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## THE RULE IN *WHITBY v. MITCHELL*<sup>1</sup>—ITS PRESENT STATUS AS SHOWN BY RECENT CASES

The Real Property Commissioners in their third report, published in the year 1883, preface that valuable section of the report which deals with perpetuities by remarking that:

“All future interests, not being remainders, are restrained in their limits by the rules of law relating to Perpetuities.”<sup>2</sup>

The words “not being remainders” are important. Are remainders subject to no rule which restrains their creation? or if they are subject to a rule, what is that rule?

The rule, usually called the rule against perpetuities, which makes void any executory interest in property which does not necessarily vest indefeasibly within a period of one or more lives in being and twenty-one years afterwards, is comparatively recent. The exact form of it was only finally settled, in the year in which the commissioners made their report, by the case of *Cadell v. Palmer*.<sup>3</sup> This rule makes void the interest or limitation which offends it, not because there would be a “perpetuity” in the older sense of the term,<sup>4</sup> but because the interest

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<sup>1</sup> (1889) 42 Ch. Div. 494; (1890) 44 Ch. Div. 85.

<sup>2</sup> p. 29.

<sup>3</sup> (1833) 1 Cl. & F. 372.

<sup>4</sup> “A perpetuity is the settlement of an estate or an interest in tail, with such remainders expectant upon it as are in no sort in the power of the tenant in tail in possession to dock by any recovery or assignment.” Lord Nottingham in the *Duke of Norfolk's case* (1682) 3 Ch. Cas. 1, 31.

or limitation is too remote. To avoid confusion this rule will be called the rule in *Cadell v. Palmer*.

If there were only one rule—that in *Cadell v. Palmer*—which applied to every interest in every kind of property including legal remainders, the law would be slightly simpler than it actually is. Some judges in England have endeavored to make this simplification, and have held that the rule in *Cadell v. Palmer* applies both to legal remainders and to common-law conditions. At present one cannot tell whether this bold step is likely to succeed, as the matter has not come before the Court of Appeal or the House of Lords. The sterner school of real property lawyers are pained by the boldness of the judges and their disregard of the history of the law. The late Mr. Challis thought that the question whether legal remainders could be subject to the rule in *Cadell v. Palmer* ought never to have arisen.

“It implies an anachronism which may be said to trench upon absurdity. It must be borne in mind that judges are very ready to extend the rule against perpetuities; and that, though the historical argument against extending the rule to legal limitations cannot easily be answered, it can easily be disregarded.”<sup>5</sup>

Is there another rule which applies to remainders? The late John Chipman Gray says, “No.”<sup>6</sup> In England, however, the Court of Appeal have decided that there is such a rule—usually named after the leading case of *Whitby v. Mitchell*, but the precise application of this rule has recently given rise to some difficulty. To understand the position it is necessary to examine the cases.

In *Whitby v. Mitchell* by a post-nuptial settlement made in pursuance of ante-nuptial articles, freehold lands were limited to the use of the husband and wife successively for life, with remainder to the use of their issue (born before any appointment made) as they should by deed appoint. Having had issue, two daughters only, they by deed appointed one moiety of the lands to the use of one daughter for life for her separate use without power of anticipation, and after her decease to the use of such person or persons as she should by will appoint, and in default of appointment to the use of her children living at the

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<sup>5</sup> Challis, *Real Property* (3d ed.) pp. 197, 200.

<sup>6</sup> Gray, *Rule against Perpetuities* (3d ed.) Appendix, K.

date of that deed equally as tenants in common in fee. Justice Kay and the Court of Appeal held that the power of appointment by will, given to the daughter, and the remainder in default of appointment, were void.

Why the power of appointment was held to be void does not appear clearly from the judgments. It must have been under the rule in *Cadell v. Palmer* that the power was void because the daughter was unborn at the date of the ante-nuptial articles.<sup>7</sup> The reason for the remainder being void is found in the rule that where land is limited to an unborn person for life with remainder to a child of such unborn person the remainder is void. Justice Kay said:

“The law as to land has always been that you cannot limit an estate to an unborn person for life, with remainder to the issue of that unborn person.”<sup>8</sup>

Lord Justice Cotton said:

“You cannot have a limitation for the life of an unborn person, with a limitation after his death to his unborn children to take as purchasers.”<sup>9</sup>

Lord Justice Lindley quotes with approval Butler’s statement:

“If land is limited to an unborn person during his life a remainder cannot be limited, so as to confer an estate by purchase on that person’s issue,” and adds, “But it is said that the old rule became obsolete, or merged or confused in the more modern law of perpetuities. Butler, however, shows that this is a mistake. The rule against perpetuities was invented much later, on account of the law of shifting uses and executory devises. When shifting uses and executory devises were invented it became necessary to impose some limit upon them, and the doctrine of perpetuities has arisen from that necessity.”<sup>10</sup>

In *Whitby v. Mitchell* the limitations were legal. In *In re Nash*<sup>11</sup> upon the marriage of A and B, land was assured to trustees upon trust after the decease of the survivor of A and

<sup>7</sup> See *Wollaston v. King* (1868) L. R. 8 Eq. 165.

<sup>8</sup> *Whitby v. Mitchell* (1889) 42 Ch. D. 494, 500.

<sup>9</sup> *Whitby v. Mitchell* (1890) 44 Ch. D. 85, 89.

<sup>10</sup> *Whitney v. Mitchell* (1890) 44 Ch. D. 85, 92.

<sup>11</sup> [1909] 2 Ch. 450; [1910] 1 Ch. 1.

B for their issue (to be born before the appointment) as A should by deed or will appoint. By his will A appointed that the trustees should stand possessed of one moiety of the land in trust for his daughter L. for life, and after her death in trust for her two named children; and as to the other moiety in trust for his other daughter J. for life and after her death in trust for her two named daughters absolutely. It was held by Justice Eve and the Court of Appeal, following *Monypenny v. Dering*,<sup>12</sup> that the rule applied to equitable as well as to legal estates and that the limitations in favour of the children of L. and J. were void.

The point has recently arisen in a more difficult form. If land is devised to A (a living person, for life) with remainder to any widow who may survive him, with remainder to A's children, is the ultimate remainder good? A may marry a person who was unborn at the testator's death; A may have children by such a person. It is, therefore, possible that in the result there may be a life estate to an unborn person followed by a remainder to her children. It is to be observed, first, that the children are the children of a born person (A) as well as being the children of an unborn person; secondly, that A's wife may not in fact be unborn at the testator's death.

Parenthetically, it may be remarked that this state of affairs does not occur in the usual form of real property settlement. When the eldest son, who is tenant in tail, becomes of age and, with his father's consent, disentails and resettles the property, the limitations (after the father's life estate) are to the son for life with remainder to his sons successively in tail, with power to the son to charge a jointure for his widow and portions for his younger children. A jointure is a rent charge secured by a term not a life estate in the property, so that no question as to the rule will arise. But recently where a small amount of land treated as an investment is settled, there has been a tendency to give a life interest to a surviving widow or husband as if the property were personalty. It is this that has given rise to the recent cases.

In the case of *In re Park's Settlement*,<sup>13</sup> Laura Park by deed poll conveyed a freehold house to the use of J. F. (a bachelor) during the joint lives of Laura Park and J. F., and in case of the death of J. F., in the lifetime of Laura Park, leaving a widow

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<sup>12</sup> (1852) 2 D. M. & G. 145.

<sup>13</sup> [1914] 1 Ch. 595.

surviving, then to the use of such widow for life and after her decease to the use of such of J. F.'s issue as should survive him and attain twenty-one years. J. F. subsequently married and died leaving his widow and one daughter surviving him.

Justice Eve, in giving judgment, said:

"It is contended that the gift to the issue is void altogether, because the limitation to the use of J. F.'s widow for life with remainder to the use of the children who might be born of her as his wife involves a double possibility or contingency in that J. F. being a bachelor might marry a lady who was not born at the date of the deed. These limitations it is argued offend against what has been called the rule against double possibilities, but what is more accurately described by Farwell, L. J., in *In re Nash* as 'the rule against limiting land to an unborn child for life with remainder to his unborn child.' I think upon the authorities that this contention is well founded."<sup>14</sup>

The statement that the issue are to be those born of J. F.'s widow does not appear to be accurate. It should also be noticed that, as J. F. married three years after the deed poll, the widow was certainly alive when Laura Park made the settlement, so that in fact there was no limitation to the issue of an unborn person. Further, the issue were described as issue of J. F. (a living person).

*In re Park's Settlement* was considered in *In re Bullock's Will Trusts*.<sup>15</sup> There a testator directed the trustees of his will to pay a third of the rent and profits of his residuary estate to his niece I. B. (who was then a spinster) for life, and after her death to pay the same to any husband with whom she might intermarry and who should survive her, during his life. After the death of both, the trustees were to sell the estate and hold the proceeds of one-third in trust for the children of I. B. attaining twenty-one, and if I. B. should die without leaving a child who should attain a vested interest, then in trust for the children of S. I. B. married, but died without having had issue. It was contended that the gift to the children of I. B. was void and that this involved the avoidance of the subsequent limitation to the children of S. In the course of his judgment Justice Sargant said:

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<sup>14</sup> *In re Park's Settlement* [1914] 1 Ch. 595.

<sup>15</sup> [1915] 1 Ch. 493.

"At first sight the rule" (*i. e.* the rule that if land is limited to an unborn person during his life a remainder cannot be limited so as to confer an estate by purchase on that person's issue) "would not appear to be applicable to the facts either here or in *In re Park's Settlement*, since in both cases the children to take were defined as being the children of a living and named person who may be referred to as the *præpositus*. To this, however, it is replied that, though the *præpositus* was living, the surviving husband or wife of the *præpositus* might have been unborn at the date of the creation of the limitations, and that the children of the *præpositus* to take or some of them may be children by the surviving husband or wife, in which event they would in fact be children of an unborn person to whom a prior life interest had been limited. *In re Park's Settlement* is obviously a decision of far reaching application and great importance."

The learned judge then considered the cases of *In re Nash*, *In re Frost*,<sup>16</sup> *Whitting v. Whitting*,<sup>17</sup> and continued:

"Before *In re Park's Settlement*, therefore, such direct authority as there is seems to me rather in favour of than against such a limitation as is now in question. And from the point of view of principle also I think that the limitation should be supported. No doubt issue must be the issue of two parents. But in general . . . . . issue to take under a limitation are defined and qualified as the issue of one parent only whom I call the *præpositus*, and the individuality of the other parent is not taken into account in any way . . . . . And it seems to me that in such cases attention should be exclusively concentrated on the particular *præpositus* indicated by the will or settlement, and that to enter upon conjectures as to the possible date of birth or other circumstances of the husband or wife of the *præpositus* would only be to introduce doubt and confusion into what ought to be a very definite and ascertainable rule of law."<sup>18</sup>

He held that the limitations were good.

It seems to have been assumed that the limitation to I. B.'s children was a remainder, and not an executory devise. The most recent case is that of *In re Clarke's Settlement Trust*<sup>19</sup> where an appointment by will was made upon certain trusts some of which were void under the rule in *Whitby v. Mitchell*. Part

<sup>16</sup> (1889) 43 Ch. Div. 246.

<sup>17</sup> (1908) 53 Sol. J. 100.

<sup>18</sup> [1915] 1 Ch. 493, 499, 501-502.

<sup>19</sup> [1916] 1 Ch. 467.

of the land had been sold and invested in personalty before the will came into operation. It was held that the invalidity only extended to the real property as it existed when the will came into operation. Referring to the rule in *Whitby v. Mitchell*, Justice Younger said:

“Much has been said as to the meaning and propriety of that rule, while some lawyers, and probably most publicists do regret that the American view has not prevailed in this country and that a rule so artificial and now without defenders or necessity, has not been abrogated by the more modern rule against perpetuities, it is clear that in no Court other than the House of Lords can the existence of the rule be questioned, nor can its application to equitable as well as to legal estates in land be disputed.”<sup>20</sup>

It will be noticed that Justice Eve, in *In re Park's Settlement*, relied upon the cases of *In re Frost* and *Whitting v. Whitting*. In the former, the limitation in effect was to a daughter of the testator for life, then to any husband of hers for life, and after the death of the survivor to the use of the children of the daughter as she should appoint, and in default, to the use of all the children who should be living at the death of the survivor. Justice Kay held that the limitation to the children was void on two grounds: (1) that it was a possibility on a possibility or a double contingency; (2) that the rule in *Cadell v. Palmer* applied to legal remainders. Justice Sargant, in *In re Bullock's Will Trusts*,<sup>21</sup> considers that *In re Nash* decided that there is no rule against a possibility on a possibility except in the form of the rule in *Whitby v. Mitchell* and that the first ground was not valid. It will be noticed that the remainder to the children could not vest until the death of the survivor of the daughter and her (probably unborn) husband, while in *In re Park's Settlement* the issue of J. F. took vested interests within twenty-one years of his death, although they would not fall into possession until the death of his (possibly unborn) widow.

Justice Sargant deals with *Whitting v. Whitting* as follows:

“The case of *Whitting v. Whitting* is one in which no indication whatever is given of the arguments or the cases cited and in which the report of the judgment is very scanty particularly as regards the point now in question. The limitation there was to a person who was on the facts

<sup>20</sup> [1916] 1 Ch. 467, 476-477.

<sup>21</sup> [1915] 1 Ch. 493, 500.

held to be an original settlor for life, then to any wife he might leave surviving for life, and then to his children attaining twenty-three. This last limitation was obviously bad within the modern rule against perpetuities as not being necessarily confined within a life in being and twenty-one years after. But the learned judge in declaring it bad on this ground, is reported to have indicated a view that it was also bad as succeeding an estate for life to a parent possibly unborn at the date of the settlement and so infringing also the old rule against perpetuities. This expression of view was entirely unnecessary for the decision of the case, and cannot, I think, be regarded as a deliberate judgment based on any consideration of prior cases. It appears to be hardly, if at all, more than an obiter dictum."<sup>22</sup>

By the "old rule" the learned judge means that in *Whitby v. Mitchell*, by the "modern rule" that in *Cadell v. Palmer*. But in *Whitting v. Whitting* the settlor had a power of appointment which is thus dealt with by Justice Neville in his judgment:

"It remains to consider whether the trust for all or such one or more exclusively of the others or other of the issue of E. M. W. (the settlor) by any wife to be born during the life of the said E. M. W. as the said E. M. W. shall by deed or will appoint, was capable of being valid by exercise in favour of his daughter by will. On the one hand it is said that it is a limitation in favour of such of the unborn children of a possibly unborn wife as E. M. W. may select, and consequently obnoxious to the rule already referred to; while on the other hand it is said that it operates merely to give a remainder in the daughter vesting immediately upon the death of the settlor and consequently is free from objection. In my opinion the donee of a particular power cannot appoint to any person to whom the original creator of the power could not have appointed. See Farwell, *Powers* (2d ed.) p. 286 The test of the validity of the estates raised being to place them in the deed creating the power in lieu of the power itself. Here the settlor and the donee of the power are one and the same person, but if the limitation in the settlement had been after a life estate to an unborn person, to unborn persons to be born in the lifetime of the settlor, it appears to me such limitations would still be obnoxious to the rule."<sup>23</sup>

This point is not dealt with by Justice Sargant, and it is sub-

<sup>22</sup> [1915] 1 Ch. 493, 500-501.

<sup>23</sup> (1908) 53 Sol. J. 100.



mitted, that in effect Justice Neville decided that, if land is limited to A for life with remainder to any wife who may survive him for life with remainder to such of A's children as he shall appoint, the limitation is void as to the power of appointment.

The inconvenience of the decision in *In re Park's Settlement* is evident. If land is limited in the usual way to A (a bachelor) with remainder to his first and other sons successively in tail, with power to create a rent charge by way of jointure in favour of any wife who may survive him, the limitations are good; but if instead of having power to create a jointure a life interest was limited to any wife who might survive A, then the limitations to the sons would be void. It is, therefore, fairly safe to prophesy that *In re Park's Settlement* will be treated as overruled by *In re Bullock's Will Trust*. Soon after the last sentence was written it was confirmed by the case of *In re Garnham*.<sup>24</sup>

In *In re Garnham*, the testator by a will made in 1837 devised real estate to trustees upon trust during the life of his son T. and after his death until the same should be sold under the trusts thereafter declared; namely, to pay the rents to his son T. for life, and after his death to any woman whom T. should marry during his life, and after the decease of the survivor of T. and his wife, to sell the real estate and stand possessed of the proceeds upon trust for the children of T. at twenty-one or marriage. In the event of there being no such child of T. (which event happened) the real estate was to be held in trust for the testator's other children who should survive T., and the children or child then living of any of the testator's children who should have died in the lifetime of T. leaving children, in equal shares *per stirpes*. T. was a bachelor at the testator's death. He afterwards married a wife, who survived him, but he had no issue. The trust for sale clearly infringed the rule in *Cadell v. Palmer* and was void, but this would not cause the beneficial interests to fail if they must vest within the period required by the rule.<sup>25</sup> The gift to T.'s children and the gift in default to the testator's other children and grandchildren must vest within twenty-one years of T.'s death, and therefore do not offend the rule in *Cadell v. Palmer*. But if *In re Park's Settlement* was correct, the gift of T.'s children would be bad under the rule in *Whitby v. Mitchell*, and it might follow that the gift to the testator's other child was bad as being dependent on a void limitation.

<sup>24</sup> [1916] 2 Ch. 413.

<sup>25</sup> *In re Daveron* [1893] 3 Ch. 421.

Justice Neville said:

"There are two points arising in the present case. The first is, what is the result, with regard to the rule against perpetuities, of a gift to a bachelor for life with remainder to any wife he may marry with remainder to his children? There has apparently been a difference of judicial opinion on that point. We have first a case before Kay, J., of *In re Frost*, and that is followed by *Whitting v. Whitting*, a decision of my own, in which I seem to have dealt with the will before me very much in the way in which Kay, J., dealt with the will before him in the case of *In re Frost*. The gifts were obviously bad on the face of them under the rule against perpetuities because the limitation was to children at twenty-five in the case before Kay, J., and at twenty-three in the case which I decided. There was a question in both cases whether in the circumstances it was a gift to the unborn children of an unborn person following on a life interest to that unborn person. Then came a decision of Eve, J., in *In re Park's Settlement*, in which he purported to follow those two decisions, and finally the matter came before Sargant, J., in the case of *In re Bullock's Will Trusts*, in which he held that such limitations were good. There is also a second point which he decided in the case before him; namely, that the gift in question was an independent gift, and not a gift in remainder. Having considered the matter as carefully as I can, I have come to the conclusion that Sargant, J.'s view is the sounder view on the point. I do not think that the fact that the children referred to might have been the children of an unborn person who took a tenancy for life, as well as the son, the bachelor, who took another tenancy for life, can effect the matter. It seems to me that upon the determination of the tenancy for life given to an existing person the class is ascertained, although the enjoyment may be postponed during a life tenancy of a person who may have been unborn at the date of the gift. In my opinion that does not offend against the rule against perpetuities. Consequently I propose to follow Sargant, J.'s decision in this respect. I may say that I have mentioned the matter to Eve, J., and he agrees with me that *In re Bullock's Will Trusts* is a sounder decision on this point than the decisions which preceded it."<sup>26</sup>

His Lordship then dealt with the question whether the real estate was converted. In this judgment the expression, "the rule against perpetuities," is used three times. On the second occasion it appears to mean the rule in *Cadell v. Palmre*; on the third

<sup>26</sup> *In re Garnham* [1916] 2 Ch. 413, 415-416.

to mean the rule in *Whitby v. Mitchell*; and this seems to be the sense in which it is used at the beginning of the judgment. *In re Frost* did not deal with the rule in *Whitby v. Mitchell*, but *Re Whitting*, as I have pointed out, was a decision on both rules. But although Justice Neville's judgment is not so full as might have been wished for, it is now clear that, in courts of first instance, *In re Park's Settlement* is out of the way. I wish, however, to suggest that the courts may not have adopted the right principle in dealing with the limits to the rule in *Whitby v. Mitchell*. I do this with some diffidence as the theory that I put forward is not hinted at in any of the reported cases.

The rule in *Whitby v. Mitchell* is an old rule dealing with remainders,<sup>27</sup> the rule in *Cadell v. Palmer* is a modern rule dealing with executory and equitable interests. Prior to the Real Property Amendment Act, 1845,<sup>28</sup> and the Contingent Remainders Act, 1877, legal contingent remainders were always liable to fail or be destroyed. It was because executory devises and equitable estates and interests were not liable to failure or destruction in the same way as legal remainders that the rule which ultimately became that in *Cadell v. Palmer* was evolved. In applying this rule possible, not actual, events are regarded.<sup>29</sup> If any limitation might in any event however improbable, infringe the rule, that limitation is void. But it is evident that if such a principle were applied to rules which regulate contingent remainders, they would continually be made void. For this reason I believe that in considering rules regulating legal remainders the opposite principle applies; namely, that actual and not possible events are to be considered. In *In re Park's Settlement*, the wife of J. F. was born in the settlor's lifetime. In *In re Bullock's Will Trusts*, I. B.'s husband was born in the testator's lifetime. In *Whitby v. Mitchell*, the daughter, E. H. D., was unborn at the date of the settlement. It was the same in *In re Nash*, and in *In re Clarke's Settlement Trusts*. This view, that actual, not possible, events must be considered not only appears to be possible on general principles, but it would get rid of the difficulty caused by *In re Park's Settlement*.

<sup>27</sup> It is simply an application of the old rule against perpetuities, and as we have seen, is called "the old rule against perpetuities" by Sargant, J.

<sup>28</sup> This did away with the necessity of appointing trustees to preserve contingent remainders.

<sup>29</sup> See Selborne, C., in *Pearks v. Moseley* (1880) 5 App. Cas. 714, 722, and Jessel, M. R., in *Hale v. Hale*, (1875) 3 Ch. Div. 643, 645.

This difficulty, for in some way or other *In re Park's Settlement* must be got rid of, was solved by Justice Sargant by the "præpositus" theory. This theory is attractive; but it has the curious result that a limitation may be good, or bad, according to the way in which the persons to take under it are described. It is however quite possible that both the theory that actual events should be considered and also the "præpositus" theory are true. In almost every case that is likely to occur, either theory would save the limitations.

There is also a third theory that the rule in *Whitby v. Mitchell* "only applies where a life interest is given to a person who by the terms of the limitation is unborn with remainder to his or her issue."<sup>30</sup> This was the case in *Whitby v. Mitchell*, but the rule is not stated by the judges in this limited form.

To sum up, the English law at present appears to be :

(1) *Legal Remainders in Land*. These are subject to the rule in *Whitby v. Mitchell* that if land is limited to an unborn person for life with remainder to the child or children of such unborn person, the latter remainder is void. But so stated, the rule is not free from ambiguity. There are four possible theories: (a) Mr. Sweet's, that "unborn" means a person who by the terms of the limitation is unborn at the date of the settlement. (b) Justice Eve's, that "unborn" means a person who may possibly be unborn. (c) Justice Sargant's, that "the children of such unborn person" means persons who in the limitation are described as children of such unborn person, and does not refer to children of such unborn person described as children of a living person. (d) The writer's, that "unborn" means a person actually unborn. The inconvenience of Justice Eve's view is so great that we may take it that it will not be followed.

In 1833 legal remainders in land were not subject to the rule in *Cadell v. Palmer*. There has been an attempt by judges of first instance to alter the law in this respect. But it may be remarked, that in *In re Frost* the decision was alternative, and that in *Re Ashforth*<sup>31</sup> the limitation, in fact, was an executory devise.

Mr. Charles Sweet holds that a further rule—that in *Chapman v. Brown*<sup>32</sup>—applies to legal contingent remainders. The rule is that a contingent remainder cannot be limited on a contingent

<sup>30</sup> Mr. Charles Sweet, 30 LAW QUART. REV. at p. 354.

<sup>31</sup> [1905] 1 Ch. 535; (1765) 3 Burr, 1626; 3 Br. P. C. 269.

<sup>32</sup> See Charles Sweet, Double Possibilities, 30 LAW QUART. REV. at p. 353.

remainder. This was the rule applied in *In re Frost*. The existence of this rule is denied by Professor Gray.<sup>33</sup> Whether or not there is such a rule is a difficult question which I cannot discuss here; but I think it probable that modern judges would not recognize it in view of certain expressions in the judgment of the Court of Appeal in *In re Nash*, and the observations on *In re Frost* made by Justice Sargant in *In re Bullock's Will Trusts*.

(2) *Equitable Remainders in Land*. These are subject both to the rule in *Whitby v. Mitchell* (because they are remainders), and to the rule in *Cadell v. Palmer* (because they are equitable). It has never been suggested that the rule in *Chapman v. Brown*, if it exists, applies to equitable remainders.

(3) *Executory Devises and Bequests and Equitable Interests*. These are subject to the rule in *Cadell v. Palmer* that they must vest indefeasibly within a period of one or more lives in being and twenty-one years afterwards, and if they do not, they are void. In applying this rule possible, not actual, events are considered.

Mr. Charles Sweet contends that executory devises and executory bequests of terms of years are also subject to the rule in *Whitby v. Mitchell*.<sup>34</sup> But in *In re Bowles*,<sup>35</sup> Justice Farwell treats the rule in *Whitby v. Mitchell* as applying only remainders, and for this reason decided that the rule does not apply to personal property. It seems to me unlikely that Mr. Sweet's view will be adopted.

(4) *Common-law Conditions*. It may be added that in 1833 common-law conditions were not subject to the rule in *Cadell v. Palmer*.<sup>36</sup> But in *Re Trustees of Hollis Hospital and Hague's Contract*,<sup>37</sup> and in *Re Da Costa*<sup>38</sup> the rule was held to apply to common-law conditions. The learned editor of Farwell on *Powers*<sup>39</sup> points out that the condition in the latter case was bad as a common-law condition. Nowadays common-law conditions are rare, but until the point comes before the Court of Appeal, it is not possible to say what the law is at the present day.

CHARLES P. SANGER.

LINCOLN'S INN, LONDON.

<sup>33</sup> Gray, *Rule against Perpetuities* (3d ed.) Appendix, K.

<sup>34</sup> The Rule in *Whitby v. Mitchell*, 12 COL. L. REV. 199.

<sup>35</sup> [1902] 2 Ch. 650.

<sup>36</sup> (1883) Real Property Commissioners, *Third Report*, p. 36.

<sup>37</sup> [1899] 2 Ch. 540.

<sup>38</sup> [1912] 2 Ch. 337.

<sup>39</sup> (3d ed.) p. 337.