Kentucky Law Journal

Volume 46 | Issue 1 Article 8

1957

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POSSIBILITY OF REVERTER AND THE RULE AGAINST PERPETUITIES IN KENTUCKY

The traditional distinction between a possibility of reverter and a right of entry for condition broken is that a "possibility of reverter arises when the preceding determinable fee expires by the terms of its own limitations, whereas the right of entry cuts short a fee simple which would otherwise continue indefinitely".[1] According to the Restatement of Property, a right of entry (therein referred to as a power of termination) comes after a condition subsequent;[2] a possibility of reverter after a condition precedent.[3] It is often stated that the latter arises when such words as "so long as," "during," and "until" are used, and the former when, "but if," "provided that," and "on condition" are used.[4] The theory seems to be that the first are words of *limitation* and thus point to a determinable fee and the latter, being words of *condition*, point to a right of entry. However, courts have recognized that these definitions are not too useful in the solving of an actual case,[5] and after an exhaustive study Professor Dunham[6] stated:

> [W]e must inform our students that outside the class room . . . it is impossible to determine before litigation whether any given phrasing of a conveyance will be interpreted as a special limitation or as a condition subsequent.[7]

He also concluded that there is no substantial difference in terms of legal consequences between the two interests.[8]

The Kentucky Court of Appeals apparently recognizes no distinction between a possibility of reverter and a right of entry and uses only the label "possibility of reverter," without attempting to determine whether under traditional theory the appropriate words were used. However, even though the court uses the label "possibility of reverter," it treats it theoretically as a right of entry would be treated under orthodox doctrine.[9] It is the purpose of this note to examine

[1] Church in Brattle Square v. Grant, 3 Gray 142 (Mass. 1855); Casner and Leach, Cases On Property 351 (1st ed. 1951).

[2] Restatement, Property, Sec. 155 (1936).

[3] Id. at Sec. 154.

[4] Simes and Smith, Law of Future Interests 343, 344 (2d ed. 1956).

[5] Stevens v. Galveston Railway, 212 S.W. 639 (Tex. 1919).

[6] Dunham, Possibility of Reverter and Powers of Termination—Frateral or Identical Twins?, 20 Chi. L. Rev. 215 (1953).

[7] Id. at 216.

[8] See also 43 Ky. L.J. 285 (1955) and cases cited and discussed therein. This note criticized the court for not distinguishing between the two interests. Cf. Leach, Cases on Future Interests 21 (4th ed. 1956).

[9] Hoskins v. Walker, 255 S.W. 480 (Ky. 1953). While calling the interest reserved a possibility of reverter, the court stated that

> "On the other hand, a breach of a condition subsequent may result in the forfeiture of the estate. . . . Some positive act of the grantor or his heirs—such as a re-entry claiming forfeiture—is necessary."

the application of the rule against perpetuities to the possibility of reverter as it is known in Kentucky. Recent decisions of the court have created doubt as to the scope and meaning of Kentucky's statute against perpetuities, especially in its application to the possibility of reverter.

The rule against perpetuities had its inception in the old English common law and is in force in this country as a common law rule except where it has been superseded by statute. In Kentucky, a statute relating to perpetuities was first enacted in 1852,[10] and is now section 381.220 of the Kentucky Revised Statutes. It provides as follows:

> 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.

This statute differs in wording from the classic statement of the common law rule by Gray:[11] "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." The Kentucky statute prohibits the suspension of the power of alienation, if taken by its plain wording and meaning, while Gray's rule prohibits the remote vesting of interests. The rules are entirely different and should not be confused. The rule against perpetuities is concerned with the remote vesting of interests and not with the suspension of the power of alienation of property through the creation of interests in unborn and unascertained persons. Unlike the rule against suspension the rule against perpetuities is not satisfied by the fact that there are persons in being who can join together and convey a fee simple title to a purchaser.[12] It is more inclusive than the rule against suspension of the power of alienation; if a devise violates the rule against suspension it will inevitably violate the rule against remoteness,[13] but the converse is not true.[14] An in-

[10] Roberts, Kentucky's Statute Against Perpetuities, 16 Ky. L.J. 297 (1928). This note also discusses the general problem of whether the statute is one dealing with suspension or restraints on alienation or if it is merely a codification of the common law rule against perpetuities.

[11] Gray, The Rule Against Perpetuities 191 (4th ed. 1942).

[12] In America, it is almost universally held that the rule against petpetuities does not apply to possibilities of reverter, whereas an executory interest has long been held subject to the rule and void if it is possible that it will not vest within the permissible period. See Morris and Leach, The Rule Against Perpetuities (1956).

[13] The power of alienation can be suspended only when unborn or unascertained persons have an interest in the property, and an interest in unborn or unascertained persons is necessarily contingent.

[14] For example, a devise "to A and his heirs so long as the premises are used for a schoolhouse, then to B and his heirs" violates the latter but not the former. B's *executory interest* may not vest in possession for centuries; but A and B can at any time join together and convey a fee simple absolute.

terest void under the rule against perpetuities may be, and usually is, alienable at all times. The court in construing the Kentucky statute stated that this statute was merely a codification of the common law rule against perpetuities.[15] Subsequent cases have created some doubt as to whether the rule against suspension of the power of alienation or the rule against remoteness of vesting (or both) is in force in Kentucky. The Kentucky statute at one time or another has been interpreted as a prohibition of (a) remoteness of vesting; (b) suspension of the power of alienation; and (c) unreasonable restraints on alienation. In *Cammack* v. *Allen*,[16] the issue before the court was whether the statute prohibited restraint on alienation. The grantor by deed conveyed a remainder after a life estate to X, until (1) she die without descendants, (2) she attempt to sell her interest or (3) she lease the land for a period of more than two years, in which case a forfeiture would result in favor of X's brothers and sisters. The court held that X had a defeasible fee encumbered with conditions subsequent and further stated that the attempt to restrain alienation for the grantee's lifetime was unreasonable, and therefore void. It was argued that the statute by implication permitted the "suspension" of alienation for a period of lives in being plus twenty-one years. The court held that the statute was inapplicable and in the course of its opinion made the following comments as to the scope and application of the statute:[17]

> It has been a statute of this state for a long number of years, and has always been treated and referred to in the opinions of this court as Kentucky's Statutes against perpetuities. . . . [A]ll . . . opinions . . . on the power to restrain alienation were rendered . . . from the standpoint of the common-law rule upon the subject. . . . In none of the opinions was the statute referred to as creating a rule with reference to the imposition of such restraints. . . . The statute, therefore, has in effect been construed to apply only to cases and situations where the suspension of alienation was due to the postponement of the vesting of a fee in a person who could alienate it. If such postponement is beyond the life or lives of persons in being and 21 years and 10 months after the creation of the estate, it comes within, not only the common law rule against perpetuities, but violates the quoted section of our statute which was but declaratory of the common-law rule and was intended only as a statute against perpetuities, and not one dealing with the right of alienation by a person in whom the fee vested within the permissible period prescribed by it.

[15] Coleman v. Coleman, 23 Ky. L. Rep. 1476, 65 S.W. 832 (1901); Cammack v. Allen, 199 Ky. 268, 250 S.W. 963 (1923); Fidelity and Columbia Trust Company v. Tiffany, 202 Ky. 618, 260 S.W. 357 (1924).

[16] Ibid.

[17] Cammack v. Allen, Id. at 272, 250 S.W. at 964-965.

If the court had adhered to its position that the statute was "but declaratory of the common law rule against perpetuities," much confusion would have been avoided in later cases.

The court has from time to time applied this statute as if it dealt with suspension of the power of alienation and unreasonable restraints as well as with the remote vesting of estates. In *Ernst* v. *Shinkle*,[18] a provision in the testator's will ". . . that it shall not be lawful to sell any of my real estate", was declared void as against the "Statute against Perpetuities."[19] In this case the restraint had no time limit and both the rule against unreasonable restraints upon alienation and the rule against suspension of the power of alienation (but not the common law Rule against Perpetuities) could be said to have been violated. The court, however, seemed to lose sight of the distinction between "restraining" alienation and "suspending" the power of alienation as well as the fact that it had previously said the statute embodied the common law Rule against Perpetuities.

The absolute power of alienation is suspended when there are no ascertainable persons in being who can join and convey a fee simple.[20] On the other hand, the rule against restraints is a rule against *express prohibition* of alienation (e.g., "B shall not convey his interest," "the interest of B is not assignable"); the effect of the rule is to invalidate the restraint, leaving the property freely alienable in the hands of the transferee. Of course a direct restraint of the disabling type as in the above example would suspend the power of alienation for the duration of the restraint, since this type removes the power to alienate. Both rules are thus violated. The confused language in the Kentucky cases might possibly result from the fact that Kentucky has long upheld reasonable restraints on alienation.[21] This has the effect of leaving the property in the hands of the transferee subject to the restraint, i.e., he, like a minor or a person non compos mentis, cannot legally transfer it.

Another case in which the court used confused language in discussing restraints was in *Kentland Coal and Coke Company* v. *Keen*.[22] A conveyance provided that "said George Keen [grantee] is not to sell this land in my [grantor's] lifetime." In construing this clause the court stated:[23]

[18] 95 Ky. 608, 26 S.W. 813 (1894).
[19] Id. at 609, 26 S.W. at 813.
[20] Chaplin, Suspension of the Power of Alienation, 3 (3rd ed. 1928).
[21] Frazier v. Combs, 140 Ky. 77, 73 S.W. 812 (1910); Anderson v. Simpson, 214 Ky. 325, 283 S.W. 941 (1926). These cases lay down a general rule that a reasonable restraint is for the life of the devisee or grantee only.
[22] 168 Ky. 836, 183 S.W. 247 (1916).
[23] Id. at 838, 183 S.W. at 248.

> That this clause creates what is known in the law of real estate conveyances as a *condition subsequent* there can be no doubt. This is so manifest as to be at once accepted without citation of authorities.

The court held that this condition was reasonable and a forfeiture implied.[24] Since the life tenant's conveyance was merely voidable, and the action was not brought in time, he could convey a good title. If this case represents Kentucky's position and a forfeiture is implied whenever a restraint is put on alienation of property, then the court is creating rights of entry or possibilities of reverter, and treating restraint cases as if they had express reverter clauses. However, in spite of the language, it is believed that this case does not represent the present rule and Professor Roberts,[25] after studying the cases, concludes that a provision for termination is always required in Kentucky. A fairly recent case, *Gray* v. *Gray*,[26] tends to support Roberts' position. In any event a "reasonable restraint" under Kentucky law could never last beyond one life in being and the Rule against Perpetuities should never be involved where the restraint is express.

In applying the statute to possibilities of reverter and executory interests the court has also termed the statute alternatively as a prohibition of remoteness of vesting, suspension of alienation and unreasonable restraints on alienation. Executory interests have been called possibilities of reverter and upheld under Kentucky's statute. In *Patterson* v. *Patterson*,[27] the grantor made a conveyance of land to the Turnpike Company, and provided that when the land cease to be used for collecting tolls it should revert back to A, B and C or their heirs (grantor's brothers-in-law). This was a suit between heirs of the grantor and the heirs of A, B and C for possession when the land was abandoned by the grantee. The former argued that the interests of A, B and C were void for remoteness as being a perpetuity. In disposing of this contention the court stated:[28]

> Without entering upon a dissertation as to the meaning of the legal term, 'perpetuity,' it is sufficient to say that the purpose of the statute is *not to compel the vesting of estates,* but to prohibit unreasonable restraints upon alienation. (Emphasis added)

[24] As indicated by its statements, the court cited no authority in support of this language. This was probably due to the fact that no authority for this statement is to be found.

[25] Roberts, Future Interests in Kentucky, 13 Ky. L.J. 186 (1924).

[26] 300 Ky. 265, 188 S.W. 2d 440 (1945). This case stated that a conveyance by a life tenant in violation of a restraint would be only voidable (obviously meaning he can convey in the face of the restraint) as there was not provision for cesser or forfeiture.

[27] 135 Ky. 339, 122 S.W. 169 (1909).

[28] Id. at 343, 122 S.W. at 170.

The court then held that the "reversion" created in A, B and C and their heirs did not violate the statute, as they could at any time sell their interests under Kentucky statutes. The interests here were not true reversions nor were they possibilities of reverter, for a reversion or a possibility of reverter arises only in the grantor when he conveys less than what he has. The interest in the instant case was an executory interest created in third persons, and was clearly void under the common law Rule against Perpetuities because it might not vest within lives in being plus twenty-one years.

Under the orthodox Rule against Perpetuities as applied in America, possibilities of reverter are classified as vested and are always valid.[29] In Kentucky a possibility of reverter has never been said to vest too remotely *but* has been said to violate the rule against suspension of power of alienation when it has been said to be inalienable. A possibility has been considered inalienable by the court when the person who gets this interest is not definitely named in the conveyance.

In *Duncan* v. *Webster County Board of Education*,[30] there was a conveyance of a lot in a large tract to the school district and the deed provided that when such land should no longer be used for school purposes it was to "revert to the tract of land, or to the person then owning and possessing the said tract of land."[31] Plaintiffs' claimed as owners by mesne conveyances from the grantor of the larger tract from which the school lot had been carved. The court held that it was unnecessary to decide whether there was a reversion or possibility of reverter since in either event the attempt to vest the reversionary right in whoever happened to own the original tract violated the statute. It was stated by the court:[32] ". . . the absolute power of alienation possibly was suspended . . . longer than during the continuance of a life or lives then in being and 21 years and 10 months. . . ." The reasoning of the court was to the effect that there was no one in being who could release the condition attached to the land. This is believed to be fallacious reasoning as there are always owners in being of the larger tract who could release it, assuming the "interest" was assigned to them by the conveyance. Under orthodox doctrine the interest sought to be created was an executory interest. The court could have very well used this classification and held the "interest" void because it would vest too remotely. A similar case was *McGaughey* v. *Spencer County Board of Education*,[33] where the interest was to revert to the "farm"

[29] Morris and Leach, supra note 12.
[30] 205 Ky. 86, 265 S.W. 489 (1924).
[31] Id. at 87, 265 S.W. at 489.
[32] Id. at 88, 265 S.W. at 490.
[33] 285 Ky. 769, 149 S.W. 2d 519 (1941).

from which it was taken. This interest was declared void, the court speaking in terms of restraints on alienation. The court used the same line of reasoning as in the *Duncan* case to the effect that there were not persons in being who could release the condition. Where, however, the land is to revert back not to the farm or tract of land from which it has been carved but to the "grantor, his heirs and assigns,"[34] the reservations are valid under the statute when sought to be enforced by remote heirs or assignees. *Bowling* v. *Grace*,[35] is representative of this line of cases. In this case the property was to revert to the grantor or his heirs or assigns. This possibility of reverter was held valid, the court stating:[36]

> [T]he absolute power of alienation was not suspended. The possibility of reverter possessed by the grantors could have been released at any time unto the holder of the defeasible fee. . . .

Thus a marked distinction appears to have been drawn between whether the possibility of reverter is reserved in the grantor, "his heirs and assigns," or whether reserved to the original "grant" or "farm" from which it was conveyed, the former being valid and the latter being considered void under the statute. The golden thread the court has seized upon and appears to apply, is that, if it is possible at all times that there is someone in existence who can release the reverter there is no violation of the statute, and where the adjoining landowner has the possibility it cannot be released. In cases where the possibility was declared void the same result could have been reached by giving the interest its proper classification of an executory interest and declaring it void under the rule against perpetuities. It is believed that the court has seized upon an illusory distinction in attempting to justify its holding in the two situations. To support the reasoning in the *Duncan* case where the possibility (properly an executory interest) was to revert back to the original tract of land, and was void because there was no one in existence to release the condition, one would have to assume that the possibility remains in the original grantor or testator's heirs and thus when the breach occurs, it "springs" to the owner of the tract at that remote time. One must further assume that no assignee down the line from the time of the creation of the condition in the original conveyance to the time of its breach has any interest in it or power to release the condition. It is submitted that the

[34] Murray Hospital Assn. v. Mason, 306 Ky. 248, 206 S.W. 2d 936 (1947); Fayette County v. Morton, 282 Ky. 481, 138 S.W. 2d 953 (1940); Bowling v. Grace, 219 Ky. 496, 293 S.W. 964 (1927).

[35] Ibid.

[36] Bowling v. Grace, Id. at 498, 293 S.W. at 964.

possibility and the ultimate power to release it must be in someone at all times. Either the grantor or his heirs must have it. The only thing one needs to know is whether the grantor is dead. If not, he can convey it at any time. If he is dead his heirs, who are ascertained, have inherited the possibility and can release it at any time. Moreover the possibility of reverter is alienable both by decisions,[37] and by statute.[38] If the grantor has conveyed the possibility, then such owner or his heirs likewise are ascertained at all times and can release the condition.

In several cases where the problems of suspension or restraints on alienation were involved, and there was no question of remoteness of vesting, i.e., prohibited sale of farm for 30 years,[39] restraint upon power of sale by life tenant,[40] the court appeared to treat the statute as one dealing with restraints on alienation only. In *Fayette County Board of Education* v. *Bryan*,[41] the question was whether a possibility of reverter to the heirs of the grantor was void, and in the course of its opinion the court stated:[42] "The purpose of the statute against perpetuities is not to compel vesting of estates, but to prohibit unreasonable restraints upon alienation." In *Bates* v. *Bates*,[43] the grantor provided that when the land ceased to be used for school purposes, the land was to revert to grantor. In 1947, 39 years later, the lot was abandoned by the school board. However, in 1925 the grantor had conveyed to X the original tract which included the school lot but no mention was made of it in the deed. The heirs of the grantor alleged that a possibility of reverter was created which descended to them. The court in rejecting their contention stated:[44]

> We construe the option to have been personal to the grantor . . . and have terminated with his death. But if it be regarded as unlimited as to the individual or to the time of its exercise . . . then the provision was void ab initio for it violated the rule against perpetuities or restraint on alienation.

A possible explanation for the above holding is that the court wanted to reach a desirable and equitable result and prevent a "windfall" to the grantor's heirs, especially since they had joined in the 1925 conveyance to the defendant. An examination of the cases however, fails

[37] Austin v. Calvert, 262 S.W. 2d 825 (Ky. 1953).
[38] Ky. Rev. Stat. sec. 381.210 states, "Rights of reversion may be sold or conveyed."
[39] Perry v. Metcalf, 216 Ky. 755, 288 S.W. 694 (1926).
[40] Gray v. Gray, 300 Ky. 265, 188 S.W. 2d 440 (1945).
[41] 263 Ky. 61, 91 S.W. 2d 990 (1936).
[42] Id. at 63, 91 S.W. 2d at 991.
[43] 314 Ky. 789, 236 S.W. 2d 943 (1950).
[44] Id. at 790, 236 S.W. 2d at 943.

to show any such pattern. In *Patterson* v. *Patterson,* supra, a remote grantee was given a "windfall" whereas in the *McGaughey* case, supra, the grantor's widow and numerous children (who had been living in the abandoned schoolhouse) were put out in the cold by the holding that the possibility of reverter reserved by the grantor was void.

In summary, the court seems to treat all interests following a forfeiture (orthodox possibilities of reverter, rights of entry, executory interests after a fee simple determinable or fee simple subject to a condition subsequent) as possibilities of reverter and to violate the rule against suspension when such interests are in persons who (according to the court) are not ascertained. It is apparent that in every situation where an interest is reserved and there is some type of restraint, one must litigate the question before a determination can be made as to whether the limitation or condition is void or valid. Just what Kentucky's statute means, and to what interests it applies, is in much confusion. One does not have to look far to come up with a case to support any proposition he might wish to propound in this field. In the recent case of *Taylor* v. *Dooley,*[45] the court recognized this when, referring to KRS 381.220, it stated:[46]

> Since its enactment, the statute has been applied indiscriminately to restraints on alienation of vested estates and to the remote vesting of an estate. The failure to distinguish between the two situations has resulted in much confusion. The power view is that the statute, as embodying the rule against perpetuities, is concerned with the remote vesting of estates rather than the restraints on alienation of vested estates, despite the language of the statute. . . .

In this case the question before the court was whether an attempt to create a remainder in the testator's great-grandchildren violated the rule against perpetuities and the court went on to say that it was unnecessary to decide that the statute may not be applied to restraints on alienation. The court also failed to state in this case that the statute had also been applied to cases as a statute prohibiting the suspension of the power of alienation. It is apparent that clarification is needed. If the court adopted fixed, mechanical rules as to what limitations and conditions are invalid under the statute, titles would be more secure and the validity of the limitations could be determined more often without a lawsuit. It may be that remedial legislation is the only solution to the problem. The legislature could bring clarity out of chaos by repealing KRS 381.220 and declaring the common law rule against perpetuities in force in this state.

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[45] 297 S.W. 2d 905 (Ky. 1956).
[46] Id. at 907-908.