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KENTUCKY DECISIONS ON FUTURE INTERESTS, 1933-1937

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The problems in that part of property law usually designated as Future Interests are as varied as they are interesting. The earlier holdings of the Kentucky Court of Appeals have from time to time been considered in earlier numbers of this journal.¹ It is the purpose of this paper to bring those summaries down to date by reviewing the decisions that have been rendered by the court during the past five years. The cases coming under this caption are usually considered under the following heading: Remainders, Possibility of Reverter, Executory Limitations, Future Interests in Personal Property, Construction of Limitations, Powers, The Rule Against Perpetuities, and Restraints on Alienation. It is proposed to consider the recent cases under these heads.

I. REMAINDERS

The court is constantly being called upon to determine whether a gift in a testator's will is an absolute one or whether it is for the life of the first taker with a remainder over. Thus a testator devises and bequeaths all the remainder of his estate to his wife "both real and personal to be hers absolutely until her death and the remainder then to go" to certain designated persons. The court here found that the testator intended the wife to take only a life estate but was entitled to receive from the

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¹ (1923-24) 12 Ky. L. J. 58, 115, 210; (1924-25) 13 Ky. L. J. 32, 83, 186; (1933) 21 Ky. L. J. 219; *Kentucky Statute Against Perpetuities* (1928) 16 Ky. L. J. 97. Also notes, (1927) 15 Ky. L. J. 345; (1932) 20 Ky. L. J. 160.

income and corpus of the estate a sufficient sum for comfortable maintenance. What was left went as a remainder to the testator's children.² A devise of "all of my real estate to do with as she sees fit" was held to give the wife a fee simple, as the court was unwilling to cut down a gift by a void or repugnant gift over. The will made a gift to the brothers and sisters of the testator at the death of the wife "if she has any of my real estate or personal property at that time."³ A devise, however, of property to testator's widow during her life or as long as she remained a widow, with "remainder" to testator's blood heirs at her death, gave the widow a life estate only. The court below had held that she had a life estate with a power to dispose of the property as she deemed necessary for her support, with a remainder of such as was left at her death or on her remarriage to go to the testator's blood kin.⁴ The upper court ruled that the wife here had no right of encroachment or consumption of the corpus of the estate. In *Thomas v. Combs*⁵ a conveyance was made to one and "his heirs and assigns" to have and to hold unto him "during his time of life and at his death to be equally divided between his heirs." This was held to convey only a life estate to the grantee. And in *Waggener v. Penn*⁶ a father devised lands to his daughter "during her natural life and at her death to descend immediately to her heirs." If the rule in *Shelley's Case* were still law in this state, this would give the daughter a fee simple. The will provided that the daughter was not to sell her interest. The court construed the words "her heirs" here to mean "children." She was childless and the sole heir of her father's estate and the court said she took the remainder while she was alive, but subject to a defeasance, if she left children when she died, "which under the decision in the old case passed the fee save on the contingency that she died leaving children. That contingency never happened, therefore her conveyance passed a fee and there is nothing left for appellants to take." This would be true were the rule in *Shelley's Case* law in this jurisdiction. Otherwise it seems hard to support the decision. The facts are practically the same as those in *Bourbon Agricul-*

² *Blessing v. Johnston*, 249 Ky. 777, 61 S. W. (2d) 635 (1933).

³ *Sumner v. Bordens*, 266 Ky. 401, 98 S. W. (2d) 918 (1936).

⁴ *Taylor v. Taylor*, 266 Ky. 375, 99 S. W. (2d) 201 (1936).

⁵ 259 Ky. 93, 82 S. W. (2d) 188 (1935).

⁶ 257 Ky. 124, 77 S. W. (2d) 427 (1934).

*tural Bank & Trust Company v. Miller*⁷ where there was also the gift of a life estate in a trust estate with a contingent remainder in the children of the life tenant, who was childless. There was a reversion in the testator which passed to his heir, who was the life tenant in this case also. Because the life tenant has also the reversionary interest it does not follow that she can pass a good fee. This would have been possible before the adoption of the statute making contingent remainders indestructible.⁸ It was the law that where there was a life estate followed by a contingent remainder and the life tenant purported to convey a larger estate than he had, his life estate was forfeited and the contingent remainder was destroyed since it was not ready to vest immediately upon the forfeiture of the life estate. In that way the grantee of the life tenant would gain a fee. There is also another statutory provision that should be considered in this connection and that is the section which provides that if a person purports to grant a greater estate than he has the deed shall operate to convey on warrant so much of the right and estate as such person can lawfully convey.⁹ Inferentially he cannot convey a greater estate. There is also another section which provides that "the alienation of the particular estate on which a remainder depends, or the union of such estate with the inheritance by purchase or descent, shall not operate by merger or otherwise to defeat, impair or affect such remainder."¹⁰ Of course it might be argued that the statute preventing the destruction of contingent remainders in effect turned contingent remainders into executory limitations which become effective upon the happening of the specified contingency and therefore the grantee in the case under consideration held a fee subject to such a limitation. Still there remain the other statutory provisions.

*Wood v. Cook*¹¹ presented a case where the life tenant purported to convey a fee and it was held that only a life estate was transferred by the deed. It did not affect the remainderman's interest. The case of *Barnes v. Johns*¹² illustrates the well established rule of construction that courts will construe a limitation

⁷ 205 Ky. 297, 265 S. W. 790 (1924).

⁸ Ky. Stat. (Carroll, 1936), § 2346.

⁹ *Id.*, § 2351.

¹⁰ *Id.*, § 2347.

¹¹ 248 Ky. 216, 58 S. W. (2d) 404 (1933).

¹² 261 Ky. 181, 87 S. W (2d) 387 (1935).

as creating a vested remainder rather than a contingent one. There a devise of realty was made to a daughter for life with remainder to her children. She died never having had children. The language of the court seems to imply that the unborn children took vested remainders. It says: "Where a testator, by his will, when construed as a whole, gives to a devisee an estate for life, and at the latter's death to any children that he or she might have, and makes no further disposition of his property, the unborn children take a defeasible fee, subject to its being defeated if there are no children born to the devisee, . . ." The usual rule is that in such a case the unborn children would take a contingent remainder.¹³ It is true, as shown in *Zinsmeister's Trustee v. Long*,¹⁴ that the possibility of defeasance does not transform into a contingent remainder what would otherwise be a vested remainder. In that case there was a trust provision that "if any of said grandchildren should die before reaching the age of thirty (30) years and leave issue surviving, such issue shall be paid the share of their parent in said net income. . . ." The court held the interest vested subject to defeasance in event of death under thirty years. In *Vittitow v. Keene*¹⁵ a remainder was given to three children equally during their lives, the share of any who should die without issue to go to survivor or survivors. No provision was expressly made for the issue taking on the death of the life tenants and the court found by implication that such a remainder was created by a fair construction of the whole will. It said that the unborn children of the life tenants would be contingent remaindermen. There was a further provision to the effect that if all of testator's children should die without issue the property should go over to testator's cousins.

In one case both realty and personalty were devised to the testator's wife for her natural life, support and maintenance, with power to sell. The court decided that she had a life estate with a power to sell but that upon her decease, one having a claim for her support and maintenance would not have a lien on the property for the same. The lower court had ordered a sale of the property to pay a hospital bill.¹⁶ Another suit involving remainders concerned a marginal release on the page on which

¹³ Simes, *Future Interests* (1936), § 82.

¹⁴ 250 Ky. 50, 61 S. W. (2d) 887 (1933).

¹⁵ 265 Ky. 66, 95 S. W. (2d) 1083 (1936).

¹⁶ *Whalin v. Whalin's Admr.*, 266 Ky. 209, 98 S. W. (2d) 501 (1936).

the deed was recorded. The life tenant sought to transfer his life estate to the remainderman in that way so that the latter could place a mortgage on the property. The court very properly held the release ineffectual as a transfer of the interest and also said that under the pleadings it could not be specifically enforced as a contract to convey.¹⁷

Several actions by remaindermen for injuries to their interests have been considered by the Court of Appeals during the past five years. It has held that remaindermen may recover damages in proportion to their interest against a natural gas company which constructed pipe lines across the land as the injury was presumed to be permanent.¹⁸ Vested remaindermen were also allowed to join with the life tenant in recovering damages against a mining company for wrongfully removing the subjacent support to the land, and the contingent remaindermen were also allowed to join in the action for the permanent injury to the property. The principle of living contingent remaindermen representing unborn contingent remaindermen applied.¹⁹ The purchaser of barn timber from a life tenant was held answerable to the remainderman in *Hayden v. Boetler*,²⁰ and in *Head v. Oldham Bank & Trust Co.*²¹ the remaindermen were allowed to recover interest on the principal fund from the death of the life tenant and were allowed to enforce the mortgage lien on the land including the amount of such interest. However, the remainderman is not entitled to maintain an action of ejectment during the outstanding life estate.²² And a claim of adverse possession does not run against the remaindermen in favor of a life tenant "without some clear, positive, overt act or express notice".²³

At least two cases concerning the transferability of contingent remainders have arisen recently and the validity of such transfer sustained under Section 2341 of the Statutes, since they

¹⁷ *Miller v. Prater*, 267 Ky. 11, 100 S. W. (2d) 842 (1937).

¹⁸ *Warfield Nat. Gas Co. v. Ward*, 254 Ky. 754, 72 S. W. (2d) 464 (1934).

¹⁹ *Cox v. Corrigan-McKinney Steel Co.*, 248 Ky. 426, 58 S. W. (2d) 625 (1933).

²⁰ 263 Ky. 722, 93 S. W. (2d) 831 (1936).

²¹ 249 Ky. 292, 60 S. W. (2d) 621 (1933).

²² *Parkey v. Arthur*, 245 Ky. 525, 53 S. W. (2d) 921 (1932).

²³ *Trimble v. Gordon*, 270 Ky. 476, 109 S. W. (2d) 1217 (1937).

are interests in land within the meaning of the statute.²⁴ Also the rule has been enforced that remainders are accelerated where a widow having a life interest renounces that interest. The court said that such remainders came into effect immediately as if the widow had died.²⁵ The property provided for the widow in the will and which she renounces is taken to compensate those legatees who are disappointed by her taking her dower and statutory interest.²⁶ This is in line with the law as followed in other jurisdictions.²⁷

The question of the right to stock dividends and extraordinary cash dividends has been recently before the court and it adhered to its well established rule that both go to the life tenant and not in part to the remaindermen, and this is so even though a portion of such surplus was earned before the testator died.²⁸ The court discussed the so-called Massachusetts and Pennsylvania rules for the division of stock and extraordinary dividends paid out of surplus accumulations. The former rule gives cash dividends, whether ordinary or extraordinary, to the life tenant and all stock dividends are regarded as capital and added to the corpus of the estate. The latter rule regards all dividends earned before the creation of the trust as belonging to the remaindermen and all dividends, whether cash or stock, earned during the continuance of the trust as income and belonging to the life tenant.²⁹

One more case dealing with remainders remains to be considered, *Todd's Executors v. Todd*.³⁰ The court there refused to uphold a provision in a will to the effect that the property devised should not be subject to the debts of the devisee. It did, however, uphold a provision that if creditors should undertake to subject the trust fund to payment of the cestui's debts, the trust should come to an end and the principal go to the remaindermen at once. In this case it was in the trustees' discretion whether they should pay the income or not to the cestui so there

²⁴ *Cox v. Corrigan-McKinney Steel Co.*, *supra* note 19, and *Hurst v. Russell*, 257 Ky. 78, 77 S. W. (2d) 355 (1934).

²⁵ *Ruh's Exrs. v. Ruh*, 270 Ky. 792, 110 S. W. (2d) 1097 (1937), *Breckinridge v. Breckinridge's Exr.*, 264 Ky. 82, 94 S. W. (2d) 233 (1936), and *Watson v. Trimble*, 261 Ky. 253, 87 S. W. (2d) 359 (1935).

²⁶ *Ruh's Executors v. Ruh*, *supra* note 25.

²⁷ *Simes, Future Interests* (1936), § 761.

²⁸ *Huble's Gdn. v. Wolfe*, 259 Ky. 574, 82 S. W. (2d) 830 (1935)

²⁹ *Id.*, at 582.

³⁰ 260 Ky. 611, 86 S. W. (2d) 168 (1935).

was nothing that could be subjected to the payment of the cestui's debts until the trustees had exercised their discretion and allotted funds to him.

II. POSSIBILITY OF REVERTER

Only two or three cases involving possibilities of reverter have been disposed of during the past five years. In *Sargent v. Trustees of Christian Church of Little Cyprass*,³¹ property was deeded to a church and to a Masonic lodge with the provision that when either grantee ceased as an order or as a Christian Church its share of the property should revert to the grantor. It was held that the land did not revert to the grantor upon the services being discontinued temporarily because of financial difficulties and sickness among the congregation and immaterial changes in the church's affiliations. In another case the grantor inserted a clause in his deed whereby the land should revert to the grantor's legal heirs after the grantor's death if the grantees did not sell the property during their lifetime. This was not a determinable fee that was created and the court properly treated it as a life estate in the grantees with a remainder to the heirs of the grantor.³² This was the creation of a life estate with a power to sell and a remainder over on failure to sell. Such remainders are good.³³ In *Fayette County Board of Education v. Bryan*³⁴ land was conveyed to a school district trustees to be held so long as it should be used for school purposes. This created a determinable fee subject to a possibility of reverter in the grantor on the cessation of the use of the land for the purpose specified. The fact that other land in the neighborhood was used for school purposes did not prevent the land from reverting to the grantor.

III. PERSONAL PROPERTY

While the tendency seems to be in dealing with future gifts in personal property to make use of the device of a trust, we find that the courts are frequently called upon to solve problems where testators have failed to draw any line between the disposition of personalty and that of realty in creating future

³¹ 252 Ky. 57, 66 S. W. (2d) 5 (1933).

³² *Mills v. Mills*, 261 Ky. 190, 87 S. W. (2d) 389 (1935).

³³ *Kales' Estates in Future Interests* (2d ed.), § 725. But see *Davis' Admr. v. Bottoms*, 258 Ky. 228, 79 S. W. (2d) 963 (1935).

³⁴ 263 Ky. 61, 91 S. W. (2d) 990 (1936).

interests in the same. The courts no longer ask whether you can have future estates in personal property.³⁵ They now take it for granted that you can. Nor do they try to explain the basis of such interests. The Court of Appeals has said that a remainderman in such a case takes personalty from the testator through his executor and after the life tenant, and does not take from or through the life tenant.³⁶ A testator left his business and personal property to his wife for life with the power "to sell, convey, or conduct the business" and further provided that "what may be remaining in her hands" at her death should be equally divided among his brothers and sisters and their portions to go to their children at their death. It was there held that his wife had a life estate and the brothers and sisters together with their children took a remainder. In treating the property as her own the widow was carrying out the testator's intent. In *Caperton v. Smith's Trustee*³⁷ the income of a trust fund was given to testator's nephews and nieces by name, with remainder to the widow or children of any that should die leaving a widow or children and, on the death of the last nephew or niece, the property was to be "equally divided among the then surviving children" of nieces and nephews. This was held to create a contingent remainder in the testator's grandnephews and grandnieces living at the death of the last nephew or niece.³⁸

IV. CONSTRUCTION OF LIMITATIONS

The Court of Appeals is constantly being called upon to determine what grantor in a deed or a testator in his will means by such expressions as "children," "issue of their body," "bodily heirs," "heirs of the body," "die without children," "die without issue," "without leaving issue," or "dying without heirs."

(a) "CHILDREN"

While the court will not ordinarily construe the word "children" to include "grandchildren" there may be cases where it is evident from the instrument under consideration as a whole

³⁵ *Trapp v. Baskin*, 246 Ky. 438, 55 S. W. (2d) 29 (1933).

³⁶ *Hall's Admr. v. Hall's Exr.*, 265 Ky. 528, 97 S. W. (2d) 23 (1936).

³⁷ 268 Ky. 223, 104 S. W. (2d) 440 (1937).

³⁸ *Anspacher v. Utterback's Admr.*, 252 Ky. 666, 68 S. W. (2d) 151 (1934).

that the testator or grantor so intended the word to be used. For instance where an estate was devised to a wife for life with remainder over to three daughters, if any "die without leaving children, the issue of their body, to survive them, then over to the other children." It was held that "children" included the grandchildren of the testator, although "issue of their body" would indicate a contrary result. The court said that the testator did not intend to disinherit the grandchildren.³⁹ Also where a will gave realty to a daughter for life with remainder to any child or children the daughter might have living at her death, this was held to include grandchildren, hence the interest vested in the child of a deceased son of the daughter upon the daughter's death.⁴⁰ The court was unwilling to resort to a construction of the will that would evidently defeat the intent of the testator. It also relied upon Kentucky Statutes, section 2064, which is to the effect that a devise to children embraces grandchildren when there are no children and no other construction will give effect to the devise. In another will the testator made a gift to the children and grandchildren of certain persons, adding "to the following named persons." He then named all such children and grandchildren except four. It was contended that the gift was to a class and the four names had been omitted by mistake. The court, however, held that these four did not take anything under the gift.⁴¹

(b) "BODILY HEIRS", "HEIRS OF THE BODY"

Such expressions as "heirs of the body" or "bodily heirs" under the old law created a fee tail which gave the first taker really a life estate with the inheritance passing on his death to the heirs of his body. This was changed in our law by statute⁴² and as soon as such an estate is created by deed or will the statute immediately converts it into a fee simple in the first taker. In some states in this country the statute converts such a devise into an estate for life in the first taker and a fee in his heirs.⁴³ In *Kinnard v. Farmers' & Merchants' Bank*⁴⁴ the Court of Appeals correctly held that the words "bodily heirs" created a fee tail

³⁹ *Hodge v. Lovell's Trustee*, 262 Ky. 509, 90 S. W. (2d) 683 (1936).

⁴⁰ *Tucker v. Tucker*, 259 Ky. 361, 82 S. W. (2d) 458 (1935).

⁴¹ *Leroy v. Read's Executor*, 252 Ky. 821, 68 S. W. (2d) 421 (1934).

⁴² Ky. Stat. (Carroll, 1936), § 2343.

⁴³ *Simes, Future Interests* (1936), § 190.

⁴⁴ 249 Ky. 661, 61 S. W. (2d) 291 (1933).

which the statute immediately converted into a fee simple and did not create a joint estate in the testator's son and the latter's children, hence the children took no interest in the land. "Bodily heirs," the court said, were not words of purchase but of limitation here. While conceding that such words might be used interchangeably with the word "children" they would be given their technical meaning, unless it appears from the instrument they are used in a contrary sense. In this particular case, also, they held the words to be words of limitation and not of purchase.⁴⁵

In *Simons v. Bowers*⁴⁶ the devise was to testator's daughter "and their bodily heirs." It was contended that the phrase "bodily heirs" meant children and that they took by purchase and not by descent. While they conceded that in many cases evidence of such intent on the part of the testator has been allowed, the court regarded the question in this case as evenly balanced and they resolved it in favor of the daughters' taking a fee. Finally, in *Whittaker v. Fitzpatrick*,⁴⁷ after providing that the land should go to the testator's son "and heirs of his body" the testator added that it was his purpose to secure to each of his living children a home for themselves and their families free from debt, "and which will at the death of each pass free and unencumbered to their children." The court said the words were not to be given their technical meaning here. The devise to the son was a life estate only and his children were vested with a remainder. "Heirs of his body" here were words of purchase and "children" included "grandchildren."

(c) "DYING WITHOUT ISSUE", "DIE WITHOUT CHILDREN"

It is very common to find in wills, executory limitations over after such expressions as "dying without issue", "dying without children" or "dying without heirs." The court will apply, if possible, section 2344 of the Statutes and make the dying without issue mean dying within the life time of the testator or the life time of the life tenant and in that way give an indefeasible fee to the devisee. It did this in *Pegram v. Kaufman*.⁴⁸ There the estate was to go over to the niece after the

⁴⁵ *Campbell v. Prestonsburg Coal Co.*, 258 Ky. 77, 79 S. W. (2d) 373 (1934).

⁴⁶ 258 Ky. 755, 81 S. W. (2d) 604 (1935).

⁴⁷ 263 Ky. 120, 103 S. W. (2d) 670 (1937).

⁴⁸ 261 Ky. 50, 86 S. W. (2d) 1042 (1935).

death of the testator's wife with the provision that if she should die without issue, the property should go to the testator's heirs. The title of the niece became absolute upon her outliving the testator's widow. In *Servier v. Servier's Administrator*⁴⁹ there was a proviso that if the beneficiary died before the contemplated division of the property, his issue should take his share but his share should go to the surviving beneficiaries in the absence of issue. It was held that the heirs of a deceased beneficiary who died without issue subsequent to the time for such division should take such beneficiary's share not received by her in her lifetime. In *Wilson v. Trabue*⁵⁰ a gift was made to children but if any should die without children his or her share should go to the surviving children. All but one had died intestate and without issue and it was held that the survivor had a fee simple. In another case a farm was devised to a nephew "but should he die before he arrives at the age of 21 years or die without a child of his own, said land is to revert to my estate." The nephew was allowed to take a defeasible fee rather than a fee simple title subject to the occurrence of either of the two contingencies named.⁵¹ Where the death of the contingent remainderman occurred prior to the happening of the contingency and prevented the trust from being carried out, the heir at law having died prior to the contingency but subsequent to the death of the remainderman, the estate of the heir was allowed to share in the division of the trust fund.⁵² In *Smith v. Webb*⁵³ the remainderman's interest was to go over to a third person if he "die without children or issue" and the court held this clause was to be restricted to the remainderman's death before the termination of the life estate, and in *Ryan v. Ball*⁵⁴ "dying without heirs" was held to refer to death at any time and the interest was lost by death in the lifetime of the testatrix. Finally in *Renaker v. Tanner*⁵⁵ to die without issue with no express disposition in the case of such event, gave a remainder by implication to the tenant's issue if he left any. The court reaffirmed in this case

⁴⁹ 261 Ky. 35, 86 S. W. (2d) 1033 (1935).

⁵⁰ 254 Ky. 661, 72 S. W. (2d) 57 (1934).

⁵¹ *Young v. Madison's Exr.*, 252 Ky. 99, 66 S. W. (2d) 1 (1933).

⁵² *Arnold v. Clay*, 262 Ky. 336, 90 S. W. (2d) 55 (1936).

⁵³ 263 Ky. 26, 91 S. W. (2d) 937 (1936).

⁵⁴ 267 Ky. 83, 101 S. W. (2d) 187 (1937).

⁵⁵ 260 Ky. 281, 83 S. W. (2d) 54 (1935).

the old doctrine that a woman is presumed to be capable of bearing children so long as life lasts.

V. POWERS

Cases involving the construction and application of powers have quite frequently demanded the attention of the Court of Appeals. In fact one instrument containing a grant of a power in it has been before this court five or six times. In one of the earlier of these five or six decisions concerning the same will, *St. Matthews Bank v. De Charette*,⁵⁶ the court defined a general power as one that authorized the donee of the power to dispose of the estate or interest in the property to whomsoever he pleases, including himself. If, however, it is limited to a specific purpose or to persons in a particular class, the court said, it is a special power. In this case there was a devise of a farm to the testatrix's daughter for life in trust with power to dispose of it by will. This created a general testamentary power. An estate in remainder was intended to be effective only in case the daughter failed to exercise the power. The creditors of the donee of the power sought to reach the interest affected by the power as assets of the estate of the donee under the doctrine of equitable assets, which is followed by a majority of jurisdictions in this country.⁵⁷ Courts that follow this view hold that since the donee of the power can make an appointment for his own benefit, and he exercises the power, he should do so for the benefit of creditors. The beneficiaries, otherwise, are mere volunteers and should not stand in the way of creditors reaching the property, so equity views it. The Court of Appeals rejects the view of the majority of courts and says that the donee's exercise of the power does not justify the court in seizing the property for the payment of the donee's debts where her estate is insufficient to pay them. In *Godfrey v. De Charette*⁵⁸ the court held the appointment under the power was valid, and in *De Charette v. De Charette*⁵⁹ it said that if the power of appointment is not exercised in good faith and for the purpose created and in the manner provided, the power would be deemed ineffectual against

⁵⁶ 259 Ky. 802, 83 S. W. (2d) 471, 99 A. L. R. 1146 (1935). See Note (1937) 25 Ky. L. J. 285.

⁵⁷ Simes, *Future Interests* (1936). § 265.

⁵⁸ 260 Ky. 147, 84 S. W. (2d) 66 (1935).

⁵⁹ 264 Ky. 525, 94 S. W. (2d) 1018, 104 A. L. R. 1455 (1936).

parties entitled to its benefits. It further rules the power cannot be delegated or assigned. The question of the Rule against Perpetuities was also involved in the case.

Where property was devised to one to have and to hold during the grantee's life with power to sell, the grantee acquired only a life estate so that his creditors could take only the life estate.⁶⁰ A devise of a fee was restricted by subsequent words in the will and reduced to a life estate. It purported to "authorize and power him (the executor) to sell and dispose of any and all of my estate as he may see fit for the benefit and comfort of my said wife." This gave the executor a power to sell the property.⁶¹ In another case the executor was empowered to make leases for the development of coal and oil rights during a five-year period.⁶² In still another case a wife was given a life interest with power to sell, lease or dispose of both the realty and personalty and what was left was to be divided between two nephews of the testator. This gave her a power and not a fee in the property, in addition to her life estate.⁶³ An opposite result was reached where the will gave a life estate and the right to sell, convey, dispose of the use and to do with it as she pleased, except that she could not sell to certain persons.⁶⁴

VI. RULE AGAINST PERPETUITIES

Any conveyance of property which does not vest within lives in being, twenty-one years and ten months is void under the Rule against Perpetuities. The statute puts the rule in a different form. It provides that the absolute power of alienation shall not be suspended for a longer period than a life or lives in being at the time of the creation of the estate, and twenty-one years and ten months.⁶⁵ The rule does not apply to a right of reverter.⁶⁶ The Court of Appeals has held that it does not apply to options given for the repurchase of land.⁶⁷ It said that the transaction was capable of being exercised at any time the parties

⁶⁰ *Roby v. Arterburn*, 269 Ky. 816, 108 S. W. (2d) 873 (1937).

⁶¹ *Lewis v. Lewis*, 253 Ky. 843, 70 S. W. (2d) 679 (1934).

⁶² *Auxier's Executrix v. Theobald*, 255 Ky. 583, 75 S. W. (2d) 464 (1934).

⁶³ *Slayden v. Hardin*, 257 Ky. 685, 79 S. W. (2d) 11 (1935).

⁶⁴ *Davis' Administrator v. Bottoms*, 258 Ky. 228, 79 S. W. (2d) 963 (1935).

⁶⁵ Ky. Stat. (Carroll, 1936), § 2360.

⁶⁶ *Fayette County Board of Education v. Bryan*, *supra*, note 34.

⁶⁷ *Coley v. Hard*, 250 Ky. 250, 62 S. W. (2d) 792 (1933).

desired so that the option did not constitute a limitation or condition forbidding the selling and conveyancing the land for a longer period than that allowed. American courts as a rule take an opposite view and hold that options are within the rule except in the case of leases.⁶⁸

In *Emler v. Emler's Trustee*⁶⁹ the testator gave his property in trust for the benefit of his wife for life and then the income was to go to his three children. After their death it was to be divided among the testator's grandchildren "that are here now or may hereafter be born to either one of my sons or daughter. Should any one of my sons have no children, it is to go back to his legal heirs, *after his death.*" Whether the provision came within the rule or not depended on whether "it" referred to the corpus of the estate or the income. The court said the will being susceptible of two constructions, one of which create a perpetuity in violation of the rule and the other construction would make a valid disposition, it would adopt the latter construction. This seems to be in keeping with a great many recent decisions⁷⁰ but not with the view long held by the courts in this country and not with the earlier Kentucky decisions as pointed out by the counsel for the appellant, namely, that the meaning of the will is first to be determined without regard to the rule and then the rule applied.

Where the interest is to vest at the death of the life tenant, there is no violation of the rule.⁷¹ Whether a power comes within the rule or not will be determined by reference to the death of the creator of the power. The instrument exercising the power, the court said in *De Charette v. De Charette*, relates back as if it were a part of the instrument by which the power was created.⁷² Then there is the question that came up in the earlier case of *Brown v. Columbia Finance & Trust Co.*⁷³ One having a power to appoint created by will, attempted to give her appointees a power to appoint and not a fee as was intended by the original donor of the power. The second attempted appointment was held void under the Rule against Perpetuities and the

⁶⁸ Simes, *Future Interests* (1936), § 512.

⁶⁹ 269 Ky. 27, 106 S. W. (2d) 79 (1937).

⁷⁰ Simes, *Future Interests* (1936), § 550.

⁷¹ *Fischer v. Porter*, 263 Ky. 372, 92 S. W. (2d) 368 (1936). But see *Renaker v. Tanner*, *supra*, note 55.

⁷² *Supra*, note 59.

⁷³ 123 Ky. 775, 97 S. W. 421 (1906).

children of the second appointor were allowed to take equally under the will.⁷⁴

VII. RESTRAINTS ON ALIENATION

As has been pointed out in earlier articles published in this journal,⁷⁵ the Court of Appeals of this state has gone farther than any other court in allowing restraints on alienation. It will allow the grant of a fee with the usual incident of conveying the same greatly restricted for a reasonable time. The court itself will decide whether the restraint is reasonable or not. Where land was devised and the testator expressed it as his will and desire that it should not be conveyed or incumbered by mortgage by the devisee until he should arrive at the age of thirty years, the court raised no objection to the provision.⁷⁶ The clause was considered together with other provisions in the will to determine what kind of an estate the devisee took. Since the court has often held such restraints valid in its earlier decisions,⁷⁷ the decision in this case is in line with the rule of *stare decisis*. A restriction on the alienation of realty for five years contained in a devise was sustained in *Auxier's Executrix v. Theobald*,⁷⁸ and a restraint on alienation to certain persons is not invalid.⁷⁹

CONCLUSION

In the period of five years the Court of Appeals has passed upon many cases calling for construction of wills and deeds. This is not out of the ordinary. Troublesome questions are presented as to whether a testator intended the devisee to have a fee or only a life estate. The decision in such a case usually turns on the testator's intent as shown by the whole will. There have been two decisions that would do justice to the Rule in *Shelley's Case* were it law in this jurisdiction today, recurrences, one might say. There are also some very questionable statements about unborn children having vested remainders. Perhaps one might say that the court has been over-emphatic in applying the rule that a remainder will be construed as vested

⁷⁴ *Barnes v. Graves*, 259 Ky. 130, 82 S. W. (2d) 297 (1935).

⁷⁵ *Supra*, note 1.

⁷⁶ *Young v. Madison's Executor*, *supra*, note 51.

⁷⁷ See 13 Ky. L. J., 195; 21 *id.* 235.

⁷⁸ *Supra*, note 62.

⁷⁹ *Davis' Admr. v. Bottoms*, *supra*, note 64.

rather than as contingent. There are many cases where remainders, both vested and contingent, have been allowed to sue or to participate in suits brought against trespassers for injuries to property. This may be a phase of the law that is likely to develop in the future to a considerable degree. The court has taken the minority view that property passing under a general power of appointment, if the power is exercised, cannot be taken by creditors of the donee of the power to pay the donee's debts. It has also taken a minority view that options are not within the rule against perpetuities. Likewise it has departed from the well established rule that a will or deed must first be construed as to its meaning before the rule against perpetuities is applied to determine whether a gift is valid.