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Kentucky Perpetuities Law Restated and Reformed

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Kentucky Perpetuities Law Restated and Reformed

By JESSE DUKEMINIER, JR.*

FOREWORD

Anyone who has tried to explain the Rule against Perpetuities to laymen finds it very like trying to picture Marianne Moore's imaginary garden with real toads in it. Full of illusion and deception, it is the abode of such fantastical characters as the fertile octogenarian, the unborn widow, the precocious toddler, the slothful executor—all imaginary beings with power to bring the Rule down hard on the head of any trespasser. This extraordinary power in imaginary hands is the result of one of the most arbitrary rules known to the common law: the rule that any possibility that a gift might vest too remotely, however fantastic, defeats the gift. Many reasonable dispositions have been mischievously struck down by such "impossible" possibilities.

In the last decade, several states have done away with the remote possibilities test entirely or in substantial part. As befits a state which has been a leader in sloughing off common law archaisms,[1] Kentucky has now joined the reform movement.[2] At its regular session last spring the General Assembly passed the 1960 Perpetuities Act,[3] adopting the common law Rule against Perpetuities as modified by an actual events test and further providing for reformation of invalid interests by cy pres. The act

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[1] Among other things abolished are the destructibility of contingent remainders, the Rule in Shelley's Case, the fee tail, the indefinite failure of issue construction, the inalienability of contingent interests, possibilities of reverter and rights of entry, the Rule in Wild's Case, the testamentary branch of worthier title, most of the technical requirements inhibiting the running of restrictive covenants, and probably the tenancy by the entirety.

[2] Kentucky has also been one of the first states to adopt the Uniform Commercial Code; and, by odd coincidence, the same states which have adopted the Code have, generally speaking, adopted the wait-and-see reform of perpetuities, and in the same order.

[3] Ky. Acts 1960, c. 167, compiled as Kentucky Revised Statutes §§ 381.215-381.223. The Kentucky Revised Statutes are hereinafter cited as KRS.

also abolishes two common law anachronisms, the determinable fee and the possibility of reverter, converting them respectively into a fee simple subject to a right of entry and a right of entry. It then terminates after thirty years rights of entry, which traditionally have been exempt from the perpetuity rule. Except with respect to rights of entry, the effect of the act is to limit the destructive force of the Rule and save many reasonable family dispositions previously held void under the remote possibilities test.

The genesis of this act was a study by the author of all the perpetuities cases decided in Kentucky, including examination of the briefs and records on appeal. This study showed convincingly the need for perpetuities reform. Among other things, it revealed some striking departures from orthodox doctrine: in the meaning of vest, in the consequences of violating the Rule, in refusing to apply the rule of convenience and the doctrine of severed shares to save class gifts. These departures resulted in 27% of the cases being wrongly decided and another 22% being of doubtful correctness under the orthodox interpretation of the Rule. In these cases tradition and innovation are so fused that, to the court at least, they exist in identity with one another.

In addition to doctrinal confusion, the study disclosed some exceedingly harsh results for the parties concerned. In more than half of the three dozen cases holding interests void, the court knew at the time of decision that the interest would in fact vest within the period. Nonetheless, the Rule required the interest be struck down because some remote event might have happened, although in fact it did not. Usually the draftsman had overlooked a "fertile octogenarian" or put in an age or time condition of more than 21 years. To make matters worse, the court added to the carnage by vigorously applying infectious invalidity.

The results of this study, which are set forth herein in Part I and in the Appendix, showed the operation of the Rule to be unpredictable and to be unfair to the intended beneficiaries. The author then undertook to draft appropriate remedial legislation. Two alternative drafts were prepared and circulated among various members of the bar, one containing changes in presumptions of law or fact to cure specific anomalies, the other adopting wait-and-see and cy pres with the Vermont statute serving as a

model. Both contained identical provisions terminating rights of entry and possibilities of reverter. The first alternative draft ran into many objections—mainly to its complexity—and proved unsaleable. The second was agreed upon as the fairest and simplest solution, but the demand for simplicity required its further reduction from five pages to three.

The changes made were purposely conservative. Perpetuities law, like most of property law, is judge-made, and detailed and complex legislative changes in property law have not often been notable successes. It was our purpose, in limiting the act to essential reforms, to leave the courts in their traditional position as the main source of perpetuities law.

Anyone who has attempted perpetuities reform knows how very difficult it is to get legislative action on so incomprehensible a subject. The recent reforms in New York were preceded by twenty-five years of constant agitation. Great credit is thus due the able sponsors of the Kentucky reform bill who pushed the legislation through with clear explanations, persuasive arguments and—perhaps most important—perseverance. They were Senators Cabell D. Francis and James C. Ware, and Representatives Richard P. Moloney and Thomas Jefferson Hill, all prominent members of the bar.

Part I of this article is a restatement of Kentucky perpetuities law prior to July 1, 1960, the effective date of the new act. Except as modified by this act, the old law remains in force. Part I is primarily designed to provide the practicing lawyer with a simplified statement of the Rule, with citations to and analyses of Kentucky cases. It purports to be comprehensive in that every perpetuities case decided by the Court of Appeals is cited, and many of them are discussed. It does not pretend to cover all the complexities of the subject, however. For that the reader is referred to the many excellent treatises[4] (with the warning that Kentucky law differs in several important particulars

[4] 6 American Law of Property, part 24, by Leach and Tudor (Casner ed. 1952); Gray, The Rule Against Perpetuities (4th ed. by Roland Gray, 1942); 5 Powell on Real Property ¶¶ 759-790 (1956); 4 Restatement of the Law of Property chs. 26-28 (1944); Simes & Smith, The Law of Future Interests §§ 1201-1480 (2d ed. 1956). These works are hereinafter cited respectively as "Am. L. Prop.", "Gray", "Powell", "Restatement of Property", and "Simes & Smith". Citations to Part 24 of Am. L. Prop. also refer to identical sections in Leach & Tudor, The Rule Against Perpetuities (1957). A delightful, short treatment of the Rule is Leach, "Perpetuities in a Nutshell," 51 Harv. L. Rev. 638 (1938).

from that stated in the texts). In view of the abstract terminology in this area the discussion is illustrated by brief hypothetical cases.[5]

Parts II and III deal with the 1960 Perpetuities Act. The reasons for, and the purposes of, the act are set forth, as well as how the act will apply in all the commonly recurring situations. By way of further illustration the act is applied to every perpetuities case decided in Kentucky in the Appendix, Tables 4-8. As will be seen, the act is of easy application in every one of these cases, and had it been in force, would have wholly saved at least two-thirds of the invalid dispositions. Parts II and III were submitted in a somewhat abbreviated form to the Senate Judiciary Committee and the House Rules Committee in support of the act. A draft of the act and explanation were also submitted informally to the Court of Appeals.

Part IV contains a presentation of the unique Kentucky law of direct restraints on alienation. This law has often been confused with perpetuities, and the purpose of stating it here is to show it as a distinct body of doctrine. It is hoped this discussion will serve the needs of lawyers, judges and students having problems involving this peculiar Kentucky law, which has never been adequately treated by legal writers.

In view of the length of this article a table of contents has been included for easy reference.

PART I

KENTUCKY PERPETUITIES LAW RESTATED

1. THE MEANING OF KRS 381.220, PROHIBITING SUSPENSION OF THE POWER OF ALIENATION (REPEALED JULY 1, 1960)

In the Senate debate on the 1960 Perpetuities Act the distinguished chairman of the Judiciary Committee, Senator George Overbey, characterized Kentucky perpetuities law as "disorganized confusion." A more apt description would be hard to come by. The confusion has many roots, but without doubt the tap root

[5] A method borrowed from Professor Leach.

and cause of its "disorganization" is the 1852 statute commonly referred to as Kentucky's perpetuities statute. With the reviser's headnote, it reads:

> *KRS 381.220. Restraints on alienation; duration of; exceptions.* The absolute power of alienation shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance of a life or lives in being at the creation of the estate, and twenty-one years and ten months thereafter; . . .

In interpreting this statute the Court of Appeals has spoken ambivalently, and many of the cases are in sharp disagreement as to its meaning.

By its express words the statute enacts a rule prohibiting suspension of the power of alienation, which must be clearly distinguished from the rule against remote vesting. The rule against remote vesting (the common law Rule against Perpetuities) is concerned solely with *contingent* interests which may remain contingent beyond lives in being plus 21 years. The policy underlying it is that all contingent interests, assignable and non-assignable, impair marketability. The rule prohibiting suspension of the power of alienation proceeds upon a different policy assumption. It assumes that *legally unassignable* interests make property unmarketable and should be struck down if they remain unassignable for more than the permitted period. Since all vested and contingent future interests are assignable or releasable if the holders thereof are ascertainable, only interests given to unborn or unascertainable persons (unassignable interests) suspend the power of alienation. In short, the rule against remote vesting applies to all contingent interests; the rule against suspension of the power of alienation applies only to interests unassignable because the taker is unborn or unascertainable.

The rule against remoteness of vesting is the more inclusive. Any interest which will violate the suspension rule will necessarily violate the rule against remoteness, but the converse is not true. Thus:

> *Case 1 (Contingent remainder after term of years).* T devises property "to A for 99 years, then in fee to Trinity Church if it is then in existence." The power of alienation is never suspended since A, Trinity Church and T's heir

(the reversioner) may join together and convey a fee simple. Under the suspension rule all interests are valid.[1] However, the gift to Trinity Church is contingent on its being in existence after 99 years, and this violates the rule against remote vesting. (If the gift over had been to A's issue whenever born living 99 years from date, the gift over would be to unascertained persons and would have violated both rules.)

Case 2 (Shifting executory interest). O deeds land "to the Fort Spring Turnpike Co., but if it ceases to use the land as a toll house, then to X." The contingent interest in X may be conveyed, and thus does not suspend the power of alienation.[2] However, it is contingent on an event that may happen too remotely and is void under the rule against remote vesting.

Whether the 1852 Revisers intended by this statute simply to enact the common law Rule against Perpetuities, whatever it was (or turned out to be), or intended to enact a rule against suspension of the power of alienation is doubtful. The statute was modeled upon section 15 of the New York Revised Statutes of 1830. At the time the New York Revisers worked it was not clear whether the common law Rule was against remote vesting or suspension of the power of alienation or both. The New York Revisers added three sections to the New York statutes: one forbidding suspension of the power of alienation beyond the period set by law (section 15); another requiring a contingent remainder after a term of years to "vest in interest" within the period (section 20); and a third providing that an executory interest might be limited on a fee if such executory interest were certain to become possessory within the period (section 24). These three sections, covering all known types of future interests held void for perpetuity under decisions prior to 1830, indicated the Revisers were attempting to restate the common law as it then existed. In Kentucky, however, section 20 (which would invalidate the gift to the Church in *Case 1*) and section 24 (which would invalidate the gift to X in *Case 2*) were not adopted. Since these sections covering known types of perpetuities were omitted, it is arguable that the Kentucky Revisers were not endeavoring to

[1] Street v. Cave Hill Investment Co., 191 Ky. 442, 230 S.W. 536 (1921). Counsel failed to argue the gift to the church vested too remotely.

[2] Patterson v. Patterson, 135 Ky. 339, 122 S.W. 169 (1909). Court held the statute did not enact the rule against remote vesting.

restate the common law but were framing a new rule against unassignable interests to supplant the common law.

Unfortunately the New York and Kentucky Revisers worked in this field before the time of John Chipman Gray, whose great treatise on the Rule against Perpetuities was first published in 1886. Gray insisted the Rule was against remote vesting alone and assignable contingent interests subject to it. Ultimately this view prevailed in England and in practically every court in this country, and today it is generally accepted that the common law Rule against Perpetuities is a rule against remote vesting. The states which had adopted statutes prohibiting suspension of the power of alienation were left with the problem of determining whether their statutes were declaratory of the common law, as Gray had later interpreted it, or were additions to or replacements of that law.

In more than one hundred years and one hundred cases this problem has never been finally resolved in Kentucky. At one time or another the Court of Appeals has interpreted the statute as forbidding (a) interests which vest too remotely, (b) interests which suspend the power of alienation, and (c) direct restraints on alienation.[3] The reviser of statutes, by his heading supplied in 1894 and adhered to since, assumes it incorporates rule (c).[4] The express words of the statute enact rule (b). Yet the court has in recent years favored the view that it embodies rule (a). In 1956 the court, noting the confusion in interpretation, stated:

> The proper view is that the statute, as embodying the rule against perpetuities, is concerned with the remote vesting of estates rather than restraints on alienation of vested estates despite the language of the statute. . . . However, it is unnecessary to decide that the statute may not be applied to restraints on alienation.[5]

Three years later, in 1959, the court again dealt with the "unfortunate confusion" caused by the statute. Admitting that

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[3] See Roberts, "Kentucky's Statute Against Perpetuities," 16 Ky. L.J. 97 (1928). For Professor Roberts' comments on subsequent cases see 21 Ky. L.J. 219, 233-36 (1933); 26 Ky. L.J. 269, 281-83 (1938); 42 Ky. L.J. 3, 19-26 (1953).

[4] Nothing could be less justified historically. The reviser has confused the rule against suspension of the power of alienation with the rule against direct restraints on alienation, with which it has no direct historical connection. See pp. 82-86 *infra*.

[5] Taylor v. Dooley, 297 S.W. 2d 905, 907-08 (Ky. 1956).

in recent cases the statute had been construed as prohibiting remote vesting, the court nonetheless concluded that "the common law rule against suspension of the power of alienation has existed in the common law of this state regardless of the troublesome statute."[6] Surely here is an odd twist: to read the express language out of the statute, then bring the express language back in as a common law rule. Although there is an authoritative ring to this statement of the court, it cannot be taken at face value. Quite clearly the court did not mean to refer to the rule against suspension of the power of alienation at all, but to the rule against direct restraints on alienation, with which it has frequently been confused and which is discussed in Part IV of this article.

Modern cases support the view that the statute simply restates the common law Rule against Perpetuities in the mistaken language of another era. But in any event one thing is clear. The common law rule against remote vesting was in force prior to the statute[7] and has been repeatedly declared to be in force since the statute.[8] The statute did not change that rule, except possibly to extend the 21 year period to 21 years and ten months.

Why the 1852 Revisers added "and ten months" to the common law period is unknown. An historian might find some connection with the 1807 act prohibiting reading or treating as authority in Kentucky courts any English post-revolutionary cases.[9] This chauvinistic piece of legislation would have prevented anyone from considering as authority *Cadell* v. *Palmer*,[10] an 1833 English case which finally settled the period of the Rule. Before this case it was not clear that the perpetuity period included only actual periods of gestation after 21 years rather than nine or ten months in gross. *Cadell* v. *Palmer* decided that

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[6] Robertson v. Simmons, 322 S.W. 2d 476, 483 (Ky. 1959).

[7] See cases cited note 11 *infra*.

[8] Page v. Frazer's Ex'rs, 77 Ky. (14 Bush) 205 (1878); U.S.F. & G. Co. v. Douglas' Trustee, 134 Ky. 374, 120 S.W. 328 (1909); Cammack v. Allen, 199 Ky. 268, 250 S.W. 963 (1923); Curtis v. Citizens Bank, 318 S.W. 2d 33 (Ky. 1958); Robertson v. Simmons, *supra* note 6.

[9] Ky. Acts 1807, c. 7. This was a compromise bill offered by Henry Clay. The original bill prohibited reading English cases of any date. It is not without irony that the Great Compromiser became one of the first victims of his own patriotic version of book burning. Less than three months after the act was approved Clav attempted to read in court from an 1802 opinion of Lord Ellenborough summarizing cases before 1776, which were not available in their original reports. The chief justice stopped him and ruled: "The book must not be used at all in court." Hickman v. Boffman, 3 Ky. (Hardin) 356, 373 (1808).

[10] 1 Cl. & Fin. 372 (1833).

only actual periods of gestation could be allowed. The Revisers, in fixing the period at "lives in being at the creation of the estate, and twenty-one years and ten months thereafter," may not have considered *Cadell* v. *Palmer* as authority.[11] Indeed, if they adhered to the statute, they may not have even read it. Whether "and ten months" meant a period of actual gestation or a further period in gross has never been decided by the Court of Appeals and, since the statute has been repealed, probably never will be.

2. WHAT THE COMMON LAW RULE AGAINST PERPETUITIES IS

The classic statement of the Rule, formulated by John Chipman Gray, reads:

> 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.[12]

Gray's recipe for a good interest was nothing more than a statement of the ingredients of decision as they existed at his time. It was a marvelously (over)simplified synthesis of numerous holdings, mainly by English judges. It is important to keep this in mind, for just as Gray turned to existing cases for the law of his time, so we must turn to Kentucky cases to find what is the common law Rule against Perpetuities applied in this state.

The Kentucky Court of Appeals subscribes to Gray's words as a proper statement of the Rule, but when the cases are examined it will be found that the court uses the word "vest" in a different way. "Vest" is the key word, and how it is used by the court is so important to understanding the Rule in Kentucky its meaning will have to be treated in detail. Before turning to the meaning of vest, however, two other aspects of the Rule require brief discussion: "lives in being" and "remote possibilities."

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[11] The Kentucky cases fixing the period were ambiguous. Between 1807 and 1852, when the 1807 act was repealed, the Court referred to the period as follows: "life, or lives in being, and twenty-one years and a few months," Moore's Trustees v. Howe's Heirs, 20 Ky. (4 T. B. Mon.) 199, 201 (1826); "a life in being and twenty-one years and nine months," Brashear v. Macey, 26 Ky. (3 J.J.M.) 89, 91 (1829); "a life in being and 21 years," Luke v. Marshall, 28 Ky. (5 J.J.M.) 353, 355 (1831); "a life or lives in being and twenty one years, and the period of gestation," Birney v. Richardson, 35 Ky. (5 Dana) 424, 427 (1837); "a life in being and twenty one years thereafter," Atty. Gen. v. Wallace's Devisees, 46 Ky. (7 B. Mon.) 611, 616 (1847).

[12] Gray § 201. This definition is enacted by Ky. Acts 1960, c. 167, § 1 (KRS 381.215).

Lives in being. Who is a "life in being"? This is usually the first question students ask when they meet the Rule. The answer is that it can be any person alive (or in the womb) at the creation of the interest, so long as his death or some event which will necessarily happen or fail to happen within his life will *insure* vesting or failure of the interest within 21 years of his death. The lives in being "may be any lives which play a part in the ultimate disposition of the property."[13] They need not be given any beneficial interest in the property nor be referred to in the instrument, but the causal connection which insures vesting must be express or implied. Thus:

> *Case 3 (Causal connection express).* T devises property in trust "to pay income to my issue per stirpes from time to time living until 21 years after the death of X, Y, and Z, at which time corpus is to be distributed among my issue per stirpes then living." X, Y, and Z are the measuring lives. The causal connection is express; their deaths will cause the 21 year period to begin running, at the end of which the gift of corpus vests. Whether they are T's issue and have a beneficial interest in the income or are persons unrelated to T is irrelevant. The gift is good. If X, Y, and Z had not been referred to by name, but were the only members of a class of measuring lives in being at T's death and such class were closed at T's death, (*e.g.*, "after the death of the last survivor of my issue living at my death"), X, Y, and Z would likewise serve as measuring lives.[14] The members of a class may serve as measuring lives if the class is closed at the beginning of the perpetuity period.
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> *Case 4 (Causal connection implied).* T devises property "to my wife for life, remainder to my grandchildren whenever born." T's children, though not mentioned in the instrument nor given any beneficial interest, are the measuring lives by implication. All T's children are in being at his death, and the remainder to his grandchildren is bound to vest on the death of his last surviving child. If the transfer were by deed, however, the grantor could have a child after the date of the deed, who could produce a grandchild long after all persons in being are dead. This grandchild would share in the gift and the remainder is void.[15] When

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[13] Bach v. Pace, 305 S.W. 2d 528, 529 (Ky. 1957). See 5 Powell ¶ 766.

[14] Gray v. Gray, 300 Ky. 265, 188 S.W. 2d 440 (1945); Clay v. Anderson, 203 Ky. 384, 262 S.W. 604 (1924); Russell v. Meyers, 202 Ky. 593, 260 S.W. 377 (1924); Gillespie v. Winston's Trustees, 170 Ky. 667, 186 S.W. 517 (1916).

[15] Bach v. Pace, *supra* note 13.

> the class of children is not closed, the children cannot be used as measuring lives because the death of those children in being will not necessarily cause the remainder to vest.

Where there are no lives causally connected with the vesting or failure of the interest, then no lives in being can be used. The interest is void if it will not necessarily vest or fail within 21 years.

In *Farmers National Bank* v. *McKenney*,[16] the draftsman called upon the court to supply the measuring lives. He attempted to set up a testamentary trust to pay income to testator's three half-sisters for life, and on the death of each to pay her share of the income to "her heirs, if any, as long as the law allows." What measuring lives is the law to allow, is the court to supply? After remarking that for "such a formidable task we are given little help by counsel for the trustee (who, incidentally, appears to have drawn this will),"[17] the Court of Appeals held the entire trust void for uncertainty. Although in this case the court declined to fill in what period "the law allows," it implied that if there had been a gift of the corpus or some clear evidence of testator's intention it would have done so. In other jurisdictions courts have held that this wording means for the lives of the primary beneficiaries (the three half-sisters above) and 21 years thereafter,[18] or, where there are no primary beneficiaries, for 21 years.[19]

The remote possibilities test. The word "must" before "vest" in the Rule incorporates the "remote possibilities" test. Under this test any possibility at the date of creation of the interest that the interest might vest beyond the period invalidates the interest. It is this test, which has brought so many draftsmen grief, that is done away with prospectively by the 1960 act. The following cases illustrate the operation of this test in its extreme, but orthodox, form. In all these cases the gifts are essentially innocent and the violation one of a technical premise rather than of policy.

> *Case 5 (The fertile octogenarian).* T devises property "to my sister A for life, remainder to A's children for their

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[16] 264 S.W. 2d 881 (Ky. 1954).
[17] *Id.* at 881.
[18] Fitchie v. Brown, 211 U.S. 321 (1908); *Re* Vaux, [1939] Ch. 465; 6 Am. L. Prop. § 24.13; Simes & Smith § 1227.
[19] *Re* Hooper, [1932] 1 Ch. 38.

lives, remainder in fee to A's grandchildren." A is 80 years old at T's death. Because the law conclusively presumes A to be capable of bearing further children, the remainder in fee might not vest until the death of after-born children, which is too remote. The remainder in fee is void.[20]

Case 6 (The unborn widow). T devises property "to my son for life, then to my son's widow for life, then to my son's issue per stirpes living at the death of his widow." The gift to the son's issue is void. It will not vest until the death of the son's widow, and she may not be a person now in being. If the son is presently married, his wife may die or be divorced, and he may then take as a second wife a woman not now alive who might survive him and be his widow. The chance of this happening may be very slight indeed, but the chance invalidates the gift.[21]

Case 7 (Administrative contingencies). T devises property to A "upon probate of my will," "when my estate is settled," "after payment of debts," or upon some similar event related to administration. Courts have often struck down these gifts on the theory the event was a condition precedent which might not happen within lives in being and 21 years.[22] No case has been found in Kentucky where such an unflinching application of the Rule has been made.[23]

Case 8 (Other remote contingencies). T devises property to his issue per stirpes living "when World War II ends," "when the gravel pits are exhausted," or upon some similar event very likely, but not certain, to happen within 21 years. Such devises have been held void.[24] A similar type of transfer is a lease of property to commence "when the building is finished." This is common commercial practice, but the lease was held void in a recent case.[25]

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[20] See twelve Kentucky cases cited in Appendix, Table 5, fact patterns 1 and 2, p. 110 *infra*. For the reverse case, where a gift would be void only if it were assumed a child of 5 could have a child, see *Re* Gaites' Will Trusts, [1949] 1 All E. R. 459.

[21] Chenowith v. Bullitt, 224 Ky. 698, 6 S.W. 2d 1061 (1928). The descriptive names—"fertile octogenarian" and "unborn widow"—were concocted by Professor Leach.

[22] See 6 Am. L. Prop. § 24.23.

[23] Compare Ford v. Yost, 299 Ky. 682, 186 S.W. 2d 896 (1944), where the court invalidated a devise in trust for 30 years "from date of probate" upon another theory. KRS 381.220 was amended in 1956 to cure some administrative contingencies. Ky. Acts 1956, c. 175. The amendment, along with the rest of the section, was repealed by the 1960 Act.

[24] Brownell v. Edmunds, 209 F. 2d 349 (4th Cir. 1953); *In Re* Wood, [1894] 3 Ch. 381. See 6 Am. L. Prop. § 24.21; Simes & Smith § 1228.

[25] Haggerty v. City of Oakland, 161 Cal. App. 2d 407, 326 P. 2d 957, 66 A.L.R. 2d 718 (1958), criticized by Professor Leach at 73 Harv. L. Rev. 1318 (1960). Can the principle of this case be extended to invalidate forward commitment agreements and other procedures currently used in mortgage financing?

3. THE MEANING OF VEST: MYTH AND REALITY

> *The tendency to assume that a word which appears in two or more rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against.*—Walter Wheeler Cook.

Anyone with a fixed and unremitting addiction to an all-embracing definition of "vest" will find Kentucky perpetuities cases unusually refractory. They will stubbornly resist analysis. The truth is vest has many different meanings, depending upon the context in which the word is used. And nowhere is this more obvious than in the Kentucky law of future interests.

The failure to distinguish between the meaning of vest for perpetuities purposes and its meanings in other contexts can only lead to confusion. This is a human failure and one with long precedent in the field of future interests. The treatises are full of definitions of vest indiscriminately applicable in all situations.[26] These definitions, however, have little place in the context of reality. They are false coin. Their purveyors have assumed that if an interest is vested for one purpose it is vested for all purposes. But this is neither logically necessary nor empirically verifiable by the cases.[27] It involves a type of fallacious reasoning John Dewey called "the fallacy of unlimited universalization." It does not take into account that the context limits the meaning of a word. It ignores the fact that the purposes and policies of a rule affect the meaning of the words used in stating the rule.

The problem we are concerned with here is violation of the Rule against Perpetuities, and meanings of "vest" derived from its use in other contexts (problems of survivorship, acceleration, destructibility, etc.) involving different policies have no necessary

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[26] See *e.g.*, Gray § 108: "Whether a remainder is vested or contingent depends upon the language employed. If the conditional element is incorporated into the description of, or into the gift to, the remainderman, then the remainder is contingent; but if, after words giving a vested interest, a clause is added divesting it, the remainder is vested."

[27] See Lynn and Van Doren, "Applying the Rule Against Perpetuities to Remainders and Executory Interests: Orthodox Doctrine and Modern Cases," 27 U. Chi. L. Rev. 436 (1960); Schuyler, "Should the Rule Against Perpetuities Discard Its Vest?," 56 Mich. L. Rev. 887, 888-926 (1958); Jones, "Vested and Contingent Remainders, a Suggestion Concerning Legal Method," 8 Md. L. Rev. 1 (1943). See also Hancock, "Fallacy of the Transplanted Category," 37 Can. B. Rev. 535 (1959).

application. This is to a fair degree demonstrable by a brief comparison of perpetuities cases with cases raising the questions of survivorship and acceleration. In *Clay v. Security Trust Co.*[28] testator devised property in trust to pay the income to Laura for life, and at her death, "I direct my trustee to hold the said estate until my nephew John Ireland Macey . . . arrives at the age of thirty-five years, and direct that the income shall be paid to him in monthly installments until the said fund is turned over to him." John predeceased Laura before he reached the age of 35. At Laura's death, John's executor claimed the fund. "The sole question," said the court, "is whether the remainder interest given to John I. Macey in the third clause of the will was a vested or contingent remainder." This is precisely the same vague way perpetuities issues are phrased; more accurately, the question was whether there was a requirement that John survive to age 35. The court held the remainder was vested with possession postponed; that is, there was no requirement of survival and the fund passed to John's executor on Laura's death. Two standard rules of construction were invoked: (a) the absence of a gift over in the event the designated person fails to survive to the time of distribution vests the gift; and (b) a gift of income to a person vests a gift of principal to the same person. In numerous cases involving similar language, where either one or both of these constructional guides could be invoked, *but where the issue was not requirement of survival but violation of the Rule against Perpetuities,* the court has classified the interest as contingent, not vested.[29]

Classification according to context is strikingly apparent in a comparison of perpetuities cases with cases involving acceleration of a remainder upon renunciation of the preceding life estate. In acceleration cases the distinction between vested and contingent remainders is, according to Professor Powell, of "decisive importance,"[30] just as it is in perpetuities cases. Contingent remainders do not accelerate, whereas vested remainders do.[31]

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[28] 252 S.W. 2d 906 (Ky. 1952).

[29] Curtis v. Citizens Bank, 318 S.W. 2d 33 (Ky. 1958); Ford v. Yost, 299 Ky. 682, 186 S.W. 2d 896 (1945); Hussey v. Sargent, 116 Ky. 53, 75 S.W. 211 (1903); Coleman v. Coleman, 23 Ky. L.R. 1476, 65 S.W. 832 (1901); Stevens v. Stevens, 21 Ky. L.R. 1315, 54 S.W. 835 (1900).

[30] 2 Powell ¶ 310 at p. 632.

[31] *Ibid.*; 2 Restatement of Property § 233. *But cf.* Simes & Smith § 796.

There are many acceleration cases in Kentucky. Most of them involve interpretation of dispositive language similar to this: "to W for life, and at her death to my children, the issue of any then deceased child to take his parent's share." Invariably the court has held the remainder to children is vested and accelerates.[32] The supplanting limitation is not regarded as requiring survival to the death of the widow. On the other hand, supplanting limitations have not been so benevolently construed in perpetuities cases. There they have been held to make the preceding gifts contingent.[33]

Even Gray and his followers recognized that a class gift could be vested for many purposes when it is not vested under the Rule against Perpetuities. Relying heavily upon eighteenth and nineteenth century English cases, Gray simply restated the decision of English judges to treat class gifts which can increase in membership as non-vested under the Rule, even though for most other purposes a class gift subject to open was treated as vested as soon as one member qualified. The decisions of Kentucky judges treating all remainders subject to total as well as partial divestment as non-vested under the Rule is but a natural development of this limited English attempt to find definitions appropriate to the perpetuities context. It reflects, as it should, a strong sense of the policy against extended dead hand control and of what practically lessens alienability. The Court of Appeals has, with great good sense, steered remarkably clear of the fallacy of unlimited universalization based upon feudal-oriented definitions.[34]

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[32] Farmers Bank v. Morgan, 308 Ky. 748, 215 S.W. 2d 842 (1948); Baldwin's Coex'rs v. Curry, 272 Ky. 827, 115 S.W. 2d 333 (1938); Ruh's Ex'rs v. Ruh, 270 Ky. 792, 110 S.W. 2d 1097 (1937). See Note, 38 Ky. L.J. 291 (1950).

[33] Curtis v. Citizens Bank, 318 S.W. 2d 33 (Ky. 1958); Fidelity & Columbia Trust Co. v. Tiffany, 202 Ky. 618, 260 S.W. 357 (1924); *cf.* Curd's Trustee v. Curd, 163 Ky. 472, 173 S.W. 1148 (1915); Stevens v. Stevens, 21 Ky. L.R. 1315, 54 S.W. 835 (1900). *Compare* Breckinridge v. Breckinridge's Ex'rs, 264 Ky. 82, 94 S.W. 2d 283 (1936) (acceleration case) *with* Coleman v. Coleman, 23 Ky. L.R. 1476, 65 S.W. 832 (1901) (perpetuities case)—gift to remaindermen "if then living," with supplanting limitation, accelerated as vested remainder in former case, held void as contingent remainder in latter.

[34] Because "vested" as used in most other contexts is an inaccurate word to describe what interests are valid under the Rule, and because the word "vested" conceals the important social policy underlying the Rule, Professor Powell believes the Rule should not be formulated as a rule against remote vesting at all, but as a rule against specific fetterings of property found socially inconvenient. His position is cogently stated at 5 Powell ¶ 767 and is adopted by 4 Restatement of Property §§ 370-382.

From the preceding discussion it should be clear that the word "vest" is not merely a word to be defined by a text. It is the working tool of the court in applying the Rule against Perpetuities. To discover its meaning requires us to see how the court works with it.

Four meanings of vest will be examined below: "vest in possession," "indefeasibly vest in interest," "vest in interest with possession postponed," and "vest in interest subject to divestment." The meaning, "vest in interest subject to open," is discussed subsequently in connection with class gifts. The question is, which of these meanings is used in applying the Rule against Perpetuities in Kentucky to future interests in transferees?

A. Vest in possession

An interest vests in possession when it becomes possessory. Applied to future interests this meaning involves no substantial difficulty. A remainder or executory interest satisfies the Rule if it necessarily will take effect in possession and enjoyment within the period. Both standard perpetuities doctrine and the Kentucky cases so hold.

> *Case 9.* T devises property in trust "to pay the income to my issue per stirpes from time to time living until 21 years after the death of my last surviving child or grandchild who was alive at my death, then to pay principal to my issue then living per stirpes." The gifts of income and principal are valid.[35] They are bound to become possessory within 21 years of the death of a person alive at T's death, though it will not be known who will enjoy the gifts until they become possessory. The gift of principal does not vest prior to possession.

Is this the only meaning of vest that satisfies the Rule? That is, must an interest become possessory within the period, or is the Rule satisfied if it merely "vests in interest" within the period? According to most writers a *remainder* is valid if it vests in interest, but an *executory interest* must vest in possession. The reason given is that an executory interest did not have the "ca-

[35] First Nat'l Bank v. Purcell, 244 S.W. 2d 458 (Ky. 1951); Gray v. Gray, 300 Ky. 265, 188 S.W. 2d 440 (1945); Emler v. Emler's Trustee, 269 Ky. 27, 106 S.W. 2d 79 (1937); Clay v. Anderson, 203 Ky. 384, 262 S.W. 604 (1924); Russell v. Meyers, 202 Ky. 593, 260 S.W. 377 (1924); Gillespie v. Winston's Trustee, 170 Ky. 667, 186 S.W. 517 (1916).

pacity" to vest in interest under feudal law. The Court of Appeals has ignored this distinction and has not attempted to classify future interests in transferees as remainders or executory interests. Along with many courts, it has treated them all as remainders. Because the court has ignored the distinction, and because application of this feudal dichotomy to modern dispositions is impossible to justify,[36] it would not be profitable to set forth an analysis of Kentucky cases in these terms.

In the early cases it was apparently assumed that a future interest in a transferee must become possessory within the period of the Rule or fail. In *Moore's Trustees v. Howe's Heirs*,[37] Chief Justice Boyle, in a frequently cited opinion, referred to the Rule and stated, "A man cannot, therefore, devise over an estate to take effect after that period, and if he does so the limitation over will be void . . ." The requirement that an interest become possessory was said to apply to remainders as well as to executory interests.[38] This theory was applied in an extraordinary way two years before the Civil War. The court had before it a deed granting freedom to the children of Martha (a slave) when each reached the age of 25. Some years after the deed was executed Martha gave birth to a son who, upon reaching 25, brought suit for his freedom. James Harlan, the father of Mr. Justice Harlan I (he of "The Constitution is color blind"), argued for the slave owner that the grant of freedom violated the Rule against Perpetuities. The court agreed, holding the limitation might not have "taken effect" during the period.[39] The son remained a slave. If a grant of freedom can be analogized to a per capita gift of money, the decision may be technically correct; but the complete answer to Harlan's argument is the Rule should not

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[36] See Dukeminier, "Contingent Remainders and Executory Interests: A Requiem for the Distinction," 43 Minn. L. Rev. 13 (1958).

[37] 20 Ky. (4 T. B. Mon.) 199, 201 (1827). Accord: Coleman v. Coleman, 23 Ky. L.R. 1476, 1477, 65 S.W. 832, 833 (1901); Armstrong v. Armstrong, 53 Ky. (14 B. Mon.) 269, 277-280 (1853).

[38] U.S. Fidelity and Guaranty Co. v. Douglas' Trustee, 134 Ky. 374, 385, 120 S.W. 328, 331 (1909): "The rule in question is that an estate in remainder cannot be created to take effect beyond the end of a life or lives in being and 21 years and 10 months thereafter."

[39] Ludwig v. Combs, 58 Ky. (1 Met.) 128 (1858). *But see* Davis v. Wood, 56 Ky. (17 B. Mon.) 86 (1856) (James Harlan arguing for the slaves), upholding grant of freedom to "Beck and all her offspring" when Beck reached 40, or when she would have reached 40 had she lived. Beck died under 40, so only the validity of the alternative contingency was at issue.

apply to a grant of freedom at all. It is monstrous irony that a rule invented to keep property free kept it slave.

More recent cases do not make it wholly clear that a remainder is void if it might vest in possession beyond the period. But, as subsequent discussion reveals, it is perilous for any draftsman to rely on any other assumption.

B. Indefeasibly vest in interest

A remainder is indefeasibly vested in interest if all the takers are *presently ascertained* and are *certain* to acquire *permanent* possession of the property at some future time. All three of the italicized requirements must be met.

Is a remainder which will vest in interest indefeasibly within the period, though perhaps in possession beyond, valid? The answer is uncertain. The only case holding such a remainder valid is *Ligget v. Fidelity & Columbia Trust Co.*[40] There John Taggart by will created a trust for his daughter Anna for life, remainder as she by will appointed, and in default of appointment to her issue. Anna appointed to her only son Robert for life, then to Robert's children for their lives, with remainder in fee to Robert's grandchildren. Only Robert was in being at testator's death, and the court held the appointment to Robert's grandchildren void. Under Taggart's will, the corpus passed in default of appointment to Robert, whose remainder vested indefeasibly at Anna's death though not in possession until the death of Robert's children. The court held this remainder valid, although it almost certainly would not vest in possession within Robert's own life (the life in being). It should be noted, however, that Robert, as reversioner, would be entitled to the corpus at the death of his children if his remainder were held void. Therefore the classification of Robert's interest as an indefeasibly vested remainder, and validating it as such, was unnecessary to the decision. He was entitled to the corpus in any event.

In addition to *Ligget*, there are strong dicta in two cases that an indefeasibly vested interest (but not an interest vested subject to defeasance) will satisfy the Rule.[41] However, one cannot be

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[40] 274 Ky. 387, 118 S.W. 2d 720 (1938).

[41] Curtis v. Citizens Bank, 318 S.W. 2d 33 (Ky. 1958); Fidelity & Columbia Trust Co. v. Tiffany, 202 Ky. 618, 260 S.W. 357 (1924).

certain of this in view of several decisions striking down what would commonly be classified as indefeasibly vested interests. Two of these cases require mention here. The others will be dealt with below under the discussion of "Vest with possession postponed" and in the next section entitled, "Is there a rule limiting the duration of trusts?"

The first of these is the well-known case of *Letcher's Trustee v. Letcher*.[42] The will of Dr. Letcher devised his extensive Ohio River farms to his son Gibney for life, then to a bank in trust to pay one-half the income to the children of his nephew Hugh and one-half to the First Presbyterian Church. Upon the death of Hugh's children the farms were to go to the Church in trust forever, but if the Church ceased to maintain the church house as a memorial to Dr. Letcher's wife, the farms were to go to the Presbyterian Synod in fee. The remainder in fee to the Church was, under orthodox classification, a remainder vested subject to divestment in favor of another charity. But since a gift over from one charity to another upon a remote condition is not subject to the perpetuity rule, the gift over could be ignored and the remainder to the Church treated as if it were indefeasibly vested. The court, however, holding the gifts to Church and Synod both void, did not consider it important to determine whether the gift to the Church was to be treated as indefeasibly vested. It implied the gift would be void whether classified as indefeasibly vested in interest or vested subject to divestment. The gift to the Church was void, the court said, because of the "remoteness of time . . . before it passes to the Session of the Church in trust," and the gift to the Synod void because it "postpones the vesting of the title for a remote and indefinite period."[43] This language appears to mean that the Rule requires vesting in possession.

The second case is *Thornton v. Kirtley*.[44] The facts were these. Testatrix created a fifty year trust of bank stock and other assets for the benefit of her issue and to maintain cemetery lots. At the end of fifty years five shares of bank stock were to be held in

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[42] 302 Ky. 448, 194 S.W. 2d 984 (1946).

[43] *Id.* at 456, 458, 194 S.W. 2d at 989 (1946). The gift to the Synod could have been invalidated as a remote gift over on a non-charitable contingency.

[44] 249 S.W. 2d 803 (Ky. 1952).

further trust to maintain cemetery lots; the remaining amount of principal was to be distributed to her issue then living. The five share trust to commence after fifty years was, classified as either remainder or executory interest, an indefeasibly vested interest.[45] Nonetheless, it was held void, as was the gift of the remaining principal. The reason: "A future charitable trust must vest or become established within the time allowed by the perpetuity rule" [citing *Letcher*].[46]

It is possible to distinguish *Letcher* and *Thornton* from the *Ligget* case on the ground that vesting in possession is required only of gifts to charities, but this would be a peculiar reversal of the law's usual favoritism. Moreover, other cases dealing with non-charities reflect this same notion that vesting in possession is required. It is also possible that in *Letcher* the court regarded tying up 500 acres of rich farmland in a church potentially forever as against public policy; and in *Thornton* saw practical difficulties in creating an interest in five shares of bank stock to spring up in fifty years; and that the strict interpretation of vest may be based on the peculiar facts of the cases. Analyzed in traditional terms, however, these two cases cannot be squared with *Ligget* insofar as it held an indefeasibly vested remainder satisfied the Rule. Since these two cases are of more recent vintage, and since classification of Robert's interest as a remainder was unnecessary to the decision in *Ligget,* there is a strong argument that they, rather than *Ligget,* state the law.

C. Vest in interest with possession postponed

The concept of "vested in interest with possession and enjoyment postponed" originated in cases where the issue was whether the donee had to survive to a specific age or to a specified date to be entitled to the gift. If the donee did not have to survive, his interest was said to be vested in interest with possession postponed. Taking this concept out of its original context and applying it in perpetuities cases, without evaluating its relation

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[45] 6 Am. L. Prop. § 24.20; 4 Restatement of Property § 370, com. h, ill. 2; Simes & Smith § 1236.

[46] 249 S.W. 2d at 806. *But cf.* Street v. Cave Hill Investment Co., 191 Ky. 422, 230 S.W. 536 (1921), upholding gift to churches after 99 years, if then in existence; Bd. of Nat'l Missions v. Harrel's Trustee, 286 S.W. 2d 905 (Ky. 1956), upholding 40 year trust for Presbyterian Church, then over to Board of Missions.

to perpetuities policy, cannot be justified. As a verbal device to mitigate the harsh applications of the Rule it operates capriciously and uncertainly. And control of enjoyment by the dead hand beyond the perpetuity period seems clearly at war with the purposes of the Rule.

Although the Kentucky court has had several opportunities to save gifts by classifying them as vested with possession postponed, it has consistently refused to do so. In *Hussey v. Sargent*[47] testator devised a sum "to be equally divided and paid to and distributed among" the children of Frederick "when" his daughter Emily reached 35 or when she would have reached 35 had she lived. Emily was age two at testator's death. There are several constructional rules, applicable where the issue is requirement of survival to distribution, that point to a construction of vested with possession postponed. Yet the court not only rejected that construction; it held the gift violated the Rule *"because* it postpones the enjoyment of the income for a period of 33 years."[48]

In *Coleman v. Coleman*[49] there was a devise in trust to pay income to testator's children, and at the end of 25 years to distribute the corpus to the children then living, with the "heirs" of any deceased child taking his share. The gift of corpus to the children must become possessory within their own lives, if at all, and the substitutional limitations to their heirs could easily have been construed as vesting at the death of each child. However, the court held the entire trust void, saying that nothing could "vest . . . until 25 years after his death, as it was provided that his estate should not be divided" until then.[50]

The most recent case is *Curtis v. Citizens Bank.*[51] There testator set up a trust to pay part of the income to his four minor children, accumulate the rest and distribute to each his share of accumulated income and corpus upon his reaching age 45. "Should any of my said children die leaving lawful issue of his or her body," the testator further provided, "then I direct that said issue of said deceased child shall take equally among them-

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[47] 116 Ky. 53, 75 S.W. 211 (1903).

[48] *Id.* at 70, 75 S.W. at 215. (Emphasis added.) Accord: *Re* Howard's Estate, 54 D.&C. 312 (Pa. 1943).

[49] 23 Ky. L.R. 1476, 65 S.W. 832 (1901).

[50] *Id.* at 1477, 65 S.W. at 833.

[51] 318 S.W. 2d 33 (Ky. 1958). The trust provisions for testator's children are abridged in the text.

selves the deceased parent's share, per stirpes, at such time as such deceased child of mine would have received any distribution under this will had he or she lived." In line with its prior cases rejecting rules of construction that would have vested the gift, the court took the position that nothing vested until time for distribution arrived. It held the gift over to issue void. Professor Sparks, noting this case in his annual survey article, commented: "a testamentary plan was apparently defeated by the court's misunderstanding of the word 'vested'. . . . The court did not give any satisfactory reason why the gifts to grandchildren did not vest upon the deaths of their respective parents with only their payment postponed."[52] Professor Sparks' analysis is of course correct if a remainder vested in interest satisfies the Rule and if there is a constructional preference for vested interests. However, the court's rejection of this preference, which smuggles in policy unexamined,[52a] seems not wholly without merit.

If these cases do not entirely eliminate from perpetuities problems the concept of vested in interest with possession postponed, the least that can be said is that the court has reversed the preference for a vested construction when payment is postponed to an age or date and violation of the Rule against Perpetuities is claimed. Without attempting to apply standard rules of construction, the court has construed gifts to "children", "heirs" and "issue" of living persons to be paid at a specific age or date as not vesting under the Rule until time of payment.

D. Vest in interest subject to total divestment

Distinguishing a remainder vested subject to divestment (or vested subject to condition subsequent) from a contingent remainder (or remainder subject to condition precedent) is one of the knottiest and most unrewarding of tasks. The former concept was developed by courts to avoid two legal consequences of contingent remainders: destructibility and inalienability. In determining what was a condition precedent and what a condition subsequent, courts drew fine and vexatious verbal distinctions in

[52] Sparks, "Future Interests," 1959 Ann. Survey of Am. Law, 35 N.Y.U.L. Rev. 401, 410 (1960).

[52a] See Schuyler, "Drafting, Tax and Other Consequences of the Rule of Early Vesting," 46 Ill. L. Rev. 407 (1951), criticizing the preference for vested construction.

language; and without regard to their purpose, these distinctions were often carried over to other problems. Since contingent remainders are indestructible and alienable today, the survival of this distinction between conditions precedent and subsequent needlessly complicates the law.

A person who has a remainder vested subject to divestment does not have any present certainty of ever acquiring possession or of retaining possession once acquired. In the sense that the remainder may never become possessory, it is contingent. Professor Freund pointed this out half a century ago:

> When a testator creates life estates with remainders, he does one of two things: he either gives property to a designated person or persons, subject to a life provision for some other person, or he makes a life provision and leaves it to be determined by circumstances existing at the end of the life where the property is to go. These two alternatives represent the real difference between vested and contingent remainders; "vested subject to be divested," when applied to an estate in expectancy, is in reality contingent; and the treating of such a remainder as vested subject to be divested for the purpose of avoiding certain restrictions or liabilities attached to contingent remainders, is a mere conventional mode of construction that should not mislead or confuse us.[53]

For perpetuities purposes, at least, the Court of Appeals is in apparent agreement with Professor Freund. In accordance with its view that the Rule requires certainty of possession to be determined within the period, the court has rejected the concept of a remainder vested subject to divestment.[54] What may be called a remainder vested subject to divestment for some purposes has never been held to satisfy the perpetuity rule in Kentucky.

Summary of the meaning of vest. A remainder in fee is valid if it will vest in possession, i.e., become possessory, free of any trust within the perpetuity period. A remainder for life is valid if it will vest in possession within the period, either in trust or as a legal

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[53] Freund, "Three Suggestions Concerning Future Interests," 33 Harv. L. Rev. 526, 527 (1920).

[54] Curtis v. Citizens Bank, 318 S.W. 2d 33 (Ky. 1958); Letcher's Trustee v. Letcher, 302 Ky. 448, 194 S.W. 2d 984 (1946); Fidelity & Columbia Trust Co. v. Tiffany, 202 Ky. 618, 260 S.W. 357 (1924); Stevens v. Stevens, 21 Ky. L.R. 1315, 54 S.W. 835 (1900); see also cases cited in notes 47 and 49 *supra.*

estate.[55] A remainder indefeasibly vested in interest, i.e., a remainder in fee in ascertained persons *certain* to become possessory at some future date, may be vested for purposes of the Rule. The cases on this point, however, are conflicting and the matter cannot be regarded as settled. It is believed that a remainder vested subject to divestment, *i.e.*, a remainder given to ascertained persons but *not certain* to become possessory, does not satisfy the Rule; but one cannot be wholly sure of this because the court usually has had a choice of constructions in applying this classification and it may have been merely construing against a vested interest. The court has also rejected rules of construction which lead to a "vested with possession postponed" classification, and has construed as contingent for perpetuity purposes gifts to become possessory at a specified future date or upon attaining a specified age.

In short, then, in determining the validity of a remainder under the Rule, vest means "become possessory". In addition it may mean "fixed in ascertained persons who have the certainty of acquiring possession,"[56] but this is not settled by any clear-cut decision. Any other meaning one accepts at his peril.

The court's orientation has not been toward the subtleties and refinements of the feudal concept of vesting, nor toward the academic horsemanship inherent in it. On the contrary the court has shown a sound grasp of policy in defining vest. In spite of contrary dicta, the sheer weight of results indicates the essential idea basing the decisions is that a rational policy against perpetuities requires a rule against remote possession and enjoyment.[57] This is the indispensable, though largely unacknowledged, premise of the perpetuities cases rejecting the vested with possession postponed construction. It was, appropriately enough, John Chipman Gray himself who first suggested this was desirable policy. "It seems that in the ideal system of law," wrote Gray, "no interests which did not vest in possession within the allotted period would be allowed. They are within the practical

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[55] The requirement that a fee, but not a life estate, must vest "free of any trust" is discussed in § 4, pp. 27-34 *infra*.

[56] See strong dictum in Curtis v. Citizens Bank, 318 S.W. 2d 33, 35 (Ky. 1958) (most recent case).

[57] Two recent writers suggest other courts are also "groping toward a possessory test of validity." Lynn & Van Doren, *supra* note 27, at 461.

reason of a Rule against Remoteness."[58] More recently Professors Simes and Schuyler have come to the same conclusion.[59] If, as it seems, this is the policy that moves the court, the law would be greatly clarified by a clear-cut decision to that effect. A decision that remainders must vest in possession within the period would settle the vexing question of whether an indefeasibly vested remainder satisfies the Rule and would, for the most part, take care of trusts that may last too long.

4. Is There a Rule Limiting the Duration of Trusts?

One repeatedly finds in Kentucky cases references to "the Kentucky law of perpetuities which limits the duration of a trust."[60] Under the common law a trust does not have to conform to the perpetuity period and may extend beyond it. The Rule against Perpetuities is concerned only with the time interests vest, not with trust duration. The question arises, then, whether the Kentucky court is laying down a rule requiring trusts to conform to the perpetuity period or whether the court is merely saying the perpetuity rule *indirectly* limits the duration of a trust.

The cases which raise this question can be telescoped into two fact situations:

> *Case 10.* T devises property in trust for 25 years "to pay the income to my children, and at the end of 25 years to distribute the corpus to my children then living, with the children of any deceased child taking his share." The gift of corpus will indefeasibly vest in interest at the death of all T's children (lives in being), but it may not become possessory until beyond the period. The gift of corpus has been held void under the Rule because it might not be distributed within the period.[61]

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[58] Gray § 972.

[59] Simes, Public Policy and The Dead Hand 80-82 (1955) (with reservations); Schuyler, "Should the Rule Against Perpetuities Discard Its Vest?", 56 Mich. L. Rev. 683, 887 (1958).

[60] Board of Nat'l Missions v. Harrel's Trustee, 286 S.W. 2d 905, 907 (Ky. 1956) (Stanley, J.). See Tyler v. Fidelity and Columbia Trust Co., 158 Ky. 280, 164 S.W. 939 (1914); Sandford's Adm'r v. Sandford, 230 Ky. 429, 20 S.W. 2d 83 (1929); Russell v. Meyers, 202 Ky. 593, 260 S.W. 377 (1924); Clay v. Anderson, 203 Ky. 384, 262 S.W. 604 (1924); Farmers Nat'l Bank v. McKenney, 264 S.W. 2d 881 (Ky. 1954). See also cases cited *infra* notes 61 and 62.

[61] Stevens v. Stevens, 21 Ky. L.R. 1315, 54 S.W. 835 (1900); Coleman v. Coleman, 23 Ky. L.R. 1476, 1477, 65 S.W. 832, 833 (1901) ("The testator, John Coleman, evidently intended that his children should not be vested with a fee simple title in his estate until 25 years after his death, as it was provided

(footnote continued on next page)

> *Case 11.* T devises property in trust "to pay income to A for life, then to A's children for their lives, then to the First Presbyterian Church forever". The church has a remainder indefeasibly vested in interest, but it will not become possessory until A's children (including any after-born ones) are dead. The gift to the church has been held void because it suspends the power of alienation and does not vest within the period of the Rule.[62]

The *Restatement of Property* takes the position that when "these cases are examined carefully it appears that the Kentucky law on trust duration is in no way different from the common law."[63] Exactly how these cases are "examined carefully" to make them fit the common law is not revealed and remains *in pectore doctorum.* It is plain the cases do one of two things. They either directly limit the duration of trusts or they require remainders to vest in possession within the period and thus indirectly limit the duration of trusts. If the *Restatement* denies the first interpretation (which it does, and correctly so in the author's opinion), the *Restatement* must affirm the second interpretation (which it does not, and in this the author believes it is wrong). Fitting the cases into both the *Restatement's* position on trust duration and its position on the meaning of vest is impossible.

The chief reporter for the *Restatement,* Professor Richard R. Powell, takes a somewhat different position in his recent treatise. He explains away several decisions that say the duration of a trust is limited by pointing out the results could have been reached on orthodox grounds. "Despite these explanations applicable to many cases," he continues, "there are cases not thus explicable, which hold trusts invalid because of their duration. These results

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(footnote continued from preceding page)
that his estate should not be divided among them until the end of the period named.") *Cf.* Thornton v. Kirtley, 249 S.W. 2d 803 (Ky. 1952); Ford v. Yost, 299 Ky. 682, 186 S.W. 2d 896 (1944); Fidelity Trust Co. v. Lloyd, 25 Ky. L.R. 1827, 78 S.W. 896 (1904). *Contra:* 4 Restatement of Property § 386, com. j. ill. 7.

[62] Letcher's Trustee v. Letcher, 302 Ky. 448, 194 S.W. 2d 984 (1946) (*semble*). *Contra:* 4 Restatement of Property § 378, ill. 1.

[63] 4 Restatement of Property, App. B, ¶ 48. No change was made in the 1948 Supplement to the Restatement which was published after Letcher's case came down. Inexplicably, Letcher's case is cited by the 1948 Supplement, p. 546, as a case "allowing a trust to continue for the lives of persons not in being when the creating instrument spoke." The case held the trust entirely void; it could not even begin, much less continue. See also 6 Am. L. Prop. § 25.87, where Letcher's case is cited as holding that a remainder is void if it will not vest within the period. The author does not note that under his meaning of "vest", the remainder held void is vested.

are difficult to reconcile with the language in other Kentucky opinions."[64] Professor Powell's analysis goes deeper into the cases than any other, but in the end it is not satisfactory because he makes no attempt to discover what the court means by the words it uses. He assumes the court means by "vest" and "suspension of the power of alienation" what he himself would mean, but there is good reason to believe the court is using language in a different way.

The fundamental question is what does the court mean by its statement that the perpetuity rule limits the duration of a trust. In answering this question it will clarify matters to note first what the court does *not* mean.

The court is not applying a rule limiting the indestructibility of private trusts. According to the treatises there may be a rule prohibiting any private trust from remaining indestructible beyond lives in being plus 21 years.[65] The rule is violated when there is a possibility the trust will remain indestructible beyond the period; the consequence is that the trust becomes destructible by the beneficiaries. Violation of this rule does not invalidate the trust or any interest therein.

The application of this rule can be illustrated with reference to *Case 11.* The trust there cannot be terminated during A's lifetime because all parties who have a beneficial interest in the trust are not ascertained. Hence the trust is indestructible during this period. At A's death, however, all beneficiaries are known, and within 21 years all will reach the age of consent. A's children and the church ordinarily may terminate the trust when the children become sui juris;[66] therefore the trust cannot remain indestructible beyond lives in being plus 21 years, and the rule is not violated. If A's children and the church could not terminate the trust, however, either because of an express provision in the trust or because continuance is necessary to carry out a material purpose of the testator,[67] the trust may remain indestructible beyond lives in being and 21 years. Under the rule limiting the

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[64] 5 Powell ¶ 816, p. 785.

[65] Simes & Smith §§ 1391-93; 1 Scott, Trusts (2d ed. 1956) § 62.10. The case authority for any such rule is quite slim.

[66] Keith v. First Nat'l Bank 256 Ky. 88, 75 S.W. 2d 747 (1934); 3 Scott, Trusts § 337.

[67] First Nat'l Bank v. Purcell, 244 S.W. 2d 458 (Ky. 1951); Miller's Ex'rs v. Miller's Heirs, 172 Ky. 519, 189 S.W. 417 (1916).

indestructibility of private trusts, the trust is not invalidated but the provision for indestructibility is, and the trust may be terminated after A's death when his children become sui juris.

In two cases the court may have applied this rule, since it merely struck down the provision for holding in trust and did not invalidate any of the interests therein.[68] However, in at least five cases the court has gone further and declared the entire devise in trust void, even though some of the interests therein were (or would become within the perpetuities period) vested in interest.[69] This clearly is not the application of a rule making valid trusts destructible at the will of the beneficiaries.

The court is not applying a rule directly invalidating any trust which may last beyond the perpetuity period. As stated, under the common law there is no direct limitation on the duration of a trust. "The fact that the Kentucky courts do not regard the statutory rule against perpetuities as actually regulating the duration of private trusts, *as such*," says the *Restatement*, "is indicated by several holdings and is conclusively established by one decision[70] allowing a trust to continue for the lives of persons not in being when the creating instrument spoke."[71] If the duration of trusts were directly limited then a secondary life estate in unborn persons in trust would be void, but such a life estate has been held valid in several cases, regardless of whether it is in trust or not.[72] It vests in possession within the perpetuity period, even though it may last too long. In *Farmers National Bank v. McKenney*[73] the court pointed out that the length of duration of the intermediate life estates is important only for determining when the remainder in fee will "vest".

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[68] Ford v. Yost, 300 Ky. 764, 190 S.W. 2d 21 (1945); Carter's Trustee v. Gettys, 138 Ky. 842, 129 S.W. 308 (1910). Compare Johnson's Trustee v. Johnson, 25 Ky. L.R. 2119, 79 S.W. 293 (1904), striking age limitation from will.

[69] See cases cited notes 61 and 62 *supra*.

[70] Ligget v. Fidelity & Columbia Trust Co., 274 Ky. 387, 118 S.W. 2d 720 (1938) (Restatement footnote).

[71] 4 Restatement of Property, App. B., ¶ 48. Accord: 6 Am. L. Prop. § 25.87; Simes & Smith § 1414; Matthews, "Comments on 1956 Kentucky Legislation: The Perpetuities Amendment," 45 Ky. L.J. 111, 123-26 (1956).

[72] Ligget v. Fidelity & Columbia Trust Co., note 70 *supra*, life estate in trust; Thomas v. Utterback, 269 S.W. 2d 251 (Ky. 1954), legal life estate; Chenowith v. Bullitt, 224 Ky. 698, 6 S.W. 2d 1061 (1928), legal life estate; *cf.* U.S. Fidelity & Guaranty Co. v. Douglas' Trustee, 134 Ky. 374, 120 S.W. 328 (1909); Taylor v. Dooley, 297 S.W. 2d 905 (Ky. 1957).

[73] 264 S.W. 2d 881, 882 (Ky. 1954).

The court is not applying the technical rule against suspension of the power of alienation. The idea that trust duration is limited is directly traceable to the perpetuities statute which was, prior to 1960, phrased as a rule prohibiting suspension of the power of alienation. The court has often said a trust suspends the power of alienation, but it is not using those words in their technical sense. Technically the power of alienation is suspended only when there are not persons in being who can convey an absolute fee.[74] If the beneficiaries of a trust can individually or jointly convey an absolute fee in possession, the power of alienation is not suspended. In Kentucky all interests in trust are alienable, absent an express restraint. Hence the only type of interest that suspends the power is one where the ultimate takers are unknown. Since remainders vested in interest are by definition in ascertained persons, such vested remainders[75] can never cause suspension of the power of alienation. In *Case 10* the power of alienation is suspended during the lives of T's children; in *Case 11* during A's life. Neither period is in excess of the rule, and therefore the gifts should have been good under the rule against suspension of the power of alienation.

It does not matter that the interests are in trust. The trustee cannot prevent alienation or termination of the trust if all the beneficiaries are ascertained, sui juris, and demand it. If the trust cannot be terminated, either because it is expressly so provided in the instrument or because a court finds a material purpose of the settlor would be frustrated by termination, it is arguable that the power of alienation is suspended. However, an express restraint on alienation for more than the perpetuity period will be struck down under the doctrine prohibiting unreasonable restraints, and thus no valid express restraint could suspend the power of alienation too long. If the prohibition is not express, but the court implies termination would frustrate settlor's purpose, the interests in trust are not invalid. Only the implied provision against termination is struck down; or, to put it another way, the court will not imply indestructibility for more than the perpetuity period. This rule limiting indestructibility of trusts has been discussed earlier in this section.

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[74] 5 Powell ¶ 767; 4 Restatement of Property § 370, com. i.
[75] Except a vested remainder in a class subject to open.

Upon close examination it becomes clear that when the court says a trust suspends the power of alienation it is not referring to any technical suspension. For remainders vested in interest, so often held void, do not technically suspend the power of alienation. Professor Powell, referring to unique New York statutes making beneficial interests in trust inalienable, accuses the court of "unjustified talking of New Yorkese."[76] Far from talking an alien tongue, however, the Court of Appeals seems to be talking plain Kentucky horse sense.

The court is giving a practical meaning to what suspends the power of alienation, implementing a policy against remote distribution. While vested remainders in trust do not technically suspend the power of alienation of specific property they do lessen the alienability and free enjoyment of a *quantum* of wealth. Even if the owners of the remainder are ascertained so that the trust can be terminated or the property sold (if the trustee has no power of sale), there are many practical impediments to termination or sale. The life tenant and remaindermen must all agree that termination or sale is desirable, and they must agree how to apportion the proceeds among their respective interests. Agreement on sale, termination and valuation is hard to achieve. Thus, the probability of alienation is considerably lessened and the control of the dead hand extended in a practical way by the creation of a trust.

It is suspension of the power of alienation in the practical, rather than the technical, sense that seems to have concerned the court. This is confirmed by the cases holding an option to purchase suspends the power of alienation.[77] An option does not suspend the power technically, as the owner and optionee may at any time join together and convey a fee. Nonetheless it does lessen marketability of property in a practical way.

Like the option cases, the cases on trust duration reveal an understanding of the need of making property alienable, and at the same time they reveal a practical concern for the dead hand's continuing control of wealth even though the specific property is alienable. This doubly acute perception is apparent from the

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[76] 5 Powell ¶ 816 at p. 786.

[77] Robertson v. Simmons, 322 S.W. 2d 476 (Ky. 1959); Maddox v. Keeler, 296 Ky. 440, 177 S.W. 2d 568 (1944); Saulsberry v. Saulsberry, 290 Ky. 132, 160 S.W. 2d 654 (1942).

beginning.[78] A trust prevents uncontrolled possession and enjoyment of the property by the *beneficiaries* alone, and in that sense it suspends the power of free alienation of a quantum of wealth. One can go through all the Kentucky trust cases and substitute "suspension of possession and enjoyment free of trust" for "suspension of the power of alienation" wherever it appears. In almost every case it will make perfect sense. No other meaning ascribed to the latter phrase serves so well. If this analysis be correct then to say perpetuities law limits the duration of a trust does not mean it directly limits it as such, for secondary life estates in unborn persons which can extend a trust beyond lives in being have been upheld. Rather, the real significance of trust duration is, as the court noted in the *McKenney* case, that it determines when the remainder in fee vests for purposes of the perpetuity rule. Thus, to say the duration of a trust is limited is but to say the *remainder in fee must vest in possession free of any trust within the perpetuity period.* In this indirect way perpetuity law limits trust duration.

Coupled with the doctrine of infectious invalidity, this proposition—and only this proposition—will explain the results in every perpetuities case in Kentucky. It is consistent with the court's rejection of constructional rules pointing to a "vested with possession postponed" classification and with the rejection of the vested subject to divestment concept in perpetuities cases. The same policy mainspring underlying the meaning of "vest"—a policy against remote distribution and possession—is visible here. There are no cases holding squarely to the contrary.

There is, however, obiter dictum in the cases that perpetuity law is not concerned with remoteness of possession. If this dictum be accepted it is impossible to reconcile the holdings of many cases with the statute prohibiting suspension of the power of alienation or with the orthodox interpretation of the Rule against Perpetuities or with any rule directly limiting the duration of trusts. Acceptance of this dictum prevents the cases from

[78] See Carter's Trustee v. Gettys, 138 Ky. 842, 846, 129 S.W. 308, 309 (1910) ("There is no practical difference between a devise restraining in express terms alienation beyond the time allowed by the statute, and a devise of property in trust by which the power of alienation is taken away from the beneficiaries for a similar length of time."); Ford v. Yost, 299 Ky. 682, 685, 186 S.W. 2d 896, 898 (1944) ("Technical alienability or the power of a trustee to sell and convey the particular property for investment is not enough to escape the statute, for the proceeds wear the same fetters of restraint.")

falling into any consistent pattern of rationalization. It therefore seems that the court may have discovered a simpler order within apparent complexity, while adhering to traditional language patterns. In such ways the law moves to sounder ground.

The above analysis, reconciling case holdings and sloughing off dicta, appears to this author to be the most satisfactory. But in truth the real explanation of this continuing conflict between holding and dictum, between what the court does and what it says, noted earlier in discussing the meaning of vest, is a mystery as puzzling as the one Henry James cunningly wove into the figure in his celebrated carpet.

5. GIFTS TO CLASSES

Under the Rule against Perpetuities a class gift cannot be partly valid and partly void. It must be valid for all members of the class or it is valid for none. If the interest of any member can possibly vest too remotely, the entire class gift is bad. This means that (a) every member of the class must be ascertained (the class must close), (b) the precise share of each member must be determined, and (c), if vesting in possession is required, each member's interest must vest in possession and enjoyment within the period. *Case 12* illustrates a common class gift which is void under these principles.

> *Case 12.* T devises property "to A for life, then to A's children for life, remainder to A's grandchildren in fee." The remainder to A's grandchildren is void because every member of the class will not be ascertained until the death of A's children, some of whom might not be in being at T's death.[79] If at T's death A has a grandchild, X, alive, X's gift is vested in interest subject to open up and let in afterborn grandchildren, but it is not vested for purposes of the Rule.

Class closing rule. Some gifts to a class may be saved through the operation of a rule which closes the class prior to the time it closes physiologically. Under the "rule of convenience" adhered to in most states the class will close when any member of the class is entitled to immediate possession and enjoyment. This rule

[79] Taylor v. Dooley, 297 S.W. 2d 905 (Ky. 1957); Maher v. Maher, 139 F. Supp. 294 (E.D. Ky. 1956); Thomas v. Utterback, 269 S.W. 2d 251 (Ky. 1954); West v. Ashby, 217 Ky. 250, 289 S.W. 228 (1926); Tyler v. Fidelity & Columbia Trust Co., 158 Ky. 280, 164 S.W. 939 (1914); Lindner v. Ehrich, 147 Ky. 85, 143 S.W. 778 (1912).

is not followed in Kentucky when the gift is to children of a "near-relative." In that case the class will not close until it becomes physically impossible for any more members of the class to be born. Thus:

> *Case 13.* O deeds land "to my daughter A for life, then to my grandchildren in fee." At the time of the transfer O has one grandchild, G, alive. Under the rule of convenience G can demand possession of his share at A's death, closing the class and forcing distribution among the grandchildren then living. The gift thus would be valid. In Kentucky, however, the class is kept open until O's children (including any after-born) are dead. Holding the class open for lives possibly not in being causes the gift to grandchildren to be void.[80]

The theory of the Court of Appeals is that when there is a gift to children of a "near-relative" the donor intends all the children, whenever born, to share in the gift. Carrying out this intention is more important than the convenience of early distribution in fixed shares. Refusing to close the class, however, sometimes causes gifts to children of a near-relative to fail in Kentucky when they would be perfectly valid elsewhere.

It does not necessarily follow from the closing of the class within the perpetuity period that the gift is valid. Every member of the class may be ascertained but his exact share may not be; and this too is required. In other words, the ultimate number of takers in the class must be fixed so that it neither increases nor decreases. Thus:

> *Case 14.* T devises property "to A for life, remainder in fee to such of A's children as reach 25." The class will close physiologically at A's death (a life in being), but the exact share each child of A will take cannot be determined until all of A's children have passed 25 or died under that age. Because a child might reach 25 more than 21 years after A's death, the gift is void.[81]

The doctrine of severed shares. Quite frequently testators attempt to tie up property for two generations with remainder in fee to the third generation, as in *Case 12.* If the will is phrased

[80] Bach v. Pace, 305 S.W. 2d 528 (Ky. 1957); Laughlin v. Elliott, 202 Ky. 433, 259 S.W. 1031 (1924).

[81] Fidelity & Columbia Trust Co. v. Tiffany, 202 Ky. 618, 260 S.W. 357 (1924). Compare Johnson's Trustee v. Johnson, 25 Ky. L.R. 2119, 79 S.W. 293 (1904).

slightly differently from that set forth in *Case 12*, the devise may be valid at common law. The will must provide that upon the death of *each* of A's children (rather than upon the death of *all* of A's children), the share of such child dying shall vest in his issue. If it does, the issue of the children in being at testator's death can prove that their interests will vest in absolutely fixed shares at the death of their parent, a life in being. Their interests are valid. The issue of A's yet-unborn children cannot offer such proof, since their parents are not lives in being, and their interests are void. This is known as the doctrine of severed shares or the doctrine of *Cattlin v. Brown*.[82] Thus:

> *Case 15.* T devises property in trust to pay the income "to A for life, then to A's children for life, and as each child of A dies to distribute the share of corpus on which he had been receiving the income to that child's issue." A has child B, born before T's death, and child C, born after T's death. The gift to B's issue is valid because it must certainly vest in possession in fixed shares within the period. The gift to C's issue is void.

This rule has been expressly rejected in Kentucky. In *U. S. Fidelity & Guaranty Co. v. Douglas' Trustee*,[83] where the instrument read the same as in *Case 15*, the first life tenant (A) had five children alive when testator died. None were subsequently born to her. It was argued that the doctrine of severed shares saved the gift to A's grandchildren, but the court held to apply this rule and validate the gift to some grandchildren while holding it bad as to others would not carry out the testator's intent. This is hard to justify on the facts of the case for the evidence was very strong that testator assumed A would have no more children, and at the time of decision A was dead and it was certain all A's grandchildren would take their shares within lives in being. If the court would not apply the doctrine of severed shares in this case, it is difficult to see any case in which it would.[84]

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[82] From the English case of Cattlin v. Brown, 11 Hare 372 (Ch. 1855). See 6 Am. L. Prop. § 24.29; Simes & Smith § 1267; 4 Restatement of Property § 389.

[83] 134 Ky. 374, 121 S.W. 328 (1909). For further litigation of this trust see U.S.F. & G. Co. v. Miller, 124 S.W. 341 (Ky. 1910); U.S.F. & G. Co. v. Carter, 158 Ky. 737, 166 S.W. 238 (1914).

[84] Compare Maher v. Maher, note 79 *supra;* Thomas v. Utterback, note 79 *supra;* Ligget v. Fidelity & Columbia Trust Co., 274 Ky. 387, 118 S.W. 2d 720

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Separability. The orthodox view is that a class gift cannot be separated into good and bad parts, and the good part upheld. Yet in a few cases the ocurt has separated the valid part and allowed it to stand. In *Sandford's Administrator v. Sandford*[85] there was a devise in trust "for the benefit of my brothers and sisters, my nephews and nieces, and their heirs so long as any of them are in existence," then to the X charity. The court held the trust was valid for the lives of the brothers and sisters and nephews and nieces in being at testator's death, and at their death the corpus should be distributed to the "then" heirs of testator. It should be noted that the court did not close the class of *takers* at testator's death but only the *measuring lives* of the trust. In effect it accelerated the final distribution date from the time "the family as stated should become extinct" to the death of persons in being. This saved the gift for after born as well as living persons who became entitled to the income within the valid period, and invalidated it with respect to those who would become entitled to income beyond that period. Changing the measuring lives of a trust, and then ordering distribution to the heirs of testator ascertained at the termination of the trust, comes very close to being an exercise of cy pres.

In a case six years later,[86] testator devised land to A and B "and their heirs for life." Without giving any reason the court held "the phrase 'and their heirs' is effectually deleted by the statute against perpetuities." Apparently the court assumed "heirs" meant lineal descendants and not A's and B's heirs at law ascertained at death. By severing off the lineal descendants as members of the class of life tenants, the court saved the gift for A and B. This case differs from *Sandford's* case in that here the court closed the class of takers rather than the measuring lives of the life estate.

In two other cases of the same era the court saved gifts by construing them as gifts to a class which would close at the death

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(1938). In these cases the gift was to A's grandchildren *per stirpes*. The Restatement of Property § 389, com. c, says the doctrine of severed shares applies to such a gift, but it was not argued.

[85] 230 Ky. 429, 20 S.W. 2d 83 (1929). *But cf.* Smith v. Fowler, 301 Ky. 96, 190 S.W. 2d 1015 (1945).

[86] Renaker v. Tanner, 260 Ky. 281, 83 S.W. 2d 54 (1935).

of persons in being.[87] Although the court validated the gifts by construction, in both cases the court went on to say by dictum that the whole gift would not fail even had the gift included persons who might be born too remotely. The good part would be separable from the bad.

These four cases liberally separating class gifts into good and bad parts seem to represent an era in perpetuities development (1929-39) and not consistent policy. More often the court has construed instruments in favor of invalidity and applied the Rule remorselessly. Witness the rejection of standard devices for saving gifts: the doctrine of severed shares, the class closing rule, the vested with possession postponed construction; the frequent application of infectious invalidity; and the tendency to equate "vesting" and "possession". On balance, the Court of Appeals has not been liberal with putative transgressors. It has been unusually strict.

Separating class gifts into good and bad parts is one of the ways the court has dealt with limitations violating the Rule. The other ways are discussed in the next section. And, as will be seen, nothing is so unpredictable as how the court will deal with an invalid limitation. The four cases above are not altogether reliable precedents.

6. CONSEQUENCES OF VIOLATING THE RULE

Once it has been determined that an interest will not necessarily vest in time and is void, the question arises what the consequences will be. If no interest in the property (*i.e.*, neither income nor remainder interest) will necessarily vest within the period, the entire transfer of course is void. The more usual case, however, is where there is only partial invalidity, where only one of several interests is void. This problem has long plagued the court, and it has come to so many different and conflicting conclusions, it is impossible to give any definitive answer as to what the consequences are. There are several rules which might be applicable, and practically every case must be litigated to the

[87] Tuttle v. Steele, 281 Ky. 218, 135 S.W. 2d 436 (1939); Tillman v. Blackburn, 276 Ky. 550, 124 S.W. 2d 755 (1939); *cf.* Emler v. Emler's Trustee, 269 Ky. 28, 106 S.W. 2d 79 (1937). *But see* Thornton v. Kirtley, 249 S.W. 2d 803 (Ky. 1952); Fidelity Trust Co. v. Lloyd, 25 Ky. L.R. 1827, 78 S.W. 896 (1904).

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Court of Appeals to determine the most appropriate one on the particular facts. The rules are as follows:

(a) Preceding estates stand; invalid interest passes by intestacy. The general rule set forth in the treatises is that the invalid limitation is stricken from the instrument, and the prior valid estates take effect just as if the invalid limitation were not in the instrument.[88] If the preceding estates are life estates, they remain standing. Striking out the remainder leaves a reversion in the transferor which, if the instrument is a will, passes to the testator's heirs by intestacy and not to the residuary devisees.[89] Thus:

> *Case 16.* T devises property "to A for life, remainder to A's children for their lives, remainder in fee to A's grandchildren." The invalid gift to A's grandchildren passes by intestacy to T's heirs.[90]

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[88] 6 Am. L. Prop. § 24.47; Gray § 248; 5 Powell ¶ 789; Simes & Smith § 1262.

[89] KRS 394.500.

[90] Bach v. Pace, 305 S.W. 2d 528 (Ky. 1957); Chenowith v. Bullitt, 224 Ky. 698, 6 S.W. 2d 1061 (1928). In Thomas v. Utterback, 269 S.W. 2d 251 (Ky. 1954), noted 43 Ky. L.J. 559 (1955); Renaker v. Tanner, 260 Ky. 281, 83 S.W. 2d 54 (1935); and Laughlin v. Elliott, 202 Ky. 433, 259 S.W. 1031 (1924), the

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> *Case 17.* T devises property "to A for life, remainder to A's children, but if any child of A dies at any time without issue him surviving, his share shall go to X." A has no children at T's death. The gift over to X on failure of issue is too remote. It is stricken out and A's children have a remainder in fee simple absolute.[91]

The rule may be otherwise if the defeasible fee would only vest in interest within the period, and not necessarily in possession. In that case the defeasible fee itself may be void for vesting in possession too remotely.[92]

(b) Preceding estates stand; invalid interest passes to the last person(s) entitled to the income. A second rule for dealing with invalid remainders after life estates, directly opposed to rule *(a)*, has been applied in some cases.[93] Under this rule the invalid interest passes to the takers of the last valid life estate rather than to the transferor or his heirs. Applied to *Case 16*, the remainder in fee would pass to A's children.

In *Ligget v. Fidelity & Columbia Trust Co.*[94] the court took notice of this line of cases which is opposed to the orthodox rule. It attempted to reconcile them by pointing out that, "It has merely happened that the one who took the last valid life estate was also the one who would take the property under our statute of descent and distribution. Such taker would take it under the statute of descent and distribution and not because he happened to be the holder of the last valid life estate."[95] The court's

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preceding life estates stood, but the court declined to say what happened to the invalid remainder.

Compare Sandford's Adm'r v. Sandford, note 85 *supra*, where the court ordered the property to be distributed, when life estates terminated, to "the *then* heirs and next of kin of the testator."

[91] Holoway v. Crumbaugh, 275 Ky. 377, 121 S.W. 2d 924 (1938); Beall v. Wilson, 146 Ky. 646, 143 S.W. 55 (1912); Brumley v. Brumley, 28 Ky. L.R. 231, 89 S.W. 182 (1905).

[92] Letcher's Trustee v. Letcher, 302 Ky. 448, 194 S.W. 2d 984 (1946). *Compare* Curtis v. Citizens Bank, 318 S.W. 2d 33 (Ky. 1958), and Fidelity & Columbia Trust Co. v. Tiffany, 202 Ky. 618, 260 S.W. 357 (1924), *with* 6 Am. L. Prop. § 24.47, case 72.

[93] Maher v. Maher, 139 F. Supp. 294 (E.D. Ky. 1956), noted 9 Okla. L. Rev. 440 (1956); Barnes v. Graves, 259 Ky. 180, 82 S.W. 2d 297 (1935); Curd's Trustee v. Curd, 163 Ky. 472, 173 S.W. 1148 (1915); Tyler v. Fidelity & Columbia Trust Co., 158 Ky. 280, 164 S.W. 939 (1914); Lindner v. Ehrich, 147 Ky. 85, 143 S.W. 778 (1912); U.S. Fidelity & Guaranty Co. v. Douglas' Trustee, 134 Ky. 374, 121 S.W. 328 (1909); Moore's Trustees v. Howe's Heirs, 20 Ky. (4 T. B. Mon.) 199 (1827) (dictum).

[94] 274 Ky. 387, 118 S.W. 2d 720 (1938).

[95] *Id.* at 396, 118 S.W. 2d at 725.

attempted reconciliation does not stand close inspection for in the *Barnes, Curd* and *Lindner* cases[96] the life tenants and the testator's heirs were *not* the same persons. The testator had other heirs besides the life tenants. The instruments all read essentially the same as in *Case 16,* and T's heirs were A, B and C and not merely A alone. The cases held the invalid remainder passed to A's children. Obviously that result could not have been reached through application of rule *(a)* alone.[97]

(c) Infectious invalidity; preceding valid estates fall with invalid remainder. The rule of infectious invalidity[98] is exactly what its name implies. The invalidity of the remainder infects the valid preceding estates and causes them to fall. It is an exception to general rule *(a).* It is applied where the invalid gift is thought to be an essential part of testator's scheme, and if it fails the testator would prefer the entire devise to fail. Applying it to *Case 16* above, the life estates in A and A's children would be struck down with the invalid gift in fee.

The Court of Appeals has applied the principle of infectious invalidity in numerous cases. The leading case is *Taylor v. Dooley.*[99] There testator devised one-half of his property in trust for his daughter Elizabeth for life, then to Elizabeth's children for their lives, remainder in fee to Elizabeth's grandchildren (same as *Case 16*). The other half he devised outright to his son Edwin. Elizabeth and Edwin were his only children and heirs. The court pointed out that testator's basic scheme was to treat his children equally, and the general rule *(a)* would result in inequality. If the remainder which testator attempted to devise to Elizabeth's grandchildren passed to testator's heirs Edwin would wind up with three-fourths of the property—his half and half of that devised to Elizabeth's line. Since this would clearly violate testator's intention the court struck down the valid life estates to Elizabeth and her children *and* the devise in another clause to Edwin, resulting in intestacy. The court then mitigated this wholesale destruction by ordering Elizabeth's intestate share

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[96] Note 93 *supra.*

[97] The results might have been reached through the application of KRS 391.140 (advancement statute), but the opinions do not state what amounts were devised to the other children.

[98] 6 Am. L. Prop. § 24.48; 5 Powell ¶ 789; Simes & Smith § 1262.

[99] 297 S.W. 2d 905 (Ky. 1957). And see Fidelity & Columbia Trust Co. v. Tiffany, 202 Ky. 618, 260 S.W. 357 (1924).

to be held in trust for her life in accordance with the provisions of the will.[100]

The result is sound if it is assumed the court had only two choices: passing the invalid interest to testator's heirs or using the principle of infectious invalidity. A third choice, strikingly appropriate in this case, is the use of rule *(b)* above. One year before *Taylor v. Dooley,* in a case involving precisely the same problem (where the general rule *(a)* would have resulted in inequality *and* the preceding life tenants were the parents of the void remaindermen), Federal Judge Swinford held the invalid remainder passed to the preceding life tenants.[101] If this had been done in *Taylor v. Dooley,* Elizabeth's children would have taken the remainder in fee. This would be more closely in accord with testator's intention than the sweeping invalidation that took place (even as partially restored by the application of the trust provision to Elizabeth's intestate share).

The principle of infectious invalidity has been used in other cases, and in all of them its use is extremely difficult to justify on the facts. In the recent *Curtis* case[102] testator left property worth over $400,000 in trust for his four minor children. The trustee was directed to pay each $100 a month and was given discretionary power to pay hospital, medical and emergency expenses, to pay for a college education for each, and to purchase a home for each child upon marriage. The trustee was further directed to distribute to each child one-third of his share of the corpus and accumulated income at age 40, one-third at age 45 and one-third at age 50. In case any child failed to live to distribution, there was a gift over to his surviving issue, such issue to take at the time the parent would have taken had he lived. The gift over to grandchildren was held void, and then with one brief sentence—"the general scheme of the testator would be frustrated by attempting to uphold the trust as to his children"—the court struck down the gifts to the children as well.

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[100] This required judicial insertion in the will of the words set off in brackets in the following quotation. Article 6 of the will read: "I direct that all property which passes or may pass to my daughter Elizabeth D. Flynn under the terms of this will [or by intestacy] shall pass to Lewis B. Flynn, Jr. as trustee for said Elizabeth D. Flynn for and during her natural life." (Record, p. 8)

[101] Maher v. Maher, note 93 *supra.*

[102] Curtis v. Citizens Bank, 318 S.W. 2d 33 (Ky. 1958). The facts stated in the text which do not appear in the opinion are taken from the record on appeal, pp. 4-5.

Surely this is a harsh way to deal with a carefully thought out estate plan. The testator's scheme was clear enough. His children were in the custody of his divorced wife, who had remarried, and the will gives every evidence that testator (a self-made man) wanted to keep the corpus out of the control of his ex-wife and out of the hands of his children until they reached middle age. His provisions with respect to income were not as liberal as they might have been, but they did not leave the children entirely destitute ($100 a month each, medical and college expenses paid and a house upon marriage). The court gave no reason why this scheme was frustrated by the failure of the gift over. If the general rule had been applied, giving the invalid interest to testator's children by intestacy, they would have held all interests in the trust. They could have terminated the trust when they all became of age unless termination would frustrate a material purpose of the testator. If the court was disturbed by the partial accumulation of income after majority the proper course would have been to allow termination of the trust at majority or to strike down the accumulation provisions. There seems to be no reason at all for infectious invalidity to kill off the entire trust.

A result similar to that reached in *Curtis* has been reached in other cases.[103] As in *Curtis*, the consequence was testator's children received the property immediately free of trust, which testator did not intend, but at least his intent was carried out to the extent that some or all of his intended beneficiaries did receive the property. The same thing cannot be said of *Letcher's Trustee v. Letcher*,[104] where the intended beneficiaries were wholly deprived of the property. There testator gave his nephew Hugh's children a life estate, with remainder in trust for a church. The court, holding the remainder void, struck down the gift to Hugh's children as well, resulting in the property passing to testator's daughter-in-law.

The constructional rule of infectious invalidity is a wise one if limited to circumstances where the testator's intent would clearly be frustrated by upholding the valid gifts. The Kentucky

[103] West v. Ashby, 217 Ky. 250, 289 S.W. 2d 228 (1926); Fidelity Trust Co. v. Lloyd, 25 Ky. L.R. 1827, 78 S.W. 896 (1904); Coleman v. Coleman, 23 Ky. L.R. 1476, 65 S.W. 832 (1901); Stevens v. Stevens, 21 Ky. L.R. 1315, 54 S.W. 835 (1900); Thornton v. Kirtley, 249 S.W. 2d 803 (Ky. 1952). In the last case the invalid limitation also infected a *subsequent* gift as well as the preceding estates.

[104] 302 Ky. 448, 194 S.W. 2d 984 (1946).

court has not so limited it. The court has given it broad application, sometimes seemingly treating it as a rule of law. Under the 1960 Perpetuities Act the rule of infectious invalidity is severely limited, if not totally abolished, with respect to instruments effective after July 1, 1960. KRS 381.216 now provides that the court shall reform the *invalid interest* "to approximate most closely the intention of the creator of the interest." Reforming the invalid interest is a much narrower power than destroying the entire limitation under the rule of infectious invalidity.

(d) Reform of invalid interest by cy pres. The doctrine of cy pres applied to private trusts had a short, happy life in Kentucky just after the turn of the century. In two cases the court reformed the invalid gift, though in quite different ways. In *Hussey v. Sargent,*[105] the court had before it the will of a New Hampshire testator devising his property in trust to pay out income to support his grandchildren, accumulate excess, and pay over accumulated income and corpus to his grandchildren when his granddaughter Emily reached 35, or if dead when she would have reached 35 had she lived. Emily was two years old at testator's death. The court treated the two contingencies as one and held the gift of corpus might vest too remotely. But since the law of New Hampshire controlled, and cy pres was applied there, the court did not strike down the gift. Instead, it reduced the distribution date to 21 years after testator's death.

The next year, in *Johnson's Trustee v. Johnson,*[106] the court had before it a Kentucky testatrix's will containing a devise similar to that in *Hussey.* The will devised property in trust to pay income to testatrix's son for life, then to the son's children until the youngest child reached 25, then to divide corpus among them. The court ordered the age limitation struck from the will and the property distributed among the children at the son's death; "the period of distribution fixed by the testatrix being void, the will will be construed as if no such conditions were contained in it."[107] The case is also explicable on the ground that the children had

[105] 116 Ky. 53, 75 S.W. 211 (1903). *Cf.* Sandford's Adm'r v. Sandford, 230 Ky. 429, 20 S.W. 2d 83 (1929), cutting out unborn persons as measuring lives of a trust.

[106] 25 Ky. L.R. 2119, 79 S.W. 293 (1904).

[107] *Id.* at 2121, 79 S.W. at 295.

vested interests with payment postponed, and only the provision for holding in trust violated the Rule.

With respect to instruments effective after July 1, 1960, cy pres is the required method of dealing with void interests.

7. APPLICATION OF THE RULE TO POWERS OF APPOINTMENT

In applying the Rule against Perpetuities to powers of appointment it is necessary to separate powers into two groups: (a) general powers presently exercisable; and (b) general testamentary powers and all special powers. General powers presently exercisable are treated as absolute ownership for purposes of the Rule. Nothing stands between the donee and absolute ownership except a piece of paper that can be signed at any time; hence the property is not tied up. All that the Rule requires of a general inter vivos power is that it become exercisable within the period. When it becomes exercisable the property becomes marketable and the policy of the Rule is not offended. Since the donee of a general power presently exercisable is treated as owner, the validity of an interest created by exercise of the power is determined on the same basis as if he owned the property in fee. The period runs from the exercise of the power.[108]

An unconditional power to revoke in one person is treated like a general power presently exercisable when the holder can exercise the power to revoke for his own exclusive benefit.[109] The period runs from the termination of the power.

General testamentary powers and special powers are treated differently from a general power presently exercisable. A person holding one of these powers does not have an absolute and unlimited present right to alienate the property, and consequently he is not treated as owner. In applying the Rule to these powers two questions arise: (a) Is the power itself valid? (b) Are the interests created by the exercise of the power valid? These questions are discussed below.

(a) *The initial validity of general testamentary powers and special powers.* For a general testamentary or a special power to

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[108] 6 Am. L. Prop. §§ 24.30, 24.31, 24.33; 5 Powell ¶¶ 786, 787.

[109] 6 Am. L. Prop. § 24.59; 4 Restatement of Property § 373; Simes & Smith §§ 1250-52.

be valid it must not be possible for it to be exercised beyond the perpetuity period. If it can possibly be exercised beyond the period it is void ab initio.[110] A testamentary or special power cannot be given to an unborn person unless its exercise is limited to the perpetuity period.

A power may be void for a reason other than offending the Rule against Perpetuities, such as improper delegation. The Kentucky court has held that a person who holds a general testamentary power cannot create a further power in another person, unless there is express authorization in the instrument.[111] If there is express authorization, the further power is treated as an extension of the original power. And, like the original power, it is void if it can be exercised beyond the perpetuities period measured from the effective date of the original instrument.

(b) *The validity of interests created by exercise of a general testamentary power or a special power.* The donee of a testamentary or special power is regarded as the "agent" of the donor with power to fill in blanks in the donor's will. Any interest created by exercise of such power must vest within 21 years of some life in being at the date the power was created.[112] The exercise of the power is read back into the original instrument, taking into consideration facts existing on the date of exercise. This is known as the "second look" doctrine (a variation of "wait-and-see"). What this means is that we wait and see how the donee actually appoints the property and then determine if the appointive interests will certainly vest within the period (computed from date of creation of the power). Thus:

> *Case 18.* T devises property "to A for life, remainder as A appoints by will." A appoints "to B for life, remainder in fee to B's children." If B was in being at T's death the remainder in fee appointed to B's children is valid since it

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110 6 Am. L. Prop. § 24.32; 5 Powell ¶ 786; Simes & Smith § 1273.

111 DeCharette v. DeCharette, 264 Ky. 525, 94 S.W. 2d 1018 (1936). Few powers of appointment have led to so much litigation as this one held by the free-spending mother of the Marquise DeCharette. See DeCharette v. St. Matthews Bank, 214 Ky. 400, 283 S.W. 410 (1926), creditors of donee attack and lose; DeCharette's Guardian v. Bank of Shelbyville, 218 Ky. 691, 291 S.W. 1054 (1927), creditors win consolation prizes; St. Matthews Bank v. DeCharette, 259 Ky. 802, 83 S.W. 2d 471 (1935), creditors attack again at death and lose; Godfroy v. DeCharette, 260 Ky. 147, 84 S.W. 2d 66 (1935), loyal allies in donee's long battle with creditors win just reward.

112 6 Am. L. Prop. §§ 24.34, 24.35; 5 Powell ¶ 788; Simes & Smith § 1274.

will vest at the death of B, a life in being. If B was not in being at T's death the remainder in fee is void.

The "second look" doctrine is applied in Kentucky as in most jurisdictions.[113] An appointment may, however, be valid under this doctrine and still run afoul of another rule peculiar to Kentucky. This latter rule is that a donee of a *special* testamentary power can appoint only in fee, unless he is expressly authorized to appoint a life estate with remainder over.[114] If he is so authorized, however, the second look doctrine applies in determining the validity of the remainder.[115]

If a donee makes an invalid appointment, what are the consequences? If the power was a general one, the doctrine of capture may apply where it is found the donee intended to blend the appointive assets with his own assets; the appointive assets then pass to the donee's estate. Otherwise the property passes in default of appointment to the takers in default, and if none to the donor or his heirs.[116] Any remainder in default of appointment is, like an appointive interest, subject to the Rule against Perpetuities.[117] A remainder in default which will become possessory within the perpetuity period is valid,[118] and the court has also held a remainder in default which will vest indefeasibly in interest within the period is valid.[119] It is not clear whether the court would apply the "second look" doctrine in determining the validity of gifts in default of appointment, as the court has never had an occasion to do so. Under the 1960 act, however, wait-and-see is applied to gifts in default of appointment as well as to the appointive interests.

The 1960 Perpetuities Act applies "to appointments made after July 1, 1960, including appointments by inter vivos instrument or will under powers created before July 1, 1960."[120] The adoption of wait-and-see does not substantially change the old law on

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[113] Ligget v. Fidelity & Columbia Trust Co., 274 Ky. 387, 118 S.W. 2d 720 (1938); DeCharette v. DeCharette, note 111 *supra.*

[114] Brown v. Columbia Finance & Trust Co., 123 Ky. 775, 97 S.W. 421 (1906).

[115] Barnes v. Graves, 259 Ky. 180, 82 S.W. 2d 297 (1935); Goodloe's Trustee v. Goodloe, 292 Ky. 494, 166 S.W. 2d 836 (1942).

[116] 6 Am. L. Prop. § 24.47, cases 74 and 75.

[117] Chenowith v. Bullitt, 224 Ky. 698, 6 S.W. 2d 1061 (1928).

[118] Goodloe's Trustee v. Goodloe, note 115 *supra.*

[119] Ligget v. Fidelity & Columbia Trust Co., note 113 *supra. But see* discussion of this case at pp. 20-22 *supra.*

[120] KRS 381.223.

validity of exercise of powers, inasmuch as the validity of interests created by exercise of the power was judged by a similar principle —"second look." The statute leaves in full force the practice of reading back into the original instrument the exercise of the power, and of requiring the measuring lives to be in being at the date of creation of the power.

8. APPLICATION OF THE RULE TO OPTIONS

Options incident to a lease. An option in a lease enabling the lessee to purchase the fee or to renew the lease is not subject to the Rule against Perpetuities.[121] Such options are commercially useful and tend to increase the marketability and development of land. Hence they are not within the policy of the Rule.

Options to expand the scope of an easement. An option to extend the scope of an easement upon future payment of money is, like an option in a lessee, not subject to the Rule against Perpetuities. This was decided in *Sorrell v. Tennessee Gas Transmission Company*[122] where the gas company was granted an easement to lay pipelines with the right to lay additional lines upon payment of $2.85 per lineal rod. The court, citing the *Restatement of Property,* held this was a grant of a "present interest" not subject to the Rule. But as the chief reporter for the Restatement has subsequently pointed out, avoiding the Rule by calling the option a present interest is specious reasoning. The proper basis for the decision, in Professor Powell's opinion, is that these options have "social advantages which outweigh the policy basing the rule against perpetuities."[123]

Options to purchase not contained in a lease. An option to purchase in gross (that is, not conferred on a lessee) creates in the optionee an equitable future interest subject to the Rule. If it is possible for the option to be exercised beyond the period, it is void.[124] The reason for application of the Rule to options in gross is that they fetter alienability of the property, especially when the optionee may purchase at a price fixed in the instru-

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121 Vokins v. McGaughey, 206 Ky. 42, 266 S.W. 907 (1924); 6 Am. L. Prop. § 24.57; 5 Powell ¶ 771; Simes & Smith § 1244.

122 314 S.W. 2d 193 (Ky. 1958). Accord, Texas Eastern Trans. Corp. v. Carman, 314 S.W. 2d 684 (Ky. 1958).

123 5 Powell ¶ 771 at p. 601.

124 6 Am. L. Prop. § 24.56; 5 Powell ¶ 771; Simes & Smith § 1244.

ment rather than at the offeror's price or the market price at time of sale.

The option may take the form of a pre-emptive option (giving the optionee the power to buy *if* the owner desires to sell) or an ordinary option (giving the optionee the power to buy whether or not the owner desires to sell). The Kentucky court has held both come within the Rule, and has invalidated both pre-emptive options[125] and ordinary options[126] if unlimited as to time. If the option is personal or can be exercised only within the life of the optionee or optionor it is of course valid under the Rule.[127]

It is sometimes difficult to distinguish an option from a right of entry for condition broken which is not within the Rule against Perpetuities. In two cases where the court was required to make this distinction, it came to opposite conclusions. In *Bates v. Bates*,[128] one T. G. Bates conveyed one-half acre to school trustees for $15 in 1908, the deed providing," T. G. Bates is to have the land at the same price when it ceases to be public property as school house property." The land ceased to be used for school purposes in 1947, after Bates' death. Bates' heirs sued to enforce the provision, claiming Bates had a reversionary interest. The court held Bates had an option, which if personal ceased at his death and if unlimited as to time violated the Rule. Under either construction, the heirs could not enforce it. The decision is sound if an analogy is drawn to a pre-emptive option to repurchase at the price paid. Yet it is not easy to explain why Bates should lose if the deed provides he has to pay $15 to retake the land and should win if the deed provides he can retake it free. In the latter case he would have a right of entry, exempt from the Rule.

In the same year in which the court decided *Bates*, it decided *Trosper v. Shoemaker*.[129] The facts were these. Shoemaker sold land to Trosper with a "restrictive covenant" providing in part: "In the event the said second party fails to buy his petroleum

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[125] Saulsberry v. Saulsberry, 290 Ky. 132, 160 S.W. 2d 654 (1942), pre-emptive option to buy at owner's own price; Maddox v. Keeler, 296 Ky. 440, 177 S.W. 2d 568 (1944), noted 33 Ky. L.J. 118 (1945), pre-emptive option to buy at $1000. For arguments that the Rule should not apply to pre-emptive options to purchase at owner's price or at market price, see 6 Am. L. Prop. §§ 26.66, 26.67.

[126] *Cf.* Robertson v. Simmons, 322 S.W. 2d 476 (Ky. 1959).

[127] Campbell v. Campbell, 313 Ky. 249, 230 S.W. 2d 918 (1950); Bates v. Bates, 314 Ky. 789, 236 S.W. 2d 943 (1950). But it may be invalid as a restraint on alienation; see Robertson v. Simmons, note 126 *supra*.

[128] 314 Ky. 789, 236 S.W. 2d 943 (1950).

[129] 312 Ky. 344, 227 S.W. 2d 176 (1950).

products from the said first party, to-wit: E. S. Shoemaker, then said first party is given the right to repay the consideration herein mentioned, to-wit: $3,000, and take possession of said property." There were further provisions that this "covenant" was binding on the heirs and assigns of both parties and "ran with the land".[130] It is plain the quoted provision did not create a covenant (though other provisions might have). The remedies for breach of a covenant are damages or an injunction. The remedy here was forfeiture upon repayment of the purchase price. The court held this was a "conditional reversionary right" which did not violate the Rule. It is difficult, however, to distinguish this case from *Bates*. Both involved deeds restricting the use of land and providing for forfeiture upon cessation of the specified use and repayment of the purchase price. It is believed the decision, in upholding this provision, is unsound. The exemption of the right of entry is an historical anomaly, which cannot be justified in policy, and should not be extended to include interests which can reasonably be classified as options because they require the payment of money to retake the premises.[131]

Fortunately the distinction between an option and a right of entry is somewhat minimized by the 1960 Perpetuities Act. Under KRS 381.216 unlimited options to purchase are valid for 21 years and void thereafter. Under KRS 381.219 rights of entry are terminated after 30 years. Hence under either classification the interest will ultimately be terminated.

9. GIFTS TO CHARITY

A gift of property to one charity with a gift over to another charity is not within the Rule against Perpetuities.[132] Thus a gift in trust to pay the income to the First Presbyterian Church so long as it exists, then to the Mercy Hospital is wholly valid, even though the gift to the Mercy Hospital may not become possessory for centuries. The rationalization for this exemption is as follows.

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[130] The court recently held the burden of a covenant to purchase petroleum products runs with the land, the benefit is assignable, and the covenant is a property interest for which compensation is payable upon exercise of eminent domain. Folger v. Commonwealth, 330 S.W. 2d 106 (Ky. 1959), noted 48 Ky. L.J. 585 (1960). These questions are in much dispute elsewhere.

[131] See 4 Restatement of Property § 394, comments a and c.

[132] Board of Nat'l Missions v. Harrel's Trustee, 286 S.W. 2d 905 (Ky. 1956). See generally 6 Am. L. Prop. §§ 24.37, 24.42; 5 Powell ¶ 770; 4 Restatement of Property §§ 396-398; Simes & Smith §§ 1278-1287.

The policy in favor of supporting charities is stronger than the policy against perpetual fettering of property.[133] It allows a perpetual trust for charity.[134] Since a charitable trust may be perpetual, it does not matter that the income may shift from one charity to another.

This exemption does not apply where the gift to charity follows a gift to an individual. If, in the example in the preceding paragraph, the income were to be paid to the testator's descendants per stirpes so long as there are any in existence (rather than to the Church), the gift over to Mercy Hospital would be void because it would vest too remotely.[135] Nor does the exemption apply where there is a gift over from a charity to an individual other than the transferor or his heirs. The gift over is required to vest within the perpetuity period or fail.

10. TRUSTS FOR EMPLOYES

In 1956, KRS 381.220 was amended to exempt trusts for employes from the Rule against Perpetuities. The amendment provided:

> A trust created by an employer as part of a stock bonus plan, pension plan, disability or death benefit plan or profit-sharing plan, for the exclusive benefit of some or all of his employes, to which contributions are made by such employer or employes, or both, for the purposes of distributing to such employes the earnings or the principal, or both earnings and principal, of the fund so held in trust, shall not be deemed to be invalid as violating the rule against perpetuities or invalid as a suspension of the power of alienation of title to property; but such a trust may continue for such time as may be necessary to accomplish the purposes for which it may be created.

It was feared that such trusts would be found to be non-charitable and subject to the Rule, though there was no previous authority to that effect. Similar statutes allowing permanent trusts for employes have been passed in more than half the states.

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[133] But see Letcher's Trustee v. Letcher, 302 Ky. 448, 194 S.W. 2d 984 (1946).

[134] A trust to maintain cemetery lots is treated as a charitable trust. Epperson v. Clintonville Cemetery Co., 303 Ky. 852, 199 S.W. 2d 628 (1947).

[135] Smith v. Fowler, 301 Ky. 96, 190 S.W. 2d 1015 (1945); Sandford's Adm'r v. Sandford, 230 Ky. 429, 20 S.W. 2d 83 (1929).

The 1956 amendment was incorporated in the 1960 Perpetuities Act and is now KRS 381.217. The language was not changed except for omission of the words "or invalid as a suspension of the power of alienation of title to property." Dean Matthews criticized the inclusion of these words in the 1956 amendment on the ground they might revive the rule against suspension of the power of alienation which the court had previously interpreted out of KRS 381.220.[136] In any case their deletion was required when that statute was repealed.

11. TRUSTS FOR ACCUMULATION

Strictly speaking, the Rule against Perpetuities is not concerned with trusts for accumulation. It is concerned only with the vesting of interests. There has developed, nonetheless, an analogous rule against accumulations, which is measured by the same period (lives in being plus 21 years) and is sometimes thought of as part of the Rule against Perpetuities.[137] Under the rule against accumulations, directions to accumulate income must be confined to lives in being and 21 years. If not so confined the direction to accumulate is void.[138] There are no Kentucky cases applying this rule and passing upon the effect of an invalid direction to accumulate.[139]

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[136] Matthews, "Comments on 1956 Kentucky Legislation: The Perpetuities Amendment," 45 Ky. L.J. 111, 123-126 (1956).

[137] 6 Am. L. Prop. § 24.65; 5 Powell ¶¶ 831, 837, 838; Simes & Smith §§ 1464-65.

[138] Stevens v. Stevens, 21 Ky. L.R. 1315, 54 S.W. 835 (1900) (dictum). There was a direction to accumulate income not necessary for support until testator's children reached 21, and then pay it over to them. There was no direction to accumulate income beyond this period. (Record on appeal, p. 2).

[139] *Cf.* Curtis v. Citizens Bank, 318 S.W. 2d 33 (Ky. 1958); Hussey v. Sargent, 116 Ky. 53, 75 S.W. 211 (1903). For possible effects of wait-and-see on the rule against accumulations, see Cohen, "The Rule Against Accumulations and 'Wait and See'," 33 Temp. L.Q. 34 (1959).

PART II

REFORMS OF THE 1960 PERPETUITIES ACT

1. WHY REFORM?

There is widespread agreement today that some reform of the Rule against Perpetuities is necessary. This current wave of dissatisfaction originated in many sources, but the main force was Professor Barton Leach's hard-hitting attack on the Rule published in 1952.[1] Professor Leach, indicting the Rule as "a technicality-ridden legal nightmare," set forth a detailed bill of particulars. His criticisms centered on the requirement of absolute certainty that the interest will vest in due time; on the harsh consequences of violating the Rule; on the subjection of commercial options to the Rule; and on the exemption of possibilities of reverter and rights of entry. Following Mr. Leach's article came a rash of articles and comments in law reviews and books,[2] and studies and pamphlets published by eminent committees.[3] Practically all these learned writers agreed with Mr. Leach's criticisms (though not necessarily with his proposed reforms), and Professor Daniel Schuyler added a further criticism of the use of the "vested in interest" concept in applying the Rule.[4]

The real question is thus not whether the Rule needs reforming, but what direction reform should take. To a large extent what is the right reform will depend upon what one conceives to be wrong with the Rule; the disease may suggest the cure. With this

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[1] Leach, "Perpetuities in Perspective: Ending the Rule's Reign of Terror," 65 Harv. L. Rev. 721 (1952).

[2] Among the more significant are Leach and Tudor, The Rule Against Perpetuities, apps. I-V and *passim* (1957); Simes, Public Policy and the Dead Hand 32-82 (1955); Bordwell, "Perpetuities From the Point of View of the Draughtsman," 11 Rutgers L. Rev. 429 (1956); Leach, "Perpetuities Legislation: Hail Pennsylvania!," 108 U. Pa. L. Rev. 1124 (1960); Mechem, "Further Thoughts on the Pennsylvania Perpetuities Legislation," 107 U. Pa. L. Rev. 965 (1959); Simes, "Is the Rule Against Perpetuities Doomed? The Wait and See Doctrine," 52 Mich. L. Rev. 179 (1953); Sparks, "A Decade of Transition in Future Interests," 45 Va. L. Rev. 493 (1959); Tudor, "Absolute Certainty of Vesting under the Rule Against Perpetuities—A Self-Discredited Relic," 34 B.U.L. Rev. 129 (1954); Waterbury, "Some Further Thoughts on Perpetuities Reform," 42 Minn. L. Rev. 41 (1957).

[3] British Law Reform Committee, Fourth Report (The Rule against Perpetuities), Cmd. No. 18 (1956); Committee on Rules Against Perpetuities, ABA Sec. of Real Prop., Prob. & Trust Law, Legislators' Handbook on Perpetuities (1958).

[4] Schuyler, "Should the Rule Against Perpetuities Discard its Vest?," 56 Mich. L. Rev. 683, 887 (1958). See also 5 Powell ¶ 767; McDougal and Haber, Property, Wealth, Land 250-51 (1948).

in mind the draftsman of the 1960 Perpetuities Act undertook an examination of all the Kentucky perpetuities cases, including briefs and records on appeal, to find out in what ways the Rule was working badly. It may be useful here to set forth these findings and the reasons for the legislative changes. (Rights of entry and possibilities of reverter are separately treated in Part III of this article.)

(a) *The Rule against Perpetuities is essentialy incomprehensible.* The conventional Rule can be stated with Delphic simplicity, but like the oracles of old it has a reputation for being excessively resistant to understanding. The briefs and opinions in Kentucky perpetuities cases indicate this reputation is well-deserved. There have been 71 perpetuities cases since 1900, an average of more than one a year. Of these 71 cases, 19 were wrongly decided according to orthodox doctrine[5] and 16 are doubtful by the same standard.[6] Only 36 (51%) of the perpetuities cases were clearly decided correctly[7]—a surprising figure considering leading authorities are in large agreement on how the Rule applies. In practically all these "wrongly decided" cases the court maintained it was applying the common law Rule. Yet it serves no purpose to argue who is in error. That would get us into semantics. The point is: there has been a breakdown in communications between the learned writers and the learned judges.

Nor have lawyers in their briefs consistently demonstrated complete or even partial familiarity with the esoteric technicalities of the Rule. In a brief of thirty years ago the entire (and unsuccessful) argument that the devise did not violate the Rule ran as follows: "Is the time at which the fee becomes fixed so indefinite, or remote, that it does violence to section 2360 Kentucky Statutes, or to the common law rule against perpetuities? We think not." Although there are few briefs so patently inadequate as that one, there are many where counsel wrongly concedes that the gift does or does not violate the Rule; where counsel does not see additional (and, under orthodox doctrine, compelling) technical arguments in his favor; where the line of

[5] See Appendix, Table 2, pp. 103-108 *infra.*
[6] See Appendix, Table 3, pp. 108-109 *infra.*
[7] See Appendix, Table 1, pp. 102-103 *infra.* This figure must be further discounted by the fact that in many of these cases the perpetuities argument is a mere makeweight.

argument keeps coming unglued; where the gift is so clearly valid the argument is absurd. There are also cases where the perpetuities issue is not raised in a prior lawsuit, and which are re-litigated to the Court of Appeals years later when some sharp-eyed title searcher has spotted the defect.

While it is necessary to point out the lack of understanding of the Rule in any study of its workings,[8] it does not seem proper to chastise severely bench and bar for their lack of expertise. Even in the best treatises the Rule is marked by imprecise and enigmatic concepts, unexpected contradictions of human experience, trifling linguistic distinctions, and deceptive subtleties and refinements. There is far more complexity than is rationally required to deal with the problems. When the technicalities are so strange and artificial and not rationally connected to any policy basis the non-specialist can understand, the level of professional expertise is, in these busy times, bound to decline.

The lack of understanding by bench and bar made it clear that any reform must simplify the law, making it more easily understandable by the average lawyer. Four basic causes of complexity and confusion were the statutory language prohibiting suspension of the power of alienation, the remote possibilities test, the unsettled and harsh law with respect to consequences of violating the Rule, and the concept of vesting. By removing the first three of these causes the 1960 Perpetuities Act should simplify the law and cut down the frequency of litigation.

(b) *The statutory language in KRS 381.220 prohibiting suspension of the power of alienation confused both bench and bar.* The confusion caused by this statute has already been discussed in connection with the common law Rule against Perpetuities and will be discussed again subsequently in connection with restraints on alienation. Repeal was necessary to bring a beginning of order. It is interesting to note that in the same year Kentucky discarded its statute of New York parentage, New York itself returned to the period of the common law Rule, threw out

[8] This situation is not limited to Kentucky. Thus Professor Sparks comments in "Future Interests," 1956 Ann. Survey of Am. Law, 32 N.Y.U.L. Rev. 419, 429-430 (1957): "Paradoxically the year is also unique in the inexpert way in which simple [perpetuities] problems have been handled by both courts and counsel. . . . Cases in which only one decision is possible but which serve to illustrate the pathetic lack of understanding of the Rule against Perpetuities by both bench and bar are frequently before the courts."

the "unborn widow" and administrative contingencies, and adopted a cy pres provision for age contingencies.[9]

(c) *Under the remote possibilities test reasonable dispositions which would in fact vest in time were frequently struck down.* Under the common law Rule, there must be no possibility that a gift will vest too remotely. This test has defeated reasonable dispositions by reasonable property owners, and usually merely because the draftsman overlooked some highly remote possibility which did not in fact happen. Since 1900 there have been 32 cases holding void future interests (excluding non-family cases dealing with possibilities of reverter, rights of entry and options). In 11 of these it was known at the time the case was decided that the interest would in fact vest in time, and thus the possibility that defeated the interest never came to pass.[10] In 7 cases it was highly probable the interest would vest in due time, but at the time of decision there was a remote possibility that a person over 55 would produce children, which possibility defeated the gift.[11] In 8 cases, it was possible the interest would vest in time, but at the time of decision one could not say it was certain or probable.[12] This leaves only 6 cases where it was not possible or was highly improbable that the interests would vest in time.[13]

The instruments in at least three-fourths of these cases do not show any intention to create a family dynasty or to tie up property beyond lives in being plus 21 years. Practically all of the invalid interests could have been saved had the draftsman been more careful and made a slight change in language. But the draftsman unfortunately overlooked the "fertile octogenarian" in 13 cases, the "unborn widow" in 1, and other unlikely possibilities in most of the others. These cases offer rather convincing support for Lord Blanesburgh's observation four decades ago that the Rule usually is "a snare, useless so far as its legitimate purpose is concerned,"[14] and for Professor Leach's recent attack on the remote possibilities test as destructive of innocent and reasonable family dispositions which actually do vest in time. If the law sets "lives in being plus 21 years" as the permissible

[9] N.Y. Laws 1960, chs. 448-452.
[10] See Appendix, Table 5, patterns 1, 3, 5, 6, pp. 110-111 *infra.*
[11] See Appendix, Table 5, patterns 2, 4, pp. 110-111 *infra.*
[12] See Appendix, Table 6, patterns 1, 3, pp. 111-112 *infra.*
[13] See Appendix, Table 6, patterns 2, 4 p. 112 *infra.*
[14] Ward v. Van der Loeff, [1924] A. C. 653, 678.

period for tying up property it is hard to see how that policy is offended by an interest which might, but does not in fact, tie up the property beyond that period.

The primary justification for the remote possibilities test is the convenience inherent in being able to determine at the outset the validity of interests. It is not necessary to wait and see if the interests vest in time. Indeed, the only objection to the reform act voiced on the floor of the Senate (other than one Senator's understandable complaint that "this is the most complex subject ever brought up in the legislature, and I'm not going to vote for something I don't understand") was that wait-and-see would prove inconvenient. There are several answers to this. Inasmuch as they have been fully set forth elsewhere,[15] it is only necessary to note them briefly here.

The first is that the assumed inconvenience of wait-and-see is largely hypothetical. In more than one-half of the Kentucky cases invalidating gifts it was known at the time of decision that the gift would vest in time. No more inconvenience would have resulted from sustaining these gifts than results from sustaining any contingent interest that will necessarily vest or fail within the period. In the others it is hard to say whether inconvenience would have arisen or not. The suits were usually brought immediately after the instruments became effective simply to declare the rights of the parties. But it is pertinent to note that where valid life estates were involved, no question of possession or distribution could have arisen until the termination of the life estates.

The real answer to the convenience argument, however, is that mere convenience cannot justify striking down the transferor's intention and depriving the intended beneficiaries of their gifts. In the analogous situation where one member of a class calls for distribution of his share before all possible members are ascertained, the Court of Appeals has rejected the rule of convenience in favor of holding the class open until it is physiologically closed. There the court does not regard convenience to the living as sufficient justification for depriving the unborn. The same policy choice underlies the wait-and-see test.

[15] See the books and articles by Leach, Tudor, and Waterbury, note 2, *supra*; and the British Law Reform Committee Report, note 3, *supra*.

If serious inconvenience does in fact result in some unusual case, the court may, under KRS 381.216, reform the instrument to vest the gift within the period, thereby preventing the inconvenience while at the same time carrying out the transferor's intent as far as possible.

Another objection sometimes voiced to wait-and-see is that it decreases the marketability of land. Whatever may be the effect of wait-and-see on marketability in other jurisdictions, its effect in Kentucky will be negligible. In Kentucky all land subject to vested or contingent future interests can be sold or mortgaged under court order if the court finds it in the best interests of the parties.[16] The petition for sale may be initiated by the life tenant or the owners of indefeasibly vested remainders or reversions. The power of a court to order sale for reinvestment extends to land held in trust as well as by legal estates, and can be exercised even though the instrument expressly provides the land cannot be sold.[17] The future interests are transferred to the proceeds of the sale, which are paid into court and reinvested under court order.[18] This broad power of sale makes the land marketable, while preserving the proceeds for the intended beneficiaries.

It has been suggested that the fantastic possibilities which have invalidated gifts—the fertile octogenarian, the unborn widow, administrative and age contingencies and such—could be eliminated without jettisoning entirely the remote possibilities test. This approach was considered and rejected for four reasons. (1) It is wrong to strike down any interest which in fact vests in due time merely because it might not have done so. It is wrong whether the contingency on which it might not have vested be regarded as probable, improbable or fantastic. (2) Remedying specific defects would require a complicated statute, and even then would not cure fantastic possibilities as yet undreamed of. (3) Agreement could not be reached on what to do with the fertile octogenarian, who accounted for so many invalid gifts. There was objection to deeming men over 60 incapable of having issue; a further stumbling block was the fact that a person of any

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16 KRS 389.030-389.040.

17 See pp. 99-100 *infra.*

18 Sale and distribution of proceeds is permitted in limited circumstances under KRS 389.020(3).

age may adopt a child who shares in any remainder given to the adoptor's children.[19] (4) A simple statute was the only kind of reform statute saleable in the legislature.

In our view the proper course was to lay down the soundest rule, and leave exceptions to be carved in it as time might require. To have kept a rule unsound in policy and carve sound exceptions in it would have added more complications, and brought inadequate relief.

(d) *The consequences of violating the Rule were harsh and unsettled.* The question of what to do with invalid gifts has long plagued the Court of Appeals.[20] None of the solutions were satisfactory. The general rule of passing the void interest to testator's heirs often frustrated his scheme where he did not intend for his heirs to share equally or at all. And where he did intend equality among his children, the rule of infectious invalidity—applied to achieve equality—wrecked havoc with his plan for protecting his children from improvidence. Moreover, most invalid limitations had to be litigated to the Court of Appeals to determine if infectious invalidity applied.

There appears to be no policy reason why a limitation which violates the Rule must be entirely struck down, often bringing down other gifts with it. Most of the void gifts were merely the product of inept drafting and could be cured by the addition or deletion of a few words. If the question were put to the average testator whether he would prefer the gift to be totally void or would prefer the gift to be suitably remodelled so as to vest at an earlier time, very likely he would say the latter.

Although giving a court cy pres power to reform invalid limitations is not altogether free from objection, we came to the conclusion that it is better than either of the alternatives a court presently has. It is a lesser power than the power to strike down other interests through infectious invalidity. It is a power to deal with the invalid interest only, leaving the valid gifts standing. Since cy pres is not resorted to if the interest does in fact vest in due time, on the basis of past Kentucky cases very few instruments should require reformation.

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[19] Breckinridge v. Skillman's Trustee, 330 S.W. 2d 726 (Ky. 1960); Bedinger v. Graybill's Ex'r, 302 S.W. 2d 594 (Ky. 1957), noted 47 Ky. L.J. 149 (1958).

[20] See pp. 38-45 *supra.*

(e) *Confusion surrounds the meaning of vest.* As previous discussion has revealed, it is not clear under what circumstances a future interest is vested for purposes of the Rule against Perpetuities.[21] A class gift vested subject to partial divestment does not satisfy the Rule nor, in Kentucky, does a remainder which might be called for some purposes vested subject to total divestment. Beyond that holdings and dicta are in conflict.

Since remainders vested in interest are as much within the reasons of the Rule as contingent remainders, it is arguable that any reform should require remainders to vest in possession within the period.[22] This argument has merit, but translating it into legislation is another matter. We concluded that it was best to leave the problem of the meaning of vest with the court. By eliminating from the perpetuities field all the feudal meanings of vest—other than indefeasibly vest[23]—the court has already narrowed the meaning of "vest in interest" to an understandable meaning, not too difficult to apply. Indeed, it is possible that the court has eliminated the concept of "vest in interest" altogether in applying the perpetuity rule.

2. KRS 381.215: ADOPTION OF THE COMMON LAW RULE AGAINST PERPETUITIES

KRS 381.215 (section 1 of the 1960 Perpetuities Act) reads:

> No interest in real or personal property shall be 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. It is the purpose of this section to enact the common law rule against perpetuities, except as hereinafter modified by KRS 381.215 to 381.223.[24]

The section sets forth the common law Rule against Perpetuities, using the language of John Chipman Gray. Only the words,

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[21] See pp. 15-34 *supra.*

[22] Professor Schuyler is the leading exponent of this idea, and has drafted an appropriate statute. See Schuyler, "Should the Rule Against Perpetuities Discard Its Vest?," 56 Mich. L. Rev. 887, 949-951 (1958).

[23] An indefeasibly vested remainder is one in ascertained, fixed persons certain to take permanent possession of the property in the future. See Curtis v. Citizens Bank, 318 S.W. 2d 33 (Ky. 1958).

[24] The reviser of statutes in codifying the act substituted "by KRS 381.215 to 381.223" for the phrase "by this Act." Inasmuch as it is hard to see how the section can "hereinafter" be modified by itself, it would have been clearer if "by KRS 381.216 to 381.223" had been substituted.

"in real or personal property," are added to Gray's classic statement of the Rule. As the Court of Appeals long ago adopted the common law Rule by decision, the section is declaratory of existing law, set forth in Part I of this article, except as the law is modified by subsequent sections of the 1960 act. The only effect of enacting this section and repealing KRS 381.220 is that the Rule is stated to be against remoteness of vesting rather than against "suspension of the power of alienation," which language has caused so much trouble. The rule against unreasonable restraints on alienation, discussed in Part IV of this article, remains unchanged.

3. KRS 381.216: THE WAIT-AND-SEE DOCTRINE AND CY PRES

KRS 381.216 (section 2 of the 1960 Perpetuities Act) reads:

> In determining whether an interest would violate the rule against perpetuities the period of perpetuities shall be measured by actual rather than possible events; provided, however, the period shall not be measured by any lives whose continuance does not have a causal relationship to the vesting or failure of the interest. Any interest which would violate said rule as thus modified shall be reformed, within the limits of that rule, to approximate most closely the intention of the creator of the interest.

The first sentence of the section adopts the wait-and-see doctrine. The second sentence, providing for reform of invalid interests, adopts cy pres.

A. *The Wait-and-See Doctrine*

The common law measured the validity of an interest by determining at the date of the instrument whether there was any possibility it would vest too remotely. Under this section validity is measured by actual events. We wait and see whether the interest actually vests in time. If it does, it is valid; if it does not, it is void. The wait-and-see principle has been adopted in Pennsylvania,[25] Vermont,[26] and Washington,[27] and in a modified

[25] Pa. Stat. Ann. tit. 20, § 301.4 (1950). For discussions of the Pennsylvania Act, see Pa. Comm. on Decedents' Estates Laws, Proposed Estates Act of 1947 (1946); Brégy, Intestate, Wills and Estates Acts of 1947, at 5251-5550 (1949); Brégy, "A Defense of Pennsylvania's Statute on Perpetuities," 23 Temp. L.Q. 313 (1949); Cohan, "The Pennsylvania Wait-and-See Doctrine—New Kernels from Old Nutshells," 28 Temp. L.Q. 321 (1955); Leach, "Perpetuities Legislation:

(footnote continued on next page)

form in Connecticut, Maine, Maryland, and Massachusetts.[28] It has also been adopted by the New Hampshire court, and possibly by the Florida court.[29] And in 1956 the distinguished English Law Reform Committee unanimously recommended it for adoption in the country where the Rule was born and grew up.[30]

In the great bulk of cases this principle will be of easy application and will save many gifts formerly held void.[31] These cases will usually involve life estates, with remainder over, and at the death of the first life tenant it will be known whether the remainder will vest in time. In other cases it may not be obvious who are the measuring lives or the interest may not be limited after a life estate. The problems that might be raised by these cases are discussed below.

Who are the measuring lives? The language, "*. . . provided, however, the period shall not be measured by any lives whose continuance does not have a causal relationship to the vesting or failure of the interest,*" is original with the Kentucky statute. It is not contained in any of the other statutes. Its purpose is to cure the problem of what lives it is permissible to wait out. If wait-and-see is taken literally it is possible to contend an interest is valid if it actually vests within 21 years after the death of *any* person who was alive when the instrument took effect. Obviously this result would be impractical, not to say absurd. Although probably no court would ever so hold, this provision clearly

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(footnote continued from preceding page)
Hail Pennsylvania!," 108 U. Pa. L. Rev. 1124 (1960); Mechem, "Further Thoughts on the Pennsylvania Perpetuities Legislation," 107 U. Pa. L. Rev. 965 (1959); Phipps, "The Pennsylvania Experiment in Perpetuities," 23 Temp. L.Q. 20 (1949).

[26] Vt. Stat. Ann. tit. 27, § 501 (1959). The Vermont statute served as a model for KRS 381.216. It was drafted by the Harvard Legislative Research Bureau and Professor Leach, whose memorandum interpreting it is reprinted in Leach and Tudor, The Rule Against Perpetuities 224-230 (1957).

[27] Wash. Rev. Code §§ 11.98.010-11.98.030 (1959 Supp.) (applicable to trusts only). For comment see 34 Wash. L. Rev. 330 (1959).

[28] Conn. Gen. Stat. Rev. § 45-95 (1958); Me. Rev. Stat. Ann. c. 160, § 27 (1959 supp.); Md. Ann. Code art. 16, § 197A (1960 supp.); Mass. Ann. Laws c. 184a, § 1 (1958). The Massachusetts statute (copied almost verbatim by the other three states) is discussed in Leach, "Perpetuities Legislation—Massachusetts Style," 67 Harv. L. Rev. 1349 (1954).

[29] Merchants Nat'l Bank v. Curtis, 98 N.H. 225, 97 A. 2d 207 (1953); Story v. First Nat'l Bank, 115 Fla. 436, 156 So. 101 (1934).

[30] See British Law Reform Committee, Fourth Report (The Rule Against Perpetuities), Cmd. No. 18 (1956), discussed in Leach, "Perpetuities Reform by Legislation: England," 70 Harv. L. Rev. 1411 (1957).

[31] See Appendix, Table 5, pp. 110-111 *infra.*

prevents such a result by limiting the measuring lives to lives causally related to the vesting or failure of the interest.[32]

What does the requirement that the measuring life have a "causal relationship to the vesting or failure of the interest" mean? In a sense it is simply declaratory of the measuring lives at common law, which, as the court said in *Bach v. Pace*,[33] "may be any lives which play a part in the ultimate disposition of the property." However, there is this difference. At common law the measuring lives had to have a causal relationship to vesting which insured vesting within the period.[34] Under wait-and-see, absolute certainty ab initio is not required, and hence the measuring lives are those in being at the beginning of the period whose continuance might affect vesting. These are lives which "play a part in the ultimate disposition of the property"; these are lives with a causal relationship to vesting.

In practically all cases the measuring lives will be one or more of the following as fits the particular facts: (a) the preceding life tenant, (b) the taker(s) of the interest, (c) a parent of the takers of the interest, (d) a person designated as a measuring life in the instrument, or (e) some other person whose actions or death can expressly or by implication cause the interest to vest or fail. Though it seems obvious, perhaps it should be pointed out that this section does not at all narrow the lives usable at common law. Any gift good under the common law remote possibilities test is valid under KRS 381.216.

Transfers upon a contingent event not related to any life. Some gifts are made on contingencies not related to lives. Examples are: $1,000 to A immediately upon probate of my will; $100,000 to my testamentary trustee to hold in trust under certain provisions; 50-year lease to X Corporation if a certain building is built. The contingencies in these cases are, respectively, probate of a will, appointment of a trustee, and erecting a building. These events are not causally related to the continuance of any life in being. In such cases the interests are valid if the

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[32] A provision of this sort is recommended by Waterbury, "Some Further Thoughts on Perpetuities Reform," 42 Minn. L. Rev. 41, 66, n. 96 (1957). The addition of this language in the Kentucky statute is approved by Leach, "Perpetuities Legislation: Hail Pennsylvanial," 108 U. Pa. L. Rev. 1124, 1146 (1960).

[33] 305 S.W. 2d 528, 529 (Ky. 1957).

[34] See p. 12 *supra*.

contingencies actually occur within 21 years. They are void if the contingencies occur thereafter.

KRS 381.216 will save for 21 years options and other commercial transactions which are limited upon contingencies unrelated to lives, and which were void at common law. Thus:

> *Case 1.* O grants "to A, his heirs, and assigns an option to purchase Blackacre for $5,000." Under common law the grant created an equitable interest in A, subject to the condition precedent of exercise. It was void under the Rule against Perpetuities since it was assignable and might not be exercised within the perpetuities period. No particular life is causally related to its exercise, and under KRS 381.216 the option is valid for 21 years, and void thereafter.[35] (If the option is personal to A, and not assignable, A's life is causally related to its exercise. It was valid at common law, and is valid under this statute.)

B. *Reformation by Cy Pres*

The second sentence of KRS 381.216 provides: *"Any interest which would violate said rule as thus modified shall be reformed, within the limits of that rule, to approximate most closely the intention of the creator of the interest."* It is copied from the Vermont statute. This sentence applies to invalid private dispositions the doctrine of cy pres, which has heretofore been applied to charitable gifts only.[36] Applying cy pres to private dispositions was first suggested by former Judge James Quarles of the Chancery Court in Louisville,[37] who earlier had been successful in persuading the Court of Appeals to apply cy pres in *Hussey v. Sargent.*[38] Professor Simes and Leach, among others, have subsequently advocated it, and New Hampshire, Vermont, Washington and possibly Idaho have adopted it.[39]

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[35] But the option still may be invalid as an unreasonable restraint on alienation. See Robertson v. Simmons, 322 S.W. 2d 476 (1959), discussed pp. 84-86 *infra.*

[36] See Citizens Fidelity Bank v. Bernheim Fdn., 305 Ky. 802, 205 S. W. 2d 1003 (1947); Moore's Heirs v. Moore's Devisees, 34 Ky. (4 Dana) 354 (1836).

[37] Quarles, "The Cy Pres Doctrine, with Reference to the Rule Against Perpetuities—An Advocation of its Adoption in All Jurisdictions," 38 Am. L. Rev. 683 (1904); revised and republished as Quarles, "The Cy Pres Doctrine: Its Application to Cases Involving the Rule Against Perpetuities and Trusts for Accumulation," 21 N.Y.U.L. Rev. 384 (1946). Professors Simes and Leach both refer to the latter article as the pioneering piece, but it appears Quarles was on top of the problem years before as a result of some successful lawyering.

[38] 116 Ky. 53, 75 S.W. 211 (1903) (applying New Hampshire law).

[39] Edgerly v. Barker, 66 N.H. 434, 31 Atl. 900 (1891); Vt. Stat. Ann. tit. 27, § 501 (1959); Wash. Rev. Code §§ 11.98.010-11.98.030 (1959 supp.) (applicable to trusts only); Idaho Code Ann. § 55-111 (1957) (applicable to trusts only; vague statute).

The adoption of cy pres requires the court to reform the invalid interest only, leaving standing the preceding valid estates, which under prior law were frequently and dubiously struck down through the application of infectious invalidity. Exactly how an instrument will be reformed depends on what is suitable on the particular facts. The next section illustrates how the power may be exercised in some common cases.

4. ILLUSTRATIONS OF HOW KRS 381.216 APPLIES

Remainders after life estates of persons in being. Where there is a life estate, or a series of life estates, created in persons in being, it is usually not necessary for a court to pass upon the validity of the remainder until the preceding estates have expired. No issue of possession of land, nor of who takes the trust corpus, can arise until that time. Therefore, we wait until the expiration of life estates of persons in being and see what the facts are at that time. If it is then necessary, the gift is reformed to comply with the Rule.

> *Case 2 (Age contingency).*[40] T devises property "to A for life, remainder to A's children who reach 25." T's heirs are A, B and C. Under former law the gift to A's children was void, and on A's death the property passed to B, C and A's estate in equal shares. Under KRS 381.216, the validity of the remainder is not determined until A's death. If at that time it is found that all of A's children were born before T's death or if all of them are then over 4 years old, the remainder is certain to vest within the period. It is valid and no reformation is required. If, however, at A's death there is a child of A under 4 who was born after the testator's death, the will is reformed to give the property to such of A's children as reach 21.[41] The justification is that testator obviously would prefer earlier vesting to total invalidity if the point could be put to him.

Remainder after successive life estates, the first of which is in a person in being, the second possibly in a person not in being.

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[40] Cases 2 and 3 are borrowed from Mr. Leach's explanation of the Vermont statute, on which KRS 381.216 was modeled. See Leach and Tudor, The Rule Against Perpetuities 229-230 (1957).

[41] Reformation by reduction of age contingency is provided for by statute in some jurisdictions. English Law of Prop. Act (1925), § 163; Conn. Gen. Stat. Rev. § 45-96 (1958); Me. Rev. Stat. Ann. c. 160, § 28 (1959 supp.); Md. Ann. Code art. 16, § 197A (1960 supp.); Mass. Ann. Laws c. 184a, § 2 (1958); N.Y. Real Prop. Law § 42-b; Pers. Prop. Law § 11-a. See also Hussey v. Sargent, 116 Ky. 53, 75 S.W. 211 (1903).

Where there is a secondary life estate given to a person who may or may not be in being at testator's death, we wait until the death of the first life tenant to determine validity of the remainders. If it appears at that time that the secondary life tenant was not in being at testator's death, the remainder is reformed to approximate most closely his intention.

Case 3 (Unborn widow). T devises property in trust "to pay the income to A for life, then to pay the income to A's widow for life, and then to pay the principal to A's issue per stirpes who are living at the death of the survivor of A and his widow." Under prior law the remainder to A's issue was void because it was possible that "A's widow" would be a person not in being at T's death. Under KRS 381.216 the validity of the remainder is not determined until A's death, when it will doubtless appear that his widow was in being at T's death and the gift to issue is valid. However, in the extraordinary case where A's widow was not in being at T's death, the gift to A's issue is reformed to read: "to the issue of A per stirpes who shall be living at the death of the survivor of A and his widow, provided that, if A leaves a widow who was unborn at my death, the interest to A's issue shall indefeasibly vest not later than 21 years after A's death." Thus reformed the gift is valid no matter what happens. If A's widow lives more than 21 years after his death, A's issue living 21 years after his death will take an indefeasibly vested remainder, not subject to surviving beyond that time. This would approximate most closely T's intent. (If, however, an indefeasibly vested remainder does not satisfy the Rule and vesting in possession is required, as some Kentucky cases seem to indicate, the reformation would require a different wording.)

Case 4 (The most common infraction of the Rule in Kentucky).[42] T has two children, a son and a daughter. T devises one-half of his estate to his son in fee. T devises the other one-half in trust "to pay income to D for life, then to D's children for their lives, then to pay the principal to D's grandchildren." Under prior law the gift to D's grandchildren was void, and the court had the choice of (a) letting it pass to T's heirs by intestacy (resulting in the son's family ultimately receiving three-fourths of T's property and the daughter's only one-fourth), or (b) striking down the entire trust *and* the gift to the son (resulting in total

[42] See cases collected in Appendix, Table 5, fact patterns 1 and 2, p. 110 *infra*, and Table 6, fact pattern 3, p. 112 *infra*.

intestacy but equal distribution). Obviously either course does violence to T's intention. Under KRS 381.216, the validity of the remainder in fee is not determined until D's death. There are three possible states of facts that might be existing at that time. (*A*) D had no children surviving her who were born after T's death. If such is the case—and prior Kentucky cases indicate it usually will be—the gift to grandchildren is incapable of vesting beyond the period. Therefore it can be declared valid. (*B*) All of D's surviving children were born after T's death. Here we know the ultimate remainder cannot vest within lives in being. The will is thus reformed to read: "to D's grandchildren, provided that, if D is survived only by children who were unborn at my death, the interest to D's grandchildren shall indefeasibly vest not later than 21 years after D's death." This means the class of takers would close 21 years after D's death, if not before. Thus reformed, the testator's intent is carried out to the greatest possible extent. (If vesting in possession is required, or if D's surviving children were all very young so that closing the class 21 years later might exclude some grandchildren, the will might be reformed to read: "if the trust does not terminate under the instrument within 21 years after D's death, it shall then be terminated and the principal distributed to D's then living children, with the issue of any deceased child taking their parent's share.") (*C*) Some of D's surviving children were born before T's death, and some after. In this case we cannot determine the validity of the gift to grandchildren at D's death, since it is still possible for the interest to prove either valid or void by actual events. We must wait until the death of D's children in being at T's death. There should be no inconvenience in waiting further because D's children are still entitled to possession or income from the property. If the last survivor of D's children turns out to be a person in being, the remainder will actually vest in time and will be valid. On the other hand, if all D's children in being at T's death die, survived by a child of D not in being, it will then be known that the remainder is incapable of vesting within lives in being. The will is then reformed in a manner similar to (*B*) above, to vest the gift within 21 years of the death of D's children in being at T's death.

Trusts measured solely by a period of years. Frequently testators set up trusts not measured by any lives in being but for a gross period of years, such as 40. The Rule against Perpetuities is not concerned with the duration of the trust as such. Rather

it is concerned with the vesting of interests in the trust. If the vesting of the interests is not causally related to any life in being, under KRS 381.216 the trust will last for 21 years and then terminate. If, as will more often be the case, the interests are causally related to lives in being though the trust is for a term of years in gross, the trust can last for the relevant lives plus 21 years, which may or may not be longer than the specified duration. Thus:

> *Case 5.* T devises property in trust "for 40 years to pay income to my issue per stirpes from time to time living, and at the end of 40 years to distribute the principal to my issue then living per stirpes." With respect to both the income and the principal interest, the class can increase or decrease in membership depending upon the life, death, and generative powers of T's issue living at his death (and of T's afterborn grandchildren as well, but they are excluded as measuring lives). They have a causal relationship to the vesting of the gifts. Hence the trust will be valid for the lives of T's issue living at his death plus 21 years thereafter, or for 40 years, whichever period is shorter. If the trust terminates on the former event, the will is reformed to distribute the principal to T's issue per stirpes living at the date of distribution. If the trust terminates on the latter event no reformation is required. (The same result should follow in a discretionary as well as a mandatory trust.)

Powers of appointment. This section brings no substantial change in the application of the Rule to interests created by exercise of special and testamentary powers, since under prior law it was standard practice to wait until the power was exercised and judge the validity of interests by facts existing at that time. Usually the power will be exercised in such a way as to bring it within the fact pattern of *Case 4.* The exercise will be read back into the original instrument creating the power, and what was said with respect to that case will be applicable to it.

Although the application of wait-and-see to powers is not new, the cy pres provision is. The old law that an invalid gift passed in default of appointment will no longer be applied if the donee's intention can be approximated more closely by reformation.

Summary. Cases 1 through *5* cover the fact pattern of every perpetuities case decided by the Kentucky Court of Appeals in

which an interest has been held void.[43] And, as we have seen, the reform statute can be applied to every one of them with little difficulty. This should dispel any notion that wait-and-see and cy pres may be difficult to apply in run-of-the-mill cases.

That all these cases—all three dozen of them—fall into five well-defined fact patterns is revealing. It indicates that bizarre hypothetical cases which can be dreamed up to show the inconvenience of wait-and-see may be, like the fertile octogenarian and the unborn widow, theoretically possible but as a practical matter rarely happen. Any general rule of law properly must be drawn to fit common and reasonable dispositions, instead of being drawn in fear of highly improbable ones. If such exceptional cases do arise, the Court of Appeals cannot be expected to push a sound principle to its drily logical extreme, resulting in great and serious inconvenience in the distribution of property. The ability of the court to reform the instrument to carry out testator's intent to the greatest extent possible should, and was designed to, prevent the wait-and-see doctrine from getting out of control in any such manner.

PART III

TERMINATION OF RIGHTS OF ENTRY AND ABOLITION OF POSSIBILITIES OF REVERTER

1. INTRODUCTION

Sections 4 through 7 of the 1960 Perpetuities Act (KRS 381.218 through 381.222) deal with rights of entry and possibilities of reverter, which historically have been exempt from the common law Rule against Perpetuities.[1] These interests are just as objectionable as interests within the Rule, in that they tie up property for long periods of time, potentially forever. With passage of time and change of conditions they leave the owner of the fee in a straight jacket.

[43] See Appendix, Tables 5, 6, and 7, pp. 110-112 *infra*. The statement in the text does not include cases on rights of entry and possibilities of reverter, which are dealt with separately in Part III of this article.

[1] Holding these interests exempt: Fayette County v. Morton, 282 Ky. 481, 138 S.W. 2d 953 (1940); Fayette County Bd. of Ed. v. Bryan, 263 Ky. 61, 91 S.W. 2d 990 (1936); Bowling v. Grace, 219 Ky. 496, 293 S.W. 964 (1927); Jefferson County Bd. of Ed. v. Littrell, 173 Ky. 78, 190 S.W. 465 (1917).

To determine the purpose and frequency of the creation of these interests the author, with the very valuable assistance of two students, Mr. William Logan and Mr. Robert Zweigart, undertook to read all the wills and deeds recorded in Fayette County (Lexington) for the year 1957.[2] There were 323 wills probated, none of which created rights of entry or possibilities of reverter. Out of 4333 recorded deeds only six created these interests. The contingencies upon which the rights of entry or possibilities of reverter were limited were:

> (a) cessation of use as a public park (two deeds from real estate development corporation to Fayette County)
> (b) cessation within twenty years of use for educational purposes (two deeds from U. S. Dept. of Health, Education and Welfare to University of Kentucky and county board of education)
> (c) cessation of use for church purposes (Ohio grantor to local church)
> (d) cessation of use for street purposes (individual to city of Lexington)

In contrast to these few deeds creating forfeiture restrictions on land use, the great majority of deeds contained or referred to non-forfeiture restrictive covenants. There were 748 deeds containing new express covenants, 1088 referring to covenants contained in a prior deed, and 1642 referring to a plat which may or may not have had restrictions recorded on its face. Only 849 deeds contained no restrictions nor reference to any restrictions in prior deeds nor reference to a plat (but two-thirds of these deeds did except from the general warranty "restrictions, if any, of record").

Although this study was limited to the deeds and wills in one county for one year, it tends to confirm what many take to be common knowledge: that rights of entry and possibilities of reverter are used almost exclusively for the purpose of restricting the use of land, and even for that purpose are used infrequently in modern times. The restrictive covenant has replaced them.

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[2] Mr. Dale Bryant ran the deeds in rural Wolfe County for the same year. Out of 276 deeds he found one providing for reverter upon cessation of school use. Ironically enough, that deed provided for reverter of the tract to "the owner of said farm that it was taken from," which provision creates an executory interest and is void for perpetuity. McGaughey v. Spencer County Bd. of Ed., 285 Ky. 769, 149 S.W. 2d 519 (1941). Mr. Bryant found no restrictive covenants recorded in Wolfe County in 1957.

From the functional viewpoint then, KRS 381.218 through 381.222 deal basically with forfeiture restrictions on the use of land, though they apply in terms to conceptual interests. The basic scheme of these sections is to reduce all types of forfeiture restrictions on the use of land to one—the right of entry—and then to provide for the termination of rights of entry thirty years after date of creation (with certain exceptions). Existing rights of entry and possibilities of reverter are subjected to the thirty year termination rule unless they are re-recorded before July 1, 1965. Detailed comment on these sections, and how they accomplish the basic scheme, follows.

2. KRS 381.218: ABOLITION OF THE DETERMINABLE FEE AND THE POSSIBILITY OF REVERTER

KRS 381.218 reads:

> The estate known at common law as the fee simple determinable and the interest known as the possibility of reverter are abolished. Words which at common law would create a fee simple determinable shall be construed to create a fee simple subject to a right of entry for condition broken. In any case where a person would have a possibility of reverter at common law, he shall have a right of entry.

The purpose of this section was to abolish the anachronistic distinction between (a) a fee simple determinable with a possibility of reverter and (b) a fee simple subject to a condition subsequent with right of entry for condition broken. These two estates with their related future interests may be illustrated by the following cases.

> *Case 1.* O deeds land "to Trinity Church so long as used for church purposes." Trinity Church has a fee simple determinable, and O has a possibility of reverter by operation of law since he did not grant an absolute fee.[3] An

[3] Devine v. Isham, 284 Ky. 587, 145 S.W. 2d 529 (1940); Fayette County Bd. of Ed. v. Bryan, note 1 *supra*. The dispositive language in *Case 1* should be compared with a grant "for church purposes only, and for no other purpose" which conveys a fee simple absolute. Scott County Bd. of Ed. v. Pepper, 311 S.W. 2d 189 (Ky. 1958); Williams v. Johnson, 284 Ky. 23, 143 S.W. 2d 730 (1940). It is not clear that a possibility of reverter would arise by operation of law in Kentucky where the grantee pays valuable consideration for the property. See Bd. of Ed. of Taylor County v. Bd. of Ed. of Campbellsville, 292 Ky. 261, 166 S.W. 2d 295 (1942).

express clause providing that the land revert back to O and his heirs is technically superfluous, but a wise addition as a practical matter to prevent litigation.

Case 2. O deeds land "to Trinity Church, but if the land is ever used for other than church purposes the grantor and his heirs may enter and terminate the estate hereby transferred." Trinity Church has a fee simple subject to condition subsequent. O has a right of entry for condition broken (called a "power of termination" in the *Restatement of Property*).

Whether the grantor creates a determinable fee with a possibility of reverter or a fee simple subject to a right of entry supposedly depends upon the language used. The former is said to be created by such words as "so long as", "during", "until". The latter is alleged to be created by words granting a fee and then adding, "provided that", "on condition that", "but" if a specified event happens the grantor may re-enter. It is notoriously difficult, however, to classify instruments by resort to such tenuous verbal distinctions. Few actual instruments fall neatly and clearly into one, and only one, category. Where classification leads to different legal consequences, it is necessary to litigate any given phrasing to determine what interpretation will be put upon it.[4]

The treatises set forth several differences in legal consequences between a possibility of reverter and a right of entry. One primary difference is that the former is more frequently held alienable. Indeed, it has been held in some few states that the mere attempt to alienate a right of entry destroyed it. This difference does not prevail in Kentucky where by statute "the owner may convey any interest in real property not in adverse possession of another."[5] This statute has been interpreted as making alienable "every conceivable interest in or claim to real estate, whether present

[4] Compare with *Cases 1* and 2 a deed "to Trinity Church, but if the land ceases to be used for church purposes it is to revert to the grantor or his heirs." "But if" points to a right of entry; "revert" points to a possibility of reverter. Held: grantor has right of entry—Ohm v. Clear Creek Drainage District, 153 Neb. 428, 45 N.W. 2d 117 (1950); Sanford v. Sims, 192 Va. 644, 66 S.E. 2d 495 (1951). Held: grantor has possibility of reverter—Baptist Church v. Wagner, 193 Tenn. 625, 249 S.W. 2d 875 (1952); County School Bd. v. Dowell, 190 Va. 676, 58 S.E. 2d 38 (1950). Held: Church has fee simple absolute—Savannah School District v. McLeod, 137 Cal. App. 2d 491, 290 P. 2d 593 (1955); Second Church v. Le Provost, 67 Ohio App. 101, 35 N.E. 2d 1015 (1941).

[5] KRS 382.010. See also KRS 381.210.

or future, vested or contingent,"[6] including possibilities of reverter and rights of entry.[7]

The other primary difference between a possibility of reverter and a right of entry is that the former becomes possessory *"automatically,"* while the exercise of the right of entry is *optional.* Several consequences are alleged to flow from the automatic nature of the possibility of reverter,[8] though many of them seem more apparent than real.[9] The Kentucky cases do not show evidence these two interests are treated differently except in one situation, but in that situation the distinction between automatic and optional termination has led to striking results. The situation is where the holder of the determinable fee has lost actual possession and control of the property after the terminating event happens. For example, a school board holding a determinable fee closes the school and boards up the windows; the neighboring landowner then proceeds to fence in the school lot. It has been held that the school board cannot oust the possessor, irrespective of who he is or whether he has a valid claim of title, because the board's title has terminated.[10] This result, insofar as it gives the law's protection to someone who, without a better claim of title, ousts a prior peaceful possessor, is unsound. Even though the board's "title" has terminated, the board, as the last person peacefully in possession, should be entitled to remain in possession until the true owner appears. And, by eliminating automatic termination, KRS 381.218 so provides.

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[6] Austin v. Calvert, 262 S.W. 2d 825, 826 (Ky. 1953), holding possibility of reverter alienable. Contrary dictum in some prior cases was expressly disapproved.

[7] Austin v. Calvert, note 5 *supra;* Webster County Bd. of Ed. v. Wynn, 303 Ky. 110, 196 S.W. 2d 983 (1946); Fayette County Bd. of Ed. v. Bryan, 263 Ky. 61, 91 S.W. 2d 990 (1936); Fulton v. Teager, 183 Ky. 381, 209 S.W. 535 (1919); Nutter v. Russell, 60 Ky. (3 Met.) 163 (1860); Ky. Coal Lands Co. v. Mineral Dev. Co., 295 F. 255 (6th Cir. 1925); *cf.* Kenner v. American Contract Co., 72 Ky. (9 Bush) 202 (1872). Similar statutes in Virginia—from which KRS 382.010 was taken—and Mississippi have been interpreted as making alienable the possibility of reverter and right of entry. Sanford v. Sims, 192 Va. 644, 66 S.E. 2d 495 (1951); Hamilton v. Jackson, 157 Miss. 284, 127 So. 302 (1930). See also 1 Am. L. Prop. § 4.68; 2 Powell ¶ 282.

[8] See 1 Powell ¶ 191; Williams, "Restrictions on the Use of Land," 27 Tex. L. Rev. 158 (1948). See also Charlotte Park & Recreation Comm. v. Barringer, 242 N.C. 311, 88 S.E. 2d 114 (1955). *Contra,* Capitol Fed. Sav. & Loan Assn. v. Smith, 136 Colo. 265, 316 P. 2d 252 (1957); Robinson v. Mansfield, 2 Race Rel. L. Rep. 445 (Ariz. Super. Ct. 1956).

[9] See Dunham, "Possibility of Reverter and Power of Termination—Fraternal or Identical Twins," 20 U. Chi. L. Rev. 215 (1953).

[10] Barren County Bd. of Ed. v. Jordan, 249 S.W. 2d 814 (Ky. 1952); Webster County Bd. of Ed. v. Gentry, 233 Ky. 35, 24 S.W. 2d 910 (1930).

The distinction between automatic and optional termination of the fee serves no useful purpose today. Functionally the determinable fee with possibility of reverter and the fee simple with right of entry are equivalents. The grantor exhibits the same objective, describes the same persons who have a right to possession, and refers to the same event for shifting the possessory estate. The categorization will in most cases depend upon chance language used. Community policy respecting these interests should be the same regardless of the verbal form.

Abolition of this anachronism with its unfortunate contemporary consequences is the first step in the statutory scheme to bring to book the right of entry and the possibility of reverter, which are exempt from the common law Rule against Perpetuities. Conversion of the determinable fee with possibility of reverter into a fee simple subject to a right of entry for condition broken, rather than the converse, was desirable because it abolished the "automatic" nature of the reverter. An optional forfeiture is less objectionable than an automatic one. The sounder policy requires the fee owner be left in possession until the transferor elects to declare a forfeiture. That this is desirable is confirmed by the abolition of automatic reverter on breach of a land use restriction by the New York legislature in 1958 and by the comprehensive study supporting that legislation.[11] Therefore the determinable fee was done away with.[12]

Effect of KRS 381.218. The effect of this section is that it is now possible to create only two types of defeasible fees: (a) the fee simple subject to a right of entry for condition broken; and (b) the fee simple subject to an executory limitation. (The latter is commonly referred to in Kentucky as *the* defeasible fee, but technically the fee subject to a right of entry is also a defeasible

[11] N.Y. Real Prop. Law § 347; N.Y. Law Revision Comm'n Report, Legis. Doc. 65(B) (1958). The New York statute abolishes both the automatic reverter and the right of entry, substituting therefor a cause of action in equity to compel a reconveyance of the land upon breach of the restriction. The action is subject to any equitable defense which might be interposed to prevent enforcement of a covenant, and forfeiture can be declared by the court only to protect a substantial interest in enforcement of the restriction. This is a more drastic curtailment of forfeiture restrictions on the use of land than is provided in KRS 381.218 and 381.219.

[12] The fee simple determinable is sometimes called a fee simple on a special limitation (meaning duration limited to a period shorter than normal duration), a qualified fee (meaning qualified in duration) or a base fee (meaning inferior). It was the purpose of the statute to abolish the estate by whatever name it is called.

fee.) The technical difference between these fees is that the former is subject to a power to terminate the fee in the transferor or his heirs, while the latter is subject to automatic divestment by an executory interest in a third party. The practical difference is much wider, however. The fee subject to a right of entry, like the determinable fee, is almost always used to restrict the use of land. The fee subject to an executory limitation is rarely used to restrict the use of land; its common use is in instruments disposing of wealth within the family. Thus:

> *Case 3.* T devises land "to A and his heirs, but if A dies without issue surviving him at his death then to B and his heirs." A has a defeasible fee, more narrowly described as a fee subject to an executory limitation. B has an executory interest.[13]

The fee simple subject to divestment by an executory limitation is not affected by KRS 381.218 or KRS 381.219. It is not used to restrict the use of land and is not within the reasons for these sections. It remains subject to the common law Rule against Perpetuities as modified by KRS 381.216. However, what would have been at common law a determinable fee *followed* by a subsequent but *non-divesting* executory limitation is, for reasons subsequently noted, treated under KRS 381.219 as a fee subject to a right of entry.

3. KRS 381.219: TERMINATION OF RIGHTS OF ENTRY AFTER THIRTY YEARS

KRS 381.219 reads:

> A fee simple subject to a right of entry for condition broken shall become a fee simple absolute if the specified contingency does not occur within thirty years from the effective date of the instrument creating such fee simple subject to a right of entry. If such contingency occurs within said thirty years the right of entry, which may be created in a person other than the person creating the interest or his heirs, shall become exercisable notwithstanding the rule against perpetuities. This section shall not apply to rights of entry created prior to July 1, 1960.

[13] In addition to death without issue, other events on which a defeasible fee may be limited include remarriage of testator's widow (Ramsey v. Holder, 291 S.W. 2d 556 (Ky. 1956), return of a long lost son (Commonwealth v. Pollitt, 25 Ky. L.R. 790, 76 S.W. 412 (1903)), attachment by son's creditors (Scott v. Ratliff, 179 Ky. 267, 200 S.W. 462 (1918)).

Rights of entry and possibilities of reverter, being exempt from the Rule against Perpetuities, tie up property very seriously. Title held subject to one of these interests is not marketable, and frequently the property is not improvable because a mortage cannot be obtained upon it. The land may remain undeveloped or limited to uneconomic uses, and the restriction cannot be released because of the difficulty in ascertaining who holds the right of entry or possibility of reverter created by a long dead grantor.[14] Because of their adverse effect upon the marketability of land, KRS 381.219 terminates all rights of entry (including under that designation what formerly would be called possibilities of reverter) which do not become exercisable within thirty years of creation.

Although the exemption of the right of entry (and the now-abolished possibility of reverter) from the Rule against Perpetuities was the loophole in the law allowing forfeiture restrictions to go on forever, it was decided that the best solution to the problem was not to subject rights of entry to that Rule. "Lives in being" have no functional relation to the proper duration of land use restrictions. The common law perpetuity period evolved naturally as a period covering ordinary dispositions of family wealth thought reasonable. From the standpoint of certainty of land titles, it is preferable to fix the maximum duration by a period of years, after which it is certain from the record alone that the right of entry is void. Other states have terminated rights of entry after a fixed period ranging from twenty to forty years, with thirty years being the most common period.[15] Thirty years was selected here because it is a reasonable period of time and the minimum period of title search required by the statutes of limitation in Kentucky. Any recorded right of entry created after July 1, 1960, will come to the attention of the title searcher who makes

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[14] The need for legislation to terminate these interests has been extensively discussed elsewhere. See Report of the Committee on Improvement of Conveyancing and Recording Practices, Proc., ABA Sec. of Real Prop., Prob. & Trust Law 73 (1957), and articles cited therein; Note, 46 Ky. L.J. 605 (1958).

[15] Twenty years—Rhode Island Gen. Laws §§ 34-4-19 to 21 (1956). Twenty-one years—Fla. Stat. Ann. § 689.18 (1959). Thirty years—Conn. Gen. Stat. § 45-97 (1958 Revision); Maine Rev. Stat. c. 160, § 29 (1954, supp. 1959); Mass. Ann. Laws c. 184A, § 3 (1955); Minn. Stat. Ann. § 500.20(2); Neb. Rev. Stat. § 76-2102 (1959); N.Y. Real Prop. Law § 345. Forty years—Ill. Rev. Stat. c. 30, § 37e (1959).

a thirty year search,[16] although by going back no further he still takes the risk that a right of entry created more than thirty years previously, which became exercisable upon breach of condition within thirty years of its creation, remains exercisable.[17]

The second sentence of KRS 381.219 provides that the right of entry *"may be created in a person other than the person creating the interest or his heirs."* This language means where there is a transfer of what would have been a determinable fee at common law, followed by a non-divesting executory interest in a third person, such executory interest shall be treated as a right of entry and validated for thirty years.[18] It was required by the conversion of the determinable fee into a fee subject to a right of entry and was designed to cure the anomalous situation illustrated by the following case:

> *Case 4.* O conveys land "to Trinty Church so long as used for church purposes, and when it ceases to be used for church purposes the land is to revert to the owners of the farm from which the land is taken." The Court of Appeals has held that "the owners of the farm" have an executory interest void under the Rule against Perpetuities.[19]

There is no good reason why it should matter who reclaims the land upon cessation of church use—the grantor, his heirs, the owners of the farm, or any other person. Indeed, it may well be preferable from society's viewpoint for the forfeiture interest to be in the owners of the farm rather than the grantor's heirs, who may be numerous and difficult to locate. This provision carries

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[16] The Massachusetts act, on which this section was based, starts the thirty year period running from the date the fee subject to a right of entry becomes possessory, rather than from the date of creation. It also provides for the alternative application of the Rule against Perpetuities. To give the title searcher more protection from a thirty year search these provisions were rejected. See also the model act drafted by Simes and Taylor, The Improvement of Conveyancing by Legislation 214-217 (1960), rejecting these features of the Massachusetts act.

[17] This risk is minimized by the requirement that a right of entry be exercised within a reasonable time after breach. Hale v. Elkhorn Coal Corp., 206 Ky. 629, 268 S.W. 304 (1925), 16 years unreasonable; Kenner v. American Contract Co., 72 Ky. (9 Bush) 202 (1873), 3 years unreasonable; Kentland Coal & Coke Co. v. Keen, 168 Ky. 836, 183 S.W. 247 (1916) (dictum).

[18] The meaning of this language, taken from the Massachusetts act, is explained by Leach, "Perpetuities Legislation, Massachusetts Style," 67 Harv. L. Rev. 1349, 1364 (1954), and by Simes and Taylor, *op. cit. supra* note 16, pp. 209-210.

[19] McGaughey v. Spencer County Bd. of Ed., 285 y. 769, 149 S.W. 2d 519 (1941); Duncan v. Webster County Bd. of Ed., 205 Ky. 86, 265 S.W. 489 (1924); *cf.* Barren County Bd. of Ed. v. Jordan, 249 S.W. 2d 814 (Ky. 1952).

through the basic scheme of the statute—to reduce forfeiture restrictions on land use to one interest, the right of entry, which can be held by any person and is terminated after thirty years.

4. KRS 381.221: TERMINATION AND PRESERVATION OF POSSIBILITIES OF REVERTER AND RIGHTS OF ENTRY CREATED PRIOR TO JULY 1, 1960

KRS 381.221(1) reads:

> Every possibility of reverter and right of entry created prior to July 1, 1960, shall cease to be valid or enforceable at the expiration of thirty years after the effective date of the instrument creating it, unless before July 1, 1965, a declaration of intention to preserve it is filed for record with the county clerk of the county in which the real property is located.

This section aims to clear titles of old rights of entry and possibilities of reverter. Many of these are useless, and all of them impair the marketability of land and prevent its development or redevelopment under changed conditions. Such titles are not only in churches and schools. Every courthouse in Kentucky contains numerous deeds providing for forfeiture if liquor is ever sold on the premises. These ancient prohibitionist deeds utterly failed to dry up the flow of liquor in this state. Their only substantial effect today is to take the property out of the mortgage market, make it unimprovable, and hinder the efforts of private capital to rehabilitate a declining urban area. The undesirable social and economic consequences of these ancient forfeiture restrictions have been widely recognized. In 1953 the Court of Appeals called attention to this "troublesome and growing problem in real estate law as to what steps, if any, should be taken to clear titles . . . where an old express clause of forfeiture or reversion is involved,"[20] and suggested remedial legislation.

This section provides for termination of rights of entry and possibilities of reverter existing as such on July 1, 1960, unless a declaration of intention to preserve them is recorded before July 1, 1965.[21] Subsection (2) of KRS 381.221 sets forth what the

[20] Hoskins v. Walker, 255 S.W. 2d 481, 482 (Ky. 1953).

[21] The original draft of KRS 381.221 was based on Mass. Ann. Laws c. 260, § 31A (1959 supp.), but caught between the hammer of local conditions and the anvil of the legislature the section as enacted was reduced to less than half the length of the original. Most of the provisions deleted covered expressly minor

(footnote continued on next page)

declaration of intention must contain. If the declaration is filed, the interest will continue to exist unlimited in duration. Requiring continuous refiling every thirty years was rejected for two reasons: very few of these interests are expected to be re-recorded; and requiring those which are re-recorded before 1965 to re-record every thirty years thereafter is, without a marketable title statute requiring continuous refiling of all claims, an unfair burden. Whether these reasons be persuasive, they controlled the matter.

If no declaration of intention is filed before July 1, 1965, with respect to a right of entry or possibility of reverter existing on July 1, 1960, and created before July 1, 1935, the interest will then cease to be valid or enforceable (a) if the contingency on which it was limited has not then happened, or (b) if the interest is a right of entry and the contingency happened before July 1, 1960, but the right remains unexercised.[22] If the contingency on which the interest is limited happens between July 1, 1960, and July 1, 1965, *and* the right of entry is exercised or the determinable fee automatically ends within thirty years of the creation of the interest, no declaration need be filed since the forfeiture interest has become possessory within thirty years of creation. If, however, the contingency happens between 1960 and 1965 and the right of entry is exercised or the determinable fee ends *more than* thirty years after creation, a declaration is required to protect against the relation back provision in the statute.

With respect to rights of entry or possibilities of reverter created after July 1, 1935, if no declaration of intention is filed before July 1, 1965, the interest will continue to be valid and enforceable until thirty years from the date of creation have expired.

Constitutionality of section. KRS 381.221 is the only section of the 1960 Perpetuities Act that is retroactive in effect, and a question of its constitutionality may be raised. It is believed that

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(footnote continued from preceding page)
matters which are now covered by implication only. This section is applicable only to rights of entry and possibilities of reverter in land. Such interests in personal property not in trust are conceivable, but practically unheard of.

[22] If the interest is a possibility of reverter and the contingency happened before July 1, 1960, the possibility of reverter automatically became a fee simple upon breach and is not an existing possibility of reverter on July 1, 1960.

the act is constitutional. Five states have enacted legislation within the past decade terminating existing rights of entry and possibilities of reverter, with two of them providing for preservation of existing interests by re-recording within a given period.[23] In 1955 the Illinois Supreme Court upheld the Illinois Reverter Act terminating existing interests without the privilege of preservation by re-recording.[24] That act was more severe in its operation than KRS 381.221.

The inclusion of the provision for re-recording within five years should remove any question of constitutionality. There are many decisions upholding retroactive legislation of a similar nature where preservation by re-recording is provided. Closely analogous are statutes requiring owners of existing mortgages to re-record them to preserve them against bona fide purchasers and creditors,[25] and marketable title statutes requiring re-recording of interests which have been in existence for more than a specified number of years.[26]

5. KRS 381.222: EXCEPTIONS TO THE THIRTY YEAR TERMINATION RULE

KRS 381.222 reads:

> KRS 381.219 and 381.221 shall not apply to any possibility of reverter or right of entry contained in a deed, gift or grant from the Commonwealth or any political subdivision thereof; nor shall they apply where both the fee simple determinable and the succeeding interest, or both the fee simple subject to a right of entry and the right of entry, are for public, charitable or religious purposes; nor shall they affect any lease present or future or any easement,

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[23] Ill. Rev. Stat. c. 30, § 37e (1959); Neb. Rev. Stat. § 76-2102 (1959); Mass. Ann. Laws c. 260, § 31A (1959 supp.), preserved if re-recorded within ten years of act; N.Y. Real Prop. Law § 345, preserved if re-recorded within three years of act or within thirty years of date of creation. See Fla. Stat. Ann. § 689.18 (1959), no provision for re-recording; retroactive application declared unconstitutional in Biltmore Village v. Royal, 71 So. 2d 727 (Fla. 1954). See also the model act in Simes and Taylor, *op. cit. supra* note 16, pp. 215-216, providing for preservation by re-recording within two years of act or within thirty years of date of creation.

[24] Trustees of Schools v. Batforf, 6 Ill. 2d 486, 130 N.E. 2d 111 (1955).

[25] Upheld in Vance v. Vance, 108 U.S. 514 (1883); Opinion of the Justices, 101 N.H. 515, 131 A. 2d 49 (1957); Livingston v. Meyers, 6 Ill. 2d 325, 129 N.E. 2d 12 (1955).

[26] Upheld in Wichelman v. Messner, 250 Minn. 88, 83 N.W. 2d 800 (1957), holding owner of possibility of reverter or right of entry lost it by failure to re-record; Tesdell v. Hanes, 248 Iowa 742, 82 N.W. 2d 119 (1957).

> right of way, mortgage or trust, or any communication, transmission, or transportation lines, or any public highway, right to take minerals, or charge for support during the life of a person or persons, or any restrictive covenant without right of entry or reverter.

This section exempts from the thirty year termination rule certain rights of entry and possibilities of reverter not within the primary purpose of the statute, which is to clear titles of forfeiture restrictions on land use. Such exemptions include resulting trusts, mineral interests, easements and rights of way, and rights of entry incident to a lease. Restrictive covenants enforceable only by injunction or damages were exempted because an arbitrary thirty year termination date would cut off many useful covenants increasing the marketability of the property. They may presently be terminated by a court when they have outlived their usefulness.[27]

The first two clauses of this section exempt certain rights of entry and possibilities of reverter which are within the statute's ambit but which were exempted because of other overriding considerations. Forfeiture interests held by the Commonwealth or its political subdivisions were excluded because it was believed the power of determining when these interests become inimical to the public interest should rest with the public bodies holding them. The clause exempting a gift over from one charity to another charity carries on the present exemption of this kind of gift from the Rule against Perpetuities.

Lastly, it should be noted that exemptions not specifically mentioned are excluded under the maxim *expressio unius est exclusio alterius*. Thus minors and others under legal disability holding an existing right of entry or possibility of reverter are not exempt from the re-recording requirement.

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[27] See Note, Covenants—Termination Resulting From a Change of Conditions, 45 Ky. L.J. 292 (1957).

PART IV

THE RULE AGAINST DIRECT RESTRAINTS ON ALIENATION

1. THE RULE AGAINST RESTRAINTS DISTINGUISHED FROM THE RULE AGAINST PERPETUITIES AND THE RULE AGAINST SUSPENSION OF THE POWER OF ALIENATION

The rule against restraints on alienation is an entirely different rule from the Rule against Perpetuities.[1] Nor is it to be confused with the rule prohibiting suspension of the power of alienation. The rule against restraints is a rule against *direct* restraints; whereas these other two rules are against *indirect* restraints caused by the creation of non-vested interests (the Rule against Perpetuities) or by the creation of interests in persons not in being or not ascertained (the rule against suspension). Direct restraints are created by expressly providing that the grantee or devisee has no power to alienate the property. Commonly the grantee is ascertained and his interest is vested, but these are unimportant matters under this rule. The important question is whether he is expressly restrained from conveying the property.

While it is easy to see that this rule against direct restraints has nothing to do with the rule against remote vesting (the Rule against Perpetuities), it is not so easy to avoid confusing it with the rule against suspension of the power of alienation. Both rules have the same objective—alienability—and both are phrased as rules concerning "alienation".[2] This similar phrasing has invited confusion because it has not specified alienation of *what*. And in that specification lies the difference between the rules. The rule against suspension is a rule against suspension of the power of alienation of the specific *property* (land, stocks, bonds or other resources). It is violated if, and only if,[3] a fee simple title to the specific property cannot be transferred. The rule against restraints, on the other hand, is a rule against inalienable *interests* in property (fee, life estate, remainder, etc.).

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[1] For comprehensive treatment of restraints on alienation see 6 Am. L. Prop. §§ 26.1-26.132 (by Professor Schnebly); 6 Powell ¶¶ 839-848; Simes & Smith §§ 1111-1171.

[2] For comparison of the two rules see Norvell, "The Power of Alienation: Direct Restraint vs. Suspension," 31 N.Y.U.L. Rev. 894 (1956).

[3] With a qualification respecting assets held in trust, to be noted later.

At first blush this seems to be only a distinction in words. If the grantee cannot convey his interest, the property itself would appear to be inalienable. But this is not necessarily—indeed, is very seldom—true. The reason is a direct restraint does not suspend the power of alienation if it can be released by persons in being. In Kentucky all direct restraints, in whatever form they are cast, carry with them forfeiture provisions. If there is an express provision for forfeiture this will be given effect. If there is not one, the transferor or his heirs have a right of entry as a matter of law. If the person who holds the right to enforce forfeiture is ascertained, he may release his interest and a fee may be conveyed. In such case there is no suspension of the power of alienation. Perhaps this can best be seen by way of illustrations.

> *Case 1 (Disabling restraint).* T devises land in fee "to A, provided however, A cannot sell the land for 20 years." As a matter of law T's heir, H, has a right of entry for condition broken.[4] A and H may join together at any time and convey the fee. Hence there is no suspension of the power of alienation.
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> *Case 2 (Forfeiture restraint).* T devises land in fee "to A, but if A sells the land within 20 years, to B." A and B can convey the fee at any time, and the power of alienation is not suspended.
>
> *Case 3 (Forfeiture restraint).* T devises land in fee "to A, but if A sells the land within 20 years, to A's issue per stirpes living at the time of sale." The power of alienation is suspended since the persons holding the executory interest over (A's issue living at time of sale) cannot be ascertained until a sale is made.[5] Obviously the suspension is merely technical, however, if A has issue living, for a purchaser could acquire a fee from A and his present issue at any time. Nonetheless, only in a case such as this does a direct restraint on a legal interest even technically suspend the power of alienation in Kentucky.

The above illustrations all deal with legal interests. Are they equally applicable to equitable interests? With respect to a trust, if the trustee has power to sell the trust assets the power of alienation of the specific property is not suspended. Nonetheless,

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[4] Kentland Coal & Coke Co. v. Keen, 168 Ky. 836, 183 S.W. 246 (1916). See cases cited note 33 *infra.*

[5] Duncan v. Webster County Bd. of Ed., 205 Ky. 86, 265 S.W. 489 (1924).

in those states which have statutory rules against suspension of the power of alienation courts have held that a *quantum* of assets is made inalienable by the creation of an indestructible trust.[6] This is perhaps an illogical extension of the suspension rule, but it is justified by policy. The trustee cannot really invest the assets as freely as if he owned them absolutely, and he cannot use them to purchase consumers' goods or other forms of wealth. It is still the dead hand controlling property, albeit the control relates to a quantum of wealth rather than to specific property. Therefore whether a trust suspends the power of alienation depends not upon the trustee's power to sell the trust assets but upon the restraints put upon the equitable interests and upon the ability of the beneficiaries to terminate the trust. If no restraints are put on such interests,[7] and all interests are held by persons sui juris who may terminate the trust, the power of alienation is not suspended. If the trust cannot be terminated because of a restraint on alienation, then such restraint has caused the power to be suspended. (It is pertinent to note here, however, that no restraint for more than a life in being and 21 years is valid in Kentucky. It is "unreasonable" and void. Therefore *no valid restraint on alienation in Kentucky can suspend the power of alienation too long.*)

Failure to distinguish the rule against direct restraints from the rule against suspension of the power of alienation can only lead into a thicket of words prickly with ambiguity. The court has many times been caught in that thicket. The recent case of *Robertson v. Simmons*[8] will suffice as an example. In that case there was an agreement between Robertson and Stilley providing that if either became the successful bidder at an auction of a certain tract of land, he would sell to the other party a set portion

[6] Grand Rapids Tr. Co. v. Herbst, 220 Mich. 231, 190 N.W. 250 (1922); Allen v. Allen, 149 N.Y. 280, 43 N.E. 626 (1896); Estate of Hinckley, 58 Cal. 457 (1881). Cf. Ford v. Yost, 299 Ky. 682, 685, 186 S.W. 2d 896, 898 (1944): "Technical alienability or the power of a trustee to sell and convey the particular property for investment is not enough to escape the statute, for the proceeds wear the same fetters of restraint." See pp. 31-33 *supra.*

[7] See Newsom v. Barnes, 282 Ky. 264, 138 S.W. 2d 475 (1940), holding equitable interests alienable unless expressly restrained.

[8] 322 S.W. 2d 476 (Ky. 1959). Other cases where the rules have been confused include Fox v. Burgher, 285 Ky. 470, 148 S.W. 2d 342 (1941); Hite v. Barber, 284 Ky. 718, 145 S.W. 2d 1058 (1940); West v. Ashby, 217 Ky. 250, 289 S.W. 228 (1926); Perry v. Metcalf, 216 Ky. 775, 288 S.W. 694 (1926); Saulsberry v. Saulsberry, 140 Ky. 608, 131 S.W. 491 (1910); Robsion v. Gray, 29 Ky. L.R. 1296, 97 S.W. 347 (1906).

of it at a fixed percentage of the purchase price. In other words, the agreement granted an option to the unsuccessful bidder. Stilley bid in the property at the sale and soon thereafter died. Seven years after the sale Robertson attempted to exercise the option. Stilley's heirs refused to sell, claiming the option was void. The option was construed as unlimited in time, and thus the question was raised whether the option violated the Rule against Perpetuities, the statutory rule against suspension of the power of alienation or the rule against unreasonable direct restraints. It is clear that the option does not violate the rule against suspension, for—Robertson and Stilley being able to convey an absolute fee to a purchaser—the power of alienation is not suspended at any time. It is equally clear that the option, if unlimited as to time as the court held it was, created an equitable future interest in Robertson which violated the Rule against Perpetuities. It was unnecessary to deal with the rule against direct restraints at all. That rule could apply only if it was decided the option was in substance, though not in form, a direct restraint.

The court reached the decision that the option was void because it was "an unreasonable suspension of the power of alienation." It seemed to treat the rule against suspension of the power of alienation and the rule against direct restraints as one and the same, and it ignored the fact that the Rule against Perpetuities as previously applied in Kentucky as well as in other jurisdictions would invalidate the option. After reviewing the "unfortunate confusion" in perpetuities law, largely caused by "the troublesome statute", the court came to some strange conclusions. It noted that KRS 381.220, while phrased as a rule prohibiting suspension of the power of alienation, had been held by the court in many cases to prohibit the remote vesting of interests. This view of the statute, said the court,

> perhaps caused us to indulge in the defective logic [in the option cases],[9] while reaching a desirable conclusion. If the court had based its decision on the theory that the option created an unreasonable suspension of the power to alienate, regardless of whether the estate was vested, it would have had ample authority for its position [*quaere*]. . . . Perhaps the cases, which so carefully pointed out that

[9] See cases cited p. 49, notes 125 and 128, *supra*. The cases were correctly decided under the Rule against Perpetuities.

> KRS 381.220 had no bearing on direct restraints of vested estates, may be disposed of or at least reconciled by the acceptance and the recognition that the common law rule against suspension of the power of alienation has existed in the common law of this state regardless of the troublesome statute.[10]

This choice of language was unfortunate, for it is apparent upon close analysis that the court was not referring to the "common law rule against suspension of the power of alienation" at all, but to the rule against restraints on alienation. The case, carefully examined, holds that an option, whether unlimited in time or limited to the lifetime of the optionee, is an unreasonable restraint on alienation. Why an option should be treated as a direct restraint on alienation (the heart of the matter under the court's analysis) is not discussed.

The 1960 Perpetuities Act repealed the statute prohibiting suspension of the power of alienation. It is hoped that this action will rid the law of all the obfuscation of the rule against direct restraints it has caused. The court will be able to base its decision either on the Rule against Perpetuities or on the rule against unreasonable direct restraints on alienation, which are easily differentiated one from the other. The new act has no effect upon the rule against restraints, except in the very minor way noted in section 4 below.

2. RESTRAINTS ON LEGAL LIFE ESTATES AND REMAINDERS

Direct restraints on alienation of legal interests may be broken down into (a) restraints on a life estate and on a remainder and (b) restraints on a possessory fee. The former types of restraints are much easier to justify and will be dealt with first.

It is settled in Kentucky that a restraint prohibiting voluntary alienation of a legal life estate for the entire duration of the estate is valid.[11] A fortiori a restraint on a life estate for a lesser period

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[10] 322 S.W. 2d at 481, 483 (1959). The case is criticized by Professor Sparks in "Future Interests," 1959 Ann. Survey of Am. Law, 35 N.Y.U.L. Rev. 401, 412 (1960).

[11] Gray v. Gray, 300 Ky. 265, 188 S.W. 2d 440 (1945); Anderson v. Simpson, 214 Ky. 375, 283 S.W. 941 (1926); Robsion v. Gray, 29 Ky. L.R. 1296, 97 S.W. 347 (1906); Morton's Guardian v. Morton, 120 Ky. 251, 85 S.W. 1188 (1905); *cf.* Howell v. Weisemuller, 299 S.W. 2d 118 (Ky. 1957). *But see* West v. Ashby, 217 Ky. 250, 289 S.W. 228 (1926), holding restraint on life estate of a person not in being void.

or permitting alienation only to a small number of persons is valid. This rule is based on sound policy. The purpose of a restraint upon a life estate is usually to protect the life tenant with an assured means of support or to preserve the property for the remainderman. The restraint may add materially to the remainderman's protection against waste, since it prevents the life tenant from substituting an irresponsible person in possession. These purposes are entirely legitimate and may require a restraint for the whole life of the life tenant for their accomplishment. Hence both the purposes of the restraint and the time necessary for fulfillment are reasonable.

A restraint on a remainder for the duration of the life estate does not add substantially to the practical inalienability which results from the creation of such interests. There are few buyers for a life estate or a remainder separately. The property cannot be sold without joinder of the life tenant and the remainderman, whose cooperation may be difficult to obtain. Because the restraint adds little practical inalienability, the Kentucky court has in several cases upheld a restraint forbidding transfer of a vested remainder during the life tenant's life.[12] In the relatively recent case of *Gray v. Gray*,[13] however, the court cast doubt on these cases. It struck down a restraint on contingent remainders in fee measured by the lives of the life tenants. The life estates were also restrained, which restraints were upheld. The rationalization of this holding is not easy to come by inasmuch as the remainders were contingent upon the remaindermen surviving the life tenants. Such a remainder following an inalienable life estate is surely not marketable; the restraint adds little inalienability to what already exists. More perplexing is why the court would strike down the restraint on a contingent remainder and uphold a restraint on an indefeasibly vested remainder, which is the type of remainder involved in the prior cases. Under the common law exactly the contrary conclusions would probably be reached.[14] On this point the *Gray* case appears unsound.

While restraining transfer of the remainder during the period

[12] Hale v. Elkhorn Coal Corp., 206 Ky. 629, 268 S.W. 304 (1925); Polley v. Adkins, 145 Ky. 370, 140 S.W. 551 (1911); Frazier v. Combs, 140 Ky. 77, 130 S.W. 812 (1910); Lawson v. Lightfoot, 27 Ky. L.R. 217, 84 S.W. 739 (1905).

[13] Note 11 *supra*. Cf. Dills v. Deavors, 266 S.W. 2d 788 (Ky. 1953).

[14] See 6 Am. L. Prop. § 26.54.

it remains non-possessory may be reasonable, restraining it for a period after it becomes possessory is a horse of another color. The restraint then becomes a restraint on a fee in possession. The court has held restraints on remainders that continue beyond the time of possession are valid if they would be valid imposed on a possessory fee.[15] The rules respecting restraints on fees, discussed below, control.

3. RESTRAINTS ON A LEGAL FEE IN POSSESSION: THE DOCTRINE OF REASONABLE RESTRAINTS

Contrary to the common law Kentucky has long permitted reasonable restraints on a fee.[16] From more than six dozen cases stretching over a century the court has developed what is known as the Kentucky doctrine of reasonable restraints. Yet the court has never, in all these cases, laid down any general test of reasonableness; nor has it articulated any policy rationalization for its doctrine. The analysis below attempts to fill these gaps by providing an operational definition of reasonableness and a policy base. It must be admitted, however, that supplying policy rationalizations where the court has given none is like playing Sancho Panza to the court's Don Quixote. And they should be read with that in mind.

Importance of purpose. The cases indicate the court has been primarily concerned with the duration of the restraint, but it is believed this is not the sole test of reasonableness. The duration of the restraint should be related to a reasonable purpose as well. Restraints on life estates and leasehold interests were allowed at common law because they served a reasonable purpose. It was important for the remainderman or reversioner to have a responsible tenant in possession. If society's interest in the free alienability of property is to give way to a grantor's desire to project his control beyond the time of transfer, the grantor's purpose

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[15] Restraint on remainder for 15 years after death of life tenant is valid: Speckman v. Meyer, 187 Ky. 687, 220 S.W. 529 (1920). Restraint for the remainderman's whole life is void: Cammack v. Allen, 199 Ky. 268, 250 S.W. 963 (1923); Ramey v. Ramey, 195 Ky. 673, 243 S.W. 934 (1922); Robsion v. Gray, note 11 *supra;* West v. Ashby, note 11 *supra.*

[16] 6 Am. L. Prop. § 26.22; Simes & Smith § 1150; Note, 40 Ky. L.J. 337 (1952).

must be one that will benefit either himself during his life or the grantee during a reasonable period of time. If the restraint is capricious or merely to perpetuate the testator's memory, or if it cannot possibly benefit the transferees, there is no reason for society's interest in alienability to give way. Just as purpose was important to the limited common law relaxation of the rule against restraints, so it should be equally important to the more extensive relaxation permitted in Kentucky.

In the first case allowing a restraint on a fee (until the devisee reached the age of 35), the court carefully pointed out that the restraint served a reasonable purpose. Said the court:

> The land is on a turnpike near the growing city of Louisville; and we presume that the principal motive for the restriction was that the value would increase rapidly. . . . [T]he locality of the land and circumstances of this case indicate [the testatrix's] prophetic wisdom in securing from waste as safe and growing an investment as probably could be made for her young daughter.[17]

The importance of reasonable purpose is also reflected in a few later cases,[18] but on the whole it has not been discussed. This can be explained either on the ground that reasonableness of purpose is unimportant or on the ground that such discussion is unnecessary on the facts of the case. The first explanation ignores the sound basis of the original judicial relaxation of the common law—appraisal of purpose. The second seems more realistic. Restraints upheld by the court have fallen into four fact patterns; restraints limited to 21 years or less, to a specified age, to the grantor's life, and to the life tenant's life. The purpose served by restraints so limited are, as will be seen below, much the same. Once it is established that a particular duration is reasonably related to a legitimate purpose, it is usually unnecessary to discuss the purpose of a restraint similarly limited. Thus, although the court has set outside limits beyond which no restraint for any purpose will be allowed, it does not necessarily follow that a restraint within those limits would be valid. It still must be a

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[17] Stewart v. Brady, 66 Ky. (3 Bush) 623, 625 (1868).

[18] Cooper v. Knuckles, 212 Ky. 608, 279 S.W. 1084 (1926); Frazier v. Combs, 140 Ky. 77, 130 S.W. 812 (1910); Kean v. Kean, 13 Ky. L.R. 956, 18 S.W. 1032 (1892).

reasonable restraint under the particular circumstances of the particular case.[19]

The importance of duration. The court has frequently stressed the importance of duration in determining the validity of a restraint. The following rules (a) through (h) state the permissible duration of restraints, based on case holdings.

(a) *An absolute restraint on the fee unlimited in duration is unreasonable and void.*[20] The ordinary purpose of an unlimited restraint is, like a fee tail, to keep the property in the family perpetually. Courts early invented means of docking the entail, principally by the fictitious lawsuit known as the common recovery. They subsequently dealt with unlimited restraints in a simpler manner—invalidating the restraint ab initio.

(b) *A partial restraint on the fee permitting alienation only to members of a small group is void if unlimited in duration.*[21] The effect of a restraint narrowly qualified as to alienees is substantially the same as an absolute restraint or as an unlimited pre-emptive option at less-than-market price. The property is not likely to be sold. The dynastic purpose of a perpetual absolute restraint is usually also present in a restraint of this type.

(c) *An absolute restraint on the fee measured by a period of years more than 21 is unreasonable and void.*[22] The opinions indicate the court was influenced by the perpetuities statute in striking down restraints for more than 21 years, but the perpetuity period is not the criterion of validity. That is made clear by the invalidation of restraints limited to the life of the grantee, a person in being. The 21 year period of the Rule was, however,

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[19] Chappell v. Frick Co., 166 Ky. 311, 314, 179 S.W. 203, 204 (1915): "There has been no general rule laid down . . . by which it may be determined what restraints are reasonable and which ones are unreasonable, and each particular case must be considered upon the particular circumstances of it."

[20] Winn v. Williams, 292 Ky. 44, 165 S.W. 2d 961 (1942); Robsion v. Gray, 29 Ky. L.R. 1296, 97 S.W. 347 (1906); Ernst v. Shinkle, 95 Ky. 608, 26 S.W. 813 (1894); Henning v. Harrison, 76 Ky. (13 Bush) 723 (1878). *Cf.* Saffold v. Wright, 228 Ky. 594, 15 S.W. 2d 456 (1929), voiding provision that bank stock "shall not be sold or converted into money as long as said banks do business."

[21] Courts v. Courts' Guardian, 230 Ky. 141, 18 S.W. 2d 957 (1929), not to be sold "out of the name Courts". *Cf.* Saulsberry v. Saulsberry, 290 Ky. 132, 160 S.W. 2d 654 (1942).

[22] Fox v. Burgher, 285 Ky. 470, 148 S.W. 2d 342 (1941), 50 years; Hite v. Barber, 284 Ky. 718, 145 S.W. 2d 1058 (1940), 60 years; Perry v. Metcalf, 216 Ky. 755, 288 S.W. 694 (1926), 30 years; Saulsberry v. Saulsberry, 140 Ky. 608, 131 S.W. 491 (1910), 54 years.

a handy analogy by which to set a maximum limit on restraints measured by years.

(d) *An absolute restraint on the fee measured by a period of years less than 21 is valid.*[23] Restraints limited for less than 21 years usually have the purpose of protecting the grantee from improvidence until he reaches a more mature age, or of keeping the family funds invested in property which the transferor regards as a good "short-term" investment. They may also be used, where alienation is allowed within the period with the grantor's consent, to protect a subdivider against undesirable persons buying in the subdivision prior to the sale of all the lots and recoupment of his investment. These are legitimate objectives and 21 years is in most cases more than adequate for their accomplishment.

(e) *An absolute restraint on the fee until the grantee reaches early middle age is valid.*[24] The purpose of imposing a restraint of this type on a grantee is to protect him from indiscretion until he reaches maturity. The cases might be explained on the ground that the age specified would in fact be reached within 21 years after transfer, and thus the restraint was measurable by a period of years less than 21. The opinions do not state how old the respective grantees were at time of transfer, however, so such an explanation cannot be verified. It is believed the best explanation is that the purpose was legitimate and the time of duration reasonable.

(f) *An absolute restraint on the fee measured by the life of the grantor is valid.*[25] A person may wish to convey property to his children inter vivos, retaining a veto power over sale. This is the effect of a provision forbidding transfer during the grantor's life, for the grantor can release the restraint and join with the grantee in conveying the fee. Such a restraint may protect the

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[23] Auxier's Ex'x v. Theobald, 255 Ky. 583, 75 S.W. 2d 39 (1934), 5 years; Johnson v. Dumeyer, 23 Ky. L.R. 2243, 66 S.W. 1025 (1902), 20 years. *Cf.* cases cited note 31 *infra.*

[24] Howard's Adm'x v. Asher Coal Co., 215 Ky. 88, 284 S.W. 419 (1926), age 21; Smith v. Isaacs, 25 Ky. L.R. 1727, 78 S.W. 434 (1904), age 35; Wallace v. Smith, 113 Ky. 263 68 S.W. 131 (1902), age 35; Stewart v. Barrow, 70 Ky. (7 Bush) 368 (1870), age 35; Stewart v. Brady, 66 Ky. (3 Bush) 623 (1868), age 35.

[25] Hutchinson v. Loomis, 244 S.W. 2d 751 (Ky. 1951); Turner v. Lewis, 189 Ky. 837, 226 S.W. 367 (1920); Kentland Coal & Coke Co. v. Keen, 168 Ky. 836, 183 S.W. 247 (1916); Pond Creek Coal Co. v. Runyon, 161 Ky. 64, 170 S.W. 501 (1914).

grantor if there is a charge for support on the transferred property.[26] The court has held restraints for the grantor's lifetime reasonable.

(g) *An absolute restraint on the fee measured by the life of the grantee is unreasonable and void.*[27] The grantee may be restrained from alienating the property for 21 years, until he reaches middle-age, or during the life of the grantor, but he cannot be expressly restrained for his whole life. It is difficult to find any wholly satisfactory reasons for this rule in the cases. In several cases the court has said such a restraint is repugnant to the fee, but of course that explanation will not stand close inspection, as Professors Gray and Schnebly long ago pointed out.[28] Alienability is not an inseparable incident of the fee. In upholding restraints for a period shorter than the grantee's whole life the court has necessarily conceded this. In two cases the court has said to give effect to the restraint would turn the fee into a life estate, which is simply a variation of the repugnancy argument. No other reasons have been advanced in the cases.

The crux of the difficulty is this. Since the law does not forbid an inalienable life estate, why should it forbid a fee inalienable for life? If it is reasonable to restrain a life estate, why isn't it reasonable to restrain a fee for the same period? Three reasons for distinguishing between these two interests suggest themselves. First, by creating a life estate and remainder the grantor makes the interests inalienable in a practical way during the life tenant's life. The life estate is not readily marketable by itself, and the life tenant and remainderman are not likely to agree upon a valuation of their respective interests. Unless both parties join, the property cannot be sold. Hence the restraint on the life estate does not cause much more practical inalienability of the life estate or of the property than would be the case without it. With respect to an absolute fee, which is readily marketable, the restraint adds inalienability where none existed before. This

[26] Hutchinson v. Loomis, note 25 *supra;* Pond Creek Coal Co. v. Runyon, note 25 *supra;* Hale v. Elkhorn Coal Co., note 12 *supra;* Polley v. Adkins, note 12 *supra;* Frazier v. Combs, note 18 *supra.*

[27] Winn v. William, 292 Ky. 44, 165 S.W. 2d 961 (1942); Lindsay v. Williams, 279 Ky. 749, 132 S.W. 2d 65 (1939); Cammack v. Allen, 199 Ky. 268, 250 S.W. 963 (1923); Brock v. Conkwright, 179 Ky. 555, 200 S.W. 962 (1918); Cropper v. Bowles, 150 Ky. 393, 150 S.W. 380 (1912); Harkness v. Lisle, 132 Ky. 767, 117 S.W. 264 (1909).

[28] Gray, Restraints on Alienation (2d ed. 1895) § 21; 6 Am. L. Prop. § 26.19.

rationalization may explain *Holt's Executor v. Deshon*,[29] though it was not referred to therein. In that case testator devised land to two sisters in fee, defeasible upon death without issue, with a restraint on alienation for their lives. (Neither sister at that time had children, but being married and age 28 and 33 respectively it was possible for them to have them.)[30] The gift over in default of issue made the fee as inalienable as it would be were they given life estates, and the restraint added little practical inalienability. The court—giving no reason except the sisters did not hold an absolute fee—held the restraint valid. Under the analysis here suggested, treating a fee defeasible upon death without issue like a life estate is proper where under the facts the restraint does not add much inalienability.

Secondly, a restraint on a life estate has another purpose in addition to protecting the life tenant. It protects the remainderman by keeping a responsible person in possession. This purpose cannot be carried out unless the restraint is for the whole duration of the life estate. When the grantee is given the absolute fee, however, there is no purpose to protect against waste whoever may take the property at the grantee's death. The grantee can waste the property if he sees fit, as there is no one else who has an interest to be protected. Hence, the protection of the remainderman is an additional reason for upholding a restraint on a life estate which cannot be given for upholding a restraint on an absolute fee.

Lastly, it is arguable that the type of persons whom the law would favor protecting are the persons to whom a testator would commonly give only a life estate if he desired to protect them. Seldom would he give a fee to persons who are under some practical disability. In all the cases in Kentucky dealing with restraints on a fee limited for the life of the transferee, the restraint has been imposed by a testator devising his property to his issue. There is nothing to indicate the devisees were not (at least in the court's eyes) perfectly competent to deal with the property. The court has not been convinced that they needed protection, and it is arguable that this is substantiated by the very act of giving them a fee rather than a life estate.

[29] 126 Ky. 310, 103 S.W. 281 (1907); *but cf.* Cammack v. Allen, note 27 *supra*, voiding restraint on defeasible fee for devisees' whole life.

[30] Holt's Ex'r v. Deshon, record on appeal, p. 26; appellant's brief, p. 7.

These reasons are not, of course, wholly satisfactory justifications for the rule forbidding restraints on a fee for the life of the grantee. Contrary arguments may be made that the rule cannot be sustained logically if restraints on life estates are permitted, and that the rule is easily evaded by a skilled draftsman and thus is of little social utility. The doctrine of reasonable restraints does not purport to be logical, however. The test of reasonableness is essentially pragmatic, and the limits drawn under it must be appraised pragmatically. If it is easily evaded by a skilled draftsman, it at least has the virtue of forcing grantors to seek the advice of lawyers who usually realize the importance of keeping the property marketable and may advise a trust or a life estate with power of sale.

(h) *A partial restraint on the fee permitting alienation only to members of a small group is valid if limited in duration to a period which would be valid for an absolute restraint.*[31] If a restraint forbidding alienation to anyone within a certain period is reasonable, a fortiori a less restrictive restraint for the same period—allowing alienation within a small group—is good. If the partial restraint is for a longer period than an absolute restraint is allowed, it should be void. Limiting alienation within a small class is only slightly less objectionable than an absolute restraint. The difference is too insubstantial to treat them differently.

4. CONSEQUENCES OF VIOLATING A VALID RESTRAINT

In many jurisdictions a distinction is drawn between a disabling restraint and a forfeiture restraint. A disabling restraint simply withholds the power to sell from the transferee. A forfeiture restraint provides for forfeiture of the interest upon alienation; there is a gift over upon alienation to a third party or a right of entry retained in the transferor or his heirs. Disabling restraints are more objectionable than forfeiture restraints, because there is no possible way they can be released. If enforced as such, the

[31] Restraint *for 20 years* limiting alienation to issue of grantor or grantee, held valid: Cooper v. Knuckles, 212 Ky. 608, 279 S.W. 1084 (1926); Price v. Virginia Iron Co., 171 Ky. 523, 188 S.W. 658 (1916); Francis v. Big Sandy Co., 171 Ky. 209, 188 S.W. 345 (1916). Restraint *for grantee's life* limiting alienation to grantor's issue, held void: Hutchison v. Loomis, 244 S.W. 2d 751 (Ky. 1951); Carpenter v. Allen, 198 Ky. 252, 248 S.W. 523 (1923); Chappell v. Frick Co., 166 Ky. 311, 179 S.W. 203 (1915); Chappell v. Chappell, 119 S.W. 218 (1909); *cf.* Dills v. Deavors, 266 S.W. 2d 788 (Ky. 1953).

property cannot be transferred during the period of restraint. A forfeiture restraint, on the contrary, can be released and a fee title can be conveyed during the period of restraint if the persons who have the right to enforce forfeiture join in the conveyance.

In Kentucky all restraints against voluntary alienation, whatever the form, are treated as forfeiture restraints. If there is no express provision for forfeiture in the instrument, the law implies one and creates a right of entry in the transferor or his heirs. This was early established in *Kentland Coal & Coke Co. v. Keen*[32] and has been adhered to since.[33] It is a sound position. It obviates the difficulty of classifying ambiguous language as disabling or forfeiture. More important, by allowing the restraint to be released, it makes it possible for the property to be sold.[34] Construing all restraints as forfeiture restraints renders the doctrine of reasonable restraints less objectionable than it would otherwise be.

Where a person transfers his interest in property in violation of a valid restraint, the transfer is not void. It is only voidable within the period of the restraint by the person entitled to enforce forfeiture (either the transferor or his heirs,[35] holding a right of entry, or a third person designated in the instrument). If such person acts within a reasonable time after breach and within the period, he is entitled to the interest forfeited.[36] But he is barred from enforcing forfeiture after the period of restraint has run.[37]

The 1960 Perpetuities Act may have some small effect upon the time within which a forfeiture can be claimed. KRS 381.219 terminates rights of entry if the contingency upon which they are

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[32] 168 Ky. 836, 183 S.W. 246 (1916), overruling Frazier v. Combs, 140 Ky. 77, 130 S.W. 812 (1910), and Pond Creek Coal Co. v. Runyon, 161 Ky. 64, 170 S.W. 501 (1914).

[33] Price v. Virginia Iron Co., 171 Ky. 523, 188 S.W. 658 (1916); Francis v. Big Sandy Co., 171 Ky. 209, 188 S.W. 345 (1916); Hale v. Elkhorn Coal Corp., 206 Ky. 629, 268 S.W. 304 (1925); Cooper v. Knuckles, 212 Ky. 608, 279 S.W. 1084 (1926); Howard's Adm'x v. Asher Coal Co., 215 Ky. 88, 284 S.W. 419 (1926); Auxier's Ex'x v. Theobald, 255 Ky. 583, 75 S.W. 2d 39 (1934).

[34] See Francis v. Big Sandy Co., note 33 *supra*.

[35] On who can enforce restraint when restrained devisees are testator's heirs, see Cooper v. Knuckles, note 33 *supra;* Auxier's Ex'x v. Theobald, note 33 *supra*.

[36] Cases cited note 35 supra; Turner v. Lewis, 189 Ky. 837, 226 S.W. 367 (1920); Hale v. Elkhorn Coal Corp., note 33 *supra* (16 years after breach unreasonable); Kenner v. American Contract Co., 72 Ky. (9 Bush) 202 (1872) (3 years after breach unreasonable.)

[37] Kentland Coal & Coke Co. v. Keen, note 32 *supra;* Price v. Virginia Iron Co., note 33 *supra;* Francis v. Big Sandy Co., note 33 *supra;* Howard's Adm'x v. Asher Coal Co., note 33 *supra*.

limited does not happen within thirty years from date of creation. This is applicable to rights of entry created or retained to enforce restraints on alienation. Where the restraint is measured by a period of years this section can have no application, since a restraint for more than 21 years is void ab initio. Where, however, the restraint is measured by the grantor's life, or by the grantee's life, or is for some other reasonable period, KRS 381.219 will apply if the period of restraint does in fact run beyond 30 years. The right of entry will then be terminated. This section does not, of course, have any effect upon the question of what restraints are valid. That remains to be determined under the reasonable restraints test. The section comes into play only after it has been decided the restraint is reasonable, and then only after the restraint has in fact run for more than 30 years.

5. RESTRAINTS UPON EQUITABLE INTERESTS

Any restraint on alienation valid as to a legal interest is valid as to its equitable counterpart. Restraints on equitable life estates,[38] and on equitable fees until the grantee reached a certain age,[39] have been upheld. Moreover, the court has upheld restraints on equitable fees for the entire life of the grantee,[40] something it has declined to do with respect to legal interests. This is justifiable on the ground that an equitable fee is less alienable as a practical matter than a legal fee, where the trust cannot be terminated and the trustee continues to keep control of the property. The restraint adds little additional inalienability.

6. RESTRAINTS ON INVOLUNTARY ALIENATION; CREDITORS' RIGHTS

The preceding discussion has been concerned with restraints against voluntary alienation, which are valid if reasonable and which are not distinguished by form. Restraints against voluntary alienation have the purpose of preventing a voluntary transfer (sale, gift or mortgage) by the transferee. Restraints against

[38] Maher v. Maher, 207 Ky. 360, 269 S.W. (1924); *cf.* Lane v. Taylor, 287 Ky. 116, 152 S.W. 2d 271 (1941); Louisville v. Cooke, 135 Ky. 261, 122 S.W. 144 (1909).

[39] So. Nat'l Life Ins. Co. v. Ford's Adm'r, 151 Ky. 476, 152 S.W. 243 (1913), age 25; Kean v. Kean, 13 Ky. L.R. 956, 18 S.W. 1032 (1892), age 28.

[40] Muir's Ex'rs v. Howard, 178 Ky. 51, 19 S.W. 551 (1917); Bull v. Ky. Nat'l Bank, 90 Ky. 452, 14 S.W. 425 (1890).

involuntary alienation have another purpose. They are designed to prevent a sale under court order to satisfy a debt or judgment. They are restraints against creditors reaching the interest of the transferee.

Although Kentucky law is liberal in upholding restraints against voluntary alienation, it is more strict than the law of other jurisdictions in validating restraints against creditors. In Kentucky all restraints against voluntary alienation and a disabling restraint against involuntary alienation are void against creditors. A spendthrift trust which would prevent creditors from reaching a debtor's interest is not recognized. This result may be required by some rather ambiguous statutes,[41] but whatever the meaning of the statutes the cases are quite clear in holding that restraints are void against creditors.[42]

There are two exceptions to the rule allowing creditors to reach inalienable interests. The first is that an express forfeiture restraint against involuntary alienation will be given effect. If the transferor provides that the transferee's interest shall cease and be forfeited if creditors attach, the interest will cease and the gift over will take effect upon attachment.[43] The creditors are left out in the cold, with nothing to warm them but the doubtful satisfaction of punishing the debtor. The rationalization for this result is that as soon as the creditors take legal action against the debtor, his interest ceases under the dispositive instrument and there is nothing thereafter for them to reach.

The same rationalization underlies the second exception—the discretionary trust. If the trustee has discretion to pay the beneficiary, the court has held creditors cannot reach the beneficial interest and have no claim against the trustee if he disregards their lien and subsequently pays something to the beneficiary

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[41] KRS 381.180; KRS 426.190.

[42] Anderson v. Blackburn, 297 S.W. 2d 919 (Ky. 1956); Meade v. Rowe's Ex'r, 298 Ky. 111, 182 S.W. 2d 30 (1944); Auxier's Ex'x v. Theobald, 255 Ky. 583, 75 S.W. 2d 39 (1934); Ford v. Ford, 230 Ky. 56, 18 S.W. 2d 859 (1929); Brock v. Brock, 168 Ky. 847, 183 S.W. 213 (1916); Smith v. Smith, 115 Ky. 329, 73 S.W. 1028 (1903); Marshall's Trustee v. Rash, 87 Ky. 116 (1888).

[43] Lane v. Taylor, 287 Ky. 116, 152 S.W. 2d 271 (1941); Scott v. Ratliff, 179 Ky. 267, 200 S.W. 462 (1918); Bottom v. Fultz, 124 Ky. 302, 98 S.W. 1037 (1907); Bull v. Ky. Nat'l Bank, 90 Ky. 452, 14 S.W. 425 (1890). *But cf.* Louisville v. Cooke, 135 Ky. 261, 122 S.W. 144 (1909), enforcing tax lien against life estate in spite of forfeiture restraint against involuntary alienation; Bland's Adm'r v. Bland, 90 Ky. 400, 14 S.W. 423 (1890), enforcing creditors' rights because debtor did not forfeit his entire interest in the property.

directly.[44] The reason is that the beneficiary has no interest capable of assignment until the trustee actually exercises his discretion and pays something over to the beneficiary. If, however, the beneficiary has an interest that equity will enforce, such as in a trust for his support, this exception does not apply and the creditors may reach the equitable interest.[45]

The reasoning of the court that the beneficiary has no interest in a discretionary trust is not wholly convincing, either on technical or policy grounds. Technically, the beneficiary's interest could be treated as an interest contingent upon exercise of discretion by a trustee. Barring a restraint, it would be assignable and the assignee would take whatever funds the trustee decides to pay out. It is possible, even probable in many cases, that the trustee would not choose to pay out any funds if the interest were assigned or attached, but the original beneficiary is prevented from receiving anything. In truth, however, to put the decision on the ground that the beneficiary has or has not an "interest" begs the question. For it is just another way of asking whether as a matter of public policy a creditor should be allowed to cut the debtor off from the fruits of the trust even though the creditor himself will not receive them. Precisely the same question underlies the enforcement of a forfeiture provision upon involuntary alienation. Since the law allows a creditor to penalize a debtor, while not profiting himself, in case of a forfeiture provision, the same policy should allow a creditor to penalize a debtor in case of a discretionary trust. He should not be able to reach the trust fund, but he should be able to require that if the trustee decides to pay anything out he should pay the creditor before he pays the beneficiary. This is the position of the *Restatement of Trusts*.[46] Nonetheless, the Kentucky cases hold that the trustee of a discretionary trust may continue to support the insolvent beneficiary with immunity from creditors.

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[44] Calloway v. Smith, 300 Ky. 55, 186 S.W. 2d 642 (1945); Todd's Ex'rs v. Todd, 260 Ky. 611, 86 S.W. 2d 168 (1935); Louisville Tobacco Warehouse Co. v. Thompson, 172 Ky. 350, 189 S.W. 245 (1916); Davidson's Ex'rs v. Kemper, 79 Ky. 5 (1880).

[45] Department of Public Welfare v. Meek, 264 Ky. 771, 95 S.W. 2d 599 (1936); Ratliff's Ex'rs v. Commonwealth, 139 Ky. 533, 101 S.W. 978 (1907); Cecil's Trustee v. Robertson, 32 Ky. L.R. 357, 105 S.W. 926 (1907); *cf.* Huffman v. Chasteen, 307 Ky. 1, 209 S.W. 2d 705 (1948). *But see* Hackett v. Hackett, 146 Ky. 408, 142 S.W. 673 (1912).

[46] Restatement of Trusts 2d § 155(2). Professor Scott concurs. See 2 Scott, Trusts (2d ed. 1956) § 155.1.

7. SALE FOR REINVESTMENT UNDER COURT ORDER

A direction to a trustee not to sell certain property going into the corpus of a trust is a restraint upon the legal, not the equitable, title. Such a direction is valid even though the trustee is directed to hold it for the entire duration of the trust. However, upon proof of circumstances arising which would defeat the purpose of the trust not contemplated by the settlor, a court may order the property sold and the proceeds reinvested even though sale is expressly prohibited.[47] The Kentucky court has been quite liberal in approving sale of trust assets. Satisfactory proof of change of circumstances frequently has consisted only of evidence that a change in investments would benefit the beneficiaries.[48] (A sale for reinvestment must be distinguished from a sale for distribution, which a court will not order if prohibited by the instrument.)

The only real restriction on the court's wide discretion to order sale is a statutory one. If the trustee is not prohibited from selling the property, but on the contrary is expressly given a power of sale, a court cannot order the property sold without the trustee's consent.[49] In sum, the settlor cannot prevent a court from ordering a sale of trust assets unless he gives the power of sale to the trustee. Some living person—either the trustee or the chancellor—must have power to sell the property to protect the beneficiaries of the trust.

May a court order sale and reinvestment of *non-trust* property where sale is expressly prohibited? Prior to 1942, section 492 of the Civil Code of Practice provided that no sale could be ordered by a court for twenty years where forbidden by the deed or will. After twenty years the court could order a sale where a change of circumstances made a sale beneficial to the grantees or devisees. The Court of Appeals, interpreting this statute narrowly, held the

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[47] Adams v. Security Trust Co., 302 Ky. 287, 194 S.W. 2d 521 (1946); Kelly v. Marr, 299 Ky. 447, 185 S.W. 2d 945 (1945), noted 35 Ky. L.J. 147 (1947), approving the rule laid down in Restatement of Trusts § 167. See 2 Scott, Trusts §§ 167, 190.4. *Cf.* Security Trust Co. v. Mahoney, 307 Ky. 661, 212 S.W. 2d 115 (1948).

[48] See Adams v. Security Trust Co., note 47 *supra;* Kelly v. Marr, note 47 *supra;* Consolidated Realty Co. v. Norton's Trustees, 214 Ky. 586, 283 S.W. 969 (1926). *Cf.* Gillespie v. Winston's Trustees, 170 Ky. 667, 186 S.W. 517 (1916); Latta v. Louisville Trust Co., 198 Ky. 45, 247 S.W. 1103 (1923), interpreting instrument as not prohibiting sale for reinvestment.

[49] KRS § 389.045 (8).

court's hand was stayed for twenty years only if sale by a *court* as well as by the grantees or devisees was expressly forbidden by the instrument. In several cases the court interpreted instruments prohibiting sale by the grantee or devisee as not prohibiting a court sale for reinvestment and approved the sale,[50] while in others it interpreted similar instruments as forbidding a sale by the court as well as by the grantees.[51] These cases are hard to reconcile, but inasmuch as section 492 was repealed in 1942, it is not necessary to attempt it. The purpose of repeal was to remove the twenty year stay of the court's hand and allow court sale for reinvestment at any time even though it was expressly prohibited in the instrument.[52] In the recent case of *Groger v. Long*,[53] the testator expressly prohibited sale of non-trust property by a court for reinvestment.[54] The circuit court ordered sale on the ground that it would prove advantageous to the beneficiaries. The Court of Appeals affirmed. It seems to be now settled that no restraint on alienation (except possibly an express forfeiture restraint on court sale with a gift over to a third party) can prevent a court sale for reinvestment.

8. CRITIQUE OF THE KENTUCKY DOCTRINE OF REASONABLE RESTRAINTS

The Kentucky doctrine permitting reasonable restraints on legal absolute interests has never found favor with the commentators or with courts in other jurisdictions. Does this mean it is an undesirable doctrine? In the author's opinion, there is no proof that it is.[55] Its rejection has largely been on theoretical grounds. There is no evidence that any significant social evil has resulted from it or that Kentucky has more unmarketable property than, say, Tennessee or Massachusetts. While doubtless a few pieces of property have been rendered less marketable, the

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[50] Gillespie v. Winston's Trustees, note 48 *supra;* Latta v. Louisville Trust Co., note 48 *supra;* Sparrow v. Sparrow, 171 Ky. 101, 186 S.W. 904 (1916); Rousseau v. Page's Ex'x, 150 Ky. 812, 150 S.W. 983 (1912). *Cf.* Vittitow v. Keene, 265 Ky. 66, 95 S.W. 2d 1083 (1936).

[51] Highfill v. Konnerman, 241 Ky. 282, 43 S.W. 2d 657 (1931); Chenault v. Burgess, 29 Ky. L. R. 569, 93 S.W. 664 (1906); Morton's Guardian v. Morton, 120 Ky. 251, 85 S.W. 1188 (1905).

[52] See Kelly v. Marr, 299 Ky. 447, 185 S.W. 2d 945 (1945).

[53] 269 S.W. 2d 291 (Ky. 1954).

[54] *Id.*, Appellee's brief, p. 5.

[55] See Barnhard, "The Minority Doctrine Concerning Direct Restraints on Alienation," 57 Mich. L. Rev. 1173 (1959), reaching the same conclusion.

restraints have often served quite useful purposes. It must also be remembered that the court has held every restraint can be released by someone, almost every restraint can be overridden by a court sale for reinvestment, and all restraints are void against creditors except one providing for forfeiture upon attachment. From society's viewpoint, the doctrine seems on balance rather innocuous.

The most forceful criticism that can be directed at the doctrine is its vague and uncertain nature. No case involving the validity of a restraint can reasonably be regarded as closed until the Court of Appeals has ruled upon it. There is probably no cure for this except a rule voiding all restraints or a rule validating them for a certain fixed period and voiding them thereafter. Whether that cure would not be worse than the disease is questionable.

Although the test of reasonableness bred much litigation in past years, the number of reported cases is definitely decreasing. There were only six in the last decade, compared to nineteen in the 1920's. This may be because inflated land values have made restraints less desirable, or because the broad court sale statute passed in 1942 makes even restrained land saleable, or because of the increased use of trusts, or because cases are being settled out of court or not appealed. Whatever the cause, it appears that effective restraints on alienation are declining in number. Unless that trend sharply reverses itself toleration of a few restraints is not a significant social evil, and the present doctrine of reasonable restraints may be regarded as satisfactory.

APPENDIX

ANALYSIS OF KENTUCKY PERPETUITIES CASES

Table 1

CASES CONSISTENT WITH ORTHODOX PERPETUITIES DOCTRINE IN RESULT

Armstrong v. Armstrong, 53 Ky. (14 B. Mon.) 269 (1853)
Atty. Gen. v. Wallace's Devisees, 46 Ky. (7 B. Mon.) 611 (1847)
Barren County Bd. of Ed. v. Jordan, 249 S.W. 2d 814 (Ky. 1952)
Bates v. Bates, 314 Ky. 789, 236 S.W. 2d 943 (1950).
Beall v. Wilson, 146 Ky. 646, 143 S.W. 55 (1912)
Board of Nat'l Missions v. Harrel's Trustee, 286 S.W. 2d 905 (Ky. 1956)
Bowling v. Grace, 219 Ky. 496, 293 S.W. 964 (1927)
Cambron v. Pottinger, 301 Ky. 768, 193 S.W. 2d 412 (1946)
Campbell v. Campbell, 313 Ky. 249, 230 S.W. 2d 918 (1950)
Carter's Trustee v. Gettys, 138 Ky. 842, 129 S.W. 308 (1910)
Chenowith v. Bullitt, 224 Ky. 698, 6 S.W. 2d 1061 (1928)
Clay v. Anderson, 203 Ky. 384, 262 S.W. 604 (1924)
Commonwealth v. Pollitt, 25 Ky. L.R. 790, 76 S.W. 412 (1903)
County Bd. of Ed. v. Littrell, 173 Ky. 78, 190 S.W. 465 (1917)
DeCharette v. DeCharette, 264 Ky. 525, 94 S.W. 2d 1018, 104 A.L.R. 1455 (1936)
Egner v. Livingston County Bd. of Ed., 313 Ky. 168, 230 S.W. 2d 448 (1950)
Emler v. Emler's Trustee, 269 Ky. 27, 106 S.W. 2d 79 (1937)
Epperson v. Clintonville Cemetery Co., 303 Ky. 852, 199 S.W. 2d 628 (1947)
Fayette County v. Morton, 282 Ky. 481, 138 S.W. 2d 953 (1940)
Fayette County Bd. of Ed. v. Bryan, 263 Ky. 61, 91 S.W. 2d 990 (1936)
First Nat'l Bank v. Purcell, 244 S.W. 2d 458 (Ky. 1951)
Ford v. Yost, 300 Ky. 764, 190 S.W. 2d 21 (1945)
Gillespie v. Winston's Trustee, 170 Ky. 667, 186 S.W. 517 (1916)
Gray v. Gray, 300 Ky. 265, 188 S.W. 2d 440, 160 A.L.R. 633 (1945)
Goodloe's Trustee v. Goodloe, 292 Ky. 494, 166 S.W. 2d 836 (1942)
Haydon v. Layton, 128 S.W. 90 (Ky. 1910)
Johnson v. Pittsburgh Cons. Coal Co., 311 S.W. 2d 537 (Ky. 1958)
Kasey v. Fidelity Trust Co., 131 Ky. 609, 115 S.W. 739 (1909)
Kenner v. American Contract Co., 72 Ky. (9 Bush) 202 (1872)
Maddox v. Keeler, 296 Ky. 440, 177 S.W. 2d 568, 162 A.L.R. 578 (1944), noted 33 Ky. L.J. 118 (1945)
Miller v. Miller, 151 Ky. 563, 152 S.W. 542 (1913)
Mitchell v. Deegan, 301 Ky. 587, 192 S.W. 2d 715 (1946)

Moore's Trustees v. Howe's Heirs, 20 Ky. (4 T. B. Mon.) 199 (1827)
Page v. Frazier's Ex'rs, 77 Ky. (14 Bush) 205 (1878)
Pullins v. Bd. of Ed. of Methodist Church, 25 Ky. L.R. 1715, 78 S.W. 457 (1904)
Russell v. Meyers, 202 Ky. 593, 260 S.W. 377 (1924)
Saulsberry v. Saulsberry, 290 Ky. 132, 160 S.W. 2d 654 (1942)
Sorrell v. Tenn. Gas Trans. Co., 314 S.W. 2d 193 (Ky. 1958)
Taylor v. Dooley, 297 S.W. 2d 905 (Ky. 1597)
Texas Eastern Trans. Corp. v. Carman, 314 S.W. 2d 684 (Ky. 1958)
Vokins v. McGaughey, 206 Ky. 42, 266 S.W. 907 (1924)

Table 2

CASES HOLDING CONTRARY TO ORTHODOX PERPETUITIES DOCTRINE*

Bach v. Pace, 305 S.W. 2d 528 (Ky. 1957)

Deed of land to W for life, remainder in fee to grandchildren of grantor. Grantor had grandchildren living at date of deed (Record, Exhibit A). Held: remainder to grandchildren void. *Contra*: 6 Am. L. Prop. § 24.25; Gray § 379; Simes & Smith, § 1270, example 5, also n. 69, 1959 pocket part. Orthodox view: class closing at W's death saves gift.

Coleman v. Coleman, 23 Ky. L.R. 1476, 65 S.W. 832 (1901)

Devise in trust to pay income to W for life, then to T's children; at end of 25 years to distribute corpus to T's children then living, with the heirs of any deceased child taking his share. Held: entire devise void. *Contra*: 6 Am. L. Prop. § 24.19, case 22a (1958 supp.); Carey & Schuyler, Illinois Law of Future Interests § 480 (1941); 5 Powell ¶ 772; 4 Restatement of Property § 378; 1 Scott, Trusts § 62.10 (2d ed. 1956); Simes & Smith § 1391; *cf.* Gray §§ 410-410.5. Orthodox view: gifts of income vest immediately; all interests in corpus will vest in interest with possession postponed at or before the death of T's children. Interests not invalid because trust may last beyond perpetuity period.

Curtis v. Citizens Bank, 318 S.W. 2d 33 (Ky. 1958)

Devise in trust to pay income to A, B, and C (T's children) and distribute to each one-third of his share of the corpus at age 40, one-third at 45, one-third at 50. If any child dies before distribution, "his issue to take equally his share per stirpes" at time he would have taken it had he lived. Held: entire trust void. *Contra*:

* In some of these cases the holdings could be made consistent with orthodox doctrine if an unusual construction were given the dispositive language.

6 Am. L. Prop. § 24.19; Carey & Schuyler, Illinois Law of Future Interests § 480 (1941); 5 Powell ¶ 784, fns. 81, 92; 4 Restatement of Property § 386, ill. 7, also § 389, ill. 2. Orthodox view: all gifts will vest in interest with possession postponed within the period. If gift to T's grandchildren void because subject to condition precedent of surviving, striking down gift to T's children is very harsh application of infectious invalidity. Case criticized by Sparks, 35 N.Y.U.L. Rev. 410 (1960).

Fidelity & Columbia Trust Co. v. Tiffany, 202 Ky. 618, 260 S.W. 357 (1924)

Devise in trust of $10 a month to invest and accumulate income for each of T's grandchildren living at his death or born within 10 years thereafter. As each grandchild arrived at age 22, trustee directed to pay him the amount invested and accumulated for his benefit; "if one or more of my said grandchildren shall die before attaining age 22, then" his share to be divided among the other grandchildren who have not attained 22. Held: all gifts to grandchildren void. *Contra*: 6 Am. L. Prop. § 24.28, case 44; 5 Powell ¶ 784; 4 Restatement of Property § 385; Simes & Smith § 1266. Per capita gift to living grandchildren will vest in possession, if at all, within their own lives. Per capita gift to afterborn grandchildren should vest in interest on birth with possession postponed. See authorities cited under Curtis v. Citizens Bank (p. 103 *supra*). See also authorities cited under Holoway v. Crumbaugh (p. 105 *infra*).

Fidelity Trust Co. v. Lloyd, 25 Ky. L.R. 1827, 78 S.W. 896 (1904)

Devise in trust to pay income to T's children, with share of income of any child dying to go to his children; at end of 40 years to distribute corpus among "those who shall then be the heirs of my body." Held: entire trust void. Under orthodox doctrine the gift of corpus is void, but the gift of income to T's children and grandchildren is valid. See authorities cited under Coleman v. Coleman (p. 103 *supra*); *cf.* Gray §§ 410-410.5. There is no reason to apply doctrine of infectious invalidity in this case. 6 Am. L. Prop. § 24.48; 5 Powell ¶ 789; Simes & Smith, §§ 1262, 1263.

Ford v. Yost, 299 Ky. 682, 186 S.W. 2d 896 (1945)

Devise in trust to pay income to A and his children, and at end of 30 years to turn over property to A for life, remainder to A's children in fee. Held: there could be no "vesting" [in possession?] for 30 years. "The provisions of the trust offend the rule . . . and are void." *Contra*: 6 Am. L. Prop. § 24.67; 5 Powell ¶ 773; 4 Restatement of Property § 378; 1 Scott, Trusts § 62.10 (2) (2d

ed. 1956); Simes & Smith §§ 1391, 1393. Orthodox view: the gift to A's children vests in interest at A's death with possession postponed. Interests not void because trust may last beyond perpetuity period. (On a second appeal, Ford v. Yost, 300 Ky. 764, 190 S.W. 2d 21 (1945), the Court eliminated the provision for holding in trust and upheld the beneficial interests.)

Holoway v. Crumbaugh, 275 Ky. 377, 121 S.W. 2d 924 (1938)

Devise to A's children whenever born; if any child dies without issue him surviving his share to X. A had 3 children, all born before T's death. None were born subsequently. Held: gift over to X void. *Contra*: 6 Am. L. Prop. § 24.47, case 72; 4 Restatement of Property § 384, ill. 2, com. g. The gifts over on death of each child are on separate divesting contingencies. Therefore, under orthodox view, the gifts over on death of each of these 3 children living at T's death are valid.

Hussey v. Sargent, 116 Ky. 53, 75 S.W. 211 (1903)

Devise in trust to pay income to A in amount necessary to support his children, accumulate excess, and pay over accumulated income and corpus to A's children when his daughter Emily reaches 35, or if dead when she would have reached 35 had she lived. Held: gift to A's children violates Rule; contingencies not separated. *Contra*: authorities cited under Coleman v. Coleman and Curtis v. Citizens Bank (p. 103 *supra*). Gift to A's children vests in interest with possession postponed at A's death under orthodox view; in any event the gift on the first contingency is valid.

Laughlin v. Elliott, 202 Ky. 433, 259 S.W. 1031 (1924)

Deed to A for life, then to B for life, then to grandchildren of A in fee. A had grandchild living at date of deed. Held: remainder in fee void. *Contra*: 6 Am. L. Prop. § 24.25; Gray § 379; Simes & Smith § 1270, example 5, also n. 69, 1959 pocket part. Orthodox view: class closing at death of A and B saves gift.

Letcher's Trustee v. Letcher, 302 Ky. 448, 194 S.W. 2d 984 (1946)

Devise to A for life, then in trust to the children of B, then to Church forever, but if Church ceases to maintain church house, to Synod. Held: gifts to children of B, to Church and to Synod all void. *Contra* as to children of B and Church: 6 Am. L. Prop. §§ 24.3, 24.19 (case 16); Gray § 205; 5 Powell ¶ 772; 4 Restatement of Property § 378, ill. 1, § 370, com. o; Simes & Smith § 1233. Orthodox view: gift to Church immediately vests in interest with possession postponed; gift to children of B vests at death of A and B, if not before. Trust not invalid because might last beyond perpetuity period. *Contra* as to gift to Synod: 6 Am. L. Prop.

§ 24.40; 5 Powell ¶ 770; 4 Restatement of Property § 397; Simes & Smith § 1280.

Lindner v. Ehrich, 147 Ky. 85, 143 S.W. 778 (1912)
Devise in trust to A for life, then to A's children for their lives, remainder in fee to A's grandchildren. Held: gift to A's grandchildren void (orthodox); preceding life estate increased to a fee (unorthodox). *Contra* on latter point: 6 Am. L. Prop. § 24.47; Gray § 248; 5 Powell ¶ 790; 4 Restatement of Property §403. Invalid interest passes to T's heirs under orthodox view.

Ludwig v. Combs, 58 Ky. (1 Met.) 128 (1858)
Deed providing that children of slave Martha should be free when they reached 25. Held: deed of freedom void under Rule against Perpetuities. Application of the Rule to grants of freedom, keeping property in fetters, violates the fundamental reason for the Rule.

Maher v. Maher 139 F. Supp. 294 (E.D. Ky. 1956), noted 9 Okla. L. Rev. 440 (1956); further litigation dismissed for lack of jurisdiction, Maher v. Maher, 154 F. Supp. 804 (E.D. Ky. 1957.)
Devise to A for life, then to A's children for their lives, remainder in fee to A's grandchildren per stirpes. Held: gift to A's grandchildren void (*but see* 4 Restatement of Property § 389, com. c); A's children take a fee. *Contra*: authorities cited under Lindner v. Ehrich (p. 106 *supra*).

Patterson v. Patterson, 135 Ky. 339, 122 S.W. 169 (1909)
Deed in fee from G to turnpike company, providing that when land ceased to be used for a toll house it would "revert back to" X, Y, and Z (not the grantor). Held: executory interest in X, Y, and Z valid. *Contra*: 6 Am. L. Prop. § 24.62, cases 94, 95, 96; 5 Powell ¶ 767; Simes & Smith § 1241.

Stevens v. Stevens, 21 Ky. L.R. 1315, 54 S.W. 835 (1900)
Devise in trust for 40 years, to pay income to T's minor children in such amounts necessary for their support, maintenance, and education. As each child reached 21 his share of any accumulated income to be paid to him; thereafter his share of income to be paid to him annually. At expiration of 40 years, corpus "is to be divided equally between my living children or issue of my said children"; if all children die without surviving issue corpus is to be divided among T's heirs. (Facts from record, p. 2; appellee's brief, p. 1.) Held: entire devise void. *Contra*: authorities cited under Coleman v. Coleman and Curtis v. Citizens Bank (p. 103 *supra*). Orthodox view: income gift to children vests immedi-

ately. All interests in corpus will vest in interest with possession postponed at or before the death of T's children (lives in being).

Street v. Cave Hill Investment Co., 191 Ky. 422, 230 S.W. 536 (1921)
Devise of land to 4 churches for 99 years, then land to be sold and proceeds divided among the churches then in existence. Held: 99-year term violated mortmain statute; term passed to T's heirs. Gift at end of 99-year term to churches then in existence held valid. *Contra* as to gift at end of 99-year term: Gray §§ 320.1, 210, 201; 5 Powell ¶ 767; 4 Restatement of Property § 374, ill. 7, also § 370, com. h. Gift is contingent on churches being in existence after 99 years—too remote.

Thornton v. Kirtley, 249 S.W. 2d 803 (Ky. 1952)
Devise in trust for 50 years to pay income to T's 3 children, or if dead to their issue per stirpes; at end of 50 years in fee to those persons receiving the income, with 5 shares of stock to be held in further trust in perpetuity to maintain cemetery lots. Held: all gifts invalid. *Contra* as to 5-share trust to begin after 50 years; 6 Am. L. Prop. § 24.20; 4 Restatement of Property § 370, com. h, ill. 2; Simes & Smith § 1236. *Contra* as to income gifts to children: 6 Am. L. Prop. § 24.19, case 22a (1958 supp.); 5 Powell ¶ 772; 1 Scott, Trusts § 62.10 (2) (2d ed. 1956); Simes & Smith, §§ 1391, 1393; *cf.* Gray §§ 410-410.5.

Trosper v. Shoemaker, 312 Ky. 344, 227 S.W. 2d 176 (1950)
Deed to A in fee, providing that if A, his heirs or assigns failed to buy oil and gas from grantor, his heirs and assigns, then grantor had right of entry upon repayment of purchase price of $3000. Held: grantor retained valid right of entry, not void option. *Contra*: 6 Am. L. Prop. § 24.56; 4 Restatement of Property § 394, com. c; Simes & Smith § 1245.

Tyler v. Fidelity & Columbia Trust Co., 158 Ky. 280, 164 S.W. 939 (1914)
Devise in trust for A for life, then to B for life, then to A's children for their lives, remainder in fee to A's grandchildren per capita. Held: remainder in fee void; preceding life tenants take a fee. *Contra:* authorities cited under Lindner v. Ehrich (p. 106 *supra*).

U. S. Fidelity & Guaranty Co. v. Douglas' Trustee, 134 Ky. 374, 120 S.W. 328 (1909)
Devise in trust to A for life, then in equal shares for each child of A for life, and upon death of any child to pay the share of corpus on which he had been receiving the income to his issue per stirpes.

Held: devise to A's grandchildren void. *Contra*: 6 Am. L. Prop. § 24.29; Gray §§ 391, 392, 395, fn. 3; 4 Restatement of Property § 389; Simes & Smith § 1267. Doctrine of severed shares saves the gift to issue of any child of A in being at T's death. All children of A were in being at T's death, so under orthodox view entire gift is valid.

Table 3

DOUBTFUL CASES UNDER ORTHODOX PERPETUITIES DOCTRINE

Brown v. Columbia Finance & Trust Co., 123 Ky. 775, 97 S.W. 421 (1906)—correct on ground donee could appoint only in fee; incorrect if ground is nonapplication of "second look" doctrine. See Barnes v. Graves, 259 Ky. 180, 82 S.W. 2d 297 (1935).

Brumley v. Brumley, 28 Ky. L.R. 231, 89 S.W. 182 (1905)—incorrect insofar as it holds void a right of entry in grantor upon failure of issue.

Curd's Trustee v. Curd, 163 Ky. 472, 173 S.W. 1148 (1915)—incorrect if instrument construed to give Mary's children a life estate, increased into a fee by invalid gift over. Opinion unclear as to construction.

Duncan v. Webster County Bd. of Ed., 205 Ky. 86, 265 S.W. 489 (1924)—incorrect if grant was of a determinable fee or if grantor held a possibility of reverter. See Brown v. Independent Baptist Church, 325 Mass. 645, 91 N.E. 2d 922 (1950).

Farmer's National Bank v. McKenney, 264 S.W. 2d 881 (Ky. 1954)—compare 4 Restatement of Property § 370, com. n., ill. 4.

Johnson's Trustee v. Johnson, 25 Ky. L.R. 2119, 79 S.W. 293 (1904)—age limitation struck from will (*semble*).

Ligget v. Fidelity & Columbia Trust Co., 274 Ky. 387, 118 S.W. 2d 720 (1938)—gift to A's grandchildren per stirpes held void; *but see* 4 Restatement of Property § 389, com. c.

McGaughey v. Spencer County Bd. of Ed., 285 Ky. 769, 149 S.W. 2d 519, 133 A.L.R. 1474 (1941)—incorrect if instrument reserves a "contingent reversion," as Court calls it, or if grant is of a determinable fee. 6 Am. L. Prop. § 24.62; 5 Powell ¶ 769; Simes & Smith § 1239.

Renaker v. Tanner, 260 Ky. 281, 83 S.W. 2d 54 (1935)—gift to heirs of living persons held void for perpetuity; no explanation given.

Robertson v. Simmons, 322 S.W. 2d 476 (Ky. 1959)—option in gross held not subject to Rule against Perpetuities, but subject to rule against unreasonable restraints on alienation. Criticized by Sparks, 35 N.Y.U.L. Rev. 412 (1960).

Sandford's Adm'r v. Sandford, 230 Ky. 429, 20 S.W. 2d 83 (1929)—liberal severance of invalid measuring lives for a trust.
Smith v. Fowler, 301 Ky. 96, 190 S.W. 2d 1015 (1945)—compare Gray §§ 410-410.5; Simes & Smith § 1261.
Thomas v. Utterback, 269 S.W. 2d 251 (Ky. 1954), noted 43 Ky. L.J. 559 (1955)—gift to A's grandchildren per stirpes held void; *but see* 4 Restatement of Property § 389, com. c.
Tillman v. Blackburn, 276 Ky. 550, 124 S.W. 2d 755 (1939)—liberal construction to avoid Rule.
Tuttle v. Steele, 281 Ky. 218, 135 S.W. 2d 436 (1939)—liberal construction to avoid Rule. Criticized by Gray § 395, n. 3; see 6 Am. L. Prop. § 24.29, n. 4; 5 Powell ¶ 816, n. 26.
West v. Ashby, 217 Ky. 250, 289 S.W. 228 (1926)—punitive application of doctrine of infectious invalidity.

Table 4

CASES HOLDING INTERESTS VALID UNDER THE REMOTE POSSIBILITIES TEST. THE RESULTS ARE NOT AFFECTED BY THE 1960 PERPETUITIES ACT, SINCE IT IS NOT NECESSARY TO WAIT AND SEE TO SAVE THE GIFTS.

Armstrong v. Armstrong, 53 Ky. (14 B. Mon.) 269 (1853)
Atty. Gen. v. Wallace's Devisees, 46 Ky. (7 B. Mon.) 611 (1847)
Board of Nat'l Missions v. Harrel's Trustee, 286 S.W. 2d 905 (Ky. 1956)
Cambron v. Pottinger, 301 Ky. 768, 193 S.W. 2d 412 (1946)
Clay v. Anderson, 203 Ky. 384, 262 S.W. 604 (1924)
Com. v. Pollitt, 25 Ky. L.R. 790, 76 S.W. 412 (1903)
DeCharette v. DeCharette, 264 Ky. 525, 94 S.W. 2d 1018, 104 A.L.R. 1455 (1936)
Egner v. Livingston County Bd. of Ed., 313 Ky. 168, 230 S.W. 2d 448 (1950)
Emler v. Emler's Trustee, 269 Ky. 27, 106 S.W. 2d 79 (1937)
Epperson v. Clintonville Cemetery Co., 303 Ky. 852, 199 S.W. 2d 628 (1947)
First Nat'l Bank v. Purcell, 244 S.W. 2d 458 (Ky. 1951)
Gillespie v. Winston's Trustee, 170 Ky. 667, 186 S.W. 517 (1916)
Goodloe's Trustee v. Goodloe, 292 Ky. 494, 166 S.W. 2d 836 (1942)
Gray v. Gray, 300 Ky. 265, 188 S.W. 2d 440, 160 A.L.R. 633 (1945)
Haydon v. Layton, 128 S.W. 90 (Ky. 1910)
Johnson v. Pittsburgh Cons. Coal Co., 311 S.W. 2d 537 (Ky. 1958)
Kasey v. Fidelity Trust Co., 131 Ky. 609, 115 S.W. 739 (1909)
Miller v. Miller, 151 Ky. 563, 152 S.W. 542 (1913)
Mitchell v. Deegan, 301 Ky. 587, 192 S.W. 2d 715 (1946)
Moore's Trustees v. Howe's Heirs, 20 Ky. (4 T. B. Mon.) 199 (1827)

Page v. Frazier's Executors, 77 Ky. (14 Bush) 205 (1878)
Russell v. Meyers, 202 Ky. 593, 260 S.W. 377 (1924)
Sorrell v. Tennessee Gas Trans. Co., 314 S.W. 2d 193 (Ky. 1958)
Texas Eastern Trans. Corp. v. Carman, 314 S.W. 2d 684 (Ky. 1958)
Tillman v. Blackburn, 276 Ky. 550, 124 S.W. 2d 755 (1939)
Vokins v. McGaughey, 206 Ky. 42, 266 S.W. 907 (1924)

Table 5

CASES HOLDING INTERESTS VOID WHICH ACTUALLY DID, OR VERY PROBABLY WOULD, VEST IN TIME; HOW KRS 381.216 WOULD HAVE SAVED THEM

(1) *Fact pattern*: T devises property to A for life, then to A's children for their lives, remainder in fee to A's grandchildren. Either opinion or record discloses that A died without having any more children born after T's death. Remainder in fee would be valid under wait-an-see. See text, pp. 66-67 *supra.*

Bach v. Pace, 305 S.W. 2d 528 (Ky. 1957)
Holoway v. Crumbaugh, 275 Ky. 377, 121 S.W. 2d 924 (1938)
Laughlin v. Elliott, 202 Ky. 433, 259 S.W. 1031 (1924)
Letcher's Trustee v. Letcher, 302 Ky. 448, 194 S.W. 2d 984 (1946)
Tyler v. Fidelity & Columbia Trust Co., 158 Ky. 280, 164 S.W. 939 (1914)
U.S. Fidelity & Guaranty Co. v. Douglas' Trustee, 134 Ky. 374, 120 S.W. 328 (1909)

(2) *Same fact pattern as (1) above.* Instrument litigated before A's death. Either opinion or record discloses that A had no more children after T's death and at the time of litigation was at an age where further children are highly improbable. Remainder in fee would almost certainly be valid under wait-and-see. For application of KRS 381.216, see text, pp. 66-67 *supra.*

Beall v. Wilson, 146 Ky. 646, 143 S.W. 55 (1912), woman age 57 at time of decision.
Lindner v. Ehrich, 147 Ky. 85, 143 S.W. 778 (1912), woman age 66 at time of decision.
Maher v. Maher, 139 F. Supp. 294 (E.D. Ky. 1956), man (widower) age 70 at time of decision.
Taylor v. Dooley, 297 S.W. 2d 905 (Ky. 1957), woman age 59 at time of decision.
Thomas v. Utterback, 269 S.W. 2d 251 (Ky. 1954), male age 66 and females age 75 and 78 at time of decision.
Tuttle v. Steele, 281 Ky. 218, 135 S.W. 2d 436 (1939), facts unclear but briefs imply T had no brother or sister (A) surviving.

(3) *Fact pattern*: T devises property to A for life, remainder in fee to A's children who reach 25. Opinion or record discloses that at A's death all his children were over 4 years of age. Thus under wait-and-see the gift would be valid. See text, p. 65 *supra.*

Johnson's Trustee v. Johnson, 25 Ky. L.R. 2119, 79 S.W. 293 (1904)
Ludwig v. Combs, 58 Ky. (1 Met.) 128 (1858).

(4) *Fact pattern same as (3) above.* Opinion or record discloses facts which make it highly probable that A's children will reach 25 within 21 years of A's death. Thus the gift probably would be valid under wait-and-see. See text, p. 65 *supra.*

Fidelity & Columbia Trust Co. v. Tiffany, 202 Ky. 618, 260 S.W. 357 (1924)

(5) *Fact pattern*: T devises property to pay income to A for life, then to A's children, and 25 years from T's death to distribute the property to A's issue then living per stirpes. Opinion or record discloses distribution date would definitely occur within 21 years of A's death. Therefore gift of corpus would be valid under wait-and-see. See text, p. 68 *supra.*

Coleman v. Coleman, 23 Ky. L.R. 1476, 65 S.W. 832 (1901)
Ford v. Yost, 299 Ky. 682, 186 S.W. 2d 896 (1945); Ford v. Yost, 300 Ky. 764, 190 S.W. 2d 21 (1945)
Hussey v. Sargent, 116 Ky. 53, 75 S.W. 211 (1903)

(6) *Fact Pattern*: T devises property to A for life, then to A's surviving widow for life, then in fee to A's issue then living. The opinion discloses A's surviving widow was in fact alive at T's death and the gift to issue would be valid under wait-and-see. See text, p. 66 *supra.*

Chenowith v. Bullitt, 224 Ky. 698, 6 S.W. 2d 1061 (1928)

Table 6

CASES HOLDING INTERESTS VOID WHICH DID NOT OR MIGHT NOT VEST IN DUE TIME; HOW KRS 381.216 WOULD HAVE APPLIED

(1) *Fact pattern*: T devises property in trust for 40 years to pay income to T's issue per stirpes from time to time living, and at the end of 40 years to distribute the corpus to T's issue per stirpes then living. For application of KRS 381.216, see text, p. 68 *supra.*

Curtis v. Citizens Bank, 318 S.W. 2d 33 (Ky. 1958)
Fidelity Trust Co. v. Lloyd, 25 Ky. L.R. 1827, 78 S.W. 896 (1904)
Stevens v. Stevens, 21 Ky. L.R. 1315, 54 S.W. 835 (1900)
Thornton v. Kirtley, 249 S.W. 2d 803 (Ky. 1952)

(2) *Fact pattern*: T devises property in trust to pay the income to his issue per stirpes forever (no termination date). Under wait-and-see the trust may continue for the lives of T's issue living at his death plus 21 years. See text, p. 68 *supra.*

Renaker v. Tanner, 260 Ky. 281, 83 S.W. 2d 54 (1935)

Sandford's Adm'r v. Sandford, 230 Ky. 429, 20 S.W. 2d 83 (1929), similar result without wait-and-see.

Smith v. Fowler, 301 Ky. 96, 190 S.W. 2d 1015 (1945)

Farmers Nat'l Bank v. McKenney, 264 S.W. 2d 881 (Ky. 1954)

(3) *Fact pattern*: T devises property to A for life, then to A's children for their lives, then to A's grandchildren in fee. A has a child born after T's death. For application of KRS 381.216, see text, p. 67 *supra.*

Brumley v. Brumley, 28 Ky. L.R. 231, 89 S.W. 182 (1905)

Curd's Trustee v. Curd, 163 Ky. 472, 173 S.W. 1148 (1915)

West v. Ashby, 217 Ky. 250, 289 S.W. 228 (1926)

(4) *Fact pattern*: T devises property to A for life, remainder as A by will appoints. A appoints to B for life, remainder to B's children in fee. B was not in being at T's death. For application of KRS 381.216, see text, p. 68 *supra.*

Brown v. Columbia Finance & Trust Co., 123 Ky. 775, 97 S.W. 421 (1906)

Ligget v. Fidelity & Columbia Trust Co., 274 Ky. 387, 118 S.W. 2d 720 (1938)

Table 7

CASES INVOLVING OPTIONS; APPLICATION OF KRS 381.216

(1) Options unlimited in time, held void, which would be valid for 21 years and void thereafter under KRS 381.216. See text, p. 64 *supra.*

Maddox v. Keeler, 296 Ky. 440, 177 S.W. 2d 568, 162 A.L.R. 578 (1944)

Robertson v. Simmons, 322 S.W. 2d 476 (Ky. 1959)

Saulsberry v. Saulsberry, 290 Ky. 132, 160 S.W. 2d 654 (1942)

Trosper v. Shoemaker, 312 Ky. 344, 227 S.W. 2d 176 (1950)

(2) Options held personal to optionee and not affected by 1960 Perpetuities Act

Bates v. Bates, 314 Ky. 789, 236 S.W. 2d 943 (1950)

Campbell v. Campbell, 313 Ky. 249, 230 S.W. 2d 918 (1950)

Table 8

CASES ON RIGHTS OF ENTRY, POSSIBILITIES OF REVERTER, AND EXECUTORY INTERESTS AFTER DETERMINABLE FEES; APPLICATION OF KRS 381.219

(1) Rights of entry and possibilities of reverter held valid. Under KRS 381.219, interest is void after thirty years if contingency has not happened. See text, pp. 75-76 *supra.*

Barren County Bd. of Ed. v. Jordan, 249 S.W. 2d 814 (Ky. 1952)
Bowling v. Grace, 219 Ky. 496, 293 S.W. 964 (1927)
County Bd. of Ed. v. Littrell, 173 Ky. 78, 190 S.W. 465 (1917)
Egner v. Livingston County Bd. of Ed., 313 Ky. 168, 230 S.W. 2d 448 (1950)
Fayette County v. Morton, 282 Ky. 481, 138 S.W. 2d 953 (1940)
Fayette County Bd. of Ed. v. Bryan, 263 Ky. 61, 91 S.W. 2d 990 (1936)
Kasey v. Fidelity Trust Co., 131 Ky. 609, 115 S.W. 739 (1909)
Pullins v. Bd. of Ed. of Methodist Church, 25 Ky. L.R. 1715, 78 S.W. 457 (1904)

(2) Executory interests held void. Under KRS 381.219, interest is treated as a right of entry; void after thirty years if contingency has not happened. See text, p. 77 *supra.*

Duncan v. Webster County Bd. of Ed., 205 Ky. 86, 265 S.W. 489 (1924)
McGaughey v. Spencer County Bd. of Ed., 285 Ky. 769, 149 S.W. 2d 519 (1941)

(3) Executory interest held valid. Under KRS 381. 219, interest is treated as a right of entry; void after thirty years if contingency has not happened. See text, p. 77 *supra.*

Patterson v. Patterson, 135 Ky. 339, 122 S.W. 169 (1909)