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Future Property Interests in Kentucky (continued)

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FUTURE PROPERTY INTERESTS IN KENTUCKY*

VIII. RESTRAINTS ON ALIENATION

An investigation of the Kentucky decisions as to future property interests shows a confusion of the doctrine that property should not be made inalienable and the doctrine that all interests must arise within a prescribed period. The court in *Commack v. Allen*¹ has helped to clear away the uncertainty as to the meaning of section 2366 of the Kentucky Statutes and holds that this section, which forbids restraints on alienation for a longer period than a life or lives in being, twenty-one years and ten months, does not apply to restraints on alienation of vested estates, but 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, and the court furthermore holds that the common law rule as to restraints is still in force in this state with the modification that partial restraints are allowed.

Restraints on alienation, as pointed out by Professor Gray in his work upon the subject,² are of two types, (1) those where the estate is given on condition that it shall not be alienated or until it is alienated; that is, subject either to the right of entry by the grantor for condition broken, or to a limitation which upon alienation puts an end to the estate without entry; and (2) those where the holder cannot assign his estate, and any attempt to do so on his part is a nullity. In the first type of restraints the estate is liable to forfeiture, but in the second the attempted conveyance alone is rendered ineffective.

In making a survey of the Kentucky cases dealing with restraints on alienation it is proposed to follow the plan of Professor Gray and to consider the subject under these two heads.

(1) FORFEITURE OF ESTATES

(a) *On Alienation*

In Kentucky as elsewhere a restraint on the alienation gen-

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¹199 Ky. 268.

²Gray—Restraints on Alienation (2nd Ed.) page 5.

erally of a fee simple is void.³ In *Henning v. Harrison*⁴ the testator incorporated the following provision in his will: "My will is that the real estate devised by me to my daughters shall remain theirs respectively and their heirs as patrimonial estate, and not subject by them to be sold." It was held that this provision was void. The reason for the court's so holding is well stated in *Harkness v. Lisle*.⁵ "The general rule is that the right of alienation is an inherent and inseparable quality of every vested fee simple title. 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. As said by Littleton: "If such a condition be good, then the condition should oust him of all power which the law gives him, which should be against reason." While bound by the former adjudications of this court to adhere to the doctrine that a limitation of time is valid, we have no hesitation in saying that the limitation attempted to be imposed by the will in question is unreasonable. A testator cannot devise a fee and then destroy it entirely."

From this statement it is seen that in Kentucky the general rule forbidding restraints on alienation in the case of an estate in fee simple is departed from to the extent that such limitations are permitted provided in the opinion of the court they are reasonable. This doctrine seems to have had its origin in the decision of *Stewart v. Brady*,⁶ where it was provided in a devise of land that it should "in no way be disposed of, by deed or gift or sale by her, until she arrives at the age of thirty-five years." It was held that this limitation on the use was not inconsistent with the fee and was therefore valid.

As said in *Lawson v. Lightfoot*⁷ the court has never fixed a limit to such restraint, but what restraints are reasonable and what are unreasonable must be determined upon the particular circumstances of each particular case as it comes before the court.⁸ A provision that the grantee should not trade or sell the

³ *Morton's Guardian v. Morton*, 120 Ky. 251, 85 S. W. 1188; *Robinson v. Gray*, 29 Ky. L. R. 1096, 97 S. W. 347; *Cain v. Gray*, 142 Ky. 402, 142 S. W. 715.

⁴ 13 Bush 723.

⁵ 132 Ky 767, 117 S. W. 264.

⁶ 3 Bush 623.

⁷ 27 Ky. L. Rep. 217, 84 S. W. 739

⁸ *Chappell v. Frick Co.*, 166 Ky. 311, 179 S. W. 203; *Lawson v. Lightfoot*, 84 S. W. 739, 27 Ky. L. R. 217.

property for twenty years except to the grantor's bodily heirs was sustained by the court in *Francis v. Big Sandy Company*.⁹

A restraint on alienation for twenty years was also held valid in *Price v. Virginia Iron & C. Co.*,¹⁰ and in *Call v. Shewmaker*.¹¹ A proviso that land should not be sold until twenty-eight years had elapsed after the testator's death was held good in *Johnson v. Dumeyer*,¹² and one to the effect that the devisee should not alienate until he arrived at the age of twenty-eight years was sustained in *Keen v. Keen*.¹³ and several cases have held that such a provision forbidding alienation before reaching the age of thirty-five years was good.¹⁴ However, where the limitation is for the lifetime of the grantee or devisee the decisions are numerous that hold such a limitation is inconsistent with the estate conveyed and is void.¹⁵ An attempt to restrict alienation to the other devisees was held bad in *Carpenter v. Allen*.¹⁶ The court said: "It needs no argument to demonstrate that substantially the whole power of alienation is taken away when one can dispose of his property only to certain persons who may be unable or unwilling to buy, or who, if able and willing to buy, have it in their power to compel the owner to accept an unfair price for the property."

A clause limiting the right of alienation to any one except the heirs of the grantor was held equally open to objection in the case of *Chappell v. Frick Company*.¹⁷

On the other hand, it is clear from the decisions that the Kentucky Court of Appeals will sustain a restriction on alienation for the lifetime of the grantor or some other person than the grantee or devisee, as the wife of the testator.¹⁸ Such a

⁹ 171 Ky. 209, 188 S. W. 345.

¹⁰ 171 Ky. 523, 188 S. W. 658.

¹¹ 24 Ky. L. R. 686, 69 S. W. 749.

¹² 23 Ky. L. R. 2243.

¹³ 13 Ky. L. R. 956.

¹⁴ *Stewart v. Brady*, 3 Bush 623; *Wallace v. Smith*, 113 Ky. 263, 68 S. W. 131; *Smith v. Isaacs*, 78 S. W. 434, 25 Ky. L. R. 1727.

¹⁵ *Morton's Guardian v. Morton*, 120 Ky. 251; *Harkness v. Lisle*, 132 Ky. 626, 117 S. W. 264; *Cropper v. Bowles*, 150 Ky. 393, 150 S. W. 380; *Thurmond v. Thurmond*, 190 Ky. 582, 228 S. W. 29.

¹⁶ 198 Ky. 252.

¹⁷ 166 Ky. 311, 179 S. W. 203.

¹⁸ *Lawson v. Lightfoot*, 84 S. W. 739, 27 Ky. L. R. 217; *Frazier v. Combs*, 140 Ky. 77, 130 S. W. 812; *Polly v. Adkins*, 145 Ky. 370, 140 S. W. 551; *Kentland Coal & Coke Co. v. Keen*, 168 Ky. 836, 183 S. W. 247; *Turner v. Lewis*, 189 Ky. 837, 228 S. W. 367.

provision, however, was held in *Forquer v. Bovard*¹⁹ not to prevent the grantee from devising the property by will to his children during the lifetime of the grantor.

The court in *Saulsberry v. Saulsberry*²⁰ ruled that a provision in a deed of 1896 stipulating that the land should not be alienated before 1950 was invalid.

In *Highland Realty Company v. Groves*²¹ the court sustained restrictions on the kind of buildings to be erected on the land, the distance from the street at which houses should be built and further provisions whereby the grantee bound himself and his heirs "not to sell or rent said property to persons of African descent nor to permit same to be used for the sale of malt, spirituous or vinous liquors for a period of fifty years." The court in the course of its opinion observed: "While such conditions as impose a restraint upon the free use or alienation of real estate are looked upon with disfavor by the courts, and are rather strictly construed, inasmuch as they detract from the freest use of the fee simple, and are annoying to owners and intervening purchasers, being somewhat at variance, too, with the system in vogue in this country which regards real estate as an article of commerce, still they are upheld when not repugnant to some plain provision of the law and not unreasonable in themselves."

Since restraints on alienation are held valid in the case of estates in fee simple provided they are reasonable, it follows *a fortiori* that the Kentucky Court of Appeals holds them lawful in the case of lesser estates, estates for life and estates for years.

In *Holt's Executor v. Deshon*²² the court upheld a restraint as to the enjoyment of a life estate where the deviser provided that the farm should never be sold, leased or rented and that no bluegrass field should be plowed. The court in sustaining a provision that the life tenants should live upon the granted premises in the case of *Baker v. Baker*²³ observed that "It is competent in creating any character of estate, whether absolute or one for life, to incumber or impose burdens upon it, and require that its enjoyment by the grantee or devisee shall be sub-

¹⁹ 154 Ky. 377, 157 S. W. 724.

²⁰ 140 Ky. 608, 131 S. W. 491.

²¹ 130 Ky. 374.

²² 126 Ky. 310, 103 S. W. 281.

²³ 191 Ky. 325, 230 S. W. 293.

ject to such incumbrances or burdens, provided they do not contravene any rule of law or public policy.”

There are two or three cases that seem to call for momentary consideration at this point as they may at first seem to be at variance with the principles already considered. *Rice v. Hall*²⁴ held that the grantees were bound by a provision requiring them to sell the land conveyed for a certain sum to a brother. The decision rests upon the particular facts of the case and does not come within the doctrine of restraints on alienation. The deeds in question related to a family settlement and the consideration for the conveyance was the agreement to sell for the stipulated price to the brother. In *Gillespie v. Winston's Trustee*²⁵ and *Sparrow v. Sparrow*²⁶ there are dicta to the effect that “Unquestionably the testatrix had the right by her will to prohibit absolutely the sale of her property for any period of time not beyond the limitation placed upon final alienation and distribution of her estate under section 2360 of the Kentucky Statutes.” That is, that restraints on alienation will be good if they do not extend beyond lives in being, twenty-one years and ten months. Of course these dicta can no longer have weight since the court settled the very point involved in the decision of *Cammack v. Allen*,²⁷ that section 2360 does not impliedly permit a suspension of alienation for a period shorter than that prescribed.

Furthermore, we need to note in passing what the court has done when the condition imposing a restraint on alienation or the enjoyment of the estate conveyed has been violated. As our subhead denotes a forfeiture is worked. To effect this, however, it will ordinarily be necessary for one who is to profit by the forfeiture to take some step to make it effective. In *Price v. Virginia Iron & C. Co.*²⁸ the court in dealing with this question used these words: “There being no limitation over, a deed made in violation of the condition is not void, but voidable, and the breach may be taken advantage of only by the grantor or his heirs, who must proceed within the prohibited time. If no action be taken by the grantor or his heirs during the pro-

²⁴ 42 S. W. 99, 19 Ky. L. R. 814.

²⁵ 170 Ky. 667, 186 S. W. 517.

²⁶ 171 Ky. 101, 186 S. W. 904.

²⁷ 199 Ky. 268.

²⁸ 171 Ky. 523, 188 S. W. 658.

hibited period, the deed made in violation of the condition becomes absolute." In the case before the court parents had conveyed land to their daughter by deed containing a condition that she could not convey the land to any except bodily heirs of the grantors for a term of twenty years. She did convey the property during the prohibited time to persons other than the bodily heirs of the grantors. After the twenty years had elapsed the heirs of the grantors sought to take advantage of the breach of the condition. The court held that as no action had been taken by the grantors or their heirs within the time the deed had become absolute.

Of course, it follows that if the condition against alienation is void, the limitation over in the event of the first taker shall alien the property is likewise void.²⁹

(b) *On Failure to Alienate*

It is the law generally in this country that if land is given to one and his heirs and he is also expressly given power to dispose of the land, a subsequent limitation over in favor of another person is invalid. This rule is followed in Kentucky.³⁰ To quote from the court's opinion in *Watkins' Administrator v. Watkins' Executor*,³¹ "The law is well settled in this state that after a devise of a fee, a limitation over of what is left or undisposed of is void, as being inconsistent with the fee theretofore granted." As part of this doctrine it is also held, if the property be given to one, accompanied by a general or indefinite power of disposition, the estate thus devised is a fee. Thus, if property be given to one with power to sell or dispose of it, such language implies a fee; likewise when property is given to one with power to use and enjoy as he may see fit. In every such case where the devisee or legatee has the right to dispose of the property at pleasure, the devise over is inoperative."

As may be seen from the language used by the court in the

²⁹ *Carpenter v. Allen*, 198 Ky. 252.

³⁰ *McCullough's Admr. v. Anderson*, 90 Ky. 126; *Clay v. Chenault*, 108 Ky. 77; *Dulaney v. Dulaney*, 25 Ky. L. R. 1659; *Becker v. Roth*, 132 Ky. 429; *Fernandez v. Martin*, 189 Ky. 438; *Linder v. Llewellyn's Admr.*, 190 Ky. 388; *Martin v. Palmer*, 193 Ky. 25; *Weller v. Dinwidie*, 198 Ky. 360.

³¹ 120 S. W. 341.

foregoing statement, the rule is applied in the case of personal property also.³²

Where, however, a life estate or interest in the property is given the first taker, with power of disposition, then the limitation over of such of the devised property as should remain undisposed of at the death of the life tenant is valid.³³ In *McCullough's Administrator v. Anderson* the court said: "We think there is a marked distinction between a power given to one who already has the fee and that given to a life tenant, who may acquire the fee by the exercise of the power given him. In the latter instance it is the manifest intention of the testator that the life tenant must acquire the fee in the mode provided by the will, and if the power is not executed, those in remainder take the estate."

In *Lancisous v. Louisville Trust Co.*³⁴ the testatrix left her personal property to her husband "for and during his lifetime" with the power to use and dispose of it "during his lifetime" "for his support, maintenance, comfort and pleasure." It was contended that this gave him absolute ownership of the property. The court, in holding otherwise, said: "It is universally true that a testator may make any disposition of his property, or attach any condition in his will which is not contrary to public policy or forbidden by law, and we have been cited to no case holding that it was against public policy, or any law, to withhold from a donee the power to dispose of the devised property by will, although he may be given all authority with reference thereto during his life that is possessed by an absolute owner."

Where, however, an absolute fee was given the first taker, with gifts over on his dying intestate or without having bodily heirs the limitation over, as we have seen, has been held void. In *Cralle v. Jackson*³⁵ one paragraph of a will gave testatrix's real estate wherever located to her daughter, and the next paragraph provided that if the daughter should die before her husband,

³² *Fernandez v. Martin*, 189 Ky. 438; *Park v. McCombs*, 142 S. W. 401.

³³ *McCullough's Admr. v. Anderson*, 90 Ky. 126; *Pedigo's Error. v. Botts*, 20 Ky. L. R. 196; *Woodward v. Anderson*, 145 Ky. 134, 140 S. W. 57; *Thurmond v. Thurmond*, 190 Ky. 582; *Craig v. Roderman*, 199 Ky. 105.

³⁴ 201 Ky. 222, 256 S. W. 424.

³⁵ 81 S. W. 669, 26 Ky. L. R. 417.

without having disposed of the property by will or leaving bodily heirs, the husband was to take the real estate with power to do with it as he desired. The court held the limitation over to the husband was void. In *Becker v. Roth*³⁶ a limitation over of such property as should remain undisposed of at the time of the wife's subsequent marriage or at her death was void as being repugnant to the fee given to the wife. The soundness of this decision, however, is questioned by Tiffany. And in *Clay v. Chenault*³⁷ the court also held that a gift over after a fee was ineffective. The testator there provided that if either or both of his sons should die without children or descendants then alive "the land of both or either of them in which said proceeds are inveted is to revert back and become a part of my general estate."

Professor Gray took the position that limitations over in cases like those just cited should be good. He saw no reason for making an executory devise illegal which depended upon the first taker's not making a deed or will, if he has the power of making one should he so wish.³⁸ The Kentucky decisions on this point are in harmony with the cases in other American jurisdictions.

(c) *On the Grantee's Insolvency*

Another instance of a condition subsequent which may work a forfeiture of the grantee's estate is one providing that the life estate or interest shall go over to a third person upon the grantee's becoming bankrupt or upon an attempt of his creditors to subject the estate or interest to the payment of their claims. Such provisions are held to be valid.³⁹

The leading Kentucky decision on this question is *Bull v. Kentucky National Bank*.⁴⁰ In that case a testator devised property to a trustee to pay the rents and profits to his son for life, but in the event a court of last resort should decide that the income was liable for the son's debts, the rents and profits should thereafter be paid to the son's wife for her separate use. In an action by the son's creditors it was decided that the provision

³⁶ 134 Ky. 429, 115 S. W. 761.

³⁷ 108 Ky. 77, 55 S. W. 729.

³⁸ Gray, Restraints on Alienation of Property (2nd Ed.), section 57.

³⁹ *Ibid.* section 78.

⁴⁰ 90 Ky. 452, 14 S. W. 425, 12 L. R. A. 37.

was valid and that the creditors were entitled to the rents only up to the time of the delivery of the opinion. The court relied upon the reasoning of the United States Supreme Court case, *Nicholas v. Eaton*.⁴¹

It said: "Counsel seems to have overlooked the fact that this was the testator's own property he was disposing of, and not his son's, and argue as if the testator had no power to annex a condition to the devise that might terminate at once all interest the son had in the property. It is said there is no authority or precedent to be followed in this case, but after careful examination of a number of cases we find the right of a testator to make such a disposition of his estate fully sustained, and have failed, by reference to the authorities referred to by counsel for the appellees, to find any single case in which their view of this question is maintained. Some of the authorities go to the extent of holding that the interest and dividends of real or personal property held in trust may be enjoyed by the beneficiary without liability for his debt.

"This court has held the contrary doctrine, but has never gone so far as to adjudge that the beneficiary might not lose his estate upon the happening of a contingency provided by the terms of the trust. A testator cannot vest the title in a trustee for the use of another, and prevent its enjoyment by the *cestui que trust* without subjecting it to the debts of the latter.

"This is the rule in this state, and the doctrine recognized in this case is not inconsistent with it. While the trustee holds the property for the use of the debtor, he holds it subject to the claims of his creditors, but where the property, or its profits, is to be applied to the use of the beneficiary (the debtor) for a limited period, or until the happening of a certain event, when the title or the entire profit is to vest in another, then the right of the creditor to subject it for the debt of the first taker is gone."

The same result was reached where similar facts were presented in later cases, *Bottom v. Fultz*,⁴² *Phillips v. Big Sandy*⁴³ and *Scott v. Ratliff*.⁴⁴ In *Phillips v. Big Sandy* the court said

⁴¹ 91 U. S. 716.

⁴² 124 Ky. 302, 98 S. W. 1037.

⁴³ 108 S. W. 276, 32 Ky. L. R. 1262.

⁴⁴ 179 Ky. 267, 200 S. W. 462.

the grantee took a fee subject to be defeated by the land being subjected to his debts.

In *City of Louisville v. Cooke*⁴⁵ a life estate was devised to a son on condition that if a judgment was entered against him subjecting his interest in the property or its use or income for his debts the estate would cease at the date of the judgment, though appealed from. A judgment in a suit for taxes was secured against the property. The court, although it regarded the provision valid, held that the property could be taken to satisfy the judgment as such a debt would not forfeit the life estate. The testator intended only debts created by the son should work a forfeiture.

Finally, in considering the question of forfeiture upon an involuntary alienation, it must be borne in mind that if there is no gift over to a third person upon insolvency or attempt of creditors to reach the interest, the condition is of no effect. In *Brock v. Brock*⁴⁶ such a case was before the court. There was a devise of land to a daughter with a provision that the land should not be used to pay the daughter's debts. No provision, however, was made for a gift over to a third person upon a creditor's attempt to satisfy his claim out of the property. The court held the condition void as against public policy.

(2) *Restraint on Alienation*

Thus far we have considered cases where the grantor or testator has sought to punish the grantee for alienating the property by providing that he should forfeit his interest therein if he should attempt to convey it. We now have to deal with cases where it has been the purpose of the one devising or deeding the property to make any attempted conveyances void and thus oblige the holder to keep the property in spite of his own wishes or those of his creditors. As a general proposition such provisions are void where the estates created are legal. When we consider equitable estates we find a difference of opinion. The earlier Kentucky cases dealing with equitable life estates are carefully considered by Professor Gray⁴⁷ and found to hold such restraints void.⁴⁸

⁴⁵ 135 Ky. 261, 122 S. W. 144.

⁴⁶ 168 Ky. 847, 183 S. W. 215.

⁴⁷ Gray's Restraints on Alienation, 2nd Ed., sections 190a-190b.

⁴⁸ See also *Brock v. Brock*, 168 Ky. 847, 183 S. W. 213.

Section 2355 of the Kentucky Statutes would seem to cover the question as far as the right of creditors is concerned. It provides that "estates of every kind held or possessed in trust, shall be subject to the debts and charges of the persons to whose use, or for whose benefit, they shall be respectively held or possessed, as they would be subject if those persons owned the like interest in the property held or possessed as they own or shall own in the use or trust thereof."

This statute would seem to prevent the creating of a so-called "spendthrift trust" in this state. The nearest approach to one that we have is to be found in cases like *Hackett's Trustees v. Hackett*,⁴⁹ *Bank of Taylorsville v. Van Dyke*,⁵⁰ and *Russell v. Meyers*.⁵¹ In each of these cases devises were made to a son for life in trust for the support and proper maintenance during the life of himself and wife and children. Creditors sought to subject the son's interest to the satisfaction of their claims. In each case it was held that the trustees had no separable interest that could be taken.

We have next to consider whether the doctrine of *Claflin v. Claflin*,⁵² which permits the creation of indestructible trusts of absolute and indefeasible equitable interests, is the law in this jurisdiction. In *Claflin v. Claflin* the Massachusetts court held that a proviso declaring that an absolute equitable owner shall not receive the principal of his gift from the hands of the trustee until a certain future time beyond the period of the *cestui's* minority, is valid. This doctrine is contrary to the practice that prevails in England and many American jurisdictions for if a *cestui que trust* is the sole beneficiary and is under no personal disability he may, as a rule, call upon the trustee for a conveyance of the trust property to him.⁵³

Professor Kales in his work on Future Interests⁵⁴ suggests that the rule of *Claflin v. Claflin* seems to be law in Kentucky and cites *Smith v. Isaacs*⁵⁵ and *Avery v. Avery*⁵⁶ in support of this view. He points out, however, that the postponed enjoy-

⁴⁹ 146 Ky. 408, 142 S. W. 673.

⁵⁰ 159 Ky. 620, 166 S. W. 1024.

⁵¹ 260 S. W. 377.

⁵² 149 Mass. 19.

⁵³ 1 Tiffany, Real Property (3rd Ed.) 430.

⁵⁴ 2nd Ed., note 45, section 733.

⁵⁵ 78 S. W. 434.

⁵⁶ 90 Ky. 613.

ment clause is wholly void if it may possibly last longer than the period allowed under the rule against perpetuities, but that it should be remembered that this is not an application of the rule against perpetuities. Professor Kale's position as to the law in Kentucky seems correct. Since reasonable restraints on alienations are allowed in the case of a legal fee simple, it follows that they will more readily be allowed in the case of equitable estates.

Smith v. Isaacs seems to be a clear case of upholding a reasonable restraint on alienation. The testator provided that his children should not have possession of the land devised until they should reach the age of eighteen years and should not have the power to alienate or encumber the property until they should become thirty-five years old. The court upheld the validity of the restrictions. In *Avery v. Avery* the testator gave stock to trustees for the benefit of his son to be held by the trustees until the son should become twenty-eight years of age, when the trust should cease, provided in the judgment of the trustees the son's habits rendered it prudent that it should be terminated. On attaining twenty-nine years of age the son brought an action to secure possession of the stock. The court said that if the chancellor should be of the opinion that the necessity for the continuation of the testamentary trust no longer existed, he should give the *cestui que trust* possession of the property, otherwise the trust should continue. A still later case bearing on this question is *Miller's Exrs. v. Miller's Heirs and Creditors*.⁵⁷ A testator directed that his executors should carry on his business for the benefit of his son until his son should reach the age of twenty-five years. All the interested parties sought to terminate the trust before the time provided for in the will. The court said that "the intention of the testator being plain, the trust should be executed, and a court has no power to terminate it, unless it is impossible of accomplishment, or is one of the trusts belonging to a class which a court may dissolve and terminate upon the request of the parties to it. . . . Ordinarily a trust is ended only when the purposes for which it was created have been accomplished. . . . It is apparent that the objects of the trust in the instant case have not been accomplished. Furthermore, this is an active trust, and it is manifest that,

⁵⁷ 172 Ky. 519, 189 S. W. 417.

although the testator had his son Walter in mind as the sole beneficiary, he intended that the control and management of the property should be in the hands of the trustees and subject to their discretion, and hence a court would refuse to terminate the trust upon his application or that of the trustees."

Only one more question remains for our consideration, namely, whether funds may be set aside to accumulate for a long period of time. If the title to the property is not to vest in the beneficiaries until the time for distribution and that time may possibly extend beyond the period fixed in section 2360 of our statutes, the provision will clearly be had as a violation of the rule against perpetuities. So we find the courts referring to section 2360 whenever a will provides that property shall be allowed to accumulate for a certain time, and if the period fixed is for a longer time than a life or lives in being, twenty-one years and ten months, the court has invariably held the provision void.

In *Stevens v. Stevens*⁵⁸ there was a direction in a will that property be held in trust for forty years and then divided equally among testator's living children or the issue of his children. This provision was held bad under section 2360. The court said: "Nor does it matter that the property is to be 'kept in trust.' A trust for accumulation must be confined within the limits fixed by the rule against perpetuities; otherwise, both the direction to accumulate and the gift of the accumulated fund are void." In *Hussey v. Sargent*⁵⁹ the testator provided that his property be allowed to accumulate for the benefit of his grandchildren and directed that "such accumulation and such income" be "equally divided and paid to and distributed among" the grandchildren when a designated grandchild should arrive at the age of thirty-five years, or would have been thirty-five had he lived. The court held that the gift did not violate the rule against perpetuities. Then, in *Fidelity Trust Co. v. Lloyd*⁶⁰ the court held a provision that an estate should not be sold or encumbered for forty years, at the end of which time it should be divided, was void under section 2360. Finally, the most recent case involving the question of accumulations is *Fidelity and Columbia Trust Co. v. Tiffany*.⁶¹ The testator de-

⁵⁸ 54 S. W. 835, 21 Ky. L. R. 1315.

⁵⁹ 116 Ky. 53.

⁶⁰ 78 Ky. 896, 25 Ky. L. R. 1827.

⁶¹ 202 Ky. 618, 260 S. W. 357.

vised real estate in trust with the direction that out of the net income derived therefrom the trustees should invest for the use and benefit of each of the testator's grandchildren living at the time of his death and for each of those that might be born within ten years thereafter, the sum of ten dollars a month, and as each arrived at the age of twenty-two years to pay him or her the amount so invested, together with the accumulation thereon. The share of any who should not attain twenty-two was to go to the others. The court held that the legacies were contingent, and since they might not vest within the period fixed by the statute, a life or lives in being, twenty-one years and ten months, the gifts were void.

It seems clear, then, that any provision for allowing funds to accumulate where the interest is not vested, will be good, provided title vests within the time fixed by section 2360. Suppose, however, that the title to the fund be vested. Then the question would seem to be whether the provision for allowing the fund to accumulate were a reasonable restraint on the donee's power to alienate. This being so, a special rule apart from a statute making the time allowed for accumulations much shorter than that provided in the rule against perpetuities, is hardly necessary in Kentucky.

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