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Future Property Interests in Kentucky (continued)

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FUTURE PROPERTY INTERESTS IN KENTUCKY*

vii. The Rule Against Perpetuities

The law student of fifty years ago was supposed to know the rule in Shelley's case and the rule against perpetuities when he went before the bar examiners to be admitted to practice. If he could show that he had mastered these two rules it was thought he had a thorough knowledge of real property law. Today the rule in Shelley's case is no longer law in this state nor in many others. The rule against perpetuities, however, still stands. In fact, it has been said that a study of the cases shows that the development of the law has steadily tended toward the elimination of all restrictions, other than with respect to remoteness.¹

The rule as stated by Professor Gray is as follows: "No interest 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."² Mr. Tiffany in his work on Real Property³ gives it in these words: "Any limitation or provision, the purpose or possible effect of which is to cause an estate to commence in the future, is invalid if, as a result thereof, an estate may commence more than twenty-one years after a life or lives in being."

From both of these statements of the rule it will be seen that it "is concerned only with the time of commencement, the vesting, of estates and not with the duration thereof." The earlier English cases threw some doubt on this point as to whether the rule was one dealing with the vesting of interests or the alienability of future interests. In the Duke of Norfolk

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¹ Earlier installments of this article are published in XII, Ky. Law Journal, 58, 115, 210, and volume XIII, p. 32.
² Spitz on Conditional and Future Interests in Property, p. 54.
³ Rule against perpetuities (3rd Ed.) section 201.
case, 4 1862, Lord Nottingham said: "A perpetuity is the settlement of an estate or an interest in tail, with such remainders expectant upon it, as are in no sort in the power of the tenant in tail in possession, to dock by any recovery or assignment, but such remainder must continue as perpetual clogs upon the estate; such do fight against God, for they pretend to such a stability in human affairs, as the nature of them admits not of, and they are against the reason and the policy of the law, and therefore not to be endured." Also in Scatterwood v. Edge 5 the court defined a perpetuity as "an estate unalienable though all mankind join in the conveyance," and again in Washburn v. Downs 6 as "where, if all that have interest join, yet they can not bar or pass the estate."

The case was finally settled in England in 1882, in the decision of the London & Southwestern Railway Co. v. Gomm, 7 where the court said: "It is impossible to assert as a general proposition that where the owner of an estate and the owner of such a contingent interest can together make a good title, or one can release to the other, the rule of perpetuities does not apply."

In this country, largely through the influence of Professor Gray, it is today pretty generally conceded that the rule is one against remoteness of vesting and not against inalienability. During the middle of the last century, however, several states, following the lead of New York, enacted statutes similar to that passed in Kentucky in 1852. The present act reads as follows: "The absolute power of alienation shall not be suspended, by any limitation or condition whatever, for a longer period than during the continuance of a life or lives in being at the creation of the estate, and twenty-one years and ten months thereafter." 8 The courts in the states 9 having such enactments have ever since been confronted with the question of whether the legislators intended thereby to re-enact the common law rule, to revoke it, or to establish a new rule against restraints on alienation.

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4 Ch. Cas. 1.  
5 1 Soek. 229.  
6 1 Ch. Cas. 213.  
7 20 Ch. Div. 562.  
8 Ky. Stat., Section 2360.  
9 Arizona, California, Idaho, Indiana, Iowa, Kentucky, Michigan, Minnesota, North Dakota, Oklahoma, South Dakota and Wisconsin.
The New York court at first held that the statute changed the common law rule as to perpetuities and made inalienability the test and not remoteness of vesting, but in the case of *In re Wilcox*, in construing the section concerning contingent remainders, the court took the view that the statute provided against remoteness of vesting and required the contingency to occur within the period fixed. The Michigan court in *Niles v. Mason* reached a similar result in construing a similar statute. The Wisconsin court, however, has followed the earlier New York cases and in *Becker v. Chester* set forth its position that the common law rule was abrogated by the statute, that the power of alienation is not suspended where there are living persons who have unitedly the entire ownership and may, presently, lawfully join in an absolute conveyance of the real property. It went further and approved the language of Ryan, C. J., speaking for the court in an earlier case where he said: "The statute limiting the rule against perpetuities to realty, manifestly abrogates the English doctrine as applicable to personality."

Mr. Nelson Trotman, however, in an excellent article on Perpetuities under the Wisconsin statutes takes a different view of the effect of the Wisconsin statutes. He says: "This rule was universally recognized in common law jurisdictions when the statute was passed, although the question of alienability had not at that time been definitely settled. If the express language of the statutes compels the result in *DeWolf v. Lawson*, and in decisions in accord therewith, namely, that a new statutory limitation unknown to the common law, is created whereby there is now placed a limitation upon the duration of present vested inalienable interests, it should not be overlooked that the section in question contains no reference in terms, to the rule against perpetuities, nor is this or any other section of the statutes necessarily inconsistent with the rule. It would, therefore, seem to follow that the rule would be in force as at common law. The statute merely says that the absolute power of alienation shall not be suspended beyond the period named. The statute does not say that future unvested alienable inter-

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194 N. Y. 288, 87 N. E. 497.
115 Wis. 90, 91 S. W. 87.
2 Wis. Law Review, 14, 26.
ests may be created. Such interests were void at common law, and, not being expressly permitted by the statute, nor permitted by necessary implication, are, it would seem, no more allowable since the statute than before."

In Kentucky the question of the meaning of this statute seems to have given the court trouble as elsewhere. For instance, in *Patterson v. Patterson* the court said the purpose of the statute was not to compel the vesting of estates, but to prohibit unreasonable restraints upon alienation. However, in the recent case of *Cammack v. Allen* the court fell into line with the better view. It was contended that the statute was aimed at restraints on alienation and since it forbade restraints on alienation for a longer period than that named in the act it impliedly permitted such restraint for a shorter period. The court denied that the statute was applicable to cases dealing with restraints on alienation. "It has been," the court said, "a statute of this state for a long number of years and has always been treated and referred to in the opinions of this court as Kentucky's statute against perpetuities. Long since its enactment and while it was a live and vital statute of this state, all of the opinions, *supra*, on the power to restrain alienation were rendered and in each of them the question as to the right to restrain alienation of the fee by a person to whom it was conveyed and was considered from the standpoint of the common law rule upon the subject and the right to impose partial restraints was grafted on to the common law rule by this court as a *pro tanto* exception thereto. In none of the opinions was the statute referred to as creating a rule with reference to the imposition of such restraints, but, as stated in numerous cases, it was referred to as our statute against perpetuities, three of which are *Kasey v. Fidelity Trust Co.*, 131 Ky. 604; *Miller v. Miller*, 151 Ky. 563, and *Curd v. Curd*, 163 Ky. 473. The statute, therefore, has in effect been construed to apply only to cases and situations where the suspension of alienation was due to the postponement of the vesting of the fee in a person who could alienate it. If such postponement is beyond the life or lives of persons in being and twenty-one years and ten months after the creation of the estate it comes within not only the common law rule against perpetuities but violates the quoted

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199 Ky. 268, 1923.
section of our statute which was but declaratory of the common law rule and was intended only as a statute against perpetuities and not one dealing with the right of alienation by a person in whom the fee vested within a permissible period prescribed by it."

This puts the law of this state in line with the Michigan decision and the recent New York cases, and Professor Gray's position that the rule is one against remoteness of vesting and not inalienability. The court in a still later case, Clay v. Anderson\textsuperscript{10} supports this view, where it is said: "That section of the statute (section 2360) means that no limited or conditional estate may ever be carved from the fee that may extend and postpone the vesting of the remainder interest for a longer period of time than the duration of the life or lives of the person or persons in being at the creation of such estate, and twenty-one years and ten months thereafter."

The reasons for the development of such a rule are so clearly stated in the opinion of Chief Justice Boyle in the decision of Moore's Trustees v. Howe's Heirs,\textsuperscript{17} 1826, that it seems worth while quoting his argument in full. He said: "Naturally no man has a power of directing to whom or in what manner his estate shall pass after his death; for, when he ceases to be, his power necessarily ceases with him. His power, therefore, in this respect must depend upon the positive instructions of society. To stimulate to industry and economy, and to enable parents to exert a beneficial influence over their children and make such arrangements as may suit the exigencies of their families, the law of this country, as well as that of most other civilized nations, has given to every one of competent capacity the power of directing by will to whom his estate shall pass. But, although it is reasonable that a man should have power of thus disposing of his estate after his death, it is obviously as reasonable that he should not have the power of directing its disposition for all time to come; and the law, while for beneficial purposes, it concedes to every one the power of directing to whom his estate after his death shall go, has at the same time been careful that this power should not be abused. To prevent, therefore, estates from being locked up forever from commercial

\textsuperscript{10} 203 Ky. 384.
\textsuperscript{17} 4 T. B. Monroe 199.
and social purposes, it has forbidden perpetuities, and fixed a period beyond which no one is allowed to direct how his estate shall devolve. That period is for life, or lives in being, and twenty-one years and a few months, and the rule is the same in this country, in relation both to real and personal estate. A man cannot, therefore, devise over an estate to take effect after that period, and, if he does so, the limitation over will be void, and the person who takes the preceding estate will have the fee simple or absolute property in the estate devised."

In determining whether the rule against perpetuities applies to a particular case, the language of the particular instrument is first construed regardless of the rule, and when the testator's meaning is once settled the court will then see whether the gift may possibly not vest until after the period fixed by the statute. The court in several cases has pointed out that the test is not whether the event or contingency named does happen or may happen, but whether it is possible for it not to happen within the time. If it is possible that the event or contingency upon which the estate is to vest may not happen within the prescribed limits, the gift is void. As the court put it in Fidelity Trust Co. v. Lloyd: "If by any possibility the vesting may be postponed beyond the period, the limitation over will be void." Nor does it save the limitation if circumstances turn out so as to render the limitation within the period allowed, for the limitation must be valid from the beginning and for the full time, under all conditions or not at all.

Furthermore, the court in applying the rule of perpetuities has refused to fix a period in the life of a woman beyond which she cannot bear children. This question came up in Tyler v. Fidelity & Columbia Trust Company, where trustees were directed to use the income from testator's property for the support of his son's wife and their children "now in being or hereafter born" and after the death of the son and daughter-in-law to apportion the rents and profits among testator's grandchildren and their descendants and after the death of the last surviving grandchild to divide the estate between testator's great-grandchildren or their descendants. At the death

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22 Tyler v. Fidelity & Columbia Trust Co., 158 Ky. 280, 164 S. W. 939.
24 Saulsberry v. Saulsberry, 140 Ky. 608.
of the testator the son had five children and none were born thereafter. It was contended that the wife was beyond the childbearing age and the son beyond the age of procreation, and therefore the gift to the great-grandchildren was not within the prohibition of the rule, but the court rejected the argument and followed the rule early established by the English court, namely, never to suppose it impossible for persons of advanced years to have children.  

In applying the rule cases are often presented to the court where a devise is valid in part and void in part. In such cases it is always held that if the good is severable from the bad, the good part will stand.  

We come then to a consideration of interests that are subject to the rule. As already seen from the general principles just stated neither present nor vested interests are subject to it. It is necessary to turn to the cases to see whether the court has held gifts to a class, equitable estates, reversions, rights of entry for condition broken, powers of appointment and charitable trusts within the rule.  

The rule against perpetuities has probably come before the court most frequently in cases of gifts over to a class after a gift to a life interest. In Johnson’s Trustee v. Johnson it was provided that after the death of the life tenant the income should go to the life tenant’s children until the youngest should reach the age of twenty-five years, when the estate should be divided. It was held that this provision violated the rule as the remainder might vest after a life in being and twenty-one years. In Fidelity & Columbia Trust Co. v. Tiffany a gift to trustees for testator’s grandchildren living at the testator’s death and born within ten years thereafter, to be paid upon his arriving at the age of twenty-two years, was held not vested and therefore within the rule. In Lindner v. Ehrich a gift to a wife for life, to testator’s son and daughter for life, and remainder to grandchildren for life and then, over to certain kindred was void. However, in Ennen v. Air a

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22 Jee v. Audley, 1787, 1 Cox 324.
25 202 Ky. 618.
26 147 Ky. 85.
27 104 S. W. 960, 31 Ky. L. R. 1184.
gift to a wife for life and after her death to her and testator's children, to be equally divided "between all male and female to them and their offspring they are only to have the use of it during their lifetime" was held good as all testator's children were in existence when the will took effect and the limitation over to the grandchildren did not violate the rule. And in Dohn's Exor. v. Dohn the postponement of vesting until the death of testator's widow or the arrival of the youngest child at twenty-five years of age, whichever event should happen first, was held not within the rule as the youngest child was living at testator's death. Finally, in U. S. Fidelity & Guaranty Co. v. Douglas' Trustee, and in Laughlin v. Elliott, the court followed the holding of earlier Kentucky decisions that in the absence of clear words of qualification the term "grandchildren" would not be limited to grandchildren living at the time of testator's death, and in both cases gifts to grandchildren were held void.

The general rule that equitable estates are within the rule as well as legal, seems not to have been raised directly in any case coming before the court, but seems to have been taken for granted in several cases.

Since a reversion is conceived of as vested as soon as created the Kentucky court followed the well established rule as to reversions in Harvey v. Bell that "neither the rule nor the statute against perpetuities has any application to reversions." And in Patterson v. Patterson, where a deed 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, instead of to the grantee herself, the court held that the reversion or limitation over was not void as a perpetuity. "Finally," the court said, "we are of the opinion that the statute against perpetuities does not apply to a conveyance of land for a public highway, or for use in connection with the operation of a turnpike, which is a public highway."

110 Ky. 884.
134 Ky. 374.
202 Ky. 433.
Johnson's Trustee v. Johnson, 79 S. W. 293; Brown v. Columbia Finance & Trust Co., 123 Ky. 775; Fidelity Trust Co. v. Lloyd, 78 S. W. 896.
118 Ky. 512.
135 Ky. 339, 345.
As pointed out by Professor Gray, the court assumed in *Kenner v. American Contract Co.*\(^4\) that a right of entry for condition broken was valid as far as the rule against perpetuities was concerned.

The case of *Brown v. Columbia Finance & Trust Co.*\(^5\) raised the point as to whether a power of appointment came within the rule. The testator devised his property in trust for the use of his daughter for life with power to appoint by will to the use of any of her children or descendants, and in default of such appointment to her heirs at law. By the will the daughter appointed to her six children for their respective lives with remainder in fee to their children. All the children were born before the testator’s death. The court took the view that “the power of appointment given to the daughter by Robert Wickliffe could not be used to extend the estate created by his will, or to postpone the vesting of the fee for a longer period than Wickliffe himself could have done. To hold it valid would be to say to the testator though restricted by the statute in the capacity to create an estate beyond a life or lives in being and twenty-one years and ten months thereafter, could, by a power of appointment, vest in some other person the ability to further extend the limitation, so as to defeat the purpose of the statute against perpetuities. This we hold would be invalid.” This view is in accord with that held by Professor Gray and the American courts. Professor Kales took the position that the opposite holding of the later English cases is correct, since when the estate passed under the will of the donee of the power the latter was, for an instant at least, owner, and, therefore, the time under the rule against perpetuities runs, not from the date of the creation of the power, but from the date of the appointment under it.

The question of whether charitable trusts come within the rule remains to be considered. The court in *Gass v. Wilhite*\(^6\) decided that the trust under which the Society of Shakers held land was valid. “For where the trust is established to be a charitable use,” the court said, “it is no objection whatever to it, that it is a perpetuity also.” The court in *Harvey v. Bell*\(^7\)

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\(^4\) 9 Bush 202; Gray, Perpetuities (3rd Ed.) section 307.
\(^5\) 128 Ky. 775.
\(^6\) 32 Ky. (2 Dana) 170.
\(^7\) 118 Ky. 512.
also observed to the same effect that "charitable trusts are, as a rule, perpetual if they are successful, and the rule against perpetuities has no application to charities after the right of enjoyment begins. A charitable trust for the maintenance of a hospital for the poor, an asylum for the indigent insane, for the propagation of religion among the heathen, or for the distribution of Bibles is all the better that it is perpetual." In *Kasey v. Fidelity Trust Co.* a gift to the American Bible Society was held valid, while in *Coleman v. O'Leary's Executor* a bequest in trust for masses for the repose of testator's soul was valid, as well as a bequest of a certain sum "to be invested and the income of which to be applied in rewards of merit to pupils in the parochial poor schools in Louisville." However, in the same case certain other gifts in trust were declared void for want of an identified or ascertainable object. A provision for the care of a grave stone or tomb, in the absence of a statute, was held in *Street v. Cave Hill Investment Co.* not a charitable gift and is void as a perpetuity, but the gift in the particular case was within section 317 of the Kentucky Statutes and valid. A gift to trustees for educational purposes was held good under the same statute in *Pullins v. Board of Education of Methodist Church* and was not void as a perpetuity.

One further point in connection with charitable trusts needs to be considered, and that is where the estate is not to vest in the donee until after lives in being, twenty-one years and ten months has elapsed. In *Kasey v. Fidelity Trust Co.* the devise was to testator's niece for life and "if my said niece should die leaving no children or lawful issue surviving her, or if such child or children should die leaving no lawful issue surviving them, then in such event I bequeath and devise all of the above estate ... to the Fidelity Trust and Safety Vault Company ... to be held by them as an endowment fund for the American Bible Society." It was contended that an indefinite failure of issue was intended and therefore the gift might not vest in the trustee until after the period allowed. The court said that if this construction were correct undoubt-

131 Ky. 609.
114 Ky. 388.
191 Ky. 422.
78 S. W. 457, 25 Ky. L. R. 1715.
131 Ky. 609.
edly the position of the appellant was sound, that the trust was void because inhibited by the rule forbidding perpetuities. This is in harmony with Professor Gray's view that where the gift is from an individual over to a corporation or person on a charitable trust, it is well settled that the rule against perpetuities applies.\(^4\)

For reasons already stated it is clear that the rule against perpetuities has nothing to do with restraints on alienation, with restrictions on the use or enjoyment of property, nor with unlawful accumulations. It is the purpose of the writer to consider those topics in another article.

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(To be Continued.)

\(^4\)Rule Against Perpetuities (3rd Ed.) section 594.