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Kentucky Decisions on Future Interests (1938-1953)

By W. LEWIS ROBERTS*

Future property interests are often defined as those estates in property that are to come into possession of the owners at some time subsequent to their creation. Earlier articles published in the Journal have covered the decisions of the Court of Appeals in this field down to 1938.¹

In treating this subject it is the practice to review the decisions under the following headings: Remainders, Reversion and Possibility of Reverter, Executory Limitations, Construction of Limitations, Powers, The Rule against Perpetuities and Restraints on Alienation. It is proposed to follow this order in reviewing the recent cases.

I. *Remainders*

The necessity of determining whether a remainder is vested or contingent has been presented as frequently to the court during the past fifteen years as in prior years. In *Montgomery's Ex'r v. Northcutt*² Judge Thomas cites with approval the following distinction drawn between vested and contingent remainders:

“The present capacity of taking effect in possession, if the possession was to become vacant, and not the certainty that the possession will become vacant, before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent.”³

In the case before the court, a devise was made to testator's daughter for life, then to testator's descendants if the daughter should die without heirs of the body surviving her. Any issue and surviving spouse of testator's two sons, who predeceased the daughter, were held to take as the remainders were vested. In

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¹ 12 Ky. L. J. 58, 115, 210 (1923); 13 Ky. L. J. 32, 83, 186 (1924); 15 Ky. L. J. 345 (1927); 16 Ky. L. J. 98 (1927); 21 Ky. L. J. 219 (1933); 26 Ky. L. J. 269 (1937); and 30 Ky. L. J. 61 (1940).

² 292 Ky. 622, 167 S.W. 2d 317 (1942).

³ 3 Caldwell's Kentucky Judicial Dictionary 2895.

another case⁴ a devise to testator's widow for life or until she remarried with remainder share and share alike, to testator's seven children, created a vested remainder in the children. Two children predeceased their mother. The court construed the gift as vested and not contingent and relied on the case of *Grubbs v. Grubbs*,⁵ which approved Kent's statement that the law favors vested estates, and no remainder will be construed as contingent which may, consistently with the intention of testatrix, be deemed vested.⁶

In *Louisville Cooperage Co. v. Rudd*,⁷ the question before the court involved a conveyance by deed where a son was to have the land during his natural life and thereafter it was to pass to the son's heirs. The deed provided that if the son should die without heirs the land should revert to the grantor if living, if not living then to the grantor's other children. The court said this gave the son a life estate and a contingent remainder in the only other child of the grantor, the plaintiff in the case, who was suing for the value of timber which defendant purchased from the life tenant. It was admitted that a contingent remainderman can maintain an action for waste, since a trial court, in the exercise of its equity jurisdiction, can make orders conserving any amount recovered. The plaintiff in this case was barred by the statute of limitations, however.

Where a testator devised land to his daughter and on her death to her children if any, and if she died without children, then the land to be equally divided between testator's other daughters; it was held that the adopted children of the daughter could not take the land under the daughter's will.⁸ Although the statute of adoption was effective to make the children her own heirs, it did not give the adopted children the right to take as remaindermen under the will of her father.

In *Mausser v. Security Trust Co.*,⁹ the estate devised was to go to any children the life tenant might have. An unborn infant's interest was a contingent remainder which became a vested remainder upon its birth. The court followed its holding in the

⁴ *Fugazzi v. Fugazzi's Committee*, 275 Ky. 62, 120 S.W. 2d 779 (1938).

⁵ 190 Ky. 258, 227 S.W. 272 (1921).

⁶ 4 KENT'S COMMENTARIES (11th ed. 1867) 203.

⁷ 276 Ky. 721, 124 S.W. 2d 1063 (1939).

⁸ *Sanders v. Adams*, 278 Ky. 24, 128 S.W. 2d 223 (1939).

⁹ 279 Ky. 453, 130 S.W. 2d 768 (1939).

*Bourbon Agricultural Bank and Trust*¹⁰ case that the fee in such case pending the happening of the contingency, the birth of a child in this case, was not *in nubibus*, as the early cases used to maintain. It was in the heirs of the testator meantime.

A conveyance to the grantor's niece for life and at her death to her bodily heirs created a life estate in the niece and a remainder in her children.¹¹ Under the rule in Shelley's case a fee tail would have been created in the niece but this rule was abrogated by statute in Kentucky.¹² The conveyance here was made in consideration of the niece's promise to support the grantor and the agreement created a condition subsequent. On failure to support, a "reversionary clause" gave the grantor the power to reenter for condition broken. The niece's reconveyance in consideration of a release of the obligation to support deprived the children of their remainder. Since a rescission and re-transfer of complete title could be accomplished by a voluntary abandonment of the undertaking to support, the court said, they saw no reason why the same result could not be accomplished by agreement. The title of the children depended upon the fulfillment of the condition to support the grantor. Where the life tenant held under an oral agreement with a cotenant for the statutory period, the evidence was held insufficient to support a title by adverse possession against the remaindermen in the case of *Barnett v. Barnett*.¹³ The court said the presumption is that one cotenant occupies the land subject to the rights of the others.

A conveyance of realty by a husband gave to his wife a life estate with remainder to their children. The couple were later divorced. At the time of the conveyance they had six children, two of whom died in their infancy, unmarried and without issue. The wife remarried and later died without having had other children. The husband remarried but had no children by his second marriage. The court found the intent of the grantor was to give the remainder to the children of his first marriage and the four children being over twenty-one years of age could convey a good title to the property.¹⁴

¹⁰ 205 Ky. 297, 265, 265 S.W. 790, 794 (1924).

¹¹ *Lawson v. Asberry*, 283 Ky. 390, 141 S.W. 2d 564 (1940).

¹² KY. STATS., sec. 2345, now KY. REV. STAT. (1948), sec. 381.090.

¹³ 283 Ky. 710, 142 S.W. 2d 975 (1940).

¹⁴ *Sermersheim v. Ackerman*, 284 Ky. 357, 144 S.W. 2d 804 (1940).

Where a gift over after a life estate was made to testatrix's "grandnieces and nephews then living," it was intended to include both grandnieces and grandnephews as the word "grand" was intended to modify both the words "nieces" and "nephews" living at the death of the life tenant. On the death of the life tenant the grandnieces and grand nephews then living acquired a fee-simple interest in the property.¹⁵ Under a devise of land with remainder over if the devisee should die without issue, the two sons of the devisee were allowed to bring an action under Section 491 of the Civil Code of Practice to sell the land and have the proceeds reinvested.¹⁶ As to the right to sell a remainder, the court pointed out in *Pointdexter v. Brumagen*¹⁷ that the right to sell a remainder belonging to an infant or an insane person is wholly statutory. In a case where the life tenant sold the property under the provisions of Section 490 of the Civil Code, he claimed he was entitled to the cash value of his life estate as shown by the mortality tables. The court held he was entitled only to the use or interest in the proceeds.¹⁸ Since living contingent remaindermen sufficiently represent the interests of the class, a sale under Section 491 for reinvestment will be affirmed.¹⁹

The court has very often had the task of construing provisions to determine whether a remainder or some other future interest was intended by the person executing the instrument. Where a husband conveyed realty to his wife and specified that if she did not sell it during the husband's life it should go to the husband at her death, otherwise to their children; the remainder at all times after the expiration of the life estate was held to be in the husband, subject, however, to be defeated by contingencies provided for in the deed.²⁰ Testatrix devised to her husband for life with remainder to son, then "to any heirs of his body, but if none, then remainder interest to be divided equally between my sisters and brothers." A power in the husband and son gave them a right to sell privately and convey good title. Contingent remaindermen not *in esse* would be bound, the court said.²¹ In *McKnight v.*

¹⁵ *Shedd's Adm'r v. Gayle*, 288 Ky. 466, 156 S.W. 2d 490 (1941).

¹⁶ *Stone v. Campbell*, 290 Ky. 32, 160 S.W. 2d 325 (1942).

¹⁷ 301 Ky. 699, 192 S.W. 2d 960 (1946).

¹⁸ *Divine v. Divine*, 305 Ky. 486, 204 S.W. 2d 804 (1947).

¹⁹ *Powell v. Childers*, 314 Ky. 45, 234 S.W. 2d 158 (1950).

²⁰ *Cornelison v. Yelton*, 296 Ky. 501, 177 S.W. 2d 879 (1944).

²¹ *Childers v. Welch*, 304 Ky. 700, 202 S.W. 2d 169 (1947).

Fleming,²² the husband was given the property during his life with authority to sell any part of the realty to meet his living expenses. At his death the property was to go to a granddaughter "to be absolutely under her control." It was held that the granddaughter took a remainder in fee simple. A bequest in trust to testator's widow for life or until she remarry, then to be paid to testator's two sons, created a vested remainder in one-half in each son.²³ In *Hall v. Hall*,²⁴ testator left his entire estate to his widow with full power to dispose of the same during her life or by will, but "should Lena R. Hall die without a will disposing of all or any part of said estate then in that event . . ." to testator's brother if living. It was held the remainder of the estate passed to the brother. A conveyance by deed to a father for life with remainder to children, if any, gave the children a vested remainder. The share of a child who died intestate prior to the father's death was inherited by his parents.²⁵ In another recent case, *Clay v. Security Trust Co.*,²⁶ a testator gave the residue of his estate to his sister for life and at her death to a nephew, to be held in trust until the nephew should reach the age of thirty-five years, when the corpus of the trust was to be paid to him. He predeceased the life tenant, his mother, before having attained the age of thirty-five years. The court held he had a vested remainder which was not defeated by his death before reaching thirty-five years of age.

During the last fifteen years several cases have come before the court where the life estates have been devised to widows and they have renounced the provisions made for them under the wills. The question presented in these cases was the effect of such renunciations on the remaindermen's rights. The holdings have uniformly been that the remainders have been precipitated and the remaindermen have come into possession at once.²⁷

Likewise the question whether a remainderman is barred by

²² 309 Ky. 486, 218 S.W. 2d 44 (1949).

²³ *Fitschen v. United States Trust Co.*, 313 Ky. 700, 233 S.W. 2d 405 (1950).

²⁴ 314 Ky. 733, 237 S.W. 2d 55 (1951).

²⁵ *Rose v. Bryant*, 251 S.W. 2d 860 (1952).

²⁶ 252 S.W. 2d 906 (1952).

²⁷ *Baldwin's Coex'rs v. Curry*, 272 Ky. 827, 115 S.W. 2d 333 (1938); *Farmers Bank & Trust Co. v. Morgan*, 308 Ky. 748, 215 S.W. 2d 842 (1948); *Gunn v. Sutherland*, 311 Ky. 578, 224 S.W. 2d 929 (1949); *Gatewood v. Pickett*, 314 Ky. 125, 234 S.W. 2d 489 (1950); *Shepard v. Moore*, 283 Ky. 181, 140 S.W. 2d 810 (1940).

the statute of limitations from asserting his right to the property continues to call for consideration.²⁸

In *Pope v. Kirk*²⁹ the effect of an alteration in the deed in order to create remainders was considered. The notary public, at the request of the grantee, inserted in the deed the words "and her grandchildren at second party's death." There was no evidence that the grantor knew of the change. The alteration would create a life estate in the grantee with remainder in her grandchildren. The court held the deed must be considered in its original form. The grantee, however, was estopped from denying the title of a grantee of two of the grandchildren and her grantee was also precluded from denying the title of such grantee.

In passing upon the question of a merger, the court said there can be no merger of a life estate and a defeasible fee in remainder.³⁰

An interested party, it was held in *Forman v. Brent*,³¹ can force the sale of property given in a testamentary trust to testator's widow for life and at her death to be sold and the proceeds divided among testator's children or their descendants.

Whether a life tenant or the remainderman is entitled to a stock dividend was raised in the case of *Ball's Ex'r v. Woodford Bank & Trust Co.*³² In that case the life tenant died on December 3. The stockholders of the bank passed a resolution for a stock dividend on December 10. The directors' resolution of November 26 was not an unequivocal declaration of a dividend. Their action was conditional and the court held the stock dividend went to the remainderman.

Finally the question has come before the court as to whether a remainderman may waive his interest or a part thereof. A testator devised half his estate to one of his sons with the proviso: "In the event Robert should die before his brother Edward, then in that event his half of the property is to pass to Edward or to Edward's child or children." In an earlier case before the court it had been adjudged that Edward had a contingent remainder

²⁸ *Slack's Ex'r v. Barrett*, 290 Ky. 251, 160 S.W. 2d 657 (1942); *Brittenum v. Cunningham*, 310 Ky. 131, 220 S.W. 2d 100 (1949); and *Wheeler v. Kazee*, 253 S.W. 2d 378 (1952).

²⁹ 255 S.W. 2d 468 (1953).

³⁰ *Gray v. Gray*, 300 Ky. 265, 188 S.W. 2d 440 (1945).

³¹ 309 Ky. 735, 218 S.W. 2d 655 (1949).

³² 311 Ky. 474, 224 S.W. 2d 678 (1949).

interest in the trust fund, the contingency being his survival. Robert was adjudged incompetent and his committee filed a bill to have the corpus of the trust encroached upon. Edward, considering himself as the sole remainderman, gave his consent to the committee's taking \$125 a month for the care of his brother Robert. The trustee requested that the property be divided equally between the two brothers. A judgment allowing Edward to waive his right and permit the trustee to take the amount agreed upon from the corpus for the support of Robert was approved on appeal.³³

II. *Reversions and Rights of Reverter*

In passing upon whether a reversionary interest can be transferred by will, the court referred to the early decision of *Alexander v. de Kermel*,³⁴ which cited Blackstone's definition of a reversion as "the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him." They accepted the proposition that "Whatever is descendable is devisable. That which one owns, he can dispose of by will."³⁵

In *Mitchell v. Dauphin Deposit Trust Co.*,³⁶ it was said that if a man devises a life estate and then the remainder to his own heirs, he creates not a remainder but a reversion in himself. The court disapproved of the decision in *McIlvaine v. Robinson*,³⁷ stating that as a rule of construction of wills the doctrine of worthier title does not aid in construing wills. The provision in the will that if the testator's daughter should die without children or descendants the estate should go to her heirs at law was held to fall under the fourth rule laid down in *Harvey v. Bell*,³⁸ which reads:

"On the other hand where there is no intervening estate, and no other period to which the words 'dying without issue' can be reasonably referred, they are held, in the absence of something in the will evidencing a contrary intent, to create a defeasible fee which is defeated by the death of the devisee at any time without issue then living."

³³ *Bank of Commerce v. Carter*, 247 S.W. 2d 533 (1952).

³⁴ 81 Ky. 345, 5 Ky. Law Rep. 382 (1883).

³⁵ *Murphy v. Boling*, 273 Ky. 827, 117 S.W. 2d 962 (1938).

³⁶ 283 Ky. 532, 142 S.W. 2d 181 (1940).

³⁷ 161 Ky. 616, 171 S.W. 413 (1914).

³⁸ 118 Ky. 512 at 523, 81 S.W. 671 (1904).

The court concluded that the heirs of the testator took the property as purchasers under the will and not by inheritance.

In *Pewitt v. Workman*³⁹ a deed conveyed a life estate to the grantor's wife with remainder to his heirs. This created a reversion in the grantor which passed to his wife under his will.

It was pointed out in *Rhodes v. Bennett*⁴⁰ that the terms "reservation" and "exception" have been used interchangeably in deeds. In that case a deed set aside a one-half acre tract for school purposes. The term "reserve" was used in the sense of "exception" in the deed and no title was thereby conveyed to the school authorities. Their occupation, the court said, had been adverse to the owners and a judgment to quiet title was denied the owners of tracts from which the school lot had been taken.

In *Hardesty v. Coats*⁴¹ a will provided if either of the sons of testator should die leaving no bodily issue ". . . their part shall revert to my estate in trust." It was held that a contingent reversion was valid and the land reverted to testator's estate upon the happening of the contingency or event even though the testator died before the occurrence of the contingency. In another case a devise of a life estate without further provision was held good as a life estate with a reversion in the devisor's heirs.⁴² In *Mills v. Taylor*,⁴³ a deed provided that if the grantees failed to sell or devise the property "in their lifetime, then said property shall fall to the legal heirs of the bodies" of the grantors "when these grantors (A. Y. Mills and Nancy Mills) shall have deceased." The grantees, shortly after the deed was given, sold the land. The court observed that even if the grantees had only a defeasible fee up until that time it then became finally vested.

The well established proposition that a reservation or exception cannot be made in favor of a stranger to the deed was emphasized in *Seward v. Seward*.⁴⁴ An exception in the deed in that case purported to be in favor of a stranger. The court, however, held it might operate in favor of the grantor to exclude the part

³⁹ 289 Ky. 459, 159 S.W. 2d 21 (1942).

⁴⁰ 307 Ky. 507, 211 S.W. 2d 693 (1948). See also *Flynn v. Fike*, 291 Ky. 316, 164 S.W. 2d 470 (1942).

⁴¹ 287 Ky. 675, 155 S.W. 2d 8 (1941).

⁴² *White v. Citizens Fidelity Bank & Trust Co.*, 313 Ky. 230, 230 S.W. 2d 899 (1950).

⁴³ 249 S.W. 2d 779 (1953).

⁴⁴ 252 S.W. 2d 869 (1952).

in question from the conveyance. The court cited with approval its decision to that effect in *Slone v. Kentucky-West Virginia Gas Co.*⁴⁵

Considering a possibility of reverter, we turn to where land is conveyed for so long as it is used for a particular purpose, the grantee acquiring a fee that is determinable upon the land being no longer used for the particular purpose. In such case it reverts to the grantor or his heirs. The grantor in the meantime does not have a future estate in the land but only a mere possibility of reacquiring it if it is no longer used for the purpose named. A possibility of reverter is to be distinguished from a right of entry for condition broken. In the latter a fee may be granted upon a condition subsequent that, for example, a certain thing shall not be done on the land. If the condition is broken, the title of the grantee becomes voidable and the grantor must enter to reacquire title to the land. In the case of the possibility of reverter upon happening of the event named, the title at once returns to the grantor without his taking any steps to reacquire it.

In *Fayette County v. Morton*⁴⁶ land was conveyed for an electric railway with the provision that if abandoned for an electric railroad the property should revert to the grantors, owners of the adjoining property. The possibility of reverter was held valid and did not violate the rule against perpetuities.

In 1798 two lots in the city of Frankfort were deeded to the Commonwealth of Kentucky for the "special purpose of erecting a jail and Penitentiary House and other appendages." The court construed the latter phrase as expressing the occasion for making the conveyance and not as a "condition subsequent" and that "no reverter of the land" was created in the grantor's heirs. The fact that the conveyance was to the Commonwealth in conformity to an act of the legislature influenced the court in arriving at this decision.⁴⁷

This problem of possibility of reverter most often comes up where land has been given for school or religious purposes. It was pointed out in *Devine v. Isham*⁴⁸ that express words of reservation are not necessary in a deed to create a right of reverter.

⁴⁵ 289 Ky. 623, 159 S.W. 2d 993 (1942).

⁴⁶ 282 Ky. 481, 138 S.W. 2d 953 (1940).

⁴⁷ *Williams v. Johnson, Governor*, 284 Ky. 23, 143 S.W. 2d 738 (1940).

⁴⁸ 284 Ky. 537, 145 S.W. 2d 529 (1940).

The title will revert upon failure of the intended purpose. In this case the conveyance was for school purposes, "but for no other purpose whatsoever, and not to be conveyed by second party to use, or uses, of no individuals." Reference was made in *Williams v. Johnson*⁴⁹ to *Fayette County Board of Education v. Bryan*.⁵⁰ where the deed read: ". . . so long as the land is used for school purposes." This case stands for the proposition that express words of reservation are not necessary. The court has also said that general words "for school purposes are only descriptive of the nature of the only use the school trustees may make of the property and do not create a limitation or condition on the fee."⁵¹ We find the word "revert" often used loosely. *Nunn v. Wright*⁵² is a case in point. A provision in a deed conveying property to a husband and wife stipulated that if the husband died before the wife the property should revert to the wife and "her bodily heirs." The court ruled that in the absence of a showing to the contrary, the wife's children took no interest in the property. The words were words of limitation and not of purchase.

Although the right of reverter is not a future interest but a mere possibility of acquiring an interest in the future, it is to be noted that this possibility can be released by the person having it.⁵³

A not uncommon instance of a condition subsequent is where a father deeds his farm to a son upon condition that the latter support the father. In *Manning v. Street*⁵⁴ the heirs sought to enforce the condition subsequent after the grantor's death. The court said on breach of the condition the grantee's title should fail. However, in the particular case, it was found that the grantor did not reserve the right to re-enter in the event of a breach of the condition, "and there was no provision for a reverter" to indicate the intention of the parties that the grantee's title should fail on a breach of the condition to support. Consequently, the

⁴⁹ *Supra*, n. 47.

⁵⁰ 263 Ky. 61, 91 S.W. 2d 990 (1936).

⁵¹ Board of Ed., Taylor Co. v. Board of Ed., Campbell Co., 292 Ky. 261, 166 S.W. 2d 295 (1942).

⁵² 303 Ky. 288, 197 S.W. 2d 439 (1946); and *Honaker v. Hutchinson*, 305 Ky. 790, 205 S.W. 2d 683 (1947).

⁵³ *Murray Hospital Ass'n v. Mason*, 306 Ky. 248, 206 S.W. 2d 936 (1947).

⁵⁴ 279 Ky. 253, 130 S.W. 2d 735 (1939).

court said, the provision should not here be construed as a condition subsequent authorizing the heirs to maintain an action.

III. *Executory Limitations*

An executory devise has been defined as a future interest created by will that is to take effect at some time subsequent to the devisor's death upon the happening of some event. The adoption of the Statute of Uses made such interests legal since a use was a "light and nimble thing" and could shift the title from one person to another upon the occurrence of the named event. Before the adoption of that statute they were recognized as enforceable in equity. These limitations were created by will. Today, however, they may be created by deed as provided in KRS 381.040. Where an estate is created in one and his heirs but if a certain contingency happens the estate is to pass to another, the first taker is said to have a defeasible fee. Such estates are far from uncommon. Several cases have arisen during the past fifteen years where a husband has devised his estate to his widow "so long as she remains my widow" or words to that effect.⁵⁵ Or a wife may devise property to her husband, but if he remarry then over.⁵⁶ Gifts to testator's son or daughter, or grandchildren, but if he or she or they die without heirs or heirs of the body then the interest to go over to another person, is a type of case that has often given rise to litigation.⁵⁷

A devise of property to grandchildren with the proviso that if any die before arriving at twenty-four years of age then his or her share to revert to testator's estate, the court said, operated to

⁵⁵ York v. York, 275 Ky. 573, 122 S.W. 2d 140 (1938); Charles v. Shortridge, 277 Ky. 183, 126 S.W. 2d 139 (1939); Hopson's Trustee v. Hopson, 282 Ky. 181, 138 S.W. 2d 365 (1940); Cuddy v. McIntyre, 312 Ky. 606, 229 S.W. 2d 315 (1950); Points v. Points, 312 Ky. 348, 227 S.W. 2d 790 (1950); and Taylor v. Farrow, 239 S.W. 2d 73 (1951).

⁵⁶ Fannin's Adm'r v. Segraves, 303 Ky. 697, 198 S.W. 2d 802 (1946).

⁵⁷ Deering v. Skidmore, 282 Ky. 292, 138 S.W. 2d 471 (1940); Mitchell v. Dauphin Trust Co., 283 Ky. 532, 142 S.W. 2d 181 (1940); Hite v. Barber, 284 Ky. 718, 145 S.W. 2d 1057 (1940); LeCompte v. Davis Ex'r, 285 Ky. 433, 148 S.W. 2d 292 (1941); Good Samaritan Hospital v. First Presbyterian Church, 286 Ky. 462, 151 S.W. 2d 78 (1941); Vittitow v. Birk, 290 Ky. 235, 160 S.W. 2d 624 (1942); Trumbo v. Sanford, 305 Ky. 231, 203 S.W. 2d 22 (1947); Kellogg v. Meadows, 309 Ky. 21, 215 S.W. 2d 951 (1948); Weinberg v. Werf, 309 Ky. 731, 218 S.W. 2d 398 (1949); and Schuler v. Getzendoner, 314 Ky. 682, 236 S.W. 2d 964 (1951).

deprive the grandchildren of a fee simple in the event of death before attaining the specified age.⁵⁸

In *Medcalf v. Whitely's Adm'x*,⁵⁹ the court, after citing Fearne and Jarman, said: "In the light of these authorities we are convinced that a life estate may be carved out of a preceding fee simple by executory devise. . . ." The will gave a fee to testator's son, subject to a life estate in the son's wife, who in turn devised it to the appellees in the case. The son was the only child of the testator. He made his wife the sole devisee in his will. She thereby acquired the fee in the property and the appellees were held to have a good fee simple title thereto.

Cases arise where a will or deed may provide that if the devisee or grantee does not convey the land, it shall go over to another at the death of the first taker. Such provisions create defeasible fees in the first takers.⁶⁰

It was pointed out in *Kurrie v. Kentucky Trust Co. of Louisville*⁶¹ that a defeasible fee in remainder may be created in personalty.

IV. Construction of Limitations

The construction of terms used in wills and deeds has always taken much of the court's time. In 1904, in the case of *Harvey v. Bell*,⁶² four rules were laid down as to the meaning to be given phrases, "dying without children" and "dying without issue."

(1) "Where an estate is devised to one for life, with remainder to another, and if the remainderman die without children or issue, then to a third person," the rule restricts the words "dying without children or issue" to death before the termination of the particular estate.

(2) Where property is devised to infants upon the termination of an estate when it is to be divided among them and there is a provision that if any die without issue then to the survivor or survivors, the phrase is limited to death before the time for distribution.

⁵⁸ *Lindsay v. Williams*, 279 Ky. 749, 132 S.W. 2d 65 (1939). See also *Malone v. Jamison*, 312 Ky. 249, 227 S.W. 2d 179 (1950).

⁵⁹ 290 Ky. 94, 160 S.W. 2d 348 (1942).

⁶⁰ *Head v. Head*, 293 Ky. 371, 169 S.W. 2d 25 (1943); *Kurrie v. Kentucky Trust Co. of Louisville*, 302 Ky. 592, 194 S.W. 2d 638 (1946); and *Cassidy v. Cain*, 311 Ky. 179, 223 S.W. 2d 744 (1949).

⁶¹ *Supra*, n. 60.

⁶² *Supra*, n. 38.

(3) If the devise is to a class, death without issue also refers to death before the time of distribution.

(4) If there is no intervening estate the words "dying without issue," in the absence of a contrary intent, create a defeasible fee which will be cut short by death without issue at any time. The court, however, pointed out that these rules must yield to the intent of the testator as found in the will as a whole.

Furthermore, resort to legislative enactment was had in the construction of "without heirs," "without children" or "issue" as used in deeds and wills; and also where an estate is given for life with "remainder to heirs."⁶³

(a) "Heirs," "Heirs at Law"

The word "heirs," unless a different intent is shown in an instrument, is to be taken in its technical sense,⁶⁴ that is, those persons who take a decedent's property as provided under the statute of descent and distribution. In *Vaughn v. Metcalf*, however, the court held that the word "heir" referred to a grandchild as the "heir" of his daughter and showed an intent that the grandchild take the fee in remainder and the testator did not intend the grandchild to take as a testamentary heir of the daughter.⁶⁵ The phrase "heirs at law" means, the court says, "heirs of the testator as of the date of the death of the daughter," the life tenant.⁶⁶ Where a will contained a provision that if any child of the testator die without "heirs" the property was to go to the other heirs, the reference was to death before the testator's death.⁶⁷ The case came within the first rule laid down in *Harvey v. Bell*.⁶⁸ A conveyance by deed to a daughter "and her bodily heirs," since the rule in *Shelley's case* has been abolished in this jurisdiction by KRS 381.070, created an estate in fee simple.⁶⁹

⁶³ KY. REV. STAT. (1948) Secs. 381.080, 381.090.

⁶⁴ *Jennings v. Jennings*, 299 Ky. 779, 187 S.W. 2d 459 (1945).

⁶⁵ 274 Ky. 379, 118 S.W. 2d 727 (1938). See *Combs v. Combs*, 294 Ky. 89, 171 S.W. 2d 13 (1943), and *Holoway v. Crumbaugh*, 275 Ky. 377, 121 S.W. 2d 924 (1938).

⁶⁶ *Mitchell v. Dauphin Deposit Trust Co.*, *supra*, n. 36.

⁶⁷ *Good Samaritan Hospital v. First Presbyterian Church*, 286 Ky. 462, 157 S.W. 2d 78 (1941).

⁶⁸ *Supra*, n. 38. Also *Mitchell v. Deegan*, 301 Ky. 587, 192 S.W. 2d 715 (1945).

⁶⁹ *Sallee v. Warner*, 306 Ky. 846, 209 S.W. 2d 491 (1948). See also *Clark v. McGrann*, 274 Ky. 1, 117 S.W. 2d 1021 (1938).

(b) "Children"

In *Ellison v. Smoot's Adm'r*⁷⁰ a provision in a devise was to the effect that if the devisee should have no children, her share should go to the children of testatrix's sister. The court observed: "Under a well-established rule of interpretation such condition is held to have reference to the death of the second devisee before the termination of the life estate. . . ." This comes within the first rule laid down in *Harvey v. Bell*.⁷¹ There are several other recent cases to the same effect.⁷²

In the absence of a contrary intention as shown by the whole will, a devise to one and "his children" creates a fee simple in the party named.⁷³ Where the devise was to two younger daughters of the testator and "to their children," it was held that "to their children" were words of purchase and the daughters' children had a remainder.⁷⁴

(c) Classes

The third rule in *Harvey v. Bell*⁷⁵ governs gifts to classes. There are several recent decisions following this rule that where the division of the remainder is postponed until the termination of the particular estate, the remainder vests at the death of the life tenant and only those living at the time share in the estate.⁷⁶ Sometimes the court speaks of the "divide and pay rule" where the remainder is held not to vest in members of the class until the time for payment arrives.⁷⁷

Whether a gift of residue to legatees is a gift to a class or to persons individually depends upon the intent of the testator.⁷⁸

⁷⁰ 286 Ky. 768, 151 S.W. 2d 1017 (1941).

⁷¹ *Supra*, n. 38.

⁷² *Deitchman v. Wooley*, 294 Ky. 186, 171 S.W. 2d 256 (1943); *Bennett v. Bennett*, 295 Ky. 393, 174 S.W. 2d 525 (1943); *Parke v. Parke's Ex'r*, 295 Ky. 634, 175 S.W. 2d 141 (1943); *Pence v. Farris*, 303 Ky. 97, 196 S.W. 2d 970 (1946); *Hall v. Spencer*, 312 Ky. 274, 227 S.W. 2d 196 (1950); and *Turner v. Simpson*, 313 Ky. 780, 233 S.W. 2d 996 (1950).

⁷³ *Boards v. Skiles*, 295 Ky. 670, 175 S.W. 2d 353 (1943); *Collis v. Citizens Fidelity Bank & Trust Co.*, 314 Ky. 15, 234 S.W. 2d 164 (1950).

⁷⁴ *Stahr v. Mozley*, 284 Ky. 552, 145 S.W. 2d 40 (1940).

⁷⁵ *Supra*, n. 38.

⁷⁶ *Maingault's Adm'r v. Carrithers*, 295 Ky. 654, 175 S.W. 2d 129 (1943); *Bill's Adm'r v. Bill's Ex'r*, 299 Ky. 749, 186 S.W. 2d 907 (1945) and *Beam v. Shirley*, 301 Ky. 320, 191 S.W. 2d 248 (1945).

⁷⁷ *Skiles v. Bowling Green Trust Co.*, 294 Ky. 211, 171 S.W. 2d 235 (1943); and *White v. Citizens Fidelity Bank & Trust Co.*, 313 Ky. 230, 230 S.W. 2d 899 (1950).

⁷⁸ *Shoenberg v. Lodenkemper's Ex'r*, 314 Ky. 105, 234 S.W. 2d 501 (1950).

It is also possible to create a class from a less number than the natural class, from three of testator's four sons as was pointed out in *Horseman v. Horseman*;⁷⁹ and in *Hardin v. Crow*⁸⁰ an estate was to be equally divided between the widow's "nearest relatives and my nearest relatives." This was held to create two classes and all the relatives in a group shared on a *per stirpes* basis.

V. Powers

Jessel, M. R. of the English Chancery Division, has given in simple words a definition of a power which is worth repeating. He says a power is the right of disposition given a person over property not his own by someone who directs the mode in which that power shall be exercised by a particular instrument.⁸¹

Powers are classified as to their scope as general or special. They may be exercised by deed or will as stipulated by the donor of the power. It was provided in the donor's will in the case of *Liggett v. Fidelity & Columbia Trust Co.*⁸² that the daughter of the testator should have a life estate in a trust fund "with remainder in fee" as "she might appoint" and "in default of such appointment" to "her issue." In her will the daughter disposed of her property including any over which she had any power of appointment, giving the income to her son for life and to his children at his death for their lives and on their deaths the income to the son's grandchildren until they reach the age of twenty-one years, when the corpus was to be distributed among them. A codicil made some changes as to payment of the income.

Since the gift to the great-great-grandchildren of the original donor of the power violated the rule against perpetuities, the son claimed the exercise of the whole power was void. The question before the court then was whether the exercise of the whole power was void since a part violated the rule against perpetuities. The answer was found in the earlier case of *Chenoweth v. Bullitt*.⁸³ To quote from that decision:

⁷⁹ 309 Ky. 289, 217 S.W. 2d 645 (1949).

⁸⁰ *Hardin v. Crow*, 310 Ky. 814, 222 S.W. 2d 842 (1949).

⁸¹ *Freme v. Clement*, 18 Ch. Div. 499 at 504 (1881).

⁸² 274 Ky. 387, 118 S.W. 2d 720 (1938).

⁸³ 224 Ky. 698, 6 S.W. 2d 1061 (1928).

“Upon principle, there would seem to be no reason why the invalidity of ultimate or penultimate limitations should affect an antecedent estate which is good itself. A devise to one for life, without more, is good; the reversion is in the devisor’s heirs. Whatever may be the rule in other jurisdictions it is not the rule in this State that the whole devise is bad when its ultimate limitations are bad.”

The power given the life tenant in *Brown v. Harlow*⁸⁴ was general, exercisable *inter vivos*. A deed gave to the grantee for life with power “to dispose of by him as he might see cause and to go at his death to his son and two daughters.” The grantee had the right to sell the property in his life-time and by so doing extinguish the defeasible fee in remainder held by his children.

It has also been held the power to sell and reinvest the proceeds gave the right to make a private sale and convey a good title.⁸⁵ A limited power, however, was given an executor where he was required to secure the consent of testator’s widow and two sons before he could sell the devised property. The death of one of the sons extinguished the power of the executor.⁸⁶

In *Harlan v. Citizens National Bank of Danville*,⁸⁷ a testamentary power provided “that said George L. Harlan may devise his interest to his widow, his descendants or my descendants.” An appointment of all estate to the donee’s brother was upheld as the power was exclusive. The donee could exclude one or more objects unless the donor of the power forbade the donee’s so doing.

Ordinarily the power to sell does not include the power to mortgage. However, a power which read “He shall have full power to use and expend any part or all of said estate for any purpose whatsoever. . . .” was held broad enough to allow the donee to mortgage the property. There was a gift over of what he had not disposed of during his lifetime.⁸⁸ Also, where property was given a son in trust “to hold, manage and control same as if it were his own” with power to sell and “to use the proceeds in any way his judgment suggests,” it was held this language gave the power to mortgage the property in order to preserve and improve the same.⁸⁹

⁸⁴ 305 Ky. 285, 203 S.W. 2d 60 (1947).

⁸⁵ Childers v. Welch, 304 Ky. 700, 202 S.W. 2d 169 (1947).

⁸⁶ Whisman v. McMullen’s Ex’r, 312 Ky. 402, 227 S.W. 2d 926 (1950).

⁸⁷ 305 Ky. 285, 203 S.W. 2d 285 (1947).

⁸⁸ Morgan v. Meacham, 279 Ky. 526, 130 S.W. 2d 992 (1939).

⁸⁹ Gaither v. Gaither, 288 Ky. 145, 155 S.W. 2d 746 (1941).

Where a power in a deed authorized the owner of the life estate to sell the land and reinvest the proceeds and stated that the obligation to reinvest was on the life tenant, the purchaser was held to be under no obligation to see that the proceeds were reinvested.⁹⁰

The question sometimes arises as to whether the donee has renounced his right to exercise the power. A statutory provision⁹¹ provides that such an intention must appear in the donee's will. In *United States Trust Co. v. Winchester*⁹² the court found an intention not to exercise the power. The opposite conclusion was reached in *Union Bank & Trust Co. of Lexington v. Bassett*.⁹³ The court found nothing in the donee's will that showed an intention not to exercise the power. The donee's will in this case directed the payment of "my" debts, funeral expenses, costs of administration, "federal estate and state inheritance taxes." It was held that it was not the intention of the donee of the power to burden her own estate with the estate taxes on the property passing under the power and directed that it be paid out of the appointed property.

Then there is the question as to a minor's right to exercise a power of appointment. *Owens v. Owens*⁹⁴ refers to the general proposition that an infant may exercise a collateral power but cannot exercise a power appendant. The exercise of the latter power would affect his own property. A power in a deed given an infant is to be exercised when the grantee becomes of age. The court points out that it had so held in an earlier case. The facts in the *Owens* case were that a soldier left an instrument purporting to make his mother beneficiary of the "death gratuity" provision in his service life insurance policy. It was ineffective to change the beneficiary as it did not conform to power given in the policy itself.

VI. *The Rule Against Perpetuities*

The confusion in terminology caused by the unfortunate wording of statutes supposed to incorporate the common law rule

⁹⁰ *Metropolitan Life Ins. Co. v. Chenault*, 282 Ky. 252, 138 S.W. 2d 490 (1939).

⁹¹ KY. REV. STAT. (1948) sec. 394.060.

⁹² 277 Ky. 434, 126 S.W. 2d 1128 (1939).

⁹³ 253 S.W. 2d 632 (1952).

⁹⁴ 305 Ky. 460, 204 S.W. 2d 580 (1947).

against perpetuities still crops out in court opinions dealing with remote vesting of estates in property. The court evidently intended to settle the question once for all in its opinion in *Cammack v. Allen*,⁹⁵ which was decided thirty years ago. As Judge Thomas pointed out in his opinion, Section 2360 of the statutes, now KRS 381.220, “. . . has always been treated and referred to in the opinions of this court as Kentucky’s statute against perpetuities. . . . In none of the opinions was the statute referred to as creating a rule with reference to the imposition of such restraints. . . .” KRS 381.220 reads as follows:

“The absolute power of alienation shall not be suspended, by any limitation or condition whatsoever, for a longer period than during the continuance of a life or lives in being at the creation of the estates, and twenty-one years and ten months thereafter.”

The rule against perpetuities according to the generally adopted view in this country is a rule against remote vesting of estates and not a rule against restraints on alienation. As pointed out by Gray, future estates, if alienable, cannot violate the rule. The present owner of a future interest can convey what interest he has in the future estate. The rule, he says, “would have been better had it been called the Rule against Remoteness.”⁹⁶

In *Letcher’s Trustee v. Letcher*⁹⁷ the Kentucky court said that section 381.220 was enacted as declaratory of the common law rule against perpetuities. The court quoted from an earlier decision⁹⁸ where it was said in construing the clause in question:

“The test, therefore, for determining the existence of a perpetuity, is not whether the event or contingency named upon which the estate devised may vest in the ultimate takers does happen or may happen, but whether it is possible that it might not happen within that time. If it is possible that the event or contingency upon which the estate will finally vest may not happen within the limit prescribed by the rule against perpetuities, the instrument is void. . . .”

⁹⁵ 199 Ky. 268, 272, 250 S.W. 963 (1923). See *Gray v. Gray*, 300 Ky. 265, 188 S.W. 2d 440 (1945).

⁹⁶ GRAY, *THE RULE AGAINST PERPETUITIES* (4th ed., 1942), 3, 4.

⁹⁷ 302 Ky. 448, 194 S.W. 2d 984 (1946).

⁹⁸ *Tyler v. Fidelity and Columbia Trust Co.*, 158 Ky. 280, 164 S.W. 939, 941 (1914).

In *Emler v. Emler's Trustee*⁹⁹ the court went contra to this rule of construing clauses involving perpetuities and took the construction that made the devise good under the rule. It was said "the court will adopt the construction which does not violate the statute." However, the correct rule of construction was followed in later cases that "the rule against perpetuities is not to be tested by actualities, but by possibilities."¹⁰⁰

The Court of Appeals formerly took a minority view as to options, that an option was not a limitation on the sale or conveyance of land and was not within the rule against perpetuities.¹⁰¹ In recent decisions it has adopted the majority view that options come within the rule.¹⁰²

The question arises in gifts to a class as to whether the estate may possibly vest beyond a life or lives in being, twenty-one years and ten months. A gift to go to the testator's grandnieces and nephews at the death of the life tenant, including "any that may yet be born," was held good as the court found it was the testator's intent "to limit the devise to children of his nieces and nephews living at the time of his death." It further said: "The whole devise is not void because the statute has been violated. That which is good, if separable from the bad, will be allowed to stand."¹⁰³

Where the estate was to be kept intact for fifty years after the death of the testator and the income to be divided among his children, it was held the rule against perpetuities was violated. The court said: "The children might live beyond the period of restraint, but that is not the test. The rule deals with possibilities and not probabilities."¹⁰⁴

In two or three decisions gifts over to churches or to school boards have been before the court to determine whether the gifts violated the rule against perpetuities. In *Smith v. Fowler*¹⁰⁵ after

⁹⁹ 269 Ky. 27, 106 S.W. 2d 79 (1937).

¹⁰⁰ *McGaughy v. Spencer Co. Board of Ed.*, 285 Ky. 769, 149 S.W. 2d 519 (1941); *Goodloe's Trustee v. Goodloe*, 292 Ky. 494, 166 S.W. 2d 836 (1942); *Maddox v. Keeler*, 296 Ky. 440, 177 S.W. 2d 568 (1944), and *Ford v. Yost*, 299 Ky. 682, 186 S.W. 2d 896 (1945).

¹⁰¹ See *Coley v. Hard*, 250 Ky. 250, 62 S.W. 2d 792 (1933).

¹⁰² *Maddox v. Keeler*, *supra*, n. 100; *Campbell v. Campbell*, 313 Ky. 249, 230 S.W. 2d 918 (1950); and *Bates v. Bates*, 314 Ky. 789, 236 S.W. 2d 943 (1951).

¹⁰³ *Tuttle v. Steele*, 281 Ky. 218, 135 S.W. 2d 436 (1939). See also *Holoway v. Crumbaugh*, *supra*, n. 65.

¹⁰⁴ *Fox v. Burgher*, 285 Ky. 470, 148 S.W. 2d 342 (1941).

¹⁰⁵ 301 Ky. 96, 190 S.W. 2d 1015 (1945).

the death of the life tenant the devised property was to go to "lineal descendants and after the death of all children and their lineal descendants to an educational board." The gift was held void. In *Cambron v. Pottinger*¹⁰⁶ the will provided for a specified sum to go to a certain church after the death of the life tenant and the remainder to be equally divided between testator's and his wife's heirs equally. These gifts over were not in violation of the rule. In *Letcher's Trustee v. Letcher*¹⁰⁷ the court said that a gift over to a church after the death of the children of a named nephew who survived the testator was a violation of the rule. However, a reservation of part of the land conveyed was made for so long as it was used for the benefit of schools and churches and the gift did not violate the rule as the court said the fee was always vested by the reservation.¹⁰⁸

Another problem presented by some of the recent decisions is that of the application of the rule to a continuing trust, frequently called an indestructible trust. Of course the rule applies to trust where there is a question of remote vesting of a fund or estate involved, as where the trustee is to pay over at a remote time a fund to a person whom he is given discretion in selecting.¹⁰⁹ Today it is generally considered that there is a third rule relating to the duration of trusts. An authority in the field of trusts makes the following statement in regard to the duration of trusts:

"Courts and writers sometimes state in a rather loose fashion that every express private trust must be limited in duration to a period not longer than lives in being when the trust starts and twenty-one years thereafter. This would make it appear that there is some common law or generally adopted statutory rule *directly* and in so many words limiting the possible life of a trust. This is incorrect, except in a few states where trusts in general, or certain trusts, have been limited in their duration by statute."¹¹⁰

He further points out that trusts are destructible if the *cestui*, when of age and sound mind, can call for a conveyance of the

¹⁰⁶ 301 Ky. 768, 193 S.W. 2d 412 (1945).

¹⁰⁷ *Supra*, n. 96.

¹⁰⁸ *Egner et ux. v. Livingston Co. Bd. of Ed.*, 313 Ky. 168, 230 S.W. 2d 448 (1950). See *Bates v. Bates*, *supra*, n. 102.

¹⁰⁹ GRAY, *THE RULE AGAINST PERPETUITIES* (4th ed., 1942), sec. 412.

¹¹⁰ BOGERT, *TRUSTS AND TRUSTEES* (1935), sec. 218.

legal estate or possession of the trust *res* and terminate the trust.

The Restatement of the Law of Trusts reads:

“A trust is not invalid either in whole or in part merely because the duration of the trust may exceed the period of the rule against perpetuities, provided that the interests of all of the beneficiaries must vest within the period.”¹¹¹

Turning to the recent Kentucky cases, let us see how the court has dealt with cases involving trusts. In *Tillman v. Blackburn*¹¹² the question was whether the provision in a will created a continuing trust for the benefit of the descendants of her daughter's children, without any limitation to time. “It would not follow that the will was void as being in violation of the statute of perpetuities, but would be valid,” the court said, “as to the descendants of those living at the time” of the death of the life tenant. The devise in trust for testatrix's children for life with a gift over to a child's issue at the age of twenty-one, provided for in *Goodloe's Trustee v. Goodloe*,¹¹³ was held not to violate the rule against perpetuities.

In another case a testator devised part of his estate to his son and his children in trust for thirty years after the probate of the will. This was held void “because it violated the statute and rule against perpetuities.”¹¹⁴ The trust considered in *Letcher's Trustee v. Letcher*¹¹⁵ was also held to violate the rule. In that case, however, the question was whether the future estate would vest within the period limited by the rule.

A fifty-year testamentary trust for payment of taxes and insurance on a farm was held to violate the rule of perpetuities in *Thornton v. Kirtley*.¹¹⁶ At the end of the fifty-year period the balance of the income from the fund was to be distributed among testatrix's children. A trust for maintenance of graves came within KRS 381.260, providing for charitable trusts.

*First National Bank & Trust Co. of Lexington v. Purcell*¹¹⁷ presented an interesting problem: whether the provision in a

¹¹¹ RESTATEMENT TRUSTS (1935), sec. 62, Comment k.

¹¹² 276 Ky. 550, 124 S.W. 2d 755 (1939).

¹¹³ *Supra*, n. 100.

¹¹⁴ *Ford v. Yost*, 300 Ky. 764, 190 S.W. 2d 21 (1945).

¹¹⁵ *Supra*, n. 97.

¹¹⁶ 249 S.W. 2d 803 (1952).

¹¹⁷ 244 S.W. 2d 458 (1951).

twenty-year endowment insurance policy for change of beneficiaries violated the rule. A testamentary trust was set up for the benefit of testator's children. The trustee was to pay the premiums on the policies until the policies were fully paid up and the trust was to continue until such time. The trust was held not to violate the rule against perpetuities. The court cited with approval from Gray, the statement that "The Rule against Perpetuities concerns rights of property only, and does not affect the making of contracts which do not create rights of property."¹¹⁸

VII. *Restraints on Alienation*

The distinction between the rule against perpetuities and a condition or limitation that restrains the alienation of the property conveyed or devised subject thereto was clearly pointed out by the court in *Cammack v. Allen*.¹¹⁹ The latter rule, the court said, deals "with the right of alienation by a person in whom the fee vested within the permissible period prescribed by it." The Kentucky rule against restraints on alienation is well stated in *Lawson v. Lightfoot*.¹²⁰ Judge Settle, in giving the opinion in that case, said:

"It must be conceded that the great weight of authority outside Kentucky is to the effect that, where the fee-simple title to real estates passes under a deed or will, any restraint attempted to be imposed by the instrument upon its alienation by the grantee, or devisee, is to be treated as void, and such is clearly the rule announced by Mr. Gray in his excellent work on Restraints of Alienation; but the contrary view has been adopted by this court in repeated decisions. . . . This court has, however, never fixed a limit to such restraints. . . ."

The restraint must be reasonable and the court itself will determine what is reasonable on the facts of a particular case.

In *England v. Davis*¹²¹ it was held that where the grantor and grantee joined in a conveyance of the property they gave a good fee simple title to a third party even though the deed the grantor had given the grantee provided that the grantee should not "rent, lease nor sell the said land without the grantor's consent only to

¹¹⁸ THE RULE AGAINST PERPETUITIES (4th ed. 1942), sec. 329, p. 360.

¹¹⁹ *Supra*, n. 95.

¹²⁰ 84 S.W. 739, 27 Ky. Law Rep. 217 (1905).

¹²¹ 273 Ky. 424, 116 S.W. 2d 977 (1938).

each other." A restraint, however, on a donee of a fee preventing him from exercising the power to encumber or alienate the property during his lifetime was held void in *Lindsay v. Williams*,¹²² and in *Newson v. Barnes*¹²³ the beneficiary under a trust which was not to terminate until his sister attained the age of twenty-one years, was allowed to convey his interest and all income from the trust prior to the time of termination of the trust. The court relied on KRS 381.040.

In *Hite v. Barber*,¹²⁴ the court, unmindful of what had been said in its decision in *Cammack v. Allen*,¹²⁵ said that a restraint that forbade selling or mortgaging the property for sixty years violated KRS 381.220. Also, in *Winn v. William*,¹²⁶ this statute was cited as the basis of holding a restraint on alienation for the lifetime of testator's children void. The gift of the balance of testator's estate in trust until the donee became twenty-five years of age was found to create a dry trust since no active duty was imposed on the trustee. This vested a fee in the beneficiary at once which he could dispose of if he so desired. And in *Kelly v. Marr*¹²⁷ it was unsuccessfully contended by counsel for appellant that under section 381.220 of the Statutes the testator had a right to restrain the alienation of the property for the time mentioned in the statute, that is, for a life or lives in being, twenty-one years and ten months. The court pointed out in the case of *Trosper v. Shoemaker*¹²⁸ that KRS 381.220 had no application as the case concerned a restraint on the use of the property sold. The grantee of a filling station was to continue the use of petroleum products sold by the grantor. It was held that the covenant was not an unreasonable restraint and was not void.

Finally, the court has found valid restraints not to alienate the land during the grantor's lifetime, where a son was under obligation to support the father during his lifetime. Such an agreement to support was the consideration for the conveyance and the court held the provision reserved a life estate in the father.¹²⁹ The

¹²² 279 Ky. 749, 132 S.W. 2d 65 (1939).

¹²³ 282 Ky. 264, 138 S.W. 2d 996 (1940).

¹²⁴ 284 Ky. 718, 145 S.W. 2d 1058 (1940).

¹²⁵ *Supra*, n. 95.

¹²⁶ 292 Ky. 44, 165 S.W. 2d 961 (1942).

¹²⁷ 299 Ky. 447, 185 S.W. 2d 945 (1945). See also *Gray v. Gray*, *supra*, n. 30, and *Ford v. Yost*, *supra*, n. 100.

¹²⁸ 312 Ky. 344, 227 S.W. 2d 176 (1950).

¹²⁹ *Chapman v. Blackburn*, 295 Ky. 606, 175 S.W. 2d 26 (1943).

chancellor in another case ruled that there was an implied right to mortgage the property to pay testator's debts although the property was not to be sold or divided until the youngest son should reach the age of twenty-seven.¹³⁰

Conclusion

The survey of the decisions rendered in Kentucky during the past fifteen years shows that few marked changes in the law of future property interests have been made. Perhaps the most notable is that of holding options within the rule against perpetuities. This shift brings Kentucky in line with the majority view that an option is within the rule against perpetuities.

Construction of deeds and wills has taken considerable time of the courts in getting at the meaning of a grantor or a testator. This is especially true in determining who is to be included in a class gift. The rules laid down in *Harvey v. Bell*¹³¹ for determining when a class is made up have been followed. In one case the court overlooked the general rule that in determining whether the devise in question violated the rule against perpetuities the test is not the actuality but the possibility of the rule's being violated and said that the construction would be taken that did not violate the statute.¹³²

The wording of section 381.220 in terms of restraint against alienation when, as the court has said, it is a rule against vesting of future interests still causes confusion in terms used in opinions dealing with restraints on alienation. There was doubtless some such idea in the English view of the rule that if an owner of a vested estate cannot alienate his interest during the period of a life or lives in being twenty-one years and nine months, then the estate cannot vest within that period. It will be recalled that counsel in the case of *Kelly v. Marr*¹³³ took our statutory statement of the rule against perpetuities literally, too, and argued that since a restraint on alienation was forbidden for a longer period than a life or lives in being twenty-one years and ten months, it could be restrained for that period.

¹³⁰ *Breetz v. Hill*, 293 Ky. 526, 169 S.W. 2d 632 (1943).

¹³¹ *Supra*, n. 38.

¹³² *Emler v. Emler's Trustee*, *supra*, n. 99.

¹³³ *Supra*, n. 127.