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Future Interests--The Rule Against Perpetuities-- Contingent Remainder--Class Gifts

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been condoned, so far as this writer can discover.¹¹ Even if it was competent to adjudge a defendant in a criminal case guilty upon a written transcript, which is doubtful, the action taken in the principal case would not have come within such procedure because the county judge in this case did not decide on the basis of a transcript of the evidence, but rather, merely rubber stamped the commissioner's actions by a perfunctory signing of the orders of the day.¹²

The majority's only direct consideration of this point was a statement in its opinion that the appellant raised the argument. There appears to have been a tacit assumption that if KRS 25.280 could be interpreted to authorize a trial commissioner to try cases in quarterly court, and if this particular commissioner acted in accordance with the provisions of the statute in submitting his action to the county judge for approval, then the case was properly tried by a person with legal judicial authority and the due process issue was settled.

One is left with the impression that the argument that the hearing and deciding function were divided in the principal case is too nicely technical to carry much weight. For from the facts of the case it is apparent that the commissioner did, in fact, both hear and decide appellant's case, and the signature of the judge was merely a formality. But if this is true, it would seem to follow that one not having legal judicial authority improperly exercised a judicial function by trying the case.

In light of the foregoing discussion it is concluded that even if KRS 25.280 is construed to allow a trial commissioner to try cases in quarterly court, he would be competent to gather evidence and submit his action with recommendations to the judge *only* in non-criminal cases. Therefore the appellant in the principal case was improperly tried and thereby denied due process.

Arthur L. Brooks, Jr.

FUTURE INTERESTS—THE RULE AGAINST PERPETUITIES—CONTINGENT REMAINDER—CLASS GIFTS—Mary Estelle Sands devised a tract of land to her son, Howard J. Sands, during the term of his natural life with remainder to his child or children living at the time of his death for their lives. Upon the death of the last surviving child of Howard J.

¹¹ Apparently the use of trial commissioners to try cases in inferior court is a situation peculiar to Kentucky. There are no Kentucky decisions on the separation of the hearing and deciding function in criminal litigation, and this writer has found nothing directly in point on the subject elsewhere.

¹² From facts of the principal case as mentioned in the dissent.

Sands, or if he die without being survived by a child,¹ the land “. . . shall pass to and be vested in fee in my sister, Miss Eugenia Williams, my niece Mrs. Sarah Harvey Boone, my nephews, Eugene Harvey, Mortimer Harvey, O. F. Williams, Jr., and John H. Williams, and my niece Mrs. Frances Mitchell, share and share alike, with the child or children of any one or more of them who may not be living at the time of the termination of the life estate hereinbefore created to take, per stirpes, the same share or shares in said tract of land that it or their parent or parents would have taken if living at that time. If any one or more of said nieces or nephews should not be living at the time of the vesting of said remainder, and should not be survived by a child or children, then his or her share in the remainder shall pass to the other living nieces or nephews, or to their children as above provided.”² Howard J. Sands brought an action individually as the only heir at law of the testatrix, and as executor of her estate, claiming that the remainder in fee violated the rule against perpetuities and was, therefore, void. The remaindermen were served with process but refused to defend the will; a *pro confesso* was taken against them. And inasmuch as the will was assailed by the executor as being void, the Chancellor appointed an administrator ad litem to defend it. The Chancellor ruled that the devise to the remaindermen in fee was valid. *Held: Affirmed.* The court held that the remainder in fee was vested, not contingent, and valid under the rule against perpetuities. *Sands v. Fly*, 292 S.W. 2d 706 (Tenn. 1956).

This case indicates the need for reform in the law of future interests. It is almost impossible for courts and lawyers to keep abreast of the complicated and technical requirements which must be met in creating future interests. Society, and by reflection the lawyer's practice, has become far too complex for lawyers to spend the time necessary to master a set of complicated rules designed to meet conditions generations ago. Nevertheless, until we have reform, lawyers will

¹ The remainder in fee to take effect upon the death of Howard J. Sands without children is valid in any event under the rule that “If a gift is made on two contingencies, stated in the alternative, it is treated as two gifts for the purpose of the rule against perpetuities, and one contingency may be held valid and the other invalid.” Simes and Smith, *The Law of Future Interests*, sec. 1257 (1956).

² A second tract of land was given to Sands for life, remainder to his children for their lives, with remainder in fee as follows: “upon the death of the last surviving child of Howard J. Sands . . . I give and devise to my niece, Elizabeth Pearson, provided she should be then living, and if not then her share in said tract shall go in fee to her mother, Mrs. Tennie Pearson and her two sisters, Mary and Geneva, share and share alike.” This remainder is not discussed in this comment because it is valid under the rule against perpetuities regardless of how it is construed. This devise is a contingent remainder with an alternative contingency. Either must vest if at all within the limits of the rule.

have to understand these rules if they are to serve their clients well. In this case a woman left her property to her son and grandchildren for their lives, and upon their death to remote collateral relatives. Everybody (the son, the guardian of the children, the remaindermen and the Court) thought this an unjust devise and cast about for ways of invalidating it, but apparently no one came up with any doctrine compelling the desired result. The doctrine was there all right, but perhaps the Court and counsel should not be chided too severely for not finding it, in view of the fact that they were working in the excessively technical, labyrinthine structure of future interests.

The issue directly before the court was whether the devise in fee violated the rule against perpetuities.³ In deciding that issue it must first be determined whether the gift is to individuals or to a class. If the devise is construed as a gift to individuals, the gift to named remaindermen may be classified as a contingent remainder or a vested remainder. If it is subject to the condition precedent of surviving the life tenants (who may include afterborn children of Howard), it will vest within the lives of the named remaindermen, if at all. If it is not subject to a condition precedent of survival, it is vested remainder and not subject to the rule. Thus classified as either contingent or vested, the remainder to *named* persons is valid. However, the alternative gift to the "children" "per stirpes" of the named remaindermen may be invalid. If it is subject to the condition precedent of surviving the life tenants, it will not necessarily vest within lives in being whether it is construed as an alternative contingent remainder or as an executory interest (divesting a vested remainder in the named remaindermen). Therefore, if the remainder is a gift to individuals, there is only one question: Is the alternative gift to children invalid because subject to the condition precedent of surviving the life tenants? On the other hand, if the remainder is construed as a gift to a composite class,⁴ and "children" is construed to mean "issue" or if survival of the life tenants by the "children" is a condition precedent, the entire remainder is invalid.

³ Sands also contended that the remainder to his children for life was contingent and violated the rule against perpetuities. The guardian ad litem for the children joined in this contention! Whether a secondary life estate conditional upon survival is vested or contingent is doubtful. Simes and Smith, sec. 142, note 32 (1956). But regardless of the classification, the gift to the children of Sands is plainly valid and the court so held. Sands' children will take possession of the property at Sands' death, if at all. Equally preposterous was the argument of Sands that the remainder in fee was limited "in the alternative by way of a contingent remainder after a particular estate in such a way that one may take effect if the other does not."

⁴ See Morris and Leach, *The Rule Against Perpetuities* 98, ill. 3 (1956).

Is this, then, a gift to individuals or to a class? This depends upon whether the testatrix was "class minded", whether she looked upon the beneficiaries as an entity.⁵ Strong evidence that she was class minded is the provision that if a named remainderman did not survive the life tenants, his share was to go to his children, or if he was not survived by any children "to the other living nieces or nephews, or to their children as above provided." The gift was to be divided up at the death of the life tenants among persons surviving at that time. The amount of each remainderman's share was not fixed until the time for distribution. Treating the property as a pie to be divided up among persons who survive at a future date tends to show that the testatrix was class minded, even though the remaindermen were specifically named.⁶

Assuming this to be a class gift, it would not be invalid if "children" means "children" and not "issue" and survival of the life tenants by the children is not a condition precedent, for the exact share of each member of the class would be determined and would vest⁷ at the death of the last named remainderman at the latest (the named remaindermen were in being at testatrix's death). But if "children" means "issue" or if survival is a condition precedent, the entire remainder is void.⁸ It seems clear that by "children" the testatrix meant "issue." She provided that if any named remainderman did not survive the life tenants his "children" were to take his share "per stirpes." If "children" means "children" only, obviously they can only take their parent's share per capita and never per stirpes. To have a per stirpes distribution, it

⁵ See 5 American Law of Property, sec. 22.8 (1952) where it is stated that if the testator looks upon the beneficiaries as an entity and not as separate and distinct individuals, the gift is one to a class, and that where the terms of the instrument provide that survivors take the share of any deceased person it is reasonable to conclude that it is an entity, or class gift.

⁶ See *Parrish v. Van Domelen*, 335 Mich. 23, 55 N.W. 2d 158 (1952) where the court held that where testatrix devised \$1000 to her brother and residue to her brother-in-law, his wife and their four children, *all specifically named*, the residue gift was a class gift. There the brother-in-law and wife had witnessed the will and their legacy was held void. However, the court in construing the residue as a class gift said their share remained in the residue and was distributable to the remaining members of the class—the children.

⁷ "To comply with the Rule against Perpetuities, an interest must be certain to become "vested" within the perpetuity period of a life or lives in being plus twenty-one years. An interest is "vested" for the purposes of the Rule when the following conditions exist—

- (a) the taker is ascertained, and
- (b) any condition precedent attached to the interest is satisfied, and
- (c) where the interest is included in a gift to a class, the exact amount or fraction to be taken is determined. This last requirement is peculiar to the Rule against Perpetuities: it is not found in the definition of a "vested interest" for any other purpose."

Morris and Leach, The Rule Against Perpetuities, 37 (1956).

⁸ *Gray, Rule Against Perpetuities*, secs. 201-206 (1942).

would be necessary for some child to have died and his children or grandchildren to take in his shoes. Thus if the words "per stirpes" are to be given effect, "children" must mean "issue." Under this construction the exact amount each member of the class would take could not be determined until the death of the life tenants, and the last life tenant might be a person who was born after the testatrix's death.

Is survival by the children a condition precedent to their interest? If it is, the entire remainder is invalid (assuming it to be a class gift) and if the remainder is construed as a gift to individuals, the alternative gift to the children is invalid. The problem here is whether the court will imply a condition of survival upon an alternative gift (one that is made in the event that a prior donee does not survive to the time of distribution). There is a split of authority among the courts on this problem. English authorities hold that where there is an alternative gift to issue of the remainderman, the issue do not have to survive the life tenant in order to take, that there is no implied condition precedent of survivorship.⁹ American decisions seem to go three ways. Some support the view that there is no implied condition of survival.¹⁰ Some reach the opposite conclusion.¹¹ Others take the view that if the first gift is a vested remainder, there is no implied condition of survival on the executory interest of the children or issue.¹²

A case closely analogous to the situation under discussion is *Jeffords v. Thornal*.¹³ There the testator bequeathed property to his widow for life with remainder to her children, if any. If the widow left no children the property was to go "one-half to my brothers and sisters, if they are living, or if they are dead to be equally divided to their children. . . ." One of testator's sisters died before the life tenant, leaving one surviving daughter and the issue of some other children who had predeceased her. The court held that the requirement of survival which was attached to the sister's gift was also attached to the gift to her children. It is evident from the language of the instrument in the *Sands* case that the named remaindermen are not to take anything unless they survive the last surviving child of Sands. It is then expressly provided that the "children" are to take "per stirpes" their parent's share. And as stated above, "per stirpes" means that if a

⁹ See Simes and Smith, sec. 659 (1956) and note 15 therein.

¹⁰ *Porter v. Porter*, 226 Mass. 204, 115 N.E. 407 (1917); *In re Colman's Will*, 253 Wis. 91, 33 N.W. 2d 237 (1948).

¹¹ *Jeffords v. Thornal*, 204 S.C. 275, 29 S.E. 2d 116 (1944); *Denison v. Denison*, 96 App. Div. 418, 89 N.Y.S. 126 (1904).

¹² *Old Colony Trust Co. v. Brown*, 287 Mass. 177, 191 N.E. 358 (1934); *In re Becker's Estate*, 127 N.Y.S. 2d 558 (Surr. 1954); *Reynolds v. Branch*, 182 Va. 678, 29 S.E. 2d 847 (1944).

¹³ 204 S.C. 275, 29 S.E. 2d 116 (1944).

“child” does not survive, his issue are to take in his place. From this language it could reasonably be concluded that it was the intent of the testatrix that survival be a condition precedent to the children taking. If this is done the devise to the “children” is plainly void as violating the rule against perpetuities, because the interest of the children will remain contingent until the death of the last surviving child of Sands.

The Tennessee Supreme Court did not analyze the problem this way. As the court saw it, the only question was whether the whole remainder was “vested” or “contingent.” The court seemed to imply that the remainder, if “contingent”, would violate the rule against perpetuities. The court treated it as a gift to individuals and held the remainder vested, relying upon an earlier Tennessee decision of *Brown v. Brown*.¹⁴ The *Brown* case, however, is not in point. There the devise was to “my two children and upon the death of either of them without leaving a child or children, or the issue of such child or children living at his or her death, to the survivor of them; and *should both of my children die without leaving a child or children living at their death*, then, and in that event, I direct the property . . . shall go over to . . . the children of my deceased sister . . . and of my brother . . .; and in case any of said children should be dead, but leaving children then living, such child or children shall . . . take such interest as said parent would have taken if alive” (emphasis added). This devise does not violate the rule against perpetuities because, as the court said, “the limitations over are to take effect immediately upon the death of the survivor of testator’s two children, lives in being at the date of the will and at the death of testator; hence the contingency upon which the estate is to rest cannot, by any possibility, . . .”¹⁵ take effect after lives in being. In the *Sands* case the remainder over could not become possessory until the death of Sands’ children and, unlike the *Brown* case, these children were not necessarily all in being. It is assumed that Sands could have more children, even though the court stated, “able counsel for the complainant . . . contends that the remainders in the instant case are contingent and void for the reason that the ‘conditional element’, as to the vesting of the fee simple title, was incorporated into the gift to the remaindermen. In other words the gift in remainder was to take effect upon the [death of the] last survivor of a class holding title. . . .” for life. “While the ‘conditional element’ was incorporated in the gift to the remainderman,¹⁶ it definitely and con-

¹⁴ *Brown v. Brown*, 86 Tenn. 277, 6 S.W. 869 (1888).

¹⁵ *Id.* at 6 S.W. 875.

¹⁶ If it was, how could the remainder be vested? Gray, Rule Against Per-

clusively appears that this condition was satisfied¹⁷ at the time of the testatrix's death, all children of Howard J. Sands being alive at that time." Was the court saying that Howard could not have any children born after testatrix's death? If it was, then of course the remainder, however construed, was valid. What the court meant is doubtful, inasmuch as it went on to say later that the life estate in Howard's children "opened upon the subsequent birth of children."

How the remainder to the *named* remaindermen could ever violate the rule is hard to see, unless the remainder is a gift to a class composed of two or more generations. There was no mention, and probably no argument, that this was a class gift. If the intention of testatrix controls, it seems clear that she was class minded and wanted her property divided up among persons who survived her grandchildren. But to give effect to this intention would violate the rule against perpetuities. Although by classifying the gift as one to individuals and requiring survival only by the named remaindermen, but not making it a "condition precedent,"¹⁸ the court carried out the testatrix's intention as far as permissible, it is doubtful that it should have been given effect at all. This was, as recognized by the court, "a very unjust will," and the remaindermen refused to defend it. They could not convey their interest to Sands and give a clear title to the property (except for the life estate in Sands' children), because some of the ultimate takers might be yet unborn. If ever there was a case for strict application of the rule against perpetuities, this seems to be it. The equities of the situation could easily have justified the court in applying the rule to this devise.

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petuities, sec. 108 (1942) states: "If the conditional element is incorporated into the description of, or into the gift to, the remainderman, then the remainder is contingent; but if, after words giving a vested interest, a clause is added divesting it, the remainder is vested."

¹⁷ How could the condition that the remaindermen had to survive the life tenants possibly be "satisfied" while the life tenants were alive?

¹⁸ The court stated that the remaindermen were ascertained when the will took effect, and that while the will provided that should one of them die without children surviving, his or her share should go to the survivors, this in no way postponed the vesting in violation of the statute but was in effect a devise of a remainder in the alternative. Such reasoning is fallacious inasmuch as there cannot be a contingent remainder after a vested remainder in fee. *Gray, Rule Against Perpetuities*, sec. 210 (1942). *Loddington v. Kime*, 1 Salk. 224 (1695). If the children have an "alternative remainder" both it and the remainder in their parents must be contingent upon the parents surviving the life tenant.