

Q&A Session this afternoon at 2:50 in HA 104.

1. *Abbott v. Holway* summarized:
  - a. The case holds that cutting timber in the manner that emerged at trial did not constitute waste under Maine law.
  - b. The case also holds that Clarissa B. did not have such an interest in the property during James Abbott's lifetime that would support an action of waste against his estate for his cutting of timber. I.e., Clarissa B. lost the battle.
  - c. The court also holds (and you can have some fun arguing whether this was holding or *dictum*) that Clarissa B.'s interest under James Abbott's deed of April 30, 1872 was good; she has a fee simple interest in the land upon her surviving him. I.e., having lost the battle Clarissa B. won the war.
  - d. The court seems to think that validating the interest required the aid of the Maine statute of conveyancing that was in effect at the time. It is not clear that it did. There is nothing in the common law that prevents one from granting an executory interest to spring out of the fee of the grantor on the condition that the grantee survive the grantor. Indeed, there is evidence, which we needn't go into, that the country conveyancer who wrote the instrument thought that that was exactly what he was doing and that he employed sufficient language to do it. (The key words are "bargain, sell" in the granting clause and "to their use and behoof" in the habendum clause.)
  - e. The real issue in the case is whether this instrument is void as testamentary, and that is a somewhat different issue. The court finds that the fact that instrument was not revocable enough to save the instrument. That result would probably hold today in most jurisdictions. There is even authority that the retention of a power of revocation is not enough to make the instrument testamentary, so long as it is clear that something passes with the delivery of the deed, though there is less agreement about this.

#### THE RULE AGAINST PERPETUITIES

There is a self-test version of the problems in this outline that allows you to enter your proposed answer and then check it:

[http://www.law.harvard.edu/faculty/cdonahue/courses/prop/lec/outcl18\\_19S\\_selftest.html](http://www.law.harvard.edu/faculty/cdonahue/courses/prop/lec/outcl18_19S_selftest.html)

1. The Rule against Perpetuities — "No interest is good unless it must vest, if at all, within some life or lives in being at the effective date of the instrument plus 21 years." John Chipman Gray, 1886.
  - a. it must *vest*
    - i. reversion (also generally possibilities of reverter and rights of entry) — they are generally regarded as always vested for purposes of the Rule
    - ii. remainders — they vest for purposes of the Rule when they vest in interest

- iii. executory interests — they are generally regarded as not vested until they vest in possession. This can make a difference:

G —> le A —> rdr le A's children —> rdr B

G —> le A —> rdr le A's children —> rdr B one day after the death of A's last surviving child

Having said this, I must confess that I know of no recent cases that so hold.

There's at least one exception to the rule that it must become possessory or fail to become possessory, the executory interest following a term of years.

G —> A 200 yrs. if he should live so long —> rdr B if he obtains a college degree

Again, I don't know of any recent cases.

There are, however, plenty of cases in this form:

G —> A 30 yrs. —> rdr B

Since there is no measuring life (the interest in both A and B are assumed to be A and his heirs and B and her heirs), the 21-year term in the Rule would invalidate the interest in B were it not for the exception. Indeed, we might say that the purpose of the exception is to allow the landlord to transfer what is sometimes inaccurately called his reversion in longer term leases.

There are also plenty of cases like this, where no exception applies.

G —> A so long as the land is used for residence purposes —> rdr B

The problem is not the identification of B but the occurrence of the condition.

Thus we may reword John Chipman Gray's classic statement of the Rule as follows: "No interest, except for an interest retained by the grantor/devisor, is good unless it must vest in interest if it is a remainder or vest in possession if it is an executory interest, unless it is an executory interest following a term of years, if at all, within some life or lives in being at the effective date of the instrument plus 21 years."

- b. "within lives in being plus 21 years" — the measuring lives — express measuring lives normally are obvious ('so long as this happens within the life time of A') — implied measuring lives are the ones that are hard — the Rule requires that all open classes be closed within the perpetuities period, the so-called "all-or-nothing" rule — hence, we must look to the implied life or lives who are responsible for determining membership in a class.

G —> le A —> rdr le A's children —> rdr A's grandchildren

- i. The remainder in the grandchildren is void, why? (Note that a strict application of the presumption of vesting

might save it, if we assume that A's children are those living at the time of the grant, but normally the presumption does not apply that far.)

ii. If G is not living, i.e., G (now D) devises, it makes no difference. The remainder in the grandchildren is still void. Why?

iii. How do we save this grant:

G —>le A —>rdr le A's children living at the effective date of this grant —>rdr A's grandchildren

That won't save it; why? what will?

G —>le my children —>rdr such of my grandchildren as reach the age of 21

D —>le my children —>rdr such of my grandchildren as reach the age of 21

Bottom line: A gift to the grandchildren of a living person is almost always is problematic. A gift to the grandchildren of a dead person is fine.

## 2. Fantastic Possibilities

a. The "all or nothing" rule (dealt with in the previous problems)

b. The "what might happen" approach (p. S251)

i. D —>le A —>rdr le A's children —>rdr A's grandchildren. A is an 80-year old woman. The "fertile octogenarian"

ii. D —>le A —>rdr le A's widow —>rdr A's children who survive both A and his widow. A is an 80-year old man, happily married to a woman of 79. The "unborn widow."

iii. D —>to such of my lineal descendants who are alive at the probate of my will. The "administrative contingency"

iv. D —>le A —>rdr such of A's grandchildren living at my death or born w/in 5 yrs. thereafter as attain the age of 21. The "precocious toddler."

v. D —>le A —>rdr such of A's grandchildren as attain 21. Same facts as (i) with a statute removing presumption of fertility. The "fortuitous adoption"

vi. D —>to my children. The Rule and high-tech procreation: "the fertile decedent."

c. the consequence of invalidity: we'll take this up next time.

## 3. Perpetuities and trusts – the Rules are surprisingly unclear.

a. It is generally thought that the perpetuities period does not run on a trust if one or more people have the power to revoke it. It is pretty clear that the perpetuities period does not run on a trust if the grantor has the power to revoke it. If the trust is irrevocable, however, the period of irrevocability is generally thought to be limited to the perpetuities period.

- b. Spendthrift trusts. The reason for the absence of clear authority may be that most such trusts are irrevocable. Hence, the R/Perp on irrevocability probably applies, and that is somewhat clearer.
4. Examples:
- a. G —> trustees to pay income to G for life —> income to G's children for their lives  
—> corpus to G's grandchildren when they reach the age of 21. G retains power to revoke during his lifetime.
  - b. G —> trustees to pay income to G for life —> income to G's children for their lives -> income to G's grandchildren when they reach the age of 21 for their lives —> corpus to G's great grandchildren when they reach 21. G retains power to revoke during his lifetime. G also grants the power to any grandchild life tenant to compel the trustees to distribute to him or her the portion of the capital attributable to him or her.

#### THE POLICY OF THE RULE

- 1. economics—3 possibilities
  - a. Removing an asset entirely from market forces—c rdr at common law—by and large solved today by making all interests alienable also by the use of the trust. Land use restrictions can have this result too, though they are not included within the Rule.
  - b. Holdout problems—the longer the time before the interest falls in, the less its present value
  - c. Transactions costs (a variant, perhaps, on the holdout problem, but we can make it separate by assuming that everyone is “rational” and has something that is worth something), G —> A, B, C, D, E, F, and G
- 2. dynasties—the use of the taxing power
- 3. internal contradiction—the fundamental problem
- 4. the basic cut of the Duke of Norfolk's case (1682): “. . . Shall . . . a Man . . . be disabled to provide for the Contingencies of his own Family that are within his View and Prospect . . . when there is no Tendency to a Perpetuity, no visible Inconvenience?”