◆ JEE v. AUDLEY

1 Cox 324, 29 Eng. Rep. 1186 (Ch. 1787)

Edward Audley, by his will, bequeathed as follows,

> Also my will is that £1,000 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 £1,000 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 £1,000 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]. Several cases determined by Lord Northington, Lord Camden, and the present Chancellor, have settled that children born after the death of the testator shall take a share in these cases; the difference is, 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 £1,000 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, and the effect of law on such limitation cannot make any difference in construing such intention. If then this will extended to after-born daughters, is it within the rules of law? Most certainly not, because John and Elizabeth Jee might have children born 10 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 the 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.

Lloyd, First Baron Kenyon
Lord Chief Justice of England, 1788-1802
by George Romney
Collection of the Fifth Baron Kenyon

NOTES AND QUESTIONS

1. Jee v. Audley is the most famous (or infamous) case involving the Rule against Perpetuities. It settled several principles that rule us yet. Two technical aspects require some explanation. First, Edward Audley left £1,000 "unto my niece Mary Hall and the issue of her body lawfully begotten." This language would create a fee tail in Mary Hall if land were involved, but a fee tail could not be created in personal property. The Statute De Donis, which authorized the fee tail, applied only to land. Language that would create a fee tail in land was construed to create the equivalent of a fee simple in personal property. Hence, Mary Hall was given the equivalent of a fee simple.

Second, the gift over to the Jee daughters is to divest Mary's fee simple "in default of such issue" of Mary Hall. The court construed this to mean upon a general failure of issue of Mary Hall. A general failure of issue, more commonly called an *indefinite failure of issue,* means "when Mary's bloodline runs out." Mary'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 is a very strange gift to the modern mind. But it was what the grantor had in mind when he created a fee tail in *A* with a gift over to *B*. Thus if *O* conveyed land "to *A* and the heirs of her body, and if *A* dies without issue to *B* and her heirs," *O* created a fee tail in *A* and intended *B*'s remainder to become possessory upon the expiration of the fee tail, that is, when *A*'s bloodline runs out. 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. But this is what Lord Kenyon held.

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 all 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.

3. 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.[22] And of course a person of any age can adopt a child.

22. The oldest mother by authenticated records is Arceli Keh of Los Angeles, who gave birth to a daughter in 1997, at age 63. The child was conceived by in vitro fertilization of a donated egg by her husband's sperm and implanted in the birth mother's uterus. It may be feasible for a woman of any age to give birth by such a procedure.

Is it possible for a person to become a parent of a child conceived after the person's death from sperm or ova deposited in an artificial insemination bank? Uniform Status of Children of Assisted Conception Act §4(b) (1988), adopted in two states, provides that an individual who furnishes the egg or sperm for posthumous conception is not a parent of the resulting child. On the other hand, California Prob. Code §6453(b)(3) (1996) provides that paternity may be established after the father's death where it was impossible for the father to hold out the child as his own, which appears to cover the case where a child is conceived after the father's death. In any event, in perpetuities cases to date, courts have ignored the possibility of posthumous parentage of a child *en ventre sa frigidaire.*

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?

5. For an illuminating and entertaining investigation into the Audley family, the Jees, and the quarrel between jealous cousins that brought on Jee v. Audley, see A.W. Brian Simpson, Leading Cases in the Common Law 76 (1995). Professor Simpson's painstaking research revealed errors in the facts stated by the reporter, Samuel Cox. When Edward Audley died in 1771, the Jees had three daughters and two sons (rather than four daughters and no sons). Edward's widow, Elizabeth, was alive at the time of the case, dying in 1791. John and Elizabeth Jee died in 1777 and 1779 respectively, before the case was decided, without having any more children. Mary Hall died unmarried without issue in 1795. Thus the fatal contingency, which brought on the spectre of a perpetuity, was in fact resolved at the end of one life in being.

The Biblical record is set by Sarah, who is said to have given birth to Isaac at the age of 90. Gen. 17:15-19. When God said to Abraham he would have a son by Sarah, the Bible says Abraham fell on his face and laughed, but a son, Isaac, was born to Sarah within a year.