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Notes and Comments

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NOTES AND COMMENTS

The Proposed Illinois Judicial Article

At a time when the population of Illinois totalled less than 55,000, the framers of the first state constitution drafted a judicial article which vested the judicial power of the state in a supreme court composed of a chief justice and three associates, which judges were to be selected by the legislature and were to serve during good behavior.[1] The framers left the duty of providing all necessary inferior nisi prius courts to the general assembly which was also directed to appoint a "competent number of justices of the peace" to serve in each county.[2] The judicial department thus fabricated to serve the frontier conditions which then prevailed proved adequate, particularly since the new constitution authorized an increase in the number of reviewing judges whenever conditions should so require.[3] Such local problems as did arise were met, from time to time, by legislative exercise of the reserved power to create inferior tribunals when and where needed.[4]

Within the next thirty years, however, the population of the state increased some sixteen fold.[5] For that matter, the political complexion of both the state and the nation had also changed. Those who drafted the 1848 constitution, therefore, responding to the new conditions, fixed a revised judicial department upon the state which embodied ideas that dominate the political scene today. Broadly speaking, the principal change produced by the second constitution came with the introduction of the concept of popular election for all state as well as for many local officials. Members of the judiciary were to be selected in the same manner and were to serve for stated terms.[6] Other factors operated to produce a reduction in the size of the supreme court.[7] It was limited to three mem-

1 Ill. Const. 1818, Art. IV, §§ 1, 3, and 4.

2 Ibid., §§ 1 and 8.

3 Ibid., § 3.

4 The legislature, for example, created courts of county commissioners by Act of March 22, 1819; established probate courts under Laws 1828, p. 37; created an extra circuit court for the area north of the Illinois River by Laws 1828, p. 38; set up a municipal court for Chicago under Laws 1837, p. 75; a mayor's court for Springfield by Laws 1839, p. 12, § 8; a county court for Cook County, and for other counties, pursuant to Laws 1845, pp. 74 and 275; as well as produced a substantial revision, including an increase in the size of the supreme court, through the medium of Laws 1841, p. 173.

5 Encyclo. Americana, Vol. 14, p. 682, gives the 1820 census as 55,211 and the 1850 census as 851,470.

6 Ill. Const. 1848, Art. V, §§ 3, 7 and 17. See also Verlie, Illinois Constitutions (Ill. State Hist. Coll., Springfield, 1919), Vol. XIII, p. xxiii.

7 Verlie, op. cit., p. xxiii, cites an early instance of state supreme court packing for political purposes.

bers whose individual salaries were set at $1,200 per year with the proviso that the judges should be ineligible for other public office for the space of one year after their terms had expired.

Actually, the overall size of the judiciary was increased for the 1848 constitution established a series of circuit courts to sit in some nine designated judicial circuits conducting at least two terms each year and empowered to exercise original jurisdiction "in all cases at law and equity" and in cases of "appeals from all inferior courts."[8] These courts were staffed by elected circuit judges chosen for a six-year term and paid the constitutionally limited wage of $1,000 per annum.[9] In addition, county courts were authorized for each county, also to be staffed by elected judges to be chosen locally for a four-year term of office. These courts were to deal with probate matters, such civil jurisdiction as the legislature might prescribe, and to handle those criminal cases which the legislature might designate so long as the punishment was by fine only, and then not to exceed one hundred dollars.[10] Other concepts, such as one calling for the use of the staggered term,[11] another prescribing qualifications for judicial office,[12] and a third setting a date for judicial elections independent of the one used for the election of other state officials,[13] were then introduced and still prevail.

Again, the constitutional system so devised could have proved to be an excellent one, at least for the times, but its framers erred in failing to look far enough into the future. Scarcely a decade later, the population had doubled and, with the advent of the Civil War, industrial and social change progressed amazingly. Inflationary trends turned fixed salaries, especially those fixed at a parsimonious level, into a source of extreme hardship. Abortive attempts, in 1862, to secure constitutional revision failed because of partisan influences,[14] but the failure merely served to emphasize the objectionable features of the 1848 system. As the population grew,[15] and the volume of business increased, the flood of litigation swelled to almost overwhelming proportions but the general assembly could, constitutionally, do nothing to increase the number of courts nor add needed members to the staff of the three-man supreme court.

8 Ill. Const. 1848, Art. V, §§ 7 and 8.

9 Ibid., § 10.

10 Ibid., §§ 16, 17 and 18.

11 Ibid., § 4. The section also served to develop the concept that the judge with the oldest commission should act as chief justice of the supreme court.

12 Ibid., § 11.

13 Ibid., § 13-15.

14 See King, Melville Weston Fuller—Chief Justice of the United States 1888-1910 (Macmillan Company, New York, 1950), pp. 48-52.

15 It stood at 2,539,891 in the 1870 census: Encyclo. Americana, Vol. 14, p. 682.

By 1870, with the adoption of the present constitution, some degree of relief was attained, but the solution then devised amounted to little more than an increase in the number of courts and in the size of the judiciary, for the integral structure of the judicial department, fashioned under the 1848 constitution, remained about the same. True, intermediate appellate courts were authorized,[16] probate courts were to be set up in certain counties,[17] police magistrates were added at the lower level,[18] and Cook County was split off as a single circuit with its own judicial scheme,[19] but this meant little more than an internal parcelling out of the judicial function into smaller units and among more hands without furnishing any true revision. The vice of the elective system was retained under pressure for more, and ever more, popular control of government.

In the years since 1870, there has been little chance to revise the state constitution and only a few amendments have been made to it. Nevertheless, as early as 1893, there was a feeling developing that a thorough reexamination of the judicial articles was especially imperative.[20] When it became apparent that it was hopeless to expect any substantial degree of revision, energy was directed toward the securing of the passage of single changes. The complexity produced by attempting to govern a city as large as Chicago had come to be by the turn of the century generated the "Home Rule" amendment of 1904. It led to the creation of the Municipal Court of Chicago,[21] which in turn became the model for other municipal courts,[22] but beyond this there has been no substantial change in the form of the judicial department of the state since it received its shape over one hundred years ago.[23]

At the present time, the judicial organization is composed of one supreme court staffed by seven men; four appellate courts, one of which is divided internally into three divisions; a series of circuit courts arranged in some seventeen circuits extending throughout the state exclusive of Cook County, presided over by some fifty-five circuit judges; twenty-eight city courts located in as many strategic cities of substantial size; one hundred and two county courts, each staffed by a single judge; thirteen probate courts; and an untold number of justices of the peace and police

16 Ill. Const. 1870, Art. VI, § 11.

17 Ibid., § 20.

18 Ibid., § 21.

19 Ibid., §§ 23 and 26.

20 See Verlie, op. cit., p. xxxi.

21 Ill. Const. 1870, Art. IV, § 34.

22 Ill. Rev. Stat. 1951, Vol. 1, Ch. 37, § 442 et seq., represents an exercise, by the legislature, of the power to create courts "in and for cities and incorporated towns" given by Ill. Const. 1870, Art. VI, § 1.

23 In the meantime, the population has expanded from the 851,470 of the 1850 census to a figure of around 8,750,000 in 1950.

magistrates.[24] In addition, Cook County is served by a circuit court composed of twenty judges and a superior court, possessing concurrent jurisdiction, with a staff of twenty-eight, some of which judges serve in the Criminal Court of Cook County or in the Family Court branch of the Circuit Court. There is also a Municipal Court of Chicago, possessed of thirty-six associate judges and a chief justice, and the nearby suburb of Evanston has its municipal court presided over by two judges.

Naturally, with such a wide distribution of judicial power among so many judges, with an attendant overlapping of jurisdiction in many instances among the trial courts, but with no efficient way of making the parts work in harmony with or supplement one another, the cry has again arisen for a true revision of at least this one aspect of the state constitution. Bar association committees, heretofore working independently, have now been merged into a Joint Committee of the Illinois State and Chicago Bar Associations.[25] That group, after extended executive sessions lasting many days, has now reported its proposed draft of a new judicial article to replace present Article VI of the 1870 Constitution. The draft has received the approval of the managing boards of the two professional associations, is presently being discussed in conferences sponsored by the law schools located within the state, and will probably be submitted for legislative action at the next session of the General Assembly.

Before that time, every lawyer and law student in the state should become familiar with its provisions and formulate his own opinion as to the wisdom and the legality of the proposal. The practicing lawyer has, from his experience at the bar, already formed an impression as to the need and desirability for change. In the interest of wholesome development in the fundamental law of the state, it is planned, in subsequent issues, to provide an explanation of, and appropriate comment on, the sections of the proposed judicial article and its accompanying schedule.[26]

W. F. ZACHARIAS

MODERNIZING THE LAW OF PERPETUITIES

Mastery over the rule against perpetuities as a mathematical proposition represents only a beginning for the draftsman of complicated wills and trusts. The creation of interests which will be absolutely certain not

[24] See Directory of the Judiciary Department, 344 Ill. App. iii, et seq.

[25] Announcement of the formation of the joint committee appears in 39 Ill. B. J. 625.

[26] The schedule, designed to integrate the revision into the existing judicial organization without causing too much disruption, is reserved for publication at a later time. Persons desiring copies of the full text of the proposed article and the schedule should communicate with Mr. Barnabas F. Sears, Chairman of the joint committee, 111 Downer Street, Aurora, Illinois, or Professor Rubin G. Cohn, Secretary, College of Law, University of Illinois, Urbana, Illinois.

to violate the mathematical confines of the rule yet which will serve the purposes of his client offers an additional task requiring a general consciousness of perpetuities and their pitfalls.[1] As the rule demands absolute certainty that interests created must vest, if at all, within the stated period,[2] that certainty is actually a theoretical one which must be established at the time the instrument is to take effect. Even though events which transpire do, in actuality, justify an assumption that the unlikely will not occur, *i. e.* that the gift will not vest beyond the period of perpetuities, nevertheless, it is an axiom of perpetuities law that probabilities are not to be considered,[3] even in cases where vesting in fact occurs within the time allowed.[4] The policy of the rule, one favoring certainty of title, is not open to challenge, but it deserves re-examination when applied to certain "hard" cases, for the principle of absolute certainty has been rigorously applied in cases where the facts were such that they all but compelled a vesting within the required period.[5]

[1] Carey and Schuyler, Illinois Law of Future Interests (Burdette Smith Co., Chicago, 1941), § 472, pp. 580-1.

[2] Gray, Rule Against Perpetuities (Little, Brown & Co., Boston, 1942), 4th Ed., §§ 201 and 214. The necessity for this certainty is emphasized by Gray's well-known statement of the rule, appearing in § 201, that no "interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."

[3] Gray, op. cit., § 214. For a criticism of the "might-have-been rule," see Leach, "Perpetuities in Perspective," 65 Harv. L. Rev. 721 (1952), particularly pp. 728, 747.

[4] This almost universally applied common law principle was reversed in Pennsylvania by the passage of the Estates Act of 1947, Pa. Laws 1947, Act. No. 39. Section 4 thereof provides, in part, that upon "the expiration of the period allowed by the common law rule against perpetuities as measured by actual rather than possible events, any interest not then vested and any interest in members of a class the membership of which is then subject to increase shall be void . . ." The committee which sponsored this act commented that the provision in question was "intended to disturb the common law rule as little as possible, but to make actualities at the end of the period, rather than possibilities as of the creation of the interest, govern, and to provide a more equitable disposition of void gifts. By regarding actualities at the end of the period, the unrealistic results based on purely theoretical possibilities are avoided. The possibility test seems peculiarly inappropriate in most Pennsylvania cases because by the time the courts do decide upon the validity of the remainders, possibilities have become actualities. This results because (1) the modern tendency is to uphold valid life estates even though the ultimate remainder seems obviously void, and (2) the court refuses to decide on the validity of future estates until the termination of the valid life estate. See Quigley's Est., 198 A. 85, 329 Pa. 281, on both points." Purdon's Pa. State. Ann., Title 20, § 301.4(b), and comment thereon at p. 475. See also comment in 48 Mich. L. Rev. 1158 (1950), particularly p. 1166.

[5] Thus a gift to such of a woman's children who shall reach the age of twenty-five would be too remote, even though the named woman be then eighty years old. The possibility that she may have more children prevents the use of the lives of existing children as the measuring rod and, although medical science recognizes that birth of more children to such a person would be a physical impossibility, yet the law conclusively presumes that a possibility exists: Jee v. Audley, 1 Cox 324 (Ch. 1787). This principle has been accepted in Illinois: Kane v. Schofield, 332 Ill. App. 505 at 522, 76 N. E. (2d) 216 at 224 (1947). See also Gray, op. cit., § 215, and annotation in 146 A. L. R. 794 (1943).

The principle in question, one proclaiming that a possibility of vesting within the period will not suffice, was nicely illustrated some years ago by the decision of the Illinois Supreme Court in *Johnson* v. *Preston.*[6] The testator there gave certain lands to his executor, to have and to hold for a term of years "from and after the date of the probate of this will." It was held that the gift to the executor was void for remoteness as it might not vest, *i. e.* the will might not be probated, within the period of the perpetuities rule. That view was later affirmed in *Ryan* v. *Beshk*[7] where property was given in remainder to four named persons if living at the time of distribution, but if any should die before that time, the share of the one so dying should go "to his or her executor or administrator to be applied" as if such decedent had owned the property. It was held that, all remainders being contingent, the gifts over to the personal representatives were too remote.

Although these cases may be said to be technically correct, they may be criticized. It is possible that a will may not be probated until a remote time,[8] but violation of the rule is so unlikely that the requirement of prospective certainty will operate harshly in such case. Especially in Illinois will this type of violation be unusual, for the Illinois Probate Act has been framed so as to promote the speedy settlement of decedent's estates.[9] The lack of cases of the type mentioned may indicate that the Johnson and Ryan decisions have operated to teach the lesson and, until 1948, the avoidance of this particular pitfall does not appear to have caused any undue warping of estate plans.

With the enactment of the Revenue Act of 1948, however, alert lawyers soon pointed out that a bequest or devise in trust to an estate could

[6] 226 Ill. 447, 80 N. E. 1001 (1907).

[7] 339 Ill. 45, 170 N. E. 699 (1930). There is, however, authority to the contrary for in Belfield v. Booth, 63 Conn. 299, 27 A. 585 (1893), the court held a gift to vest fourteen years after settlement of the testator's estate to be valid. In view of the executor's fiduciary duty to settle the estate promptly, the court found that the time of administration could not last for so long as seven years after the testator's decease.

[8] Gray, op. cit., § 214.3, note 1, cites a case where the will was not proved for sixty-three years.

[9] Under Ill. Rev. Stat. 1951, Vol. 1, Ch. 3, § 212, a person having possession of the will must deliver it to the clerk of the probate court immediately upon death of the testator and the court is empowered to compel production of the will on its own motion. The destruction or secreting of a will is made a criminal offense by Section 213. The executor, according to Section 214, has a duty to institute proceedings for probate of the will within 30 days after he has been notified of his appointment. His failure to file an inventory within the required period fixed by Section 323, or to make proper accounting, is not only ground for his removal under Section 430(g) but may justify commitment to jail pursuant to Section 457. In addition, one who, without good cause, fails to close an estate within two years after issuance of letters to him is charged, according to Section 462, with interest at ten per cent. per anum on the fair market value of all personal estate which has come into his control. It might be noted that counterparts of these provisions were in force when the case of Johnson v. Preston was decided.

be a useful device in qualifying the gift for a "marital deduction" permitted in connection with the federal estate tax.[10] The validity of such a bequest or devise has, therefore, assumed new importance. While the law allows a deduction of that property included in the gross estate which passes to the surviving spouse, at least to the extent of one-half of the "adjusted gross estate,"[11] a disposition which passes only a life interest or a "terminable" interest to the spouse will not qualify for the deduction.[12] On the other hand, a gift in trust for the benefit of the surviving spouse for life, with power in the life-tenant beneficiary to appoint to herself, or to her estate, will qualify.[13] If, as has been pointed out, such an appointment would be held to be a nullity under local perpetuities law,[14] the total gift to the spouse would then constitute no more than a life estate or other "terminable" interest,[15] hence would be inadequate for purpose of the deduction. Until recently, then, before a draftsman could qualify such a gift for the marital deduction, it was necessary for him to draft a provision which would comply both with the rule against perpetuities and with the provisions of the federal estate tax law.

The hitherto relatively dormant decisions in the Johnson and Ryan cases have, therefore, suddenly been projected into the limelight, for the doctrine there laid down could affect many a testamentary gift planned by one who wished to give a limited interest to the surviving spouse for life but who also desired to take advantage of the marital deduction. What had, previously, been only an occasional inconvenience, now assumes the proportions of a regular addition to the burdens laid on the draftsman.

Fortunately, for Illinois, the potential size of the problem induced the legislature, at its last session, to enact a bill which is now listed as Section 153a of the Conveyances Act. It declares that the "vesting of any limitation of property, whether created in the exercise of a power of appointment or in any other manner, shall not be regarded as deferred for purposes of the rule against perpetuities merely because the limitation is made to the estate of a person or to a personal representative, or to a trustee under a will, or to take effect on the probate of a will. The provisions of the Act shall apply only to limitations created after the effective

10 See Casner, "Estate Planning Under the Revenue Act of 1948—The Regulations," 63 Harv. L. Rev. 99 (1949), particularly pp. 101-2.

11 26 U. S. C. A., § 812(e)(1)(A), and § 812(e)(1)(H).

12 Ibid., § 812(e)(1)(B).

13 Ibid., § 812(e)(1)(F). A "non-appointive" trust may also qualify for the marital deductions: Reg. 105, § 81.47a(b)(2). See generally, Lasser, Estate Tax Handbook (Matthew Bender Co., Albany, New York, 1951), pp. 602 and 617.

14 See notes 6 and 7, ante.

15 Casner, "Estate Planning Under the Revenue Act of 1948—The Regulations," 63 Harv. L. Rev. 99 (1949), particularly pp. 101-2.

date hereof."[16] It is the gist of the new section that the mere theoretical possibility of too-remote vesting should not serve to invalidate the planned disposition of an estate, but the statute should not be read in too broad a fashion. The words indicating that the vesting should not be regarded as deferred "merely because the limitation is made to the estate of a person," would also support the negative inference that *other events* could cause the vesting to be regarded as a tardy one. In the absence of such events, however, there is no room for judicial discretion for the statute is expressed in the form of a command.

One relying on the new statute should note that the four kinds of disposition mentioned are really no more than formal variations of the same thing, *i. e.* a gift to the estate of a person. Being of limited scope, in that it withholds the common law requirement of advance theoretical certainty of vesting in the one specialized case, the statute does not specifically lengthen the period of perpetuities. The language thereof might serve, however, to support the inference that the answer to the question as to whether or not the common law period of perpetuities has been exceeded is to be ascertained retrospectively, as a matter of fact,[17] rather than prospectively as a matter of theory.[18]

It should also be noted that the basic policy of the rule against perpetuities, one designed to prevent the tying up of property for too long a time after the donor's death, is not seriously compromised, if it is compromised at all. In the case of a grant to "A for life with remainder to such person, including A's personal representatives, as A shall by will appoint," there is the admitted possibility that the estate might not be settled, nor letters taken out, for more than twenty-one years after A's death. In such event, an appointment to A's personal representative would, when read back into the instrument creating the power, admittedly violate the common law rule as applied in the Johnson and Ryan cases. Under the new statute, however, the appointed interest will not be regarded as deferred and void merely because of the *form* of the limitation. Although title may, under the statute, remain uncertain and unmarketable for the period of perpetuities, since vesting will be contingent upon settlement of A's estate, nevertheless this delay in vesting is clearly within the policy of the rule. It is further apparent, under Illinois law,[19] that the uncer-

[16] Ill. Rev. Stat. 1951, Vol. 1, Ch. 30, § 153a. The legislation was drafted and proposed by the Committee on Trust Law, Chicago Bar Association, of which Daniel M. Schuyler was chairman.

[17] The broader provision to be found in Pennsylvania, note 4 ante, is specific on the point.

[18] Constitutional problems relating to retroactive application of statutes concerning property have been avoided by making the Illinois provision apply solely to limitations created after the effective date of the new statute.

[19] See note 9, ante.

tainty may be readily dispelled by persons interested in the title, for the Probate Act provides that any person may petition to have the will probated.[20] If the statute be construed to permit a limitation which in fact vests at a time more remote than the period of perpetuities, then the policy of the rule is somewhat compromised; but such cases would be extremely rare.

On the whole, it would seem that, except to those who might wish to cling to outworn "landmarks of the law" merely for the sake of perpetuating the lore with which they are familiar, the new statute provides a great convenience for those engaged in the drafting of marital deduction trusts. It offers a convenience, in fact, which, regardless of any subsequent change in the tax law which stimulated its adoption, should continue to be a useful and reasonable provision entirely consistent with the general policy of the law relating to perpetuities.

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[20] Ill. Rev. Stat. 1951, Vol. 1, Ch. 3, § 215.