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Future Property Interests in Kentucky (continued)

W. Lewis Roberts
University of Kentucky

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FUTURE PROPERTY INTERESTS IN KENTUCKY*

IV. PERSONAL PROPERTY

In considering the question of future interests in personal property, Professor Gray quotes the statement from Lord Coke in *Lampet's Case*,¹ where Coke says, "This case of a devise of a lease for years to one for life, and after his death to another during the residue of the term, hath produced *septem questiones vexatus et spinosas*." Professor Gray then adds, "The case of a like bequest of a chattel personal has added to the difficulty of these questions; they have never been satisfactorily solved, nor does such solution seem possible until clear conception is formed of the nature of future interests in personalty. This conception has hitherto been absent in the law."²

In Kentucky it was early settled that there may be future interests in personal property as well as in real. The question came before the court in 1813 in the case of *Keen and West v. Macey*.³ A gift of slaves was made to one for life with remainder to her children, and the court held that the remainder was lawful and effectual. Section 32 of a legislative act of 1798 in respect to slaves provided "that no remainder of any slave or slaves shall or may be limited by any deed or last will and testament in writing of any person whatsoever, otherwise than the remainders of a chattel, personal, by the rules of common law, can or may be limited."

As pointed out by the court, "the only question involved in the determination of this cause, is whether by the rules of the common law a chattel could be granted to one for life, with a limitation in remainder to another?" The court said, "It was anciently held that chattels in their nature were incapable of any limitation over, and that a grant or devise of them but for an hour or a minute, was a gift forever. Hence it was a long time before Courts of Justice could be prevailed upon to have any regard for a devise over, even of a chattel real or term for years, after an estate for life limited therein; and to get

*The first two parts of this article were published in XII Kentucky Law Journal, p. 58 and p. 115.

¹ 10 Co. 46 b, 47 a.

² Gray's Perpetuities (3rd Ed.) p. 587.

³ 3 Bibb, 39.

out of the literal authority of the old cases, a distinction was formerly taken, that a remainder might be limited for the residue of the years, but not for the residue of the term, but by a train of adjudged cases, that distinction does not now exist, and the remainder of a term, or a personal chattel, may be limited by will, whether the term, or the lease, or the use and occupation of the land, or the lands themselves, or the use of the chattel be bequeathed."

After reviewing the English cases the court further said: "From these authorities, we think, by the rules of the common law, as they are recognized and known, both in England and this country, a personal chattel may be granted to one for life, with remainder to another, either by will or deed."

The same principle was followed in several other early cases.⁴ The opinion in *Betty v. Moore*,⁵ however, raised the question of whether such limitations can be created by conveyances *inter vivos*. The suit in that case concerned the validity of a gift of a slave upon condition that if the donee die without issue the chattel should revert. The court said the condition was void and entire property vested absolutely in the first donee. But the court admitted that the law was settled that there might be a limitation of a remainder after a life estate in personalty.

Whatever doubt may have been raised by this decision as to the creation of future interests in personal property by conveyances *inter vivos*, seems to have troubled the judges later. In *Johnson's Adm'r v. Johnson*⁶ a conveyance of both realty and personalty was made through a trustee to the grantor's wife for and during her natural life, as her sole and separate estate with remainder over to their children so far only as the real estate was concerned. The court in ruling that at the wife's death the remainder in the personalty reverted to the husband observed:

"But we understand it to be well settled now that gifts for and during the life of the donee or the life of another may be made of personal property; and except when the nature of the

⁴ *Adie v. Cornwall*, 3 T. B. Mon. 276.

Moore v. Howe, 4 T. B. Mon. 199.

Bowling v. Dobyms, 5 Dana, 434.

Jackson v. Sublett, 10 B. Mon. 467.

Knight v. Donahoo. 3 B. Mon. 277.

⁵ 1 Dana, 235.

⁶ 104 Ky. 714.

Property is such, as that it will be consumed in its use, the donee shall have only the use for the specific term, and shall account for the body of the gift to the person entitled thereto; when the nature of the property is such as that its use means its consumption then the donee takes it absolutely."

The leading Kentucky case on the subject of future interests in personalty is, of course, *McKee v. McKee's Executor*.⁷ There the testatrix devised and bequeathed to her daughter M. a dwelling house and "all the portraits and pictures, household and kitchen furniture, table ware, china and silver ware, and in other words, all the personal property used in and about said house and premises . . . for and during her natural life, and at her death to pass and go to her children or their descendants." There was also a life estate given another daughter S in a fund of \$5,000 subject to be defeated upon her remarrying and upon her death or remarriage it was to pass to a grandson. The court held that M took a life interest in both the real and personal property and that the remainder in each vested in her children upon her death as provided in the will; and that S took a life interest in the \$5,000 subject to be defeated by her remarriage. As to whether a life tenant of personal property should be required to give a bond to protect the remainderman the court decided that "where the life tenant is to have an income of money, or similar property devised, the possession of which is directed to be given her, she may be compelled to execute a bond to the remainderman that it will be forthcoming at the termination of the particular estate. In the case of the personal property mentioned in the second item, the enjoyment of which could not be had without its physical possession—probably without its consumption in whole or in part—the bond should not be required, and was not in this case."

The principles laid down in this decision seem desirable and have been sustained by later cases.⁸ The most recent cases on the subject are those of *Lanciscus v. The Louisville Trust Company, Ex'or* and *Bartlett v. Same*,⁹ in which cases a life interest was given the husband of the testatrix with all the powers

⁷ 26 Ky. L. Rep., 736, 82 S. W. 451.

⁸ *Harris, et al. v. New, et al.*, 167 Ky. 262, 180 S. W. 375.

Kelly v. Anderson, et al., 173 Ky. 298, 190 S. W. 1101.

⁹ 201 Ky. 222.

and authority over the property of an absolute owner, except that he could not make a testamentary disposition of any part of it. It was contended on the part of the husband that "at common law the only characteristics of absolute ownership in personal property were the right of possession and the right of absolute disposition, and that when they are combined the entire estate in the property is vested in the one having those rights." The court rejected this view and held that the testatrix could create a life estate in the first taker, with power of disposition by him, and also create a future interest in the remainder of it not so disposed of.

To meet the argument that the attempted limitation of the "remainder" interest in the husband's share was void because under the terms of the will he took all of it and there was nothing left to which the attempted "remainder" interest could attach the court said: "Necessarily that argument must and does proceed upon the theory that the word 'remainder' has the same significance when applied to the creation of future interests in personalty that it has in the creation of the same character of interests in realty. If the premise is correct the conclusion contended for would necessarily follow, but we are not prepared to admit the similitude. If the devised personalty is given in specie and is non-perishable, nor will be fully consumed in its use by the life tenant, there may be a 'remainder' interest created in it similar to that in real property; but, if the property is of a perishable nature and if the use of it by the life tenant destroys or consumes it the word 'remainder,' as applied to a future interest, has no such significance as when applied to the same interest in realty. When applied to realty the word designates a future title to the whole of the property, while if applied to the aggregate of personalty, perishable or non-perishable, it can at most refer and attach to the *residue* or *remnant* of the property."

V. CONSTRUCTION OF LIMITATIONS

When we come to the construction of limitations we are dealing with a subject where the courts' decisions may appear to differ upon facts that seem to be the same. This result is due to the fact that in construing wills, the court looks first to see

what is the intent of the testator from the language he has employed,¹⁰ and in so doing it will look to the entire will and not confine its investigation to the language of a particular sentence, clause or paragraph.¹¹

The words and phrases most often passed upon by the court in connection with limitations on future estates are "heirs" or "heirs of a living person," "survivor" or "survivors," "dying without children" or "without issue surviving;" words purporting gifts on failure of issue, cross-limitations or remainders; the determination of classes; and divesting contingencies and conditions precedent to the taking effect of executory devises and bequests.

(a) *The Meaning of Heirs or the Heirs of a Living Person.*

The general rule as laid down in *Tiffany* in the case of a limitation in favor of the testator's heirs is that the word "heirs" means primarily those persons who were the heirs at the time the testator died and not those who are his heirs at the time the heirs acquire possession.¹² The word may also be used to designate those who are heirs "apparent" at the time of the execution of the will, those who would be heirs were the testator to die at that time.¹³ "The word 'heir,' in its strict technical sense, denotes the person on whom at the ancestor's decease, the law casts the inheritance."¹⁴

In passing upon the will of Henry Clay the Kentucky court ruled that the term "heir" in a will should be interpreted according to the subject matter, when there is no other clue to its interpretation. If the subject be realty, the term should be understood in its technical sense, and if the subject be personalty, the same term should be held as importing distributees or successors.¹⁵ The case of *Prather v. Watkins' Executor*¹⁶ laid down the general rule that where there is a devise or bequest to "heirs," "heirs at law," or "legal heirs," the law presumes the intention of the testator to be that the beneficiaries so designated

¹⁰ *Reed v. Williams*, 194 Ky. 662.

Prother v. Watson's Ex'or, 187 Ky. 709.

¹¹ *Martin v. Thompson, Ex'r*, 191 Ky. 102.

¹² *Tiffany*, Real Property, sec. 497.

¹³ *Williamson v. Williamson*, 18 B. Mon. 329.

¹⁴ *Williamson v. Williamson*, 18 B. Mon. 368.

¹⁵ *Clay v. Clay*, 2 Duv. 295.

¹⁶ 187 Ky. 709, 220 S. W. 532.

shall take *per stirpes* and not *per capita* but that a contrary intent may be shown.

In considering whether a testator intended to use the word "children" in the sense of "heirs," the court in *Naville v. American Machine Company*¹⁷ reviewed the cases on the subject and divided them into three classes: First, where there is a devise by a father or mother to a son, daughter, or blood relation, in which the language "to him and his children forever" is used, the word "children" has been construed as meaning "heirs," and they take no interest in the property devised.

Second: In devises to a blood relation and his children, where the word "forever" is not used following the word "children," the children take a fee subject to the life estate of the parent; and

Third: In devises by a husband to his wife and her children, the children take the fee and the parent the life estate. In the particular case under consideration by the court there was a devise to "my beloved daughter, Anna Marie Naville for her to enjoy for herself and her children forever." The court held that case came within the first class and the daughter took a fee simple; the word "children" was used as a word of inheritance and not of purchase.

In *Hayes, et al. v. Hayes, et al.*,¹⁸ there was a devise to testator's daughter Alice, "or her heirs," Pauline, John, Elva, Richard, William and Margaret. The court after construing "or" to mean "and" held that the case fell within the second class enumerated in *Naville v. American Machine Company*, and that the daughter took a life estate, with the remainder to her six children in fee.

In *Froman, et al., v. Froman, et al.*,¹⁹ the court was called upon to determine the meaning of a crudely worded will where a daughter was to have real estate for her lifetime "for her benefit if she has no heir of her own *ishue* at her death to come back to my *bodly* heirs," and the court held the daughter took a life estate with a remainder in her children living at her death.

Walden v. Smith, et al.,²⁰ involved the construction of a deed which gave an interest to a daughter for life with remainder

¹⁷ 145 Ky. 349.

¹⁸ 154 Ky. 729.

¹⁹ 175 Ky. 536.

²⁰ 179 Ky. 829.

at her death to her "heirs" and the court concluded from the wording of the whole instrument that "heirs" was used in the sense of "children" and was intended as a word of purchase and not of limitation.

An opposite result was reached in the recent case of *Lyons, Gdn., et al., v. Lyons, Ex'r, et al.*,²¹ where a deed conveyed a joint estate to a husband and wife for and during their lives with remainder to the "heirs of their bodies." The court said: "The words 'heirs of their bodies' must be held to mean in effect the same as 'heirs of his body,' and 'heirs of her body,' hence joint heirs are included in the expression. There is nothing in the deed to indicate that the expression 'heirs of their bodies' was intended to be used as synonymous with or equivalent to 'children' or 'their children.' We must, therefore, give to the expression 'heirs of their bodies' the usual technical meaning which that expression generally imparts, which is that of joint descendants of the two living at the time of the death of the survivor of the life tenants."

These cases show the trend of the decisions where the court has been called upon to interpret the word "heirs" or similar expressions.

(b) "*Survivor*" Construed as "*Other*."

Courts as a general rule have construed "survivor," "surviving" or their equivalents as "other" where to do so will let in issue of predeceased members of a class and carry out the probable intent of a testator. This is especially true where any other construction would lead to an intestacy or to inequality among those standing in the same degree of relationship, to the testator. The Kentucky court, however, and a few other courts have taken the position that this is a forced construction, and that the burden of proof in such a case is on the party maintaining that this is the proper construction in a particular case.²²

The court states the problem clearly in *Gorham v. Betts*:²³ "There has been much discussion as to the effect of provisions in wills in favor of 'survivors.' The controversy has been

²¹ 201 Ky. 520.

²² 37 Cyc. 640.

²³ 86 Ky. 164, 5 S. W. 465.

whether the word should have its literal and natural meaning, or whether it should *prima facie* be construed as equivalent to the word 'others' in the absence of circumstances or something in the context showing that it was used in a strictly literal sense."

In *Harris v. Berry*²⁴ the court considered the word "survivor," as used in the will before it, a flexible term which might be molded by the context and spirit of the will to comprehend all the testator's surviving descendants who were intended to be beneficiaries. The view of the court is more clearly stated in *Bayliss v. Prescott*,²⁵ that "the proper intention of the testator can not be reached by departing from the language of the will, which must be construed and not changed. In the absence of all explanation by the rest of the instrument, the word survive, as used in Bayliss' will, must be interpreted according to its literal and plain meaning, this being the rule established by a number of cases."

Cases of a similar nature are *McCormick v. Reinberger*,²⁶ and *Moore's Adm'r v. Sleet*,²⁷ where the court substituted the word "and" for "or" in order to carry out the intention of the testators.

(c) *Vesting of Legacies.*

Whether the testator intended a legacy to take effect as an immediate gift altho its enjoyment be postponed or whether it be intended a gift conditioned upon some future event, as attaining a certain age or marrying, often presents difficult questions in the construction of the language used in a will. Where there is a gift of a legacy to a person *at, if* or *when* he shall attain, or upon his attaining, twenty-one or marrying, courts have held that the gift does not vest until the legatee becomes twenty-one or marries whatever the condition may be. The court in *Roberts' Executors v. Brinker*²⁸ dealt with this question. To quote from the opinion at length:

"Bequests of personalty are construed generally according to the rules of the civil laws; and according to the doctrines of

²⁴ 7 Bush, 113.

²⁵ 79 Ky. 252.

²⁶ 194 Ky. 608.

²⁷ 113 Ky. 600, 68 S. W. 643.

²⁸ 5 Dana, 570.

that code, adopted in Courts of Equity, which take cognizance of legacies, a legacy given when the legatee marry or attain a prescribed age, without anything else in the will, controlling or aiding the interpretation of it, will be understood to be contingent, and 'when' will, in such a case, be deemed synonymous with if, or some other word or phrase implying a condition precedent to the vestiture of any certain interest. And accordingly, a bequest of money to an infant at twenty-one years of age, or when he shall become twenty-one years old, will be construed to mean that he shall have no interest unless he shall attain the prescribed age. But a legacy to an infant *in presenti*, to be paid *in futura* is deemed to be vested, and as not depending on his living until the time fixed for payment."

In *Wallingford v. DeBell*²⁹ the court pointed out the fact that there is a distinction between the cases in which the time or event mentioned in the bequest qualifies the gift itself and those in which it is to be taken as referring to the time of payment. The court said that if the qualification is annexed, not to the gift or legacy itself, but merely to the time of payment, although the enjoyment be postponed, the right vests immediately. So where a testator devised slaves to his grandchildren and directed his executor to hire them out until the youngest became twenty-one years of age and then sell them and divide the proceeds equally; it was held in *Hocker v. Gentry*³⁰ that the grandchildren took vested interests at the time of the testator's death.

Wherever the postponement of the payment of a legacy is for the convenience of the estate the legacy vests at once.³¹

In *Willett's Adm'r v. Rutter's Adm'r*,³² the will provided that surplus personal property should be converted into money and loaned out during the life of testator's wife and at her death divided between his daughter and granddaughter. As testator had made other provision for their maintenance and there was nothing to show an intent that they should enjoy the interest in the meantime, the court ruled that the daughter and granddaughter took only a contingent interest in both principal and interest. However, in *Evans v. Henderson*³³ the court held

²⁹ 15 B. Mon. 551.

³⁰ 3 Metc. 463.

³¹ *Kamp's Ex'r v. Hallanberg*, 8 Ky. L. R. 529.

³² 84 Ky. 317, 1 S. W. 640.

³³ 24 Ky. L. R. 363, 68 S. W. 640.

that the children took a vested remainder where testator devised his realty and personalty to his wife for life and provided that after the payment of her funeral expenses, "then" the remaining property should go to his "loving children, all to share alike," and the child of one who died before the widow did, took his parent's share. The first of these cases seems to be contrary to the general rule that the law favors holding a remainder or legacy as vested, unless there is a clear intention that it shall not vest immediately. Where the payment of the principal is postponed, a gift of the interest in the meantime tends to show an intent to make an immediate gift of the principal.

(d) *Gifts Over Upon Death Without Issue.*

In marked contrast to the small number of cases in the Kentucky reports bearing upon the question of when a bequest of personalty vests is the very great number of decisions dealing with gifts over upon a prior taker's "dying without issue" or "dying without children." "Dying without issue" may refer to death before that of the testator, to death during the lifetime of a life tenant, or to death at any time, that is, an indefinite failure of issue.

Since estates tail no longer exist in Kentucky the latter construction would be bad in this State because it would bring the devise within the prohibition of the rule against perpetuities. The court early rejected the old English rule in favor of construing such phrases as importing an indefinite failure of issue³⁴ and we find section 2344 of our statutes providing that "unless a different purpose be plainly expressed in the instrument, every limitation in 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 abolished the common law rule as to an indefinite failure of issue.

³⁴ *Daniel v. Thomson*, 14 B. Mon. 562.

In *Harvey v. Bell*³⁵ the court reviewed its earlier holdings on the interpretation of such phrases as "dying without issue" and laid down four rules:

1. "Where an estate is devised to one for life, with remainder to another, and, if the remainderman die without children or issue, then to a third person, the rule is that the words 'dying without children or issue' are restricted to the death of the remainderman before the termination of the particular estate."³⁶

2. "On the same principle, where property is devised to one or more infants, and is to be held by their trustees or guardians until they are twenty-one years old, and then to be turned over to them, or divided between them, with the proviso that, if they die without issue, it shall go to the survivors, or, if all die, to a third person, it has been held that the limitation as to dying without issue is to be limited to a death in infancy before the period of distribution."³⁷

3. "And where, by the will, the devise is to a class, and the period of division is postponed even where the devisees are not infants, it has been held that the limitation as to dying without issue must be confined to a death without issue before the period of division fixed by the will."³⁸

4. "On the other hand, where there is no intervening estate, and no other period to which the words 'dying without issue' can be reasonably referred, they are held, in the absence of something in the will evidencing a contrary intent, to create a defeasible fee which is defeated by the death of the devisee

³⁵ 118 Ky., 512, 81 S. W. 671.

³⁶ Citing *Pool v. Benning*, 48 Ky. 623.

Mercantile Bank v. Ballard, 83 Ky. 481.

Ferguson v. Thomason, 87 Ky. 519.

Dickison v. Ogden, 89 Ky. 162.

Pruitt v. Holland, 92 Ky. 641.

Lewis v. Shropshire, 68 S. W. 426, 24 Ky. L. R. 331.

Baxter v. Isaacs, 71 S. W. 907, 34 Ky. L. R. 1618.

³⁷ Citing *Hughes v. Hughes*, 51 Ky. 115.

Thackston v. Watson, 84 Ky. 206.

Trabue v. Terry, 9 S. W. 161, 10 Ky. L. R. 345.

Wilson v. Bryan, 90 Ky. 482.

Jones v. Moore, 96 Ky. 273.

Kephart v. Heatt, 78 S. W. 425, 25 Ky. L. R. 1602.

³⁸ Citing *Duncan v. Kennedy*, 72 Ky. 580.

at any time without issue then living."³⁹ The court recognizes the fact that all these rules must yield to the intent of the testator as shown by the whole will.

This correlation does not provide for cases like *Burnham v. Suttle*,⁴⁰ *Powell's Ex'r v. Crosby et al.*,⁴¹ and *Rue v. Lisle*⁴² where the court held that "dying without issue" meant death during the lifetime of the testator. However, the rules laid down are often cited in later decisions. Among those standing for the proposition of the first rule that where an estate is devised to one for life, with remainder to another, with gift over on the remainderman's dying without issue, the words "dying without issue" are restricted to death before the termination of the particular estate may be noted *Bradshaw v. Williams*,⁴³ *Wilson v. Wilson*,⁴⁴ *Baker v. Thomas*,⁴⁵ *Spacey v. Close*,⁴⁶ *Eakins v. Eakins*,⁴⁷ and *Bonner v. Wedekins*.⁴⁸ And among the many supporting the fourth proposition that where there is no intervening estate, or where there is a period fixed for distribution, the words create a defeasible fee, defeated by death at any time without issue are *Johnson et al v. Powell et al*,⁵⁰ *Craig's Adm'r v. Williams*,⁵¹ and *Bacon v. Dickinson*.⁵² A very recent case coming within the third rule that "dying without issue" in an instrument devising property to a class, refers to death without issue before the time fixed for division, is the case of *Linton, Guardian v. Hail*.⁵³

³⁹Referring to *Hart v. Thompson*, 42 Ky. 482.

Deboe v. Lawen, 8 B. Mon. 616.

Daniel v. Thomson, 53 Ky. 662.

Harris v. Berry, 70 Ky. 113.

Sale v. Crutchfield, 71 Ky. 636.

Crozier v. Crundall, 99 Ky. 202 and others.

⁴⁰148 Ky. 495.

⁴¹89 S. W. 721, 28 Ky. L. R. 619.

⁴²200 Ky. 520.

⁴³140 Ky. 160.

⁴⁴151 Ky. 790.

⁴⁵172 Ky. 334.

⁴⁶184 Ky. 523.

⁴⁷191 Ky. 61.

⁴⁸193 Ky. 743.

⁴⁹200 Ky. 202.

⁵⁰160 Ky. 591.

⁵¹179 Ky. 329.

⁵²199 Ky. 121.

⁵³201 Ky. 591.

(e) *Cross Remainders by Implication.*

The second rule in *Harvey v. Bell* concerned express cross remainders and settled the time referred to by such expressions as "dying without issue." Another important question relative to cross remainders is when, if ever, they are to be implied.

In its opinion in *Eckridge v. Deweese*⁵⁴ the court quotes in full the definition of a cross remainder as given by Bouvier: "Where a particular estate is conveyed to several persons in common, or various parcels of the same land are conveyed to several persons in severalty, and upon the termination of the interest of either of them his share is to remain over to the rest, the remainders so limited over are said to be cross remainders. In deeds such remainders can not arise without express limitation. In wills, they frequently arise by implication." In the case before the court, it was conceded that the will contained no express provision creating a cross remainder but it was contended that one arose by implication. In the particular will, however, the court failed to find that one was created by implication.

In *Bohon v. Bohon*⁵⁵ the Court of Appeals states the general rule that cross remainders can be given by deed only by express limitations and can never be implied, while in wills a more liberal construction is given and they may be raised by implication. Otherwise in the case of wills a partial intestacy might occur. In raising cross remainders by implication the court is thereby seeking to carry out the probable intention of the testator. As pointed out by *Tiffany*⁵⁶ there is one difference to be kept in mind between cross remainders and cross executory limitations—in the latter, after the limitation of estates in fee simple to two or more persons, it is provided that, in certain events, the share of each shall pass to the other or others—and that distinction lies in the fact that, even in wills, cross executory limitations are not implied, in so far at least as their existence would involve the divesting of an estate previously vested. In such a case no implication is necessary to avoid intestacy.

⁵⁴ 180 Ky. 438.

⁵⁵ 78 Ky. 403.

⁵⁶ 1 Real Property (2nd Ed.) 532.

(f) *Determination of Classes.*

Another type of cases where the court is called upon to construe terms used in a will, is where property is given to a group or class of persons. It becomes necessary to decide at what time the class is determined in order to settle the question as to whom the class includes. Where there is a devise to a body of persons uncertain in number at the time of the execution of the will and to be ascertained at a future time is a devise to them as a class and not as individuals.⁵⁷ The time of settling the members of the class may be that of the death of testator, the death of the life tenant or the time of distribution, as where it is to be made upon the eldest child's attaining twenty-one years of age or marrying.

Where an immediate gift is intended to the children of a living or deceased person, if any are alive at the testator's death, they alone are entitled to take; but if no children are living at the time of testator's decease, all children subsequently coming into existence are entitle to take. The general rule, however, has not been followed in Kentucky, as pointed out by the court in *Baker v. Baker, Jr.*:⁵⁸ "At common law a bequest to a class was held to embrace all in the class at the time the bequest was to take effect, but where there was a postponement of the payment of the legacy until a period subsequent to the death of the testator every person answering the description at the time fixed for the division was held entitled to participate as one of the class. This is the rule that has been adopted in many states.

"In this State, however, the common law rule has not been followed, and in the cases of *Lynn v. Hall*, 101 Ky., 738; *Goodridge v. Schoefer*, 24 Rep., 219; *Claywood, et al. v. Jones, et al.*, 108 S. W. 888; *Gray's Adm'r v. Pash, et al.*, 24 Rep., 963; and *U. S. Fidelity and Guaranty Co. v. Douglas' Trustee*, 120 S. W., 328, it is held that a bequest to the children of A would, in the absence of a contrary intent expressed in the will, include, not only the children of A living at the death of the testator, but all such as might thereafter be born to him. It may be said that this rule of construction is now well settled law of this

⁵⁷ *Milton v. Sellors*, 167 Ky. 704, 181 S. W. 346.

Rogers v. Burress, 199 Ky. 769.

⁵⁸ 143 Ky. 66.

State; and in the absence of some expression in the will indicating a contrary intention on the part of the testatrix, the principle would govern in the case at bar.”

The court decided, however, that the direction in the particular will that the property should be divided among the children, share and share alike, showed an intention on the part of the testatrix that only those living at her death should participate.

In *U. S. Fidelity and Guaranty Company v. Douglas' Trustee*⁵⁹ the court said that the word “grandchildren” means not only the offspring of children in being at the time of testator's death but any that may be thereafter born. It further said, “This is the only just, reasonable, and fair rule of construction. A child of a son or daughter is no less a grandchild because born after the death of its grandparent, and common justice would require that afterborn children should be entitled to participate in the residuum of the estate unless there is some provision in the will evincing clearly an intention on the part of the testator that they should not be permitted to do so.”

Then we have the case where a division is not to be made among the members of a class until the death of a life tenant or until the oldest member of a class reaches a certain age. It is generally held that the property vests immediately in those living at the testator's death subject to divesting in part to let in any afterborn children; that is, while none that are in the class at the time the will becomes effective, drops out, new members may be added before the time of distribution. The court so held in *May v. Walter's Executors*,⁶⁰ *Walters v. Crutcher*,⁶¹ *Turner v. Patterson*,⁶² and *Phillips v. Johnson*.⁶³

In *Croan v. Maraman's Guardian*⁶⁴ there was a devise to a wife and son, providing that if both should die before the son became twenty-one years of age, the property should go to testator's surviving partners. There were two partners at the time of testator's death and it was held each took an interest

⁵⁹ 134 Ky. 374.

⁶⁰ 97 S. W. 423, 30 Ky. L. R. 59.

⁶¹ 15 B. Mon. 2.

⁶² 5 Dana, 292.

⁶³ 14 B. Mon. 140.

⁶⁴ 148 Ky. 135.

which was not defeated by the death of one before the death of the son.

Another case of passing interest in connection with this subject is that of *Dohn's Executor v. Dohn* and others.⁶⁵ Testator bequeathed one hundred dollars a month to his wife for life, and seventy-five dollars a month to each child until the youngest should reach twenty-one years. On death of the wife and on the youngest child's reaching twenty-one, the entire estate was to be divided among the children or their heirs. The will provided further that "the issue of the child or children dying should

⁶⁵110 Ky. 384, 62 S. W. 1033.

inherit the share of its parent." The monthly installments were held to be absolute gifts but a distributive share of the estate did not vest until the youngest became twenty-one or the death of the widow occurred, whichever event should happen last.

(g) *Divesting contingencies and conditions precedent to taking effect of executory devises and bequests.*

The last questions to be considered under construction of wills are, what effect the failure of a gift over will have upon the preceding interest and what effect will the failure of the preceding interest have upon an executory devise or bequest? As an instance of the former case, suppose a testator leaves his property to his daughter A, when she shall attain twenty-one, with a gift over to his nephew in the event of her death without leaving issue; and that the nephew dies before the testator. Does the daughter take an absolute interest? The New Jersey court held that she would.⁶⁶ Runyon, Ch., said: "The gift to Jane was absolute, subject to be defeated by the contingent executory gift over. She was the primary object of his bounty. The provision made in the contingency of her dying without leaving lawful issue, was made expressly for another object of his bounty whom he desired and intended to benefit in that event. That object had ceased to exist, and the provision, therefore, was at an end, and the primary gift was left wholly unaffected by it." This view would seem to carry out the intention of the testator and is in accord with the American decisions but contra to the English cases on the point.⁶⁷

⁶⁶ *Drummond v. Drummond*, 11 C. E., Green (N. J.) 234.

⁶⁷ *Tiffany*, 1 Real Property, p. 587.

The rule is very clearly stated in the first edition of the American and English Encyclopaedia of Law:⁶⁸ "The better opinion is that where an executory interest is limited after a fee simple in realty or an absolute interest in personalty, the prior interest becomes indefeasible, on the failure of the ulterior interest, since the prior interest is only to be defeated for the benefit of the ulterior interest, and that purpose failing the original interest remains. Hence on principle it would seem immaterial whether the ulterior interest failed because the contingency upon which it was limited to take effect had not happened, or had become impossible, or because the ulterior limitation itself was void in its creation, or had lapsed by the death of the executory devisee in the lifetime of the testator."

A Kentucky decision cited to support this rule is that of *Gorham v. Betts*.⁶⁹ The testator provided in his will that certain realty should go to his daughters and "in case either of my daughters above named should die, leaving no child living at her death, then her portion shall be equally divided between her sisters only, my sons taking no part thereof." The court held that this created a defeasible fee in the daughters only so long as there was a survivor of the class named and that when but one remained alive there could be no defeasance, although she might die childless. Therefore it was evident the testator intended to vest a fee simple in her.

Now, suppose we have a devise to a child or the children of A, but if all such children die under twenty-one, then to B, and A dies without having had children, does the estate vest in B? It is generally held that it does as such a result is what the testator intended. The Kentucky decision nearest in facts seems to be *Armstrong v. Armstrong*⁷⁰ where testator having three children by his first wife and four by his second, in making provision in his will for the children of both marriages, directed that "in the event of any of said children departing this life without issue, or such issue dying themselves, then that portion so willed to each person so departing this life shall descend to the full brother or sisters who may survive, to be divided as nearly equal among them as may be; and in the event

⁶⁸ Vol. 20, p. 942.

⁶⁹ 86 Ky. 164.

⁷⁰ 14 B. Mon. 269.

of them all departing this life, then the whole estate, real and personal, is to be divided among my first wife's children." One of the children of the last marriage died an infant, before the testator, and the court held that the portion of such child did not lapse but vested in the full brothers and sisters who survived.

As a last word relative to construction of wills one can not do better than to bear in mind always the words of the court in *Reed v. Williams*⁷¹ that "the rule of construction to which all others must give way is that the intention of the testator must be ascertained from the instrument as a whole and in the light of the circumstances and conditions surrounding him at the time of its execution."

(To be continued)

W. LEWIS ROBERTS

University of Kentucky
College of Law

⁷¹ 194 Ky. 662.