, during minority, is not invalid.

In the case of Groub v. Blish, discussed above, where stock was transferred to a depository and certificates issued for the stock, the dividends from the stock to be partially accumulated for nineteen years and eleven months, it was argued that the provision for accumulation was invalid under the statute in question. The Court held that the statute had no application, being directed against the accumulation of funds for the benefit of unborn generations, and not against an accumulation of funds for the payment of debts, or other business purposes.

With the exception of the unusual circumstances of the case last cited the statute has been enforced in its literal sense. It is unambiguous, and there should be little difficulty in drafting an instrument which will not offend the provisions of the statute.

58 Theliusson v. Woodford, H. of L. 1805, 11 Ves. 112.
60 Dyson v. Repp, 29 Ind. 482 (1868).
61 Porter v. Union Trust Co., 182 Ind. 637 (1914).
64 (Ind. App.) 152 N. E. 609 (1928).
against accumulations. As far as accumulations from real property are concerned they are not limited by the statute and are either governed by the "Statute against Perpetuities," or the Rule against Perpetuities. For the same reasons advanced above in the conclusion as to the effect of the "Statute against Perpetuities" it is submitted that accumulations from real estate must be limited to lives in being.

CHARITIES

A great part of the confusion of the subject of the Rule against Perpetuities and Restraints on Alienation, arose out of the cases dealing with charitable trusts. It was apparent that a permanent gift to charity took the property out of circulation, so to speak, indefinitely. There was a restraint on alienation, in one sense of the word, for the reason that the beneficiaries being uncertain, there could be no conveyance.

There was for a while confusion as to whether the Rule against Perpetuities was a rule against the remoteness of vesting of estates, or a rule against unreasonable restraints on alienation, and there was considerable discussion as to whether the Rule against Perpetuities applied to charitable gifts. It was decided that there was not an unreasonable restraint on alienation, and that in fact public policy favored such a restraint as was necessarily a part of a charitable gift. And it is now quite definitely settled that the Rule or Statute against Perpetuities, as properly understood as a prohibition against the remote vesting of estates, does apply to charitable gifts. The gift must vest within the time allowed, but having so vested it is valid, although it may last forever.65

The interesting question is whether or not after a vested charitable gift, there may be limited a valid gift over to another charity, without regard to the Rule or Statute against Perpetuities. If the gift must admittedly vest in the first instance within the time allowed by the rule, then logically the second gift would fail unless properly limited in time. The law seems to be settled in Indiana by the case of Herron v. Stanton,66 that a gift over to a second charity is valid even although it may vest beyond lives

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65 Tiff. Real Prop. 2d Ed., Vol. 1, p. 617; Reasoner v. Herman, 191 Ind. 642 (1921), at p. 652; Dykeman v. Jenkins, 179 Ind. 549 (1913) at p. 563; City of Richmond v. Davis, 103 Ind. 449 (1885); Barr v. Geary, 82 Ind. App. 5 (1924).
66 79 Ind. App. 683 (1920).
in being. This is an admitted exception to the rule, but is the generally recognized law.67

SPENDTHRIFT TRUSTS

As to how far a restraint is good, which attempts to create an interest in a beneficiary which is not subject to execution for the payment of his debts, has not been definitely decided by the Indiana courts, although so-called spendthrift trusts are quite generally recognized as valid in the United States.68 It will be noted that Mr. Tiffany cites the case of McCoy v. Houck,69 as deciding that a spendthrift trust is good. But it is submitted that the case merely recognizes the general validity of such an arrangement, and does not decide the question. The question was whether the beneficiary had taken a life estate or something more, and it was decided that he took merely a life estate.

The case of Langdon v. Ingram,70 does hold that a spendthrift trust during minority and the life of the mother of certain children was valid, and it is assumed in the case of Thompson v. Murphy,71 that a spendthrift trust was good in Indiana, the court in the last case holding however, that in that case no such trust was in fact attempted to be created.

In view of the language of these three decisions and the general law on the subject, it is safe to assume that a spendthrift trust is good in Indiana.

LIVES IN BEING

There is but one case in Indiana discussing the question as to whether or not a child who is en ventre sa mere is a life in being within the meaning of the rule or statute, and it is said in that case that it is.72 In one other case such a child has been held to be a child in being so as to take a present estate on the death of the testator.73 Such a child is a life in being so that it takes under a deed,74 and also so that it inherits under the Indiana Statute of Descent.75

69 180 Ind. 634 (1913).
70 28 Ind. 360 (1867).
71 10 Ind. App. 464 (1894).
73 Biggs v. McCarty, 86 Ind. 352 (1882).
74 King v. Rea, 56 Ind. 1 (1877).
75 Cox v. Matthews, 17 Ind. 367 (1861).
FUTURE LEASEHOLD ESTATES

There are no cases discussing the question as to whether or not a lease to begin in the future if it is not measured by lives in being is good under the statute. Mr. Tiffany regards the common law as unsettled on that question, and presents a forcible argument to the effect that such an interest is as invalid as a fee simple sought to be created to vest beyond the time allowed under the rule. If Mr. Tiffany's reasoning is correct then a lease in Indiana for a term of years to begin in the future, at any time not measured by lives in being, would be invalid under the statute.

CONTINGENT REMAINDERS

There are no cases in Indiana which discuss the question as to whether this "statute against perpetuities" applies to contingent remainders. If there is a contingent remainder limited after an estate for life, for example, where the contingency named may not occur within the time allowed, still the contingent remainder is good, for the reason that in order to vest at all it must vest at the termination of the estate for life upon which it is limited, or be cut off by the vesting in possession of the reversion. The effect of the law is to really limit the contingent remainder as follows: "contingent remainder to unborn child of B at 22, if he arrives at the age of twenty-two during the lifetime of the life tenant."77

OPTIONS

The more important question is, does the "statute against perpetuities" apply to options? If so all options in order to be valid must be limited to take effect, not within a number of years, but within lives in being. In England and in a good many states in this country it has been held that an option to purchase real estate not measured by lives in being plus twenty-one years, was invalid under the Rule against Perpetuities. On the other hand, in Minnesota and other states where the New York Statute has been copied, and which provides that the test of inalienability must be whether or not there are lives in being who by joining can convey, it has been held that an option is not

invalid for the reason that the owner of the option can release it, or join with the owner of the land and convey a fee.\footnote{Mineral Land Inv. Co. v. Bishop Iron Co., 134 Minn. 412, 159 N. W. 966, L. R. A. 1917 D 900, and cases cited in note beginning at page 904. Tiff. Real Prop. 2d Ed., Vol. 1, p. 607, and cases there cited.}

Although as seen in the discussion of the Indiana cases above on two occasions the Appellate Court has applied the New York measure of alienability, it is apparent that it is far from settled in Indiana just whether the statute is directed against restraints on alienability, remoteness of vesting, or both. If it were only the first then the Common Law Rule against Perpetuities is still law in Indiana. In that event an option could be limited up to twenty-one years. If the statute completely supersedes the common law, and if it is aimed at remote vesting of estates, as it certainly has been construed to be, without regard to the alienability of the entire fee, then any option not limited to be exercised within lives in being is invalid. But having applied the New York test as to alienability in the last two cases decided, the Indiana Courts may apply it to an option, and thus eliminate the question.

The effect of the “Statute against Perpetuities” in connection with the creation of future estates by a power has received no attention by the Indiana Courts so far. The problems and the results are quite similar to those in connection with options.

(To Be Continued)