THE RULE AGAINST PERPETUITIES

HARRIS v. KING. 56 C.L.R. 177.

The rule against perpetuities is too well known to require statement here, but there is a qualifying principle which is not so well known and which operates in some cases to restrict the scope of the main rule. It is to this effect—where the testator or settlor limits the future estate so that it depends for its vesting on the happening of any one of two or more separate events, then, if the event which in fact happens is such that it could not have occurred outside the period, the gift is good, notwithstanding that others of the specified contingencies are too remote. Thus, the effect of this rule is that the contingencies invalid as infringing the rule against perpetuities are struck out and the valid contingency left standing so that the future estate vests if that valid contingency in fact occurs.

This principle is well illustrated by the High Court case, *Harris v. King,* where there was a limitation of the equitable estate in land situate in Pitt Street, Sydney. The limitation, to put it in the form with which law students are most familiar, was in substance as follows: Devise to A (a spinster) for life, and after her death to her husband (if any) for life or, if she should have children, to her husband for life and to her children during the life of her husband, and "after the death of A and her husband (if any)" to such of her children, living at the death of the survivor of A and her husband, as should attain 21 or marry.

In fact A died a widow, leaving children who had attained full age. It is clear that when the disposition was made, it was possible that A might marry a man who was born after the testator's death and who might survive her by more than 21 years, and accordingly the gift over after the death of the husband is void for remoteness. It was, however, contended that the limitation should be read in a different way, a way which would validate the remainder. It was urged that the limitation should be read so that the remainder vested on "A's death or the death of her husband (if any)," so that there was one valid and one invalid contingency. It was then said that the invalid contingency should be disregarded and that, as the valid contingency was the one that had in fact happened, the remainder was good and had vested. It was said that the contingency on which the remainder depended should be regarded, not as one compound contingency, but as two separate and alternative contingencies, one valid and one invalid, on the happening of either of which the remainder was limited to vest and, in effect, that the invalid contingency should be struck out, leaving merely the valid one, so that the remainder would depend on one contingency which had in this case occurred.

Dixon J., at pp. 185-6, stated the principle involved thus: "It is said that two distinct contingent events are described by . . . the disposition in question; the occurrence of one such event outside the period which the rule against perpetuities allows might have been antecedently possible, but the other, that in fact happened, could

only occur inside the period. The principle relied on amounts almost to a qualification to the general rule that no future estate or interest is valid unless at the time of its creation it is certain that, if it vests, it will do so within the prescribed period.

"For it is a subsidiary rule that if the vesting of an estate or interest depends on two or more distinct contingencies, specified as independent and alternative events, it is no objection that some of them might conceivably have taken place beyond the period if, in the result, a contingency so separately stated occurs which could not have done so; e.g., a gift over if a named person in being should die leaving no issue him surviving or if he should die without issue who attain 25 describes two distinct conditions. If the first is fulfilled, its fulfilment must occur at the end of the life in being and so within the requisite period. But the second condition may be fulfilled more than 21 years after the dropping of that life. The limitation therefor depends on a contingency with a double aspect. It comprises two alternative conditions, only one of which is to operate. One condition conforms with the rule against perpetuities, the other offends against it. Accordingly, the gift may take effect in one case but not in the other. But this is only so because the two contingencies are expressly distinguished. They are stated as two separate events, the happening of which will vest the future interest created. From their nature they are alternative." But "a condition cannot be analysed into all the events the happening of which would fulfil it." At p. 187, Dixon J. quotes Lewis on the Law of Perpetuity: "Whenever the valid alternative contingency is left to implication merely or wherever it is not so expressed as to be separable from the remote contingency but is rather embraced in this, the limitation will be void as depending on an event too remote and with which there is no alternative or concurrent that may give effect to the limitation."

The Court (Starke, Dixon and McTiernan JJ.) held that it was not possible to read the limitation in this case as specifying the event of A's death occurring after the death of her husband as a distinct and independent contingency on which the remainder vested. It was held that there were not distinct and independent contingencies expressed, but that there was one compound contingency which could be satisfied by several events, some within and some not within the period allowed by the rule against perpetuities. It is clear that, to come within the principle sought to be invoked in this case, there must be a disjunctive expression of two separate and independent contingencies, and it is not sufficient to have one compound contingency which may be satisfied by two or more events. "The Court will not sever or split up a compound event."