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RECENT KENTUCKY CASES ON FUTURE INTERESTS

W. Lewis Roberts*

The term future interests is applied to estates which are to come into the possession of the owner thereof at some future time. It includes remainders, reversions, executory limitations, possibilities of reverter and rights of entry for condition broken. Also under its caption are treated construction of limitations, powers, the rule in Shelley's case, expectancies, the rule against perpetuities and restraints on alienation. Some ten years ago a series of articles in this journal covered the earlier Kentucky cases on the subject and it is the purpose at this time to consider those decisions that have been reported since that article was published.1

I. REMAINDERS

In some of the recent decisions the court has taken occasion to define both contingent and vested remainders. In one opinion it has said that "a vested remainder is a fixed interest to take effect in enjoyment after a particular estate is spent, and is an actual estate which may be sold and the title passed to the purchaser, but, a contingent remainder is one limited so as to depend on some event or condition, which is uncertain and may never happen or be performed."2 Many courts have further pointed out that a contingent remainder is not a present interest in land, but at most an expectation of acquiring one in the future. The Court of Appeals has called attention to the fact that section 2341 Kentucky Statutes has made contingent remainders subject

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1 8 Ky. L. Jour. 58, 115, 210; 9 Ky. L. Jour. 32, 83, 186.

2 Lanberger v. Cornell, 190 Ky. 844, 229 S. W. 54 (1921).
to sale and conveyance. The purchaser, however, will receive nothing unless the contingent remainderman survives until the event occurs upon which his estate vests. In the case before the court the testator gave all his estate to his wife for life and one-third at her death to such persons as the wife should direct by will. The remaining two-thirds was left to the testator’s mother but in case she should predecease the testator’s wife then to the testator’s brothers and sisters. The court properly held that the brothers and sisters’ interests in the estate were executory devises. Their interests would not attach except upon the contingency of the mother’s dying in the life time of the testator’s widow. The brothers and sisters took “executory devises, with all the essentials, of contingent remainders,” the court said.

The court also held in another case where a remainder in land, after a life estate to the testator’s wife, was given to a son and a daughter, but if the daughter should die unmarried and without a child or children living then over to the son, that the son took an executory devise in the interest given to the daughter. This was subject to sale and conveyance under section 2341, Kentucky Statutes. Where a conveyance was made to a wife for life and after her death to a daughter for life with remainder to the daughter’s children but if she die without children, the land to revert to the grantor, a subsequent deed by the grantor to a third person and a deed by such third person, the grantor’s wife and daughter back to the grantor, did not defeat the rights of the daughter’s children. The rights of the daughter’s children could be divested only under the provisions of the Civil Code of Practice, section 486.

A gift of a contingent remainder after a life estate raises the question what becomes of the seisin before the happening of the event which vests the remainder? Does it remain in the grantor or in the testator’s heirs until the happening of the contingency or is it in nubibus, the clouds, as the early writers contended? The Court of Appeals considered the question carefully in Bourbon Agricultural Bank & Trust Co. v. Miller and decided

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3 Ibid., at page 852. See also Fidelity & Columbia Trust Co. v. Tiffany, 202 Ky. 618, 260 S. W 357 (1924).
6 205 Ky. 297, 265 S. W. 790 (1924).
that the seisin during the life tenancy was in the testator's heirs, but in *Crawford v Hisle*\(^7\) the court said the seisin was *in nubibus* until the event happened which vested the remainder. To support the proposition the Bourbon bank case was cited. The court, however, in a later case corrected the erroneous position taken in the Crawford case and said the seisin did not remain in abeyance until the termination of the life estate and then vest in the testator's collateral kindred for want of a contingent remainderman, since there is no unvested title to real estate.\(^8\)

Several cases defining the relative rights of life tenants and remaindermen have been decided in recent years. A remainderman was denied the right to drill for oil on the premises without having first secured permission to do so from the life tenant.\(^9\) In the same case a parol agreement to divide royalties from oil wells on the premises was held not to be within the Statute of Frauds. Where a remainder was given an infant upon condition that he care for the grantor and his wife in their declining years and the wife on the death of the grantor sent the boy away against his protests and thus rendered performance of the condition impossible, it was held his estate in remainder was not defeated.\(^10\) A life tenant was not allowed to charge the cost of repairs to the remaindermen nor against their interests.\(^11\) Nor was the remainderman allowed reimbursements for improvements made before the death of the life tenant.\(^12\) The question when the statute of limitations begins to run against the remainderman often arises. Since the remainderman is not entitled to enter until the death of the life tenant, the statute does not run against him until that time.\(^13\) As between the life tenant and the remainderman the former's amicable holding cannot be adverse to the latter, so where the former occupies during his life under a void will and sells timber from the premises, his holding is not adverse to the latter, but where he claims the

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\(^1\) 214 Ky. 536, 283 S. W 1019 (1926). See also *King v. Wurtz*, 227 Ky. 705, 13 S. W (2d) 1048 (1929).

\(^2\) *Slack v. Downing*, 233 Ky. 554, 26 S. W (2d) 497 (1930).

\(^3\) *Meredith v. Meredith*, 204 Ky. 608, 264 S. W. 1109 (1924).

\(^4\) *Boggess v. Oraif*, 224 Ky. 97, 5 S. W (2d) 906 (1928).

\(^5\) Supra, note 2.

\(^6\) *West v. West*, 201 Ky. 498, 257 S. W 706 (1923).

\(^7\) *Superior Oil Corp. v. Alcorn*, 242 Ky. 314, 47 S. W (2d) 973 (1932).
entire estate under the will and notice is brought home to the
remainderman, the statute of limitations begins to run imme-
diately and not from the time of the life tenant’s death.14 While
the remaindermen cannot maintain suit to recover possession
before entitled to possession, they may institute suit to quiet
title notwithstanding the life tenant is in possession.15

At common law contingent remaindermen could not be con-
vveyed. If a remainderman gave a warranty deed and the estate
finally vested in him, his grantee would be allowed to take under
the doctrine of deed by estoppel. Also such an attempted con-
vveyance might be enforced in equity as an executory agreement.
Today, in most states, future contingent interests can be con-
vveyed. This result has been reached in two or three different
ways. In Kentucky the court has held that such estates are
interests in land and therefore transferable under section 2341,
Kentucky Statutes.16 In one case, however, the court used
language to the effect that a contingent remainderman does not
have an alienable interest. The decision was correct on the facts
as after purporting to convey his future interest, the contingent
remainderman died before the contingency happened, conse-
quently nothing passed under his deed as vesting was dependent
upon his surviving the life tenant.17

Formerly at common law, if the life tenant attempted to con-
vvey a fee simply, he forfeited his estate and the remainderman
could enter at once. If the remainder were contingent and the
remainderman was not determined or the contingency had not
happened which would entitle him to the estate upon the deter-
mination of the life estate, the contingent remainder was de-
stroyed by the tortious conveyance by the life tenant. This was
so because the feudal conception of seisin required a particular
estate to support the contingent remainder. All this has been
changed by statute18 and a contingent remainder now will not
fail for want of a particular estate to support it. Also by stat-
ute19 where a life tenant purports to grant a greater estate than

14 Hargis v. Flesher Petroleum Co., 231 Ky. 442, 21 S. W (2d) 818
(1929).
15 Wells v. Cornish, 237 Ky. 236, 35 S. W (2d) 308 (1931).
18 Kentucky Statutes (Carroll, 1930), Sec. 2346.
19 Ibid., Section 2291.
he has, the conveyance will be effective to transfer what estate he does have. It follows from these two enactments that if the life tenant attempts to convey a fee simple the remainderman’s interest is not accelerated so that he may enter at once. Where the remainder is vested, however, and the prior life estate is surrendered, the remainder will accelerate and become a present estate.

II. POSSIBILITY OF REVERTER

A possibility of reverter is the right of the grantor of an estate to have the ownership revert or come back to him upon the expiration of the estate granted, provided such estate was granted for so long as the land should be used for a certain purpose or a certain event did not happen. It is not a present interest in land but a mere possibility of acquiring an estate in the future. The estate comes back to the grantor or his heirs upon the happening of the event specified in the original grant and no act like re-entry is necessary on the grantor’s part as is the case in a right of entry.

Testators have sometimes caused confusion by using technical words, such as “remainder” and “revert” in such ways as to cause difficulty in construing their wills. For instance in one case a testator said the “remainder to revert.” The court pointed out that a remainder never reverts. It was claimed in this case that the testator used the word “remainder” in its technical or legal sense and thereby gave his wife and son only a life estate. A provision that if the grantee should die without leaving children, the land should “revert” to the grantor’s estate was held to mean his whole estate in the sense of sum total of possessions and not his heirs. The court said the deed provided for returning the interest conveyed whether it was a possibility of reverter or a contingent reversion, subject to conveyance of the fee thereof by a subsequent absolute deed by the grantor and his wife. It is difficult to tell just what the court means by the term “contingent reversion.” A reversion is

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2 Supra, note 13.
23 King v. Wurts, 227 Ky. 705, 13 S. W (2d) 1043 (1929).
created by operation of law. It is the interest in the land which the grantor has not parted with. It is a present vested interest the enjoyment of which, as in the case of other future interests, is postponed. If there is a contingency as to whether the estate will come back to the grantor, the court must have meant a possibility of reverter by the term and its use in this instance was redundant. It would seem that the grantor in this case had at most a possibility of reverter, which at common law could not be conveyed since it was not an estate. It could, however, be released to one in possession. The second deed to the son, therefore, would be effective as a release of the grantor's possibility of reverter. On similar facts the court so held in an earlier case. The inalienability of a possibility of reverter was pointed out by the court in a later case. An interesting case was presented as to the nature of a possibility of reverter where land was conveyed for school purposes with the provision if it should cease to be so used it should revert to the person then owning the larger piece from which the land in question was taken. The court avoided the difficulty of settling the nature of the reversionary right and correctly held it was void under our statutory provision as to perpetuities. As pointed out by the Tennessee court in a case involving similar facts, the deed created an executory limitation, that is a shifting use, in favor of whoever should be the owner of the larger tract of land at the time the lot in question should cease to be used for school purposes, but as this might not vest within lives in being, twenty-one years and ten months from the time of the original conveyance it would be void under the rule against perpetuities. Since this limitation over to whoever might be the owner of the original lot at the time the smaller lot ceased to be used for school purposes was void, the result would be that there would be a possibility of reverter in the original grantor and since a possibility of reverter is not within the rule against perpetuities, the land in this case should go to the grantor if living, if not, to his heirs.

The Kentucky Court of Appeals in effect, at least, recognized

26 Duncan v. Webster County Board of Education, 205 Ky. 86, 265 S. W 489 (1924).
that the reservation of the right to land granted upon the provision that it ceased to be used for a certain purpose might be given to a person other than the grantor in an earlier case. There the grantor conveyed land to a turnpike company for a tollhouse with a provision that on the cessation of such use the land should revert to certain named persons. As the limitation over was to persons in being it did not come within the rule against perpetuities and was held valid.

It would seem then, that since under the doctrine of shifting uses the estate given for a definite use and over to a designated person other than the grantor creates a good executory limitation in such third person, the rule that a possibility of reverter cannot be assigned or created in a third person is not of much force today.

III. EXECUTORY LIMITATIONS—EXECUTORY DEVISES

A devise to take effect upon the happening of some future event was early held good in equity and became good at law upon the adoption of the Statute of Uses. Likewise estates created by deed to become effective upon some contingency were held good. They were early designated springing and shifting uses. The term executory limitations includes both springing and shifting uses and executory devises. These estates may be created on fees and not exclusively after estates less than fees as was the case with remainders. Under our statutes "any estate may be made to commence in future by deed, in like manner as by will, and any estate which would be good as an executory devise or bequest, shall be good if created by deed." Where a testator devises his estate to his wife for life, remainder to his son and daughter, share and share alike, but if the daughter should die unmarried and without a child or children living, then her moiety to go to the son, it was held the daughter took a vested remainder subject to be defeated by her dying unmarried and childless in the lifetime of the wife. The interest devised to the son in his sister's moiety was not a contingent remainder because it was limited after a fee, but it was an executory devise. Here since both son

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29 Kentucky Statutes (Carroll, 1930), Section 2341.
and daughter joined in a deed together with the life tenant, their grantee got a good title to the fee.\(^3\)

The court has on one or two occasions overlooked executory limitations and said that a limitation over after a devise of a fee is void.\(^3\) In a recent decision the Court has set forth the correct view. It said: "Some confusion has arisen in the opinions of courts, and which we have not escaped, in failing to distinguish a technical common law remainder, which must be supported by a prior particular estate, and a future interest taking effect as a fee in derogation of a defeasible fee devised or conveyed to the first taker. When the latter character of future interest is created by a will it is known in the law as an 'executory devise' and when it is created by a deed it is commonly designated as a 'conditional limitation', and in either event it is given effect as a 'shifting or springing use.' "\(^3\) The same language was used by the court in a case decided three years earlier.\(^3\)

**IV Personal Property**

The Kentucky Court of Appeals has accepted the prevalent view in regard to future interests in personal property. It refers to a future beneficarial interest in personality as one in remainder, regardless of whether it is perishable or given in specie. Thus where there was a bequest of personality to a husband for life with power to dispose of the same, "during his lifetime," for his support, maintenance, comfort and pleasure, with a gift over of any part that should not be disposed of to a nephew, a valid remainder was created in the nephew.\(^3\)

**V Construction of Limitations**

The court has often been called upon to construe words and phrases in both deeds and wills affecting limitations on future estates. The court is repeatedly asked to determine the meaning to be given to such expressions as "heirs", "legal heirs", "children", "bodily heirs", or "heirs of the body", "dying

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\(^3\) Supra, note 4.
\(^4\) Beemon v. Utz, 217 Ky. 158, 289 S. W. 221 (1926).
\(^5\) McWilliams v. Havely, 214 Ky. 320, 283 S. W. 103 (1926).
\(^6\) Ewersng v. Ewerng, Exr., 199 Ky. 450, 251 S. W. 645 (1923).
\(^7\) Lanciscus v. The Louisville Trust Co., Exr., 201 Ky. 222, 256 S. W. 424 (1923).
without children”, “dying without heirs”, or “dying without leaving issue”

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

The phrase "heirs at law" has called for judicial interpretation recently. The question has been put to the court whether a wife is an "heir" of her husband. The court pointed out in one case that "heirs at law does not ordinarily or according to its legal technical meaning include a surviving wife." But in the particular case a remainder to a son's "heirs at law" meant distributees, including the son's surviving wife. The estate consisted principally of personalty and the testator had expressly said no husband of any daughter should "be deemed her heir at law." In another case the court held that a widow was not an "heir" of her husband but that she was a "distributee" of his estate under sections 1403 and 2132 of the Kentucky Statutes. The estate consisted principally of personalty and the testator had expressly said no husband of any daughter should "be deemed her heir at law." In another case the court held that a widow was not an "heir" of her husband but that she was a "distributee" of his estate under sections 1403 and 2132 of the Kentucky Statutes. Again the word "heirs" in a will is a word of limitation and not of purchase unless it appears it was used in the sense of "children." In a will "her heirs" were held to mean "children" where the parties designated as heirs were not heirs of the widow but heirs of the widow's husband under whom they held.

(b) "Children"

Although "children" is ordinarily a word of purchase and not a word of limitation, it may be used in the sense of "heirs" as a word of limitation and will be so construed where the language of the whole will shows it was so used. Likewise in a deed granting land to a parent and his "children", it was construed as a word of purchase and vested a life estate in the parent with a remainder in the children, but here, too, the court will look to the entire instrument to determine the meaning of the grantor. In a devise to a granddaughter and "her children, the heirs of her body", it was held a fee tail was created in the testa-

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Fidelity & Columbus Trust Co., Gdn. v. Vogt, 199 Ky. 12, 250 S. W 486 (1923).
Azarch v. Smith, 222 Ky. 566, 1 S. W (2d) 968 (1928).
Shaver v. Ellis, 226 Ky. 806, 11 S. W (2d) 949 (1928).
Hicks v. Jewett, Tr., 202 Ky. 61, 258 S. W 984 (1924).
tor's granddaughter, which was converted by section 2343, Kentucky Statutes, into a fee simple. "Children" here was construed as "heirs" as it was used in that sense by the testator. Where the grant was to A and "the heirs of her body forever" the word "forever" was said to have a technical meaning and when used with "children" the two words were construed as words of limitation and not of purchase. "Children" when followed by "forever" means "heirs." The court divides the cases into three classes: (1) "devises by a father or mother to a son, daughter or blood relation, in which the language 'to him and his children forever' is used, (2) devises to a blood relation and his children, where the word 'forever' is not used followed by the word 'children;' and (3) devises by a husband to his wife and her children." In the first class "children" is construed as "heirs" and the children take no interest in the property. In the second class children take a fee simple subject to a life estate in their parent. And in the third class the children also take a fee and their parent a life estate. This result is deemed to carry out the intent of the testator as he would not want the land on his wife's death to pass to strangers.

A bequest of personalty to the "children now living" of testator's brothers and sisters was held to include grandchildren, who were allowed to share per stirpes. This was contrary to the general rule that "children" does not include grandchildren.

(c) "Heirs of the Body"

In a devise to a son for life "and at his death then to the heirs of his body, in fee forever and share and share alike, tenants in common," it was held that both the son’s children and grandchildren took. In construing the phrase "to R and his bodily heirs" in a deed, the court held a fee tail was created which section 2343, Kentucky Statutes, converted into a fee simple; but a devise to a son and his bodily heirs after his death was held in another case not to create a fee tail, convertible

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42 Martin v. Martin, 203 Ky. 712, 262 S. W. 1091 (1924).
43 Williams v. Ohio Valley Banking & Trust Co., 205 Ky. 807, 266 S. W. 670 (1924).
44 Sowder v. Mott, 205 Ky. 257, 265 S. W. 467 (1924).
47 Yarrington v. Freeman, 201 Ky. 135, 255 S. W. 1034 (1923).
under sections 2343-2345. It was a life estate in the son with a remainder in fee in his bodily heirs. The fact that the testator gave the son’s widow dower in the land showed an intent that the son should have a life estate.\(^47\) Where other language in a will shows that the testator used the phrase “heirs of her body” to mean “children”, the children took a vested remainder.\(^48\) It is also held that “heirs of the body” means lineal descendants and not heirs in the ascending line.\(^49\) A devise of an undivided interest in land for the devisee’s natural lifetime with remainder to her legal heirs of her body gave the devisee a life estate only.\(^50\) Also a grant to a married woman and “the heirs of her body begotten” although generally construed as a fee tail, was held to give a life estate to the grantee and a fee to her children, as heirs of the body were referred to in the instrument as the grandchildren of the grantor.\(^51\)

(d) Gifts Over Upon Death Without Issue

“Dying without issue”, “dying without heirs”, or “dying without children” may refer to death before that of the testator, to death during the lifetime of the life tenant, or to death at any time, that is, an indefinite failure of issue. Since estates tail no longer exist as such in Kentucky, the last of these constructions would be bad under the rule against perpetuities. The statute\(^52\) provides that “unless a different purpose be plainly expressed in the instrument, every limitation in a deed or will contingent upon a person dying ‘without heirs’, or other words of like import, shall be construed a limitation to take effect when such person shall die, unless the object on which the contingency is made to depend is then living, or, if a child of his body, such child be born within ten months next thereafter.” This abolishes the common law rule as to an indefinite failure of issue.

In 1904, the court after carefully reviewing the earlier cases

\(^{44}\) Reeves v. Tomlin, 213 Ky. 547, 281 S. W. 522 (1926).
\(^{46}\) Manning v. McGINNIS, 212 Ky. 451, 279 S. W. 668 (1926).
\(^{50}\) Kentucky Statutes (Carroll, 1930), Section 2344.
on the interpretation of the phrase "dying without issue" and similar expressions, formulated four rules. The cases support these rules. (1) Where there is a devise of a life estate with remainder to another and if the remainderman die without issue, then to a third person, dying without issue refers to death before that of the life tenant.53 (2) Where the devise is to trustees for one or more infants until they are twenty-one then to be divided between such beneficiaries but if any die without issue, his share to go to the survivors or if all die, then to a third person, death without issue there refers to death before the time for distribution. (3) Where the devise or bequest is to a class and division is postponed, the limitation is confined to death before the time fixed for distribution.54 (4) Where there is no intervening estate, the limitation is imposed and no contrary intent is shown, a defeasible fee is created which is defeated by death of the devisee at any time without issue then living.55 These rules, however, must yield to a contrary intent of the testator as shown by the whole will. In an excellent opinion in the Atkinson case, Judge Thomas pointed out that there had been recent decisions diametrically opposed to each other upon the question before the court and that the court was therefore called upon to adopt the line it would follow in the future. The court chose the line in harmony with the fourth rule stated above.

(e) Determination of Classes

In recent years the court has had very few occasions to decide at what time the membership of a class is to be determined and thereby settle who is to share in the gift to the class. In one case a devise to children of another was held to include all the children of such person born at the time of testator’s death and those born thereafter. A vested remainder subject to open up and let in after-born children was created.56

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54 Howard v. Howard’s Tr., 212 Ky. 847, 280 S. W 156 (1926).
56 Supra, note 37.
this case also followed the early common law rule that a woman is presumed to be capable of bearing children as long as she lives.

Where a testator devised land to his daughter and her children "to be entailed for their use and benefit", the daughter was held to take a life estate as the testator did not intend to create an estate tail, which under section 2343 of the statutes would become a fee simple in the daughter.\(^{57}\)

\[(f)\] **Defeasible Fees**

During the past year the court considered a case in which a devise was made to a wife with a subsequent provision that if she should marry the estate should be put in trust for the benefit of the testator's surviving children, the court defined a defeasible fee as a fee simple of which the grantee or devisee becomes vested subject to divestment upon the happening of some contingency provided by the deed or will.\(^{58}\)

**VII. Powers**

A person may be given the right to dispose of property regardless of whether he has ownership or not. Such a right is referred to as a power. The court in sustaining a limitation over after a life estate with power of disposition, went so far as to say that where the devise is absolute with power of disposition the gift over of undisposed remainder is void.\(^{59}\) At first glance this statement might seem to be wrong, but it undoubtedly represents the law.\(^{60}\) Courts have regarded the gift over as repugnant to the gifts of a fee. In so doing they have overlooked the whole doctrine of executory limitations. The grantor or testator in such case could make such a gift over good by wording the grant or devise in such a way as to take effect as an executory limitation.

Where a life estate was devised to a daughter with power to appoint and there was neither residuary devise nor disposition of the estate on failure to appoint and the daughter was the testator's sole heir at law, the reversion after the life estate vested in the daughter on the testator's death by virtue of the statute of


\(^{59}\) *Craig v. Radelman*, 199 Ky. 501, 251 S. W. 631 (1923).

\(^{60}\) Kales, Estates, Future Interests (2d ed.), Section 719.
descent and she held the estate in fee simple.\(^{61}\) There was a merger in such case of the life estate and the reversion. The conveyance of the interest to which the power is appendant extinguishes the power. The court said the conveyance by warranty deed of the life tenant extinguished the power.\(^{62}\) A power may be limited, that is be a special power, as where the devise is to testator's wife with a power of disposition thereafter "amongst any of the children." This was held to give the widow a life estate with the right to dispose of it by deed to any of the children during her life or by will at her death.\(^{63}\) That an exercise of a power may be void because of fraud was shown in a case where the person having the power agreed to appoint to one who promised to pay off the appointor's debts and to pay an annual sum to his widow. This was so even though there was provision in the will for a disclaimer.\(^{64}\) The court said the correct rule is "if it is plain that the intention of the donee in the exercise of the power is not to benefit the appointee unless and except some benefit results to the donee or another not the object of the power" the appointment is void.

VIII. Rules in Shelley's Case

Section 2345 of the Kentucky Statutes abolishes the rule in Shelley's case. It provides that wherever by deed or will an estate is given to a person for life and after his death to his heirs or heirs of his body, it shall be construed as a life estate in such person and a remainder in fee in his heirs. The rule in Shelley's case gave such a person a fee simple, regarding the gift to his heirs as words of limitation and not of purchase.

In a grant to two persons in fee simple with covenants of general warranty, to be used by them jointly for and during their natural lives and at the death of either of them his or her respective one-half interest to vest in his or her respective heirs at law in fee simple with power in the grantees during their joint lives, or the survivor of them, to convey, created a life estate with power to convey a fee simple.\(^{65}\) Had the rule in Shelley's

\(^{a}\) Kentucky Statutes (Carroll, 1930), Sections 1393-1403.
\(^{b}\) Mountjoy v. Kesselman, 225 Ky. 55, 7 S. W. (2d) 512 (1928).
\(^{c}\) Supra, note 38.
case been in force, a fee simple in the first takers would have been created. A devise to A for life and then to be equally divided amongst her then living children, and the descendants of such children who may die, created a life estate with contingent remainders. This left a reversion in the testator which descended to his heirs and "not a possibility of reverter." The court pointed out that the rule in Shelley's case would have given a different result.66

IX. Expectancies

The Kentucky Court of Appeals stands alone on the proposition that an expectancy cannot be conveyed. Attempted conveyances of a child's expectancy in his parent's estate have been uniformly held invalid.67 This is so even where the conveyance is by warranty deed. The title of the grantor when it vests in such land will not pass to his grantee under the doctrine of deed by estoppel.68 The court has based its stand on such attempted conveyances of expectancies on section 210 of the Kentucky Statutes, which provides that a sale or conveyance of land in the adverse possession of another shall be null and void.69

X. The Rule Against Perpetuities

The common law rule concerning perpetuities, as defined by Professor Gray, provided that no interest in property "is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."70 The earlier English cases so formulated the rule that it hit at both remote vesting and restraint on alienation. At the middle of the nineteenth century several state legislatures attempted to codify the rule. That of Kentucky Statutes, section 2360, originally passed in 1852, is quite typical. It provides that "the absolute power of alienation shall not be suspended by any limitation of condition whatever, for a longer period than during the continuance of a life or lives in being at the creation of the

66 Walker v. Irvine's Exr., supra, note 25; see also Crawley v. Crawley, supra, note 49.
68 The Consolidation Coal Co. v. Riddle, 198 Ky. 256, 248 S. W 530 (1923).
70 Rule Against Perpetuities (3rd ed.), Section 201.
estate and twenty-one years and ten months thereafter.'" Thus statute has caused a great deal of confusion. It is worded as a rule against restraints on alienation but was evidently intended to state the common law rule against perpetuities, which has come to be a rule against remote vesting of estates, due largely to the influence of Professor Gray. The idea of the legislature in so wording the statute was that if land could not be alienated before a remote period it could not vest before that time and hence the restriction tended to a perpetuity. On many occasions the Court of Appeals has expressly said that this section of the statutes is declaratory of the common law rule and was intended only as a statute against perpetuities, not one dealing with the right of alienation. The court at other times has overlooked these declarations and has treated the statute as a rule against restraint on alienation. The question seems now to be settled that the statute is to be regarded as a rule against remote vesting. The rule is concerned with whether the estate may possibly vest beyond the period named and not with the possibilities of its so vesting. If it may possibly vest at a time beyond the named period, it is void. Thus a devise after a life estate to testator's widow, to a son and his then wife during their natural lives and to the survivor and on the death of the survivor, to their children or lineal descendants, was void as to the limitations following the life estate to the son's wife. It was possible that the son might marry a woman not born at the time of the testator's death. The "life or lives" mentioned in the statute are not necessarily lives of beneficiaries but may be lives of persons foreign to such estate. A devise of a remainder to a grantor's grandchildren is too remote, and this is so where each grandchild was to receive his share upon reaching twenty-two years of age. Where the beneficiaries under a gift bad in part

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73 Chenoweth v. Bullitt, supra, note 64.
74 Ibid.
75 Ibid.
76 Clay v. Anderson, supra, note 71.
77 Laughlin v. Elliot, 202 Ky 433, 259 S. W 1031 (1924).
78 Fidelity & Columbia Trust Co. v. Tiffany, supra, note 3.
because of remoteness in vesting failed to ask the court to eliminate the void part of the gift, the whole gift was defeated.\footnote{West v. Ashley, 217 Ky. 250, 289 S. W. 228 (1926).}

XI. RESTRAINT ON ALIENATION

As already pointed out the cases show a confusion of the doctrine that property should not be made inalienable and the doctrine that all interests must arise within a prescribed period. A recent decision of the court has definitely settled that section 2360, Kentucky Statutes, does not apply to restraints on alienation of vested estates,\footnote{Chenoweth v. Bullitt, supra, note 64. See also Cammock v. Allen, supra, note 71.} although prior to that decision the court had erroneously stated that it did.\footnote{Perry v. Metcalf, supra, note 72; Bowling v. Grace, supra, note 72.}

In Kentucky, as elsewhere, a total restraint on the alienation of a fee is bad. It was pointed out by the court many years ago that the right to alienate is an inherent and inseparable quality of every vested fee simple title.\footnote{Harkness v. Lisle, 132 Ky. 767, 117 S. W. 264 (1909).} The court said that to hold that alienation could be restrained during the lifetime of the fee simple holder would be to deprive the fee of all its essential qualities. However, such restraints on the alienation of a fee as the court deems reasonable will be sustained. The Kentucky Court of Appeals has gone farther in allowing limited restraints than any other court. As to what is reasonable in such a case, the court will itself decide. It has held a provision prohibiting the sale of a farm for thirty years from the date of the will void.\footnote{Perry v. Metcalf, supra, note 72.}

A stipulation that property was to be kept intact as long as all testator’s surviving children lived was construed to allow alienation when one of them died and the clause was held valid.\footnote{Cahill v. Petzer, 204 Ky. 644, 265 S. W. 32 (1924).} A provision that land should not be alienated during the parents’ lives, was a condition subsequent and not a covenant and rendered a conveyance voidable and not void upon alienation in violation of the condition.\footnote{Hele v. Elkhorn Coal Co., 206 Ky. 629, 268 S. W. 304 (1925).} A deed of an heir, in violation of a restraint in the ancestor’s will providing the land be not sold until the testator’s youngest child should become twenty-one years of age, was voidable, as the restraint was not unreason-
Where land was devised to testator's daughters to manage and divide the emoluments of the land, a restriction that the land be not sold until the death of the last surviving daughter and then be divided among the daughters' children, was held valid. The remainder was held to be vested in those then living, subject to be opened up to admit children born thereafter to testator's daughters. The court has recently held a restriction on alienation for twenty years good and a conveyance in violation thereof voidable by the grantor or, after his death, by his heirs. The forfeiture, however, must be enforced during the restricted period.

The general rule as to restraints on alienation applies to personal as well as to real property. Where a gift of bank stock was made with a provision that it should not be sold or converted into money "so long as said banks do business," the restraint was held void as an unreasonable restraint.

Finally, in a very recent decision, the court has held invalid as a restraint on alienation a condition that the homestead devised "should not be sold out of the name of Counts." The court said that whether the restraint imposed on alienation was for a reasonable period must be decided upon the particular and peculiar circumstances presented by each case.

**Conclusion**

In conclusion it can be said that several points concerning the law of future interests in Kentucky have during the past ten years been more clearly defined. The court has definitely adopted the view that the seisin when a contingent remainder is created, remains in the grantor or, in case of his death, in his heirs, until the happening of the event on which the remainder is to vest, and not the view that it remains in nubibus until that time. The law as to possibility of reverter and as to executory limitations has been more clearly expounded. There is a tendency, also, to construe terms like "heirs", "children" and "dying without issue" in both deeds and wills, with greater uni-

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86 Howard's Admx. v. Asher Coal Mining Co., 215 Ky. 88, 284 S. W. 419 (1926).
88 Cooper v. Knuckles, 212 Ky. 608, 279 S. W. 1084 (1926).
89 Stafford v. Wright, supra, note 71.
The court has definitely settled that section 2360, Kentucky Statutes, is a restatement of the common law rule against perpetuities and not a statutory rule against restraint on alienation, and the court has reaffirmed its position that there may be reasonable restraints on the alienation of even a fee simple but that it will itself determine what is a reasonable restraint under all the circumstances of the particular case.