

PAINÉ v. HYDE.

All the male members of the Fowle family mentioned here: George, Thomas, and Edward are the brothers of Louisa Caroline (Fowle) Man.

term.  
ROLLS' COURT, WESTMINSTER, WEDNESDAY, NOV. 24.  
PAINÉ v. HYDE.  
This was the petition of Mrs. Ann Elizabeth Fowle, widow of George Fowle, and her children, claiming a legacy under the will of William Spica, dated 4th of September, 1799, and the question arose upon the construction of a will. The testator bequeathed all the residue of his estate and effects to his trustees and executors upon trust, in case Catherine Paine should die unmarried, to transfer 600*l.* Consols. to Thomas Fowle, of Rainham, farmer; the like sum of 600*l.* stock to Edward Fowle, of Cobtree, farmer; the like sum of 600*l.* stock to Thomas Fowle, of Hant, near Maidstone, farmer; and the like sum of 600*l.* unto George Fowle, of Bexley, farmer; and in case of the decease of either of them, to transfer the legacy of the party dying equally among such of his children as should be then living. But his will was, that the legacies should be subject to this express condition—that the said Edward, Thomas, and George Fowle, their respective heirs, executors, and administrators, should within three years next after his decease, pay to his trustees and executors all such sums of money as might be due to him, the testator, at his decease. The testator died in January, 1800; Catherine Paine died on the 15th of January, 1840, intestate and unmarried. The legatees paid the debts due from them to the testator, but not within the three years, the time prescribed by the will.  
Mr. KINDERSLEY and Mr. PURVIS for the petitioners, who claimed as representatives of the legatees, argued that they were entitled to the legacies.  
Mr. PEMBERTON, Mr. WILCOX, and Mr. BEVAN, for the respondents, contended that the legacies failed in consequence of the non-performance of the express condition imposed by the testator, that the legatees should within three years after his decease pay his executors all such sums as were due to him.  
Lord LANGDALE said he would give judgment to-morrow.

The Times November 25 1841

A legacy which might take effect immediately was given upon condition that the legatee should within three years after the testator's death pay, all money due from the legatee to his estate: Held, that the substantial performance of the condition after the expiration of the three years and before the legacy became payable prevented the forfeiture of the legacy in the absence of any express clause of forfeiture or gift over of the legacy on failure of performance of the condition.

In this case the testator, by his will, gave the income of his residuary estate to Catherine Paine during her life, if she continued unmarried. If she married, he gave her only an annuity of £30 and gave the residue of his estate to the children of Thomas Hyde by his wife Hannah; but in case Catherine Paine died unmarried (which event happened), he directed his trustees to transfer sums of £600 Consols to each one of four persons, viz., John, Edward, Thomas, and George Fowle; but in case of the death of either of them, then he directed the trustees "to pay, assign, or transfer the said legacy of him so dying, unto and equally amongst such of his children as should be then living, when and so soon as the youngest of such children should attain the age of fourteen years;" and to pay, assign, and transfer the residue

of his estate unto such person as Catherine Paine should appoint, and in default of appointment (which happened), to the children of Thomas Hyde by Hannah his wife. He then expressed his will to be, " that the legacies given to them, the said Edward, Thomas, and George Fowle, were given to them subject to and upon this express condition, that they, respectively, and their respective heirs, executors, and administrators, should, within three years next after his the testator's decease, well and truly pay or cause to be paid unto the testator's Paine trustees and executors, all debts or sums of money as should or Hyde might be due or owing by or from them or any of them at the time of his decease." And he declared that nothing in his will contained should invalidate or make void the securities which he held for the repayment of money due to him from Edward, Thomas, and George Fowle.

The testator died in January, 1800. Thomas and George Fowle were indebted to the testator in the sum of £150, which was not paid until January, 1804. Edward and Thomas were also indebted to the testator in the sum of £1,900 and were bound to secure the reinvestment of £6,400 Consols, which sums were not repaid and reinvested until May, 1806. Thomas Fowle was also indebted to the testator in the sum of £345/., which was not repaid until May, 1806; so that, in effect, the monies were not repaid within the three years from the testator's death, as required by the will. Edward, Thomas, and George Fowle afterwards died in the lifetime of Catherine Paine, and she died unmarried in January, 1840.

The legacies were now claimed by the children of Edward, Thomas, and George Fowle, who presented a petition in the cause for payment. Their claim was opposed by the persons entitled to the residuary estate, on the ground that the condition, (viz. payment of the debts within three years next after the testator's death), had not been performed, and that upon the context of the whole will, taken in connection with the words in which the condition was expressed, it appeared that the testator intended a strict performance.

Mr. Kindersley and Mr. Purvis, in support of the petition:

It is a general principle of the Court, that it will relieve against a forfeiture occasioned by the mere nonpayment of money within a particular time: *Cage v. Russell*.

The condition does not apply to the petitioners, who are the children, for the testator says, "the legacies given by me to them, the said Edward, Thomas, and George Fowle, are given to them upon this condition," &c. This condition, therefore, does not apply to the children.

Paine Mr. Pemberton and Mr. Beaton, contra: The condition is applicable to the children, who take in substitution, for every provision attaching to an original legatee is applicable to the substituted legatee. Mr. U'Ulcock, in the same interest.

Mr. Kindersley, in reply:

The gift to the children is a substantive gift, and the performance of the condition does not attach to them, but to the parents, their respective heirs, &c.

The Master Of The Rolls [after stating the bequest and condition, said]:

The testator, by his will, has given a great many legacies, some of which he directed to be paid at particular times; and as to many of his legacies, he directed that they should not be paid until after the expiration of three years from the time of his death. He directed the executors to get in all monies due to him, as soon as convenient after his death; and he declared, that the securities given by Edward, Thomas, and George Fowle were not to be invalidated by any thing in his will. But on considering the whole will, it does not appear to me to throw any further light upon the testator's intention, as to the time limited by the condition, than is expressed in the statement of the condition itself.

The legacies were contingent upon the death of Catherine Paine, unmarried. It was wholly uncertain whether she would marry or not, and at what time she would die; she might have died unmarried within three years after the testator's death. It was equally uncertain, whether the Fowles would survive her or not; and if she had died unmarried within the three years, the legacy might have become vested in the Fowles, or in the children, before the expiration of the time appointed for the performance of the condition; and, looking at these circumstances, and considering the words in which the condition is expressed, I think that it is to be regarded as a condition merely for payment of money, in which the time limited has not, by this Court, been deemed to be of strict obligation; and Paine that it was substantially performed by payment of the debts, although Hyde, the money was not paid until after the day expressed in the condition. I am therefore of opinion, that the petitioners are entitled to the legacies which they claim, and also to the costs of the application.

When the testator in his gift to the children of Fowles, in the event of the original legatee's dying, describes each legacy as the legacy of him so dying, he does not mean to speak of the legacy as vested in him, but merely as a legacy which would have been his if he had not died; and the legacies described as given to the parents in the clause expressing the condition, were only contingent legacies, which, by the deaths of the legatees in the lifetime of Catherine Paine, became incapable of vesting in the legatees, and in fact became contingent legacies to the children. If the words be construed strictly, they do not apply to the legacies given to the children, though consisting of the sums which in another event would have been given to the parents. The testator may have meant otherwise, but it is not necessary to decide the point.