

Jee v. Audley
Court of Chancery, 1787
1 Cox 324, 29 Eng. Rep. 1186

Edward Audley, by his will, bequeathed as follows,

Also my will is that £1000 shall be placed out at interest during the life of my wife, which interest I give her during her life, and at her death I give the said £1000 unto my niece Mary Hall and the issue of her body lawfully begotten, and to be begotten, and in default of such issue I give the said £1000 to be equally divided between the daughters then living of my kinsman John Jee and his wife Elizabeth Jee.

It appeared that John Jee and Elizabeth Jee were living at the time of the death of the testator, had four daughters and no son, and were of a very advanced age. Mary Hall was unmarried and of the age of about 40; the wife was dead. The present bill was filed by the four daughters of John and Elizabeth Jee to have the £1000 secured for their benefit upon the event of the said Mary Hall dying without leaving children. And the question was, whether the limitation to the daughters of John and Elizabeth Jee was not void as being too remote; and to prove it so, it was said that this was to take effect on a general failure of issue of Mary Hall; and though it was to the daughters of John and Elizabeth Jee, yet it was not confined to the daughters living at the death of the testator, and consequently it might extend to after-born daughters, in which case it would not be within the limit of a life or lives in being and 21 years afterwards, beyond which time an executory devise is void.

On the other side it was said, that though the late cases had decided that on a gift to children generally, such children as should be living at the time of the distribution of the fund should be let in, yet it would be very hard to adhere to such a rule of construction so rigidly, as to defeat the evident intention of the testator in this case, especially as there was no real possibility of John and Elizabeth Jee having children after the testator's death, they being then 70 years old; that if there were two ways of construing words, that should be adopted which would give effect to the disposition made by the testator; that the cases, which had decided that after born children should take, proceeded on the implied intention of the testator, and never meant to give an effect to words which would totally defeat such intention.

MASTER OF THE ROLLS [SIR LLOYD KENYON].¹ Several cases. . . have settled that children born after the death of the testator shall take a share in these cases; the difference is,

¹ The Master of the Rolls, originally keeper of the chancery records, became the chief deputy of the Lord Chancellor. Until 1827 the Master of the Rolls sat in the evening from six to ten o'clock, when the Lord Chancellor was not sitting.

In 1788 Sir Lloyd Kenyon was created Baron Kenyon and succeeded the great Lord Mansfield as Lord Chief Justice of England, which office he held until 1802. Kenyon was a narrow-minded judge who openly sneered at the equitable doctrines introduced into the law by Mansfield. Standing by the ancient technicalities of the law, Kenyon was testy to advocates in his court, blazing into anger when a word or sentence not in harmony with his sentiments was uttered. It was alleged that Lord Kenyon invariably stiffed waiters by not tipping, not even a half penny. But "he had the glory of dying very rich." 4 John Campbell, *Lives of the Chief Justices of England* 1,101(1873). See also 1 William Townsend, *The Lives of Twelve Eminent Judges* 33-128 (1846)

where there is an immediate devise, and where there is an interest in remainder; in the former case the children living at the testator's death only shall take; in the latter those who are living at the time the interest vests in possession; and this being now a settled principle, I shall not strain to serve an intention at the expense of removing the landmarks of the law; it is of infinite importance to abide by decided cases, and perhaps more so on this subject than any other. The general principles which apply to this case are not disputed: the limitations of personal estate are void, unless they necessarily vest, if at all, within a life or lives in being and 21 years or 9 or 10 months afterwards. This has been sanctioned by the opinion of judges of all times, from the time of the Duke of Norfolk's Case to the present: it is grown reverend by age, and is not now to be broken in upon; I am desired to do in this case something which I do not feel myself at liberty to do, namely to suppose it impossible for persons in so advanced an age as John and Elizabeth Jee to have children; but if this can be done in one case it may in another, and it is a very dangerous experiment, and introductive of the greatest inconvenience to give a latitude to such sort of conjecture. Another thing pressed upon me, is to decide on the events which have happened; but I cannot do this without overturning very many cases. The single question before me is, not whether the limitation is good in the events which have happened, but whether it was good in its creation; and if it were not, I cannot make it so. Then must this limitation, if at all, necessarily take place within the limits prescribed by law? The words are "in default of such issue I give the said £1000 to be equally divided between the daughters then living of John Jee and Elizabeth his wife." If it had been to "daughters now living," or "who should be living at the time of my death," it would have been very good; but as it stands, this limitation may take in after-born daughters; this point is clearly settled by *Ellison v. Airey*, 1 Ves. 111, and the effect of law on such limitation cannot make any difference in construing such intention, If then this will be extended to after-born daughters, is it within the rules of law? Most certainly not, because John and Elizabeth Jee might have children born ten years after the testator's death, and then Mary Hall might die without issue 50 years afterwards; in which case it would evidently transgress the rules prescribed. I am of opinion therefore, though the testator might possibly mean to restrain the limitation to the children who should be living at the time of his death, I cannot, consistently with decided cases, construe it in such restrained sense, but must intend it to take in after-born children. This therefore not being within the rules of law, and as I cannot judge upon subsequent events, I think the limitation void. Therefore dismiss the bill, but without costs.

NOTES AND QUESTIONS

1. *Jee v. Audley* is a classic exposition of the Rule against Perpetuities. In order to understand its application in *Jee v. Audley*, several technical issues need to be explained. The bequest by Edward Audley of £1,000 "unto my niece Mary Hall and the issue of her body lawfully begotten" would have created a fee tail in Mary Hall if Audley had devised land to Mary, but a fee tail could not be created in personal property. Statute De Donis, which authorized the fee tail, applied only to land. An attempt to create a fee tail in personal property resulted in the creation of a fee simple. Thus, Audley gave a fee simple to Mary Hall in the £1000.

The gift to the Jee daughters would divest Mary's fee simple "in default of such issue" of Mary Hall. Baron Kenyon construed this to mean the indefinite failure of issue of Mary Hall, which means "when Mary's bloodline runs out." Mary Hall's bloodline might run out at her death, if she leaves no descendants then living, or it might run out centuries hence, when her

descendants disappear from the face of the earth. It is this second possibility that leads to a gift that might vest too remotely.

A gift over to B when A's bloodline runs out no longer makes sense. In the world of English manors, however, such a gift made sense when coupled with the principle of primogeniture. If Sir Soggybottom wished to convey Blackacre to his nephew Roland to secure a manor for Roland and his progeny, but to send Blackacre to his son Arthur should Roland no longer have progeny, he might convey a fee tail by granting Blackacre to "Roland and the heirs of his body, but if Roland dies without issue, to Arthur and his heirs." In that bygone era, this would ensure that Blackacre would pass from Roland to Roland's first son, and so on, but if the bloodline should die out, possession of Blackacre would go to Arthur or his successors. In *Jee v. Audley*, a fee tail was not created, and it is hard to believe Edward Audley had in mind shifting possession of £1,000 when Mary Hall's whole line of descendants expired, yet this is what Baron Kenyon held. Moreover, Kenyon's construction produced the same result that would have obtained if Mary Hall had been given a fee tail, which she could not have because the £1000 was personal property.

When the fee tail was abolished, courts and legislatures decided that a gift over to B "if A dies without issue" should not be construed to mean a gift to B when A's bloodline expires but rather should be given a common sense meaning: the donor intends a gift to B "if, at A's death, A has no issue living." If Edward Audley's will had been construed to give the £1,000 to the Jee daughters if, and only if, there were no issue of Mary Hall living at her death, the gift over to the Jee daughters would be valid because it would vest or fail at Mary's death.

Although gifts over on the expiration of a bloodline rarely occur in modern times, the principles involved in *Jee v. Audley* remain fundamental. A gift over upon failure of a bloodline is the equivalent of a gift over upon any remote event that may happen more than 21 years after the death of all living persons.

2. Why were not the following persons validating lives in being under the Rule against Perpetuities: Mary Hall; John and Elizabeth Jee; the four Jee daughters living at testator's death?

The answer, of course, is that the gift to "the daughters then living of my kinsman John Jee and his wife Elizabeth Jee" will not necessarily vest or fail within 21 years after the death of any or ail of these persons. The gift might vest in an afterborn daughter of the Jees more than 21 years after these persons are dead. See if you can write the scenario for remote vesting. Because the gift is not invalid unless you assume Elizabeth Jee can have a child, the scenario must include Elizabeth Jee bearing a daughter after Audley's death as well as Mary Hall giving birth to a child after Audley's death.

In thinking about this problem, note that *Jee v. Audley* established the proposition that, under the Rule against Perpetuities, it must be assumed that a person of any age can have a child, no matter what the person's physical condition.² And of course a person of any age can adopt a

2 According to news accounts, in 2005 a 67 year old woman, Adriana Ilescu, gave birth to a daughter by caesarian section. The pregnancy was facilitated by nine years of fertility treatments. A web link to a news story is <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2005/01/17/wmama17.xml>. The Biblical record is set by Sarah, who is said to have given birth to Isaac at the age of 90. Genesis 17:15 – 19. The youngest mother on record is Lina Medina, who on May 14, 1939, at the age of 5 years, 7 months, and 21 days, was delivered by caesarean section of a son. For a web link to this amazing phenomenon, see <http://www.snopes.com/pregnant/medina.asp>. While Lina Medina embodied Professor Leach's "precocious toddler" Adriana Ilescu was thirteen years shy of being the fertile octogenarian.

child.

4. Lord Kenyon says: "If it [the gift over] had been to 'daughters now living,' or 'who should be living at the time of my death,' it would have been very good." Standing alone, this statement is wrong. Do you see why? On the other hand, if Lord Kenyon was adding words to Edward Audley's will and meant to say, "if the gift over had been to the daughters now living who are then living, it would have been very good," the statement would be correct. Do you see why?

[The edited version of the case and portions of the notes are taken from Dukeminier & Krier, Property, 5th Edition (Aspen 2002). © Jesse Dukeminier, Trustee and James Krier, Trustee, 2002.]