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The Rule Against Perpetuities in Kentucky

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THE RULE AGAINST PERPETUITIES IN KENTUCKY.

1. The Problem Stated.

The common law rule against perpetuities may be stated thus: any attempt to create an executory or contingent interest in property is void, if, according to the terms of the limitation, that interest might by any possibility vest at a date more remote than twenty one years after the end of some life or lives in being at the time of the attempt, periods of actual gestation not counted. The possibility of such remoteness is to be viewed from the time of the attempt to create the interest, i. e. the date of the deed or the death of the testator when the limitation is contained in a will.

This common law rule originated in what may be called judicial legislation by the English courts, and it was recognized and applied in a considerable number of Kentucky cases before the the passage of any statute, for example: Moore v. Howe, 4 T. B. Mon. 199; Brashear v. Macey, 3 J. J. Marsh. 89; Luke v. Marshall, 5 J. J. Marsh, 353; Brown's Heirs v. Brown's Devisees, 1 Dana 39; Attorney General v. Wallace, 7 B. Mon. 611. The Legislature passed in 1852 and there has ever since existed as a part of our statute law the following provision, now section 2360 of Judge Carroll's edition of the statutes:

> "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."

Probably this provision was intended to be declaratory of the common law. The courts have frequently assumed that the

statute merely declared the common law rule, and have sometimes expressly so stated. For example, in Kasey v Fidelity Trust Company, 131 Ky. 609, 115 S. W. 739, the Court says: Section 2360, Ky. St., which is declaratory of the common law rule on the subject, is as follows:" and then quotes that section. The purpose of this essay is to enquire whether the statute of 1852 has changed the common law rule and if so, to what extent.

2. A Rule Against Remoteness or a Rule Against Restraints on Alienation.

It will be observed the common law rule against perpetuities is a rule against remoteness in the vesting of interests or estates whereas the statute forbids, in terms, suspension of the power of alienation.

Frequently an interest which is not vested can not be aliened because none or not all of the persons in whom it may vest are yet in being. To illustrate, the testator devises land to his son A for life, remainder to A's youngest son for life, and remainder in fee to that grandson's youngest son. A survives the testator. Here it is perfectly obvious that the gift to the gift to the great grandchild may not vest until more than twenty one years after A's death. Hence the gift to him would be void under the common law rule because too remote. It is equally obvious that this last mentioned remainder in fee would be inalienable so long as there is a possibility of a younger son being born. If that limitation were valid, the power of alienation might be suspended for more than twenty one years and ten months after A's death. A number of the limitations which have been held bad under the Kentucky statute are both too remote as to vesting and also susdend the power of alienation for more than the statutory period. Limitations of that sort are held invalid in the following cases: Stevens v. Stevens, 21 Ky. L. Rep. 1315, 54 S. W. 835; Coleman v. Coleman, 23 Ky. L. Rep. 1476, 65 S. W. 832; Fidelity Trust Company v. Lloyd, 25 Ky. L. Rep. 1827, 78 S. W. 896; U. S. Fidelity & Guaranty Company v. Douglas, 134 Ky. 378, 120 S. W. 328; Tyler v. Fidelity & Columbia Trust Company, 158 Ky. 280, 164 S. W. 939.

On the other hand, a future interest may be executory or contingent and yet alienable. Suppose a devise to A for life, with remainder to A's youngest son for life, and remainder in fee to B if A's youngest son dies childless, but remainder in fee to C if A's youngest son does not die childless. The contingent remainders to B. and C. are too remote under the common law rule against perpetuities, because neither of them can vest until the death of A's youngest son. Yet as soon as A dies and his youngest son is determined, that life tenant together with B and C could join in conveying a perfect title if the two contingent remainders were valid. Though contingent, one or the other of them would be certain to vest.

We can suppose a simpler case which violates the common law rule against perpetuities without making alienation impossible. Testator devises land to A and his heirs, with an executory devise over to B and his heirs in the event that A's direct descendants shall become extinct within four generations. Here A and B could immediately join in conveying a perfect title, yet the executory devise to A is void for remoteness under the common law rule.

Are such limitations bad in Kentucky? If so, is it because the statute is construed as forbidding them, or is it becaue there is in Kentucky a common law rule against remoteness in vesting in addition to the statutory rule against suspending the power of alienation?

In Patterson v. Patterson, 135 Ky. 339, 122 S. W. 169, the Court, in discussing section 2360, said:

> "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."

In that case, A had conveyed land to a turnpike company for a toll-gate house with a provision in the deed that when it ceased to be used for that purpose the lot should "revert" to B, C, and D, or their heirs. The use for that purpose having ceased, B. C. and D took possession and, after many years, brought a suit to quiet title against claims by the heirs and devises of A. It was

held that the lower court should have overruled a demurrer to the petition. The court based its decision in part upon the ground that

> "The deed did not render the property inalienable, for the turnpike company, after receiving it, had at any time the right to sell its turnpike to an individual, company, or the fiscal court, and with such sale convey the use of the ground and toll-house to its vendee and its vendee to another, ad libitum, so long as the property was used for the single purpose to which it was devoted by the Smedley deed. On the other hand, appellants had like power to sell and convey at any time the reversionary interest in the toll house and ground conveyed them by the deed."

But the court also placed its decision upon three other grounds. It thought that A's heirs were barred by long acquiescence on her part and theirs in the possession of B, C, and D. It had the idea that even though an interest might possibly vest at too remote a time viewed from the date of the deed creating it, there would be no objection under the rule against perpetuities if there were no such possibility of remoteness at the death of the grantor. We should note in passing that this idea is at variance with the true rule of common law in the case of a deed although it it perfectly sound as to a will, which does not become effective when it is executed but when the testator dies. The court also based its decision in this case upon the ground that the interest here was a possibility of reverter analogous to the resulting trust to the donor after a charitable trust has come to an end. As the court expressed it, the rule against perpetuities "does not apply to a conveyance of land for a public highway, or for use in connection with the operation of a turnpike (citing a case on charitable trusts). If the deed * * * had not provided for the reversion of the title upon the abandonment of the use of the land for tollhouse purposes, nevertheless, under the law of this state, it would in consequence of such abandonment have reverted to the grantor, and, this being true, neither the statute against perpetuities nor other obstable stood in the way of her providing in the deed for its reversion to another or others instead of herself." The decision might also be supported on the theory that if the

interest of B, C, and D was too remote, the claim of A's heirs would likewise be too remote, and therefore B, C, and D being in possession would have a better claim than the defendants who had never been in possession.

Summing up the discussion of this case, Patterson v. Patterson may be cited to support the proposition that an interest too remote under the common law rule against perpetuities is valid in Kentucky if it can be aliened, but the weight of the case as an authority for that proposition is weakened by the fact that the decision would be the same even if the rule as to remote alienable interests is otherwise.

On the other hand, there are at least four Kentucky cases in which the court says that a certain limitation is invalid, when an examination of the facts discloses that the interest created is too remote as to vesting but would be alienable forthwith if it were valid.

In Morgan v. Denny, 1 Ky. L. Rep. 346, 10 Ky. Op. 796, there was a gift over to "my son James and his heirs" upon an indefinite failure of the issue of the first taker. The case is only abstracted in the Kentucky Law Reporter, but the opinion is given in full in Kentucky Opinions, and one can observe there that the opinion makes no mention of the statute but says the gift over violates "the rule of law against perpetuities" and cites only cases antedating the passage of the statute. The failure of the Court to notice this decision in its opinion in the Patterson case should be considered in weighing that case as an authority.

The other three cases referred to have been decided since Patterson v. Patterson. In Linder v. Ehrich, 147 Ky. 85, 143 S. W., 778, a gift over to certain collateral kindred in case none of the testator's grandchildren left surviving issue, was considered bad. This gift over was clearly too remote as to its vesting under the common law rule against perpetuities, but the persons to whom it was given might have aliened forthwith. It should be noticed, however, that the collateral kindred had not appealed.

In Beall v. Wilson, 146 Ky. 646, 143 S. W. 55, a gift over to collateral kindred if all of the children of the first taker should die without issue, was held bad. In this case the appeal was taken by the collateral kindred and the validity of that gift was

the sole question before the court. This is a decision squarely *contra* to the language in the Patterson case, The Court cites the Kentucky statute and talks about the period allowed by the statute, but relies largely upon general text-books on real property. The Patterson case is not referred to in the opinion.

In Miller v. Miller, 151 Ky. 563, 152 S. W. 542, the portion given to one of the testator's children as first taker was devised over to his other children in the event of a failure of that daughter's issue either before or after her death. The Court cites the provision of the Kentucky Statutes, sec. 2343, that a limitation upon an attempted fee-tail shall be held valid, when the limitation would be valid upon a fee-simple, and then goes on to say that the gift over is bad because it provides for the "vesting" of an estate at a period beyond the life or lives in being and twenty-one years and ten months thereafter. It should be observed, however, that here as in Linder v. Ehrich the persons to whom was given the remote but alienable interest, had not appealed.

We have, then, on the one hand, to support the view that the Kentucky law permits an interest remote as to vesting provided it is alienable, the language and one of the *rationes decidendi* of the Patterson case and the argument that such is the most natural interpretation of the statute. On the other hand, we have the earlier case of Morgan v. Denny, the later square decision in Beall v. Wilson, and the view expressed by the Court as to the invalidity of the limitations in Linder v. Ehrich and Miller v. Miller. No one can say with assurance that the law is either one way or the other.

If the Kentucky law does forbid an interest too remote as to its vesting but which would be alienable if valid, is the law so because the statute is to be construed as forbidding such interests or because the common law rule against remoteness is not supplanted by the statute against suspension of the power to alien? One could hardly do more than guess at the answer to that inquiry, but it would become important if the statutory period of a life or lives in being and 21 years and 10 months thereafter is found to be different from the period prescribed by the common law rule against remoteness.

3. Forbidding Alienation of Vested Estates.

The common law rule against perpetuities, as has been repeatedly pointed out, has to do with the vesting of estates. If the instrument creating a vested estate forbids its alienation for a period exceeding that prescribed by the statutes, the attempted restraint on alienation is invalid in Kentucky. Sometimes the reason given is that it violates the statute. An example of this is Ernst v. Shinkle, 95 Ky., 608, 16 Ky. L. Rep., 179, 26 S. W., 813.

There are a number of Kentucky cases upholding a clause forbidding the alienation of a vested interest for some period less than that prescribed by the statute against perpetuities. Where the court simply refuses to order a sale for reinvestment because of a clause forbidding a sale, the result is to be supported on the ground given in Chenault v. Burgess, 29 Ky. L. Rep., 569, 93 S. W., 664, where the court said:

> "It may be unfortunate that the grantor tied up the title to the land as he did, forbidding the sale of it by judicial proceedings for reinvestment under section 491 of the Code. But the court has no inherent power to sell such a title for reinvestment of the proceeds in other property, and the statute which confers the power expressly excepts out of its operation cases of this sort."

Other cases where the court refused to order a sale because of a clause forbidding alienation in the instrument creating the interest are Ennen v. Air,, 31 Ky. L. Rep., 1184, 104 S. W., 960, and Morton v. Morton, 120 Ky., 251, 27 Ky. L. Rep., 661, 85 S. W., 1188.

The court has repeatedly upheld clauses forbidding alienation for what it considered a reasonable period, in each instance a period less than that laid down in the statute against perpetuities. Thus a clause forbidding alienation by a devisee in fee for a specified time has been enforced, Stewart v. Brady. 3 Bush 623 (until devisee in fee reaches age of 35), Stewart v. Barrow, 7 Bush 368 (exact time not stated in opinion), Wallace v. Smith, 113 Ky. 263, 24 Ky. L. Rep. 139, 68 S. W. 1028, (until devisee in fee reaches 35); Smith v. Isaacs, 25 Ky. L. Rep. 1727, 78 S. W.

434 (same period). Likewise a clause forbidding alienation by a remainder-man in fee during the life of the life tenant has been held reasonable, Lawson v. Lightfoot, 27 Ky. L. Rep. 217, 84 S. W. 739; Frazier v. Combs, 140 Ky. 77, 130 S. W. 812. The same thing is true of a clause forbidding alienation by life tenants during their own lives, Holt's Executor v. Deshon, 126 Ky. 310, 31 Ky. L. Rep. 744, 103 S. W. 281. This rule that the restraint of alienation for a reasonable period is permitted, although well established in Kentucky, is contrary to the overwhelming weight of authority in other jurisdictions, as is recognized by the later Kentucky cases. Even in Kentucky. it cannot prevent the property from being subjected to the claims of creditors, Smith v. Smith, 115 Ky. 329, 24 Ky. L. Rep. 2261, 73 S. W. 1028, and an ingenious lawyer ought to find little difficulty in avoiding the restrictions of such a clause by having an accomodating creditor to force a sale.

We have the rule that a clause forbidding a sale for a reasonable period effectively prevents a voluntary sale. What is a reasonable time? In Robsion v. Gray, 29 Ky. L. Rep., 1296, 97 S. W., 347, the court says:

> "The provision that the land is never to be sold in the clause giving it to the heirs of John G. Gray, is void, as creating a perpetuity in violation of section 2360 of the Kentucky Statutes, although the restriction on the power of alienation by John G. Gray was valid, as under the statutes the power of alienation may be suspended during the life in being at the creation of the estate."

The intimation in this *dictum* that the test is the period in section 2360, is certainly not the law in view of later decisions. In Harkness v. Lisle, 132 Ky., 767, 117 S. W., 264, the court held invalid a clause prohibiting a devisee in fee from conveying or encumbering the land during his entire lifetime. In Cropper v. Bowles, 150 Ky., 393, 150 S. W., 380, the court held invalid a similar provision in a deed which however did not forbid a devise by the first taker nor a sale for reinvestment under orders of court.

To sum up the law under this heading, we may say: A clause forbidding voluntary alienation for a reasonable period is effec-

tive. A period exceeding that stated in the statute on perpetuities is unreasonable, but a period less than that stated in the statute is not necessarily reasonable, its reasonableness must be determined by some other test.

4. Periods of Gestation.

Is the period allowed under the Kentucky statute the same as that allowed by the common law rule against perpetuities? Suppose a devise to A and his heirs subject to a gift over in case A's descendants should become extinct within 21 years and 10 months after A's death. The gift over would be too remote according to the common law rule. Although periods of actual gestation are permitted in addition to the period of lives in being and 21 years, the period cannot be "in gross." Does the Kentucky statute permit the ten months to be "in gross?"

If so, may a period of actual gestation be allowed in addition to the 21 years and 10 months? Suppose a devise to those grandchilden of the testator who are alive when his youngest grandchild shall reach the age of 21 years and 10 months. Here, if the testator's last surviving child should die, and have a posthumous child, that child would not reach the age of 21 years and 10 months until 21 years and 10 months plus the period of gestation after the end of the lives in being at the testator's death.

Upon these two problems, we can do no more than guess what construction the court would put upon the statute.

May more than one period of actual gestation be allowed? Suppose a gift to those grandchildren of the testator who reach their majority. If the testator has a posthumous child, and that child has a posthumous child, what them? The answer must be that the testator's unborn child is nevertheless a life in being within the meaning of the statute, and that the result here is the same under the statute as under the common law rule.

5. Conclusion.

A correct solution of the problems which have been discussed here is perhaps not very important. The careful practitioner will in any case of doubt follow the maxim, "Safety first," and advise against relying upon a title which depends upon either view as to

these questions, until an adjudication can be had on that very case. That such questions can still be considered open when more than half a century has passed since the adoption of the statute, illustrates the folly of hoping to clarify the law by passing statutes thought to be declaratory of common law rules.

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REVIEWS.

A SKETCH OF ENGLISH LEGAL HISTORY: by Frederick W. Maitland, L.L. D., Downing Professor of the Laws of England in the University of Cambridge, and Francis C. Montague M. A., Professor of History, University College, London, Late Fellow of Oriel College, Oxford; Edited with Notes and Appendices by James F. Colby, Parker Professor of Law in Dartmouth College; G. P. Putnam's Sons, 1915.

The names of the authors and contributors to this volume are too well known as those of authorities to need any comment.

Following the very able and instructive article of Dr. Joseph Redlich, of the University of Vienna, treating of the weaknesses of the "case method" in American law schools, the appearance of this collection is very opportune. The book contains a reprint of a series of articles upon the chief epochs in the history of our law, constituting a "brief but comprehensive, accurate but untechnical" account of the origin and growth of the English law. For the ordinary reader and for the student the volume is an admirable introduction and guide to English legal history.

As an appendix to each chapter, a list of recommended readings upon the different topics treated adds greatly to the usefulness of the book.

SELECT CASES AND OTHER AUTHORITIES ON THE LAW OF PROPERTY: by Edward H. Warren, Story Professor of Law in Harvard University; published by the Editor, Cambridge, 1915.

This is one of the new case books prepared in accordance with the decision of the professors of the Harvard Law School who conduct the courses given to first year students. They acted in furtherance of a decision to make a general change in the courses offered to those first entering on the study of the law. The expe-