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RULE AGAINST PERPETUITIES IN MISSOURI*

WILLARD L. ECKHARDT**


Mercantile Trust Co. v. Hammerstein3 may be the most important Missouri case in many years on the Rule Against Perpetuities. The problems involved were many and extraordinarily complex, and my analysis and commentary will be much longer than the able and succinct opinion of Pritchard, C.2

Mercantile Trust Co. v. Hammerstein was an action for declaratory judgment4 that the trust created by the residuary clause of the will of Mrs. J. M. Griffin, who died on August 26, 1959, was void in its entirety because it violated the Rule Against Perpetuities.4 The pertinent provisions of Mrs. Griffin's will are set forth in the opinion partly in the form of verbatim

*Originally it was planned that this article would contain a discussion of selected Missouri court decisions in the property field in volumes 371-380, inclusive, of the South Western Reporter, Second Series, but the extended length of the discussion of several perpetuities problems has made it necessary to limit the article to a consideration of only one case.

**Professor of Law, University of Missouri.
1. 380 S.W.2d 287 (Mo. 1964).
2. In addition to having the opinion before me, I have read the briefs and the appellant's suggestions on motion for rehearing or transfer to the court en banc. I have been furnished a copy of the will and of the trial court's decree through the courtesy of Judge Pritchard. I have not examined the pleadings or the transcript of testimony.
4. This contention is explicit in Appellant's Brief, p. 2, lines 11 and 20, and is implicit throughout the brief. This contention also is explicit in the editorial summary of the case before the headnotes, 380 S.W.2d at 287. This issue is recognized but not stated very explicitly in the opinion, 380 S.W.2d at 288, col. 2, lines 7-11.

Nowhere in the briefs or opinion is Lockridge v. Mace, 109 Mo. 162, 18 S.W. 1145 (1891), cited or referred to, even though the appellant's entire case is bottomed on the application of the doctrine of Lockridge v. Mace. It simply seems to be assumed that everyone is familiar with the single most important authority upon which the case turns. Lockridge v. Mace will be considered at length infra.

(27)
quotations and partly in a slightly recast form. At this point it is recommended that the reader study carefully the dispositive provisions of the trust as set out in the opinion; one cannot brief the limitation as it is drawn, but could only repeat it more or less in full.

In brief reconstructed form the dispositive provisions are as follows. Testatrix bequeathed $41,000, one-sixth of the residue of her estate, to trustees to hold in trust for twenty-five years (unless the trustees at their discretion sooner terminate the trust), the trustees to pay the income quarterly as follows: to Named Nephew for life or until the trust terminates; then to widow ofNamed Nephew for life, or until remarriage, or until the trust terminates; then to such of the lineal descendants per stirpes of the Named Nephew as are alive on each quarterly income payment date, until the trust terminates; then to Named Niece for life or until the trust terminates; etc., etc., with various other cross-remainders. Upon the termination of the trust the trustees are to pay over the corpus as follows: to Named Nephew; but if he does not survive the trust termination, and if his widow does survive the trust termination and has not remarried, to his widow; if neither Named Nephew nor his widow take, to such of Named Nephew's lineal descendants per stirpes as survive the trust termination;

5. 380 S.W.2d at 288-289. The portions not quoted verbatim are stated accurately in the opinion.

Some further briefing of ¶ 6 of the will may be helpful. The first sentence of ¶ 6 gives the residue to two named trustees. ¶ 6 (a) is concerned with the powers of the trustees in managing the trust estate. ¶ 6 (b) is concerned with allocations as between income and corpus.

The first sentence of ¶ 6 (c), not quoted in the opinion, is as follows:

"(c) The Trustees shall hold the Trust Estate in trust for the following groups and the persons named in each group, with the provision that the net income, each year be paid equally to said group and the persons therein named or other persons hereinafter named, to-wit:

[(Here follow the provisions for groups one, two, and three, as set forth verbatim in the opinion, 380 S.W.2d at 288-289.)]

¶ 6 (d) provides for quarterly payments of income: "(d) With reference to the Trust Estate herein created, income payments herein directed shall be payable, or accrue for the benefit of the respective beneficiaries from the date of my death and of such payments shall be made quarterly, each calendar year."

¶ 6 (e), providing for the twenty-five year term of the trust and for distribution of corpus, is quoted verbatim in the opinion, 380 S.W.2d at 289, col. 1, and is quoted verbatim in text preceding note 73 infra.

¶¶ 6 (f) through 6 (h) on successive interests in income and substititutional interests in corpus are accurately stated in the opinion, 380 S.W.2d at 289, and these sub-paragraphs complete the dispositive provisions.

¶¶ 6 (i) through 6 (k) are concerned with waiving bond for the trustees, successor trustees, and trustees' fees.

The parts of the will having a bearing on the meaning of "named beneficiaries" (a term used by the trial court and the supreme court), are quoted verbatim in note 127 infra.
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A niece of Mrs. Griffin, Dorothy Weber Long, was one of the named beneficiaries who took a share in income and corpus under the trust, conditioned on survival, and she also was an heir-at-law of Mrs. Griffin and would take a share absolutely by intestate descent if the testamentary trust of the residue was void. Mrs. Long survived the testatrix by about eighteen months and died testate on March 14, 1961. Plaintiff-Appellant Mercantile Trust Company is the executor of Mrs. Long’s estate and in effect is claiming a share of the residue of Mrs. Griffin’s estate as assets of Mrs. Long’s estate. As indicated in respondent’s brief, although perhaps not proved at the trial, the real party in interest as plaintiff was William C. Long, widower of Mrs. Long, who would take nothing if the Griffin trust is valid (he being the only spouse excluded under the trust), but would take a surviving spouse’s interest if his deceased wife took a share absolutely as an heir of Mrs. Griffin.

In this suit for declaratory judgment to have the testamentary trust declared completely void, the trial court apparently made no declaration as to who was entitled to income for twenty-five years but declared only as to corpus; exactly what the trial court declared as to corpus will be considered in detail later, but in general the trial court held the trust valid so that the residuary estate did not pass by intestate descent.

On appeal by the plaintiff, the income provisions were largely ignored, and the principal thrust of the appellant’s brief was that the gift of corpus was to a class or classes of persons who are to be ascertained at the end of a gross period of twenty-five years, that the interests are contingent, and that they may vest beyond the perpetuities period. Therefore, it is asserted by appellant, the testamentary trust fails completely. However, appellant stated no reason for this alleged total failure and no authorities are cited for this. Appellant also argued that the alleged saving clause, ¶ 6 (e), was not an effective saving clause, but rather created a special power of appointment which itself violated the Rule Against Perpetuities.

The respondent’s brief argued that the initial gifts of corpus to named

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6. This brief of the limitation essentially is my reconstruction of the limitation which is considered in detail later.
8. Supra note 4.
nieces and nephews were not contingent (subject to a condition precedent), but rather were vested subject to a condition subsequent, and therefore did not violate the Rule Against Perpetuities. The brief did not argue the validity of the divesting interests. The respondent also urged that the alleged saving clause, ¶ 6 (e), was effective. A further argument was that Missouri should adopt the “wait and see” doctrine, testing the validity of a limitation at the end of the perpetuities period by what actually happens rather than at the beginning of the perpetuities period by what might happen.

The supreme court adopted the position of the respondent that the initial gifts of corpus to named persons were vested, subject to divestment by shifting executory interests, rather than contingent, and therefore these initial gifts of corpus were not subject to the Rule Against Perpetuities. The supreme court in the main opinion by Pritchard, C., did not discuss nor rule on the issue whether the shifting executory interests were valid. Nor did the court give any significant attention to the alleged saving clause. The court held the rule in Whitby v. Mitchell inapplicable. More importantly, while the court did not expressly consider nor rule on the applicability of the doctrine of Lockridge v. Mace (the court’s attention not having been directed to the doctrine), the holding in fact probably has the effect of overruling Lockridge v. Mace. Exactly what the supreme court held is considered in detail later in this paper.

II. The Draftsman’s Slip Is Showing

In drafting dispositions of property it is axiomatic that any provision for a distribution of property beyond a gross period of twenty-one years may violate the Rule Against Perpetuities, and any such provision must be carefully examined to make sure that it does not violate the rule or proper prophylactic measures must be taken to assure compliance with the rule. As Judge Pritchard cogently notes in his opinion, a twenty-five year period “obviously raises the red flag of warning or danger, at least insofar as the possibility of litigation is concerned.”

No draftsman who has more than a speaking acquaintance with the Rule Against Perpetuities would knowingly and intentionally provide simply for a twenty-five year trust with income to be distributed periodically

9. 380 S.W.2d at 292, col. 2.
Another rule of thumb is that a gift by deed to such of the grantor’s children as attain 21, or a gift by will to such of the testator’s grandchildren as attain 21, cannot vest too remotely, but that a gift to lineal descendants of a more remote generation or at a greater age prima facie may vest too remotely.

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to persons to be ascertained at the time of each income distribution and principal to be distributed to persons to be ascertained at the termination of the twenty-five year trust. In the principal case the trust, in part at least, was held not to violate the Rule Against Perpetuities but it was necessary in litigation to establish its validity. Deacon v. St. Louis Union Trust Co., a case concerned with a will which disposed of the Lambert Pharmacal Company fortune and which provided for a thirty year trust, is another example; here also, but only after litigation, the court held that there had been no violation of the Rule Against Perpetuities. In appellant's brief in the principal case industrious and able counsel has dredged up many horrible examples from other jurisdictions of private trusts for gross periods of longer than twenty-one years. The end result sometimes is fatal (or at least partially fatal in other jurisdictions), but sometimes not: as to some trusts a violation of the Rule Against Perpetuities may never be noticed, or by common consent may be ignored; and in some cases in litigation a court will perform a miracle of salvage as did the Missouri court in Trautz v. Lemp.

It is very simple to set up a trust to continue for twenty-five or thirty or even more years, with distribution of principal to persons to be ascertained at the termination of the trust, and still run into no danger of violating the Rule Against Perpetuities. The draftsman simply provides that the trust shall terminate and distribution of principal be made at the end of a gross period of twenty-five years, or of a period measured by the life of the longest liver of X, Y, and Z plus twenty-one years, whichever period is shorter. In the principal case there were forty-three identified potential beneficiaries of various ages at the testatrix' death; a reasonable number of these persons could have been designated as measuring lives with certainty that at least one of the designated lives would continue for at least four years.

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10. 271 Mo. 669, 197 S.W. 261 (1917).
11. Appellant's Brief, pp. 17-36, Point I (D).
12. 329 Mo. 580, 46 S.W.2d 135 (1932). Where the testator directed that a trust was "to commence immediately upon the termination of the administration of my estate" [an event that might happen too remotely], the court held he meant "at my death." The case is noted in 17 St. Louis L. Rev. 370 (1932).
13. I personally would use twenty years instead of twenty-one years in this type of case; the practical effect is the same.
15. This same basic technique may be used in a variety of situations to avoid violation of the Rule Against Perpetuities. For example, it may be provided that a shopping center lease shall commence on the completion of the construction of the building (an event that might occur too remotely), or at the end of a gross.
If the fault is so obvious and its avoidance so simple, why do these mistakes occur, mistakes that may not be fatal but may at least precipitate litigation? In some cases at least, an able lawyer who knows better has simply had an inexplicable lapse; in other cases a stenographic error not caught in proofreading is responsible, e.g., typing “twenty-five” for “twenty-one,” or leaving out a saving clause; and in still other cases the time available, e.g., with a potential testator on his deathbed, may not be sufficient for careful work. In other cases, what appears to be a lawyer’s work is really a layman’s adaptation of a legal form or layman’s revision of a lawyer’s work.

In the course of giving some excellent advice on drafting instruments to avoid the Rule Against Perpetuities, Professor W. Barton Leach says (emphasis added):

Have someone else check the instrument for possible violations of the Rule. (This is sound drafting procedure anyway, but with reference to the Rule Against Perpetuities it is indispensable.) *Knowledge of the Rule and considerable experience in drafting and estate planning are not sufficient insurance against a mistake.***

III. RULE AGAINST PERPETUITIES STATED—THE RIGHT EMPHASIS

Part of the trouble a non-specialist has in applying the Rule Against Perpetuities no doubt results from glossing over three words, here emphasized, in Professor John Chipman Gray’s classic statement of the rule:

> period of twenty-one years, whichever first occurs (adding an escape clause for the benefit of the potential tenant if construction takes too long).

Where a statutory perpetuities scheme allows no gross period, the period for an option to purchase (for example) might be designated as a period of one year, or a period measured by the longer life of X and Y, whichever period is shorter.

16. It seems to me that Voltaire once made a statement generally to the effect that “I wish that my enemy would write a book.” I am unable to verify the author, the line, or the citation, and I am reduced to quoting Job out of context to make my point: “… my desire is … that mine adversary had written a book.” *Job 31:35* (10th Eng. ed. by James 1611). Each of us dreads that inexplicable lapse which might appear in any publication of his.

17. In this situation a saving clause always should be used. See text accompanying note 75 infra.

18. I remember one law student in Legal Drafting who did not at first see the reason for three “in the presence of” recitals in the usual will attestation form, and who “improved” the form by eliminating two of the recitals. The resulting trauma had its educational value, and that former student who now is a lawyer probably knows more about “in the presence of” recitals than any other lawyer in Missouri.

19. *Leach & Tudor, 6 American Law of Property* § 24.7 (g) at 26 (Casner ed. 1952). See also § 24.8 for an advocate’s check list of suggestions which may defeat or save a gift.

See also *Simas & Smith, Future Interests* §§ 1293-1297 (2d ed. 1956), on avoiding violation of the Rule Against Perpetuities in drafting instruments.
“No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.\textsuperscript{2} As a consequence of overlooking these three words, there is a tendency to ask the wrong question as to a doubtful interest, viz.: Is it certain that this interest will vest within the period of the rule? Having asked the wrong question, one often gets the wrong answer as to whether the interest violates the Rule Against Perpetuities.

That the above question (which I assert to be the wrong question) is the one to ask is fortified by numerous statements to that effect. For example, the Model Rule against Perpetuities Act states the rule (emphasis added): “No interest in real or personal property shall be good unless it must vest not later than ....”\textsuperscript{2} Even a writer as sophisticated and knowledgable as Professor Leach left out “if at all” in one exposition of the rule (emphasis added): “If an interest is to satisfy the Rule against Perpetuities, the stated dogma is that it must be absolutely certain to vest within the period of the Rule.”\textsuperscript{2} Another example is the catch-line in 41 AM. JUR. Section 24, “Possibility of Interest Not Vesting within Period as Test.”

\textsuperscript{20.} Gray, Rule Against Perpetuities § 201 (2d ed. 1906; 3d ed. 1915; 4th ed. by Roland Gray, 1942).
In the principal case, 380 S.W.2d at 290, the court quotes the rule as stated in St. Louis Union Trust Co. v. Kelley, 355 Mo. 924, 935, 199 S.W.2d 344, 350 (1947). This is Gray’s statement of the rule slightly elaborated.

\textsuperscript{21.} 9C Uniform Laws Annotated 75-76; approved as a model act in 1944 by the National Conference of Commissioners on Uniform State Laws and by the American Bar Association. Three states have adopted this model act, California in 1951, Montana in 1959, and Wyoming in 1949.

The real utility of the model act is in a state which is abandoning a statutory perpetuities scheme based on New York legislation on suspension of the absolute power of alienation, and is substituting in its place the common law Rule Against Perpetuities; the model act would serve no useful purpose in a state which already has the common law Rule Against Perpetuities. In view of the patent defect in the model act I would not use it in its present form in any state.

House Bill No. 341, 70th General Assembly, 1959, was drawn to abolish the doctrine of Lockridge v. Mace and to adopt the “wait and see” doctrine. At the beginning of § 1 the Rule Against Perpetuities was restated as follows: “Where under a deed, will or other instrument, which shall hereafter become effective, the vesting of any property in this state, or of any interest in such property, is or may be postponed beyond a period of twenty-one years, plus actual periods of gestation, after the death of the last to survive of all persons who were in being at the effective date of the deed, will or other instrument ....” I thought then and still am of opinion that it would be less dangerous to start: “If any interest in property violates the rule against perpetuities ....” House Bill No. 34, 71st General Assembly, 1961, was essentially the same bill. On these bills, see note 120 infra.

\textsuperscript{22.} Leach & Tudor, 6 American Law of Property § 24.21, first sentence (Casner ed. 1952). Other expositions of the rule in the same treatise include the vital words, and no one who makes a reasonable study of the material on perpetuities would be misled. Cf. § 24.3 on what the Rule Against Perpetuities is and is not.
The right question to ask as to a doubtful interest is this: Is there any possibility that this interest may vest more remotely than the period of the rule? My own statement of the rule some years ago was an attempt to cause the right question to be asked: "A future interest subject to a condition precedent is void if by any conceivable course of events the condition precedent may happen and the interest vest more remotely than a period of lives in being and a period of twenty-one years thereafter, and any actual periods of gestation." A year later Dean Everett Fraser wrote what I consider to be the most comprehensible statement of the rule to date (emphasis added):

The Rule Against Perpetuities requires that every future interest be so limited that by the terms of its limitation it must either vest or cease to exist within the period allowed. If by the terms of its limitation it might continue to exist as an unvested interest after the period allowed it is void in its creation.

I have found that the dichotomy, "either vest or cease to exist," conveys to my students more meaning than does the orthodox statement of the rule where "if at all" tends to be overlooked. Consequently in my analysis of the several parts of my reconstructed limitation in the principal case I will use the Fraser terminology.

23. The question is so put pursuant to an acceptance of Gray's remoteness of vesting approach. I believe this is the most practical approach for the working lawyer, provided he understands the exceptions and that the word "vesting" must be tortured out of shape to fit some situations.

Professor Richard R. Powell's statement of the rule is derived from a significantly different approach, with a large ingredient of suspension of the power of alienation, but the same end result generally would follow from either approach. Powell's statement of the rule and his rationale are developed in 5 Powell, REAL PROPERTY § 767A (1962). See also RESTATEMENT, PROPERTY § 370, comment i, last paragraph (1944), which states Powell's basic approach.

The statement of the rule itself in RESTATEMENT, PROPERTY § 370 (1944), is essentially a remoteness of vesting approach. The blackletter states that subject to certain exceptions "the limitation of a future interest in favor of one other than the conveyor is invalid when, under the language and circumstances of such limitation, such future interest may continue to be subject to an unfulfilled condition precedent for longer than the maximum period described in § 374." (Emphasis added.) The blackletter is followed by a twenty page commentary.


25. Fraser & Sammis, The California Rules Against Restraints on Alienation, Suspension of the Absolute Power of Alienation, and Perpetuities, 4 Hastings L.J. 101, 107 (1953). At 112 there is another statement of the rule but with the same emphasis on "either vest or cease to exist."
IV. THE LIMITATION RECAST AND ANALYZED—

Perpetuities Violations Found

The dispositive provisions of the will in the principal case are stated in the court's opinion and have been noticed above. As is often the case, the provisions are so complex the human mind has trouble in grasping, holding, and fully comprehending the dispositive scheme, and this difficulty is aggravated here because the provisions do not proceed in chronological order. To cover the disposition of both income and corpus, one must think of the clauses in § 6 of the will in the following order: subparagraph (c) on primary income beneficiaries; subparagraphs (f), (g), or (h), on successive income beneficiaries; subparagraph (e), last sentence, on primary beneficiaries of corpus and cross-reference to provisions on substitute beneficiaries of corpus; and subparagraphs (f), (g), or (h), on substitute beneficiaries of corpus. The problem areas with reference to the Rule Against Perpetuities remain in hazy focus unless one reconstructs the limitation to bring into sharp view the interests which may (and in my opinion do) violate the Rule Against Perpetuities.

To simplify matters, the reconstruction will be confined to the gift to one nephew, Nelson Weber, with only one cross-gift, that to Dorothy Weber Long. I have chosen the gift to Nelson Weber, § 6 (c), rather than the gift to the niece, Dorothy Weber Long, which is the gift the court analyzed, because the gift to her does not provide for her widower and in that respect is unlike the several other gifts. Reconstructing the gift to the one nephew, Nelson Weber, has the further advantage of making it clear that we are dealing with a share the definite fractional size of which is determined at the testatrix' death, viz., one sixth of the residue or $41,000; we are not dealing with a share of uncertain size, the exact size of which can be determined only after the running of a gross period of twenty-five years. Further, to simplify the problem, it will be assumed at this point that the trust is to continue for a full twenty-five year period; the problem of potential termination at an earlier time will be considered in another section.

26. 380 S.W.2d at 288-289. See note 5 supra, for some additional provisions not stated by the court.

27. It may be charged that in this reconstruction I am, in part at least, stating the obvious; to that charge I plead guilty. It has been my experience that in dealing with a field so esoteric as the Rule Against Perpetuities it is best first to lay a foundation by stating the obvious, whether one is a law teacher teaching law students, a lawyer preparing a brief for the perusal of a judge, or a judge writing an opinion for lawyers and law teachers.

28. See text accompanying note 73 infra.
In making the following reconstruction I have made an assumption as to survivorship. Survivorship may be effected by condition precedent or by condition subsequent, and in the principal case it was hotly contested which means the testatrix used as to the first takers. But granted that survivorship is required, there still remains the question as to the point of time to which survivorship relates: surviving the testatrix; surviving the first-named taker, Nelson Weber; surviving his widow; surviving to the date of distribution; etc. In my reconstruction I have assumed that the testatrix' original limitation will be interpreted or construed throughout to mean that each and every beneficiary of income or corpus must survive to and be alive on the date a distribution of income or corpus is made; but a definitive interpretation or construction by a court might not be in accord with this assumption.

Following each part of the limitation as reconstructed I have stated what estate or interest it creates. In doing so, I have used terminology which may not be technically accurate, but which will convey more clearly the true character of the interest. For example, with respect to the gifts of corpus, I have used the term “in fee” which is appropriate to an interest in land; ordinarily the term “absolutely” would be used with respect to an interest in chattels, but this becomes very awkward when an “absolute” interest is not absolute but is defeasible. Whether there can be a life estate and several remainders for life in a term for twenty-five years in chattels is open to debate, but in this country the terminology is not objectionable. Whether there can be a vested remainder in fee following a term for twenty-five years in chattels also is open to debate. At common law when dealing with land the interest would be analyzed as a present fee subject to a term of years. Today when dealing with land, the ordinary analysis would be a term for years and a vested remainder. In any event, the terminology I have used does not affect the application of the Rule Against Perpetuities.

29. Another example of the time referent problem is the gift which depends on “death without issue,” e.g., A devises Blackacre to B in fee but if B dies without issue to C in fee.

“Dying without issue” may mean “never having had issue,” or it may mean “without issue surviving B at B’s death” (definite failure of issue, § 442.480, RSMo 1959), or it may mean “if B’s line of lineal descendants ever runs out” (indefinite failure of issue, the common law presumption). Furthermore, even with a definite failure of issue construction (if B dies without issue him surviving), there are still two possibilities: first, that B dies without issue before the testator dies; and second, that B dies without issue either before or after the testator dies.

On the “death without issue” problem, see Eckhardt & Peterson, Possessory Estates, Future Interests and Conveyances in Missouri, § 58 n.93; 23 V.A.M.S. 53-54 (1952).
Following each statement as to an interest the testatrix intended to create I have indicated the validity or invalidity of the interest under the Rule Against Perpetuities and briefly analyzed the perpetuities problem. Originally I had intended to come to firm conclusions and to support these conclusions with an array of primary and secondary authorities. However, in view of the fact that the court probably ruled only on the validity of the initial gifts of corpus and may not have ruled on the validity of the successive interests in income nor on the validity of the substitutional interests in corpus, and in view of the remote possibility that the validity of these interests may be litigated in the future, I have deemed it better to present what should be taken as tentative rather than firm conclusions, and to cite authorities generally rather than specifically. In other words, my intention is to indicate the issues upon which the case would break if the matter were litigated, but not to give any firm indication as to how any such new litigation should be decided.

Reconstructed, the beneficial interests limited by Mrs. Griffin's will are as follows:

Residue in trust for twenty-five years, the trustee to pay 9/54ths of the income (the income on $41,000 initial corpus) quarterly to the following beneficiaries by way of successive interests:


Nephew has a present life estate, but the life estate is determinable prior to his death. This present interest obviously does not violate the Rule Against Perpetuities.

2—Income. Then to Nephew's widow for life, or until remarriage, unless trust sooner terminates in 1984.

Widow has a contingent remainder for life, which is determinable prior to her death. Widow may not be Nephew's present wife, and in fact may be a person born after testatrix' death, the so-called "unborn widow"; the remainder for life is contingent rather than vested because the identity of the widow is uncertain until Nephew's death.

30. The exact rulings of the trial court and the supreme court are considered in text accompanying note 124 infra.

31. The reconstructed limitation is shown in brief form in text accompanying note 6 supra.

32. Any resemblances between the copyrighted book 1984, by George Orwell, and this paper of mine, are purely coincidental. My "1984" results from the addition of 25 years, the period of the trust, to 1959, the date of testatrix' death.
Widow's contingent interest for life does not violate the Rule Against Perpetuities because it will either vest or cease to exist at Nephew's death, the end of a life in being.33

3—Income. Then to such of Nephew's lineal descendants, per stirpes and not per capita, as from time to time are alive on each quarterly income distribution date, until trust terminates in 1984.

A class,4 lineal descendants per stirpes, has a series of contingent interests in quarterly distributions, the interest in each quarterly distribution being contingent on being born, on being of the proper degree of relationship, and on surviving to the income distribution date. By reason of death class members may drop out of the class before any income distribution date, and the class opens to new class members after each income distribution date and remains open until the next income distribution date.

Interests in income distributions during the first twenty-one years of the trust cannot vest later than a gross period of twenty-one years, cannot vest too remotely, and do not violate the Rule Against Perpetuities.35

Interests in income distributions during the twenty-second through the twenty-fifth year may vest in some class member too remotely, i.e., in an "afterborn class member," one who is born after the testatrix' death. Because the interest might vest in some class member too remotely, under the all-or-nothing rule of Leake v. Robinson36 the entire class gift of any particular quarterly income distribution after the twenty-first year fails not only as to those class members who might come into the class too remotely but also as to those class members whose interests could not vest too remotely (viz., those living at the testatrix' death).37 However, this


34. See generally on the application of the Rule Against Perpetuities to class gifts: Leach & Tudor, 6 American Law of Property §§ 24.26-24.29 (Casner ed. 1952); 5 Powell, Real Property ¶¶ 780-784 (1962); Restatement, Property §§ 371, 383-389 (1944); Simes & Smith, Future Interests §§ 1265-1270 (2d ed. 1956).

35. On the very difficult problem as to whether there is a series of class gifts rather than a single class gift, see Simes & Smith, Future Interests § 1261 (2d ed. 1856).


37. Leach & Tudor, 6 American Law of Property § 24.26 (Casner ed. 1952); 5 Powell, Real Property ¶ 780 (1962); Restatement, Property §§ 383-384 (1944); Simes & Smith, Future Interests § 1265 (2d ed. 1956).
would seem to be a proper case to apply the exception as to a gift to be divided among a class of subclasses, inasmuch as the maximum number of stirps is known at Nephew’s death, and there should be severability as to certain of those lineal descendants who are alive at testatrix’ death; under this view, part of the gifts of income for the twenty-second through the twenty-fifth year might be saved from the application of the Rule Against Perpetuities.\textsuperscript{38}

It should be here noted that if as a matter of basic construction the membership of the class of lineal descendants is finally determined at Nephew’s death and is not subject to further increase or decrease (i.e., a construction that the condition of survival relates to Nephew’s death and not to the date of income distributions), there would be no violation of the Rule Against Perpetuities as to this class.


Niece has a contingent remainder for life, which is determinable prior to her death.

Niece’s contingent interest does not violate the Rule Against Perpetuities because it will either vest during Niece’s life or cease to exist at Niece’s death, the end of a life in being, and should be held valid. It should be immaterial that this otherwise valid interest follows an interest in lineal descendants which in part at least is voided by the Rule Against Perpetuities.\textsuperscript{39}


Mother’s interest is of the same character and is valid for the same reasons stated next above as to Niece’s interest.

6—Income. And so on for other named persons, their surviving spouses, their lineal descendants per stirpes as of each income distribution date, etc., by way of a series of successive gifts of income.

Except as to the interests in the first of the other named persons, which

\textsuperscript{38} Leach & Tudor, 6 American Law of Property § 24.29, case 45 (Casner ed. 1952); 5 Powell, Real Property ¶ 781 [11 n.41 (1962); Simes & Smith, Future Interests § 1267 (2d ed. 1956).

\textsuperscript{39} On this phase of infectious invalidity, see the following: Leach & Tudor, 6 American Law of Property § 24.51 (Casner ed. 1952); 5 Powell, Real Property ¶ 789 (1962); Restatement, Property § 402, comment (d); § 403, comment (f) (1944); Simes & Smith, Future Interests § 1264 (2d ed. 1956).

I am assuming here and elsewhere in my analysis of the reconstructed limitation that the doctrine of \textit{Lockridge v. Mace} does not cause the whole to fail as a matter of course.
are contingent rather than vested, in general the detailed basic analysis of the five income provisions next above is applicable to this sixth income provision which essentially provides for cross-remainders in favor of other nieces and nephews. Because of the splitting of this 9/54th share there no doubt are additional violations of the Rule Against Perpetuities under class gift rules, but the matter has been spun out quite far enough already and few readers would follow me further into the labyrinth. The analysis of the first five interests in income is sufficient to show that there was one violation of the Rule Against Perpetuities.

7—Income. [Resulting trust to testatrix' estate, passing by intestate descent to heirs of testatrix determined at her death.]

If the dispositive provisions do not effectively dispose of income for the full twenty-five year term of the trust, either the trust would prematurely terminate and the corpus go back to the testatrix or there would be a resulting trust of all or a part of the income to the testatrix' estate. In this case there would not be the problem as to whether the undisposed of income should be accumulated and pass with corpus because the gifts of corpus also would fail. The resulting trust problem is considered in more detail infra under "7—Corpus."

Upon termination of the trust in 1984, twenty-five years after its creation, 9/54ths of the corpus and any undistributed accrued income incident thereto shall be paid and delivered to the following beneficiaries by way of substitutional interests:

1—Corpus. Nephew in fee, subject to condition subsequent in next paragraph.

Nephew has a vested remainder in fee, subject to complete divestment by way of condition subsequent if he dies prior to trust termination.

Being a vested remainder, even though it is defeasible, the interest is not subject to the Rule Against Perpetuities.40

In the principal case the supreme court construed the interest as defeasibly vested, not contingent. This was a hotly contested issue, and was the issue most extensively briefed in the case.41 The greater part of

40. Leach & Tudor, 6 American Law of Property § 24.19, cases 20-21 (Casner ed. 1952); 2 Powell, Real Property ¶ 277 (1950); 5 id., § 767A [51] n.22 (1962), citing Thomson v. Union Nat'l Bank, 291 S.W.2d 178 (Mo. 1956); Simes & Smith, Future Interests § 151 (2d ed. 1956).

41. Appellant's Brief, pp. 17-51; Respondent's Brief, pp. 9-13, Point I; Appellant's Reply Brief, pp. 5-11; and Appellant's Motion for Rehearing or Transfer to Banc, pp. 3-7.
Judge Pritchard's opinion is concerned with this problem. In my opinion, the court correctly held that the interest was defeasibly vested, not contingent, and therefore was not subject to the Rule Against Perpetuities.

Even if the interest were a contingent remainder subject to the condition precedent of survival, or even if it were an executory interest subject to the same condition precedent, the interest would not violate the Rule Against Perpetuities because it will either vest during Nephew’s life or cease to exist at Nephew’s death, the end of a life in being. Therefore, it would seem that the contention most strongly made by the plaintiff would not have helped the plaintiff even if the court had accepted the plaintiff’s view (assuming further that the court would make a correct application of the Rule Against Perpetuities rather than following the rather impressive array of cases cited by and supporting the plaintiff). Be it remembered, we are dealing with a fraction, 9/54ths, determined at the testatrix’ death, not with a share the size of which is uncertain until the end of a gross period of twenty-five years.

2—Corpus. But if Nephew is not alive on the date the trust terminates, and if his widow is alive on that date and has not remarried, to his widow in fee.

Widow has a shifting executory interest in fee, subject to the conditions precedent expressly stated and subject to the further inherent contingency that her identity is uncertain until Nephew’s death. The court adopts the
executory interest theory at point [5] in its opinion,44 but as pointed out below in my analysis of the court's holding, the court's holdings as to the validity of the several executory interests are at least obscure.45

As noted above, widow may not be Nephew's present wife and in fact may be a person born after testatrix' death, the so-called "unborn widow."46 The contingent interest in the widow prima facie violates the Rule Against Perpetuities because it may vest more remotely than the period allowed, and is a variant of the classic "unborn widow" type of case with a dash of the "precocious toddler" type of case;47 but in order to apply the rule here a court would have to accept not merely one but two absurdities.

A hypothetical sequence of events whereby the interest might vest too remotely is as follows: Immediately after testatrix' death all persons who are allowable lives in being die except Nephew. Three months later a girl-child, W, is conceived, and nine months later W is born (she is therefore not a life in being for purposes of applying the rule). When W is one year of age, Nephew marries her, this being two years after testatrix death. The next day Nephew dies, ending the last life in being, and making W his widow. It will take almost twenty-three more years to determine whether W remains a widow and survives the termination of the trust, the point of time at which her interest may vest. Under this hypothetical case, the widow's interest may vest as remotely as lives in being and twenty-three years.

If Nephew were a young bachelor and if the period of time available were not arbitrarily limited to twenty-five years, this sequence of events with reasonable intervals of time is about as likely to happen as the percentage of marriages where the age differential is some twenty years. But where the total available period of time is twenty-five years for this sequence of events, a realistic court on one theory or another would say that the contingent interest in the widow does not violate the Rule Against Perpetuities because the interest must either vest or cease to exist within a period of lives in being (the Nephew's) and twenty-one years; one theory might be that any widow of Nephew necessarily will be a life in being.48

3—Corpus. But if neither of the above take, to such of Nephew's lineal

44. 380 S.W.2d at 292.
45. See text accompanying notes 56-64 and accompanying notes 131-135 infra.
46. See note 33 supra for authorities on the "unborn widow."
47. The precocious toddler is one of Professor Leach's favorite characters. See LEACH & LOGAN, 6 AMERICAN LAW OF PROPERTY § 24.22 (Casner ed. 1952).
48. For escape routes, see the discussion in LEACH & LOGAN, op. cit. supra note 47.
A class,\textsuperscript{49} lineal descendants, has a first alternative shifting executory interest in fee, subject to the express condition precedent of surviving, and subject to the further contingency that the identity of class members who take is uncertain until the trust terminates. Some class members may be (and in the principal case were\textsuperscript{50}) lives in being, persons in existence at testatrix' death, and some class members may be afterborn, born after testatrix' death.

Under the all-or-nothing rule, this contingent interest violates the Rule Against Perpetuities because as to some potential class members it may vest more remotely than the period allowed.\textsuperscript{51} A hypothetical series of events whereby the interest might vest too remotely is as follows: Immediately after testatrix' death all persons who are allowable lives in being die except Nephew and his wife. Three months later another child is conceived, one year later Nephew and his wife have a child (who is not a life in being), and immediately thereafter both Nephew and his wife die, ending the last lives in being. It will take almost twenty-four more years to determine whether this child survives the termination of the trust, the point of time at which the child's interest may vest. Under this hypothetical case, the child's interest may vest as remotely as lives in being and twenty-four years. Appellant in his brief gives two hypotheticals illustrating how the interest might vest too remotely in lineal descendants\textsuperscript{52}; the first is similar to my hypothetical above; the second involves a lineal descendant taking who is the unborn child of an unborn person, raising the rule in \textit{Whitby v. Mitchell}, but not citing the case.\textsuperscript{53}

In lieu of voiding the entire class gift, this would seem to be a proper case to apply the exception as to a gift to be divided among a class of subclasses, inasmuch as the maximum number of stirps is known at Nephew's death, and there should be severability as to certain of those lineal descendants who are alive at testatrix' death; under this view, the interests of some class members in corpus might be saved from the application of the Rule Against Perpetuities.\textsuperscript{54}

\textsuperscript{49} See note 34 \textit{supra} for authorities on the application of the Rule Against Perpetuities to class gifts.
\textsuperscript{50} Appellant's Brief, p. 39.
\textsuperscript{51} Authorities are cited in note 36 \textit{supra}.
\textsuperscript{52} Appellant's Brief, pp. 14-15.
\textsuperscript{53} The status of the rule in \textit{Whitby v. Mitchell} in Missouri is considered at length in text accompanying note 91 \textit{infra}.
\textsuperscript{54} Authorities on severability are cited in note 38 \textit{supra}. 
It should be here noted that if as a matter of basic construction the membership of the class of lineal descendants is finally determined at Nephew's death and is not subject to further increase or decrease (i.e., a construction that the condition of survival relates to Nephew's death and not to the date of distribution of corpus), there would be no violation of the Rule Against Perpetuities as to this class.

4—Corpus. But if none of the above take, and if Niece is alive on the date the trust terminates, to Niece in fee.

Niece has a second alternative shifting executory interest in fee, subject to the condition precedent of surviving the termination of the trust.

This contingent interest does not violate the Rule Against Perpetuities because the Niece's interest either will vest during her lifetime or will cease to exist at her death, the end of a life in being. It should be immaterial that this otherwise valid interest follows an interest in lineal descendants which in part at least is voided by the Rule Against Perpetuities.¹⁵⁵

5—Corpus. But if none of the above take, and if Niece's Mother is alive on the date the trust terminates, to Mother in fee.

Mother's contingent interest is of the same character and is valid for the same reasons stated next above as to Niece's interest.

6—Corpus. And so on for other named persons, their surviving spouses, their lineal descendants per stirpes, by way of a series of substitutionary gifts.

Except as to the interests in the first of the other named persons, which are contingent rather than defeasibly vested, in general the detailed basic analysis of the five gifts next above is equally applicable to this sixth provision as to corpus which essentially provides for cross-remainders as to other nieces and nephews. Because of the splitting of this 9/54th share there no doubt are additional violations of the Rule Against Perpetuities under class gift rules, but the matter has been spun out quite far enough already, and few readers would follow me further into the labyrinth. The analysis of the first five interests in corpus is sufficient to show that there was at least one violation of the Rule Against Perpetuities, and possibly there were two violations.

7—Corpus. [Resulting trust to testatrix' estate, passing by intestate descent to heirs of testatrix determined at her death.]

If all of the interests in corpus are valid, none violating the Rule Against Perpetuities, there is a remote possibility that none of the bene-

¹⁵⁵. On this phase of infectious invalidity, see the authorities cited in note 39 supra.
ficiaries will survive to the date when corpus is distributed. In such a case the interests of the last indicated takers might be construed as not subject to being divested by reason of failure to survive, in which case their heirs or devisees would take and there would be nothing left over to revert to the testatrix' estate. On the other hand, a reversionary interest might be implied in testatrix' estate which would pass by intestate descent to testatrix' heirs determined as of her death.

If some of the interests in corpus are void because they violate the Rule Against Perpetuities, again there are two possibilities. If the valid interest is vested subject to divestment and if the divesting interest fails because it violates the Rule Against Perpetuities, ordinarily the valid interest will be enlarged into an indefeasible interest, i.e., what was a defeasible fee becomes an indefeasible fee. In such case there would be no reversionary interest in the testatrix' estate. On the other hand, if the defeasible interest is not enlarged but remains defeasible, a reversionary interest, a "right of entry for condition broken," would be implied in testatrix' estate and would pass by intestate descent to testatrix' heirs determined as of her death.

V. EXECUTORY INTERESTS VESTING AT TIME CERTAIN

Not Subject to Rule Against Perpetuities

Decently buried at the end of the principal case is a statement in a per curiam opinion that one would prefer to leave unnoticed if the grave were unmarked, but regrettably West Publishing Company picked up the matter in headnote 8, keyed to PERPETUITIES § 4 (13), and some lawyer with a perpetuities case will exhume the body. The court has this to say:

In its motion for rehearing or in the alternative for transfer to the court en banc plaintiff says, citing 41 Am. Jur., Perpetuities, § 30, and 70 C.J.S. Perpetuities § 13, that the executory devise here may take effect beyond the period specified by the rule against perpetuities and is void. We have examined the cases cited under the general statements to this effect in the aforesaid two citations and we find that there was in each no time limitation in any case within which the condition was to take effect. The [main] opinion [next above] follows the rules set forth in A.L.I. Rest. Prop. §§ 370 g and 386 j, that "An executory interest so limited as to become possessory at the end of a precisely computable period of time, as for example at the end of twenty-five years, is also not subject to a condition precedent, and so is excluded from the rule (against perpetuities)." (Parentheses added.)

56. 380 S.W.2d at 293.
Suppose that A duly transfers Blackacre to those persons then living who shall be A's lineal descendants on January 1, 2465, per capita and not per stirpes. The court apparently said this springing executory interest is not subject to the Rule Against Perpetuities and is valid. This of course cannot be. The principle is the same whether the period is 500 years as in my hypothetical or twenty-five years as in the principal case. I am morally certain that the court, after reexamination of its position, will not so hold if the case ever comes before the court.

The principle alluded to is applicable where the person who is to take and the time when he is to take are certain, and there is no "condition precedent" other than passage of time: A duly transfers Blackacre to B in fee from and after January 1, 2001. The substance is the same as if A had conveyed to a straw and the straw had conveyed to A and his heirs through December 31, 2000, then to B in fee. In this latter case B would have a vested remainder in fee, not subject to the Rule Against Perpetuities, or at an earlier period in history, a present fee simple subject to a term of years. Scholars are in agreement on this exception as to certain executory interests, the problem simply being to get around the dogma that executory interests do not have the attribute of vesting in interest before they become possessory.57

The trap the court fell into was created when the Restatement, Property § 370, comment g (1944), did not expressly state that the person to take must be an ascertained person. Professor Powell, who was Reporter for this part of the Restatement of Property, does not state expressly in his treatise that the person to take must be ascertained. He says: "Executory interests limited on an event certain to occur, however, require different consideration."58 His hypothetical, however, makes it clear that he has in mind a gift to an ascertained person. Probably the reason why Professor Powell and the Restatement of Property are not more explicit on the person to take is that the principle of the exception they are dealing with ought to be applicable not only where the identity of the person to take is


58. 5 POWELL, REAL PROPERTY § 779 n.14 (1962).
certain at the effective date of the transfer, but also in the case where the
identity of the person to take is not certain at the effective date of the
transfer but will become certain within the perpetuities period. Both Pro-
fessor Powell and the Restatement are talking about executory interests
that satisfy the Rule Against Perpetuities except as to the remote date for
vesting in possession.\textsuperscript{59}

In the opinion on motion for rehearing, the court refers to “the execu-
tory devise here,” but it is not clear whether the court means some partic-
ular executory devise (the first one following the defeasibly vested re-
mainder in the named beneficiary), or whether all executory devises are
meant.\textsuperscript{60} My analysis of the limitation indicates that there are two executory
devises of corpus in unascertained persons, the widow and the lineal de-
scendants; the first of these may violate the Rule Against Perpetuities, and
the second clearly violates the rule.\textsuperscript{61} There also are two executory devises
in ascertained persons, Niece and Niece’s Mother, neither of which violates
the Rule Against Perpetuities.\textsuperscript{62} In the main opinion the court notices that
there are “several” executory interests, not just one.\textsuperscript{63} The court in the
per curiam opinion on the motion for rehearing may be holding (errone-
ously) that none of the executory devises in the testatrix’ will violate the
Rule Against Perpetuities, but I am inclined to think that the court had in
mind an executory interest in a named person. What the court actually held
is considered below.\textsuperscript{64}

\section*{VI. Two Separate Theories of Invalidity?—Remoteness of
Vesting under Rule Against Perpetuities; Time
Limitations on Indestructibility of Private Trusts}

In the principal case it is clear that the appellant argued for total in-
validity of the trust, mainly in his Point I (D):

A trust for a period of twenty-one or more years which does not
create an interest in the beneficiary which will necessarily vest
within a period of twenty-one years after the instrument becomes

\textsuperscript{59} The opinion on motion for rehearing also cites \textit{Restatement, Property}
\textsuperscript{§ 386, comment i (1944), a comment on a problem which is functionally similar.}
This comment is concerned with the related problem of a present interest or a
vested remainder with mere postponement of possession or enjoyment.

\textsuperscript{60} A principal thrust of Appellant's Brief on Motion for Rehearing or Trans-
fer to Banc, pp. 8-11, Point II, is directed to the validity of the several executory
interests. This was a point which was noticed but not really argued in the main
brief.

\textsuperscript{61} See text accompanying notes 44 and 49 \textit{supra}.

\textsuperscript{62} See text accompanying note 55 \textit{supra}.

\textsuperscript{63} 380 S.W.2d at 292, col. 1.

\textsuperscript{64} See text accompanying note 123 \textit{infra}.
effective is invalid because it violates the Rule against Perpetuities.\textsuperscript{65}

Why there should be total invalidity is never specifically stated. The most obvious basis, one appellant may have assumed is so obvious it need not be stated, is to show some violation of the Rule Against Perpetuities as to some interest, and then apply the doctrine of \textit{Lockridge v. Mace} to invalidate the whole.

In proceeding under this theory, one would analyze the several beneficial interests and determine which, if any, violate the Rule Against Perpetuities, but one would ignore the potential duration of the trust as a matter of no significance. Any interests which violate the Rule Against Perpetuities are void at their inception. In most jurisdictions, the interests which do not violate the rule would be valid, unless striking the void interests and saving the valid interests would so upset the dispositive scheme that the court in its discretion would strike the whole.\textsuperscript{66} However, Missouri, Illinois, and Pennsylvania (at an earlier time) would strike the whole as a matter of course; in Missouri this is known as the doctrine of \textit{Lockridge v. Mace.}\textsuperscript{67} In my analysis of my reconstruction of the limitation in the principal case, I indicate several beneficial interests in the income and in the corpus which violate the Rule Against Perpetuities. Striking the whole would follow as a matter of course under the doctrine of \textit{Lockridge v. Mace.}

A second theory, related but more or less independent, is that the law has a time limitation (perpetuities period) on the indestructibility of private trusts, and that a private trust which is limited so as to be indestructible for a period longer than the permitted period is void in whole or in part.\textsuperscript{68} It is clear than an "honorary trust," e.g., to maintain a gravestone, to care for a specific animal, etc., is void at its inception if its duration may exceed the perpetuities period. There is a similar rule as to trusts for non-charitable unincorporated associations.

In the case of a family trust so limited that beneficial interests may vest too remotely and the trust thereby is "indestructible" for too long a period

\textsuperscript{65.} Appellant's Brief, pp. 17-36, develops this point. See also note 4 supra.
\textsuperscript{66.} \textsc{Leach & Logan, 6 American Law of Property} § 24.48 (Casner ed. 1952); 5 \textsc{Powell, Real Property} ¶ 789 (1962); \textsc{Restatement, Property} § 402 (1944); \textsc{Simes & Smith, Future Interests} § 1262 (2d ed. 1956).
\textsuperscript{67.} The doctrine of \textit{Lockridge v. Mace} is considered in text accompanying note 112 infra.
\textsuperscript{68.} This is an entirely different problem from that of a trust which is to come into existence on a condition precedent which may happen more remotely than the period of the Rule Against Perpetuities. Such a trust violates the rule and is void at its inception, unless saved by some exception.
because some beneficiaries are unascertained and therefore could not join to terminate the trust, the courts in grasping for an answer may be making a new rule of law related to but distinct from the Rule Against Perpetuities, and that new rule may crystallize and emerge in ten, fifty, or a hundred years. That rule could be that such a trust is valid for the perpetuities period, but invalid insofar as it is indestructible beyond the perpetuities period. Or the rule could be that such a trust is void at its inception. My impression is that appellant's theory was not just the pure Rule Against Perpetuities theory, but in part at least was this latter indestructible trust theory, and his position was that on this latter theory the trust should be void at its inception.

In the principal case, there was much in the appellant's brief to the effect that § 6 (e), which permitted the trustee to terminate the trust at any time, was not an effective saving clause, with the respondent to the contrary that it was an effective saving clause. I suggest that the effect of § 6 (e) as a saving clause could be quite different under the two theories, that it could be an ineffective saving clause under a Rules Against Perpetuities theory, but an effective saving clause under an indestructible trust theory.

One facet of the indestructible trust problem, the Claflin rule, has been ably discussed by Professor William F. Fratcher in an earlier issue of the Missouri Law Review.

69. As a practical matter in most cases, the normal application of the Rule Against Perpetuities will prevent such indestructibility because the interests which would prevent destructibility are void at their inception.

70. LEACH & TUDOR, 6 AMERICAN LAW OF PROPERTY § 24.67 (Casner ed. 1952), has a brief consideration of this problem. The family trust is dealt with under point "a." At the beginning of § 24.67 it is said: "The first edition of Scott on Trusts did not deal extensively with this matter; however, Professor Scott is now planning a second edition of his work and has come to the conclusion that an extended discussion should be included in this revision of his treatise. For this reason the subject is given minimum treatment in the present Treatise." Text authorities are cited in § 24.67, n. 1.

71. The saving clause is considered in text accompanying note 73 infra.

Moran v. Sutter, 360 Mo. 304, 313 [41], 228 S.W.2d 682, 687 [5] (1950), is pertinent on the indestructible trust point. The case is discussed in note 88 infra.

72. Fratcher, Trusts and Succession, 22 Mo. L. Rev. 390, 390-395 (1957), discussing Thomson v. Union Nat'l Bank, 291 S.W.2d 178 (Mo. 1956).
Paragraph 6 (e) of the will in the principal case provided in the first sentence:

The Trust Estate is to continue in existence for not more than twenty-five (25) years after my death, and may be closed before that time, at the sole discretion of my Trustees, should they deem it advisable to do so. In the event that such closing is made prior to the end of such twenty-five (25) year period, no Trustee shall become liable to any beneficiary herein named or any contingent beneficiary, because the closing was made prior to the end of said period. At the time of any termination of said trust, all the net principal and accrued income shall be paid and delivered to the above-named persons, as their respective interests may appear, or such other persons, as hereinafter provided.

as an abstract discussion, but the adverse criticism of the opinion of Barrett, C., was not justified because the facts and issues in the Thomson case were such that no court in this country would have terminated the trust, and the case provides no basis for predicting the extent to which Missouri will go in applying the Claflin rule.

In the Thomson case a 1917 testamentary trust made provision for the testator's widow for life, with beneficial interests in income and corpus in his children (in fact there were three sons), and beneficial interests in income and corpus under certain circumstances in the issue of each child; there was a provision for reverter to the testator's estate if a child died without issue. The authorized trust investments were so restricted that the net income declined seriously. The widow and the three sons (each over forty) brought suit against the trustee and against six grandchildren (children of two of the three sons) primarily to destroy or terminate the trust, but if this could not be done to get authorization for deviation so as to permit investment in better yielding securities and to authorize invasion of the corpus for the benefit of the widow, the life tenant. The supreme court granted no relief, affirming the judgment of the trial court.

The commentator in 22 Mo. L. Rev. at 390 had briefed the limitation to show clearly the interests in the issue of the children, but he fell into error when he stated on p. 391 (emphasis added): "The court held that, although the plaintiffs were the sole beneficiaries of the trust, they were not entitled to terminate it prematurely because that would defeat a material purpose of the trust." The error is repeated in 22 Mo. L. Rev. at 394, line 22.

Obviously the plaintiffs, the widow and her three sons, were not the sole intended beneficiaries of the trust; the beneficiaries included as well the six grandchildren who were defendants, and included also issue as yet unborn. The interests of the issue, born and unborn, cannot be extinguished by trust termination and must be protected, unless these interests expire or are extinguished on another theory. One theory would be that the future interests in the issue of the children violated the Rule Against Perpetuities and were void. Another theory would be that by interpretation or construction the remainder of a son who attained forty became indefeasibly vested and no longer was subject to divestment in favor of issue. The limitation itself was so drawn that several interpretations or constructions are possible.

I see nothing in the opinion to indicate that the status of the future interests in lineal descendants was ruled on, nor do I see anything in the opinion to indicate that the court viewed the plaintiffs as the sole beneficiaries at the time of the suit. Respondent in point three of its brief argued that there cannot be encroach-
The trial court in ¶ 14 of its decree found this to be an effective saving clause.72 The effect of the alleged saving clause became one of the most hotly contested issues in the appeal briefs,74 and the court’s handling of the problem will be discussed below.

A catch-all clause to help avoid a violation of the Rule Against Perpetuities has been called a “saving clause” in Missouri, and by others it has been variously referred to as a “safety clause,” a “vesting provision,” and a “blanket clause to insure validity”; there seems to be no single term in general use. A typical saving clause is the one in Potter v. Winter,75 described by the court as follows:

By “Section H” of Item Four it was provided that the provisions of the preceding sections of Item Four to the contrary notwithstanding, “no trust in this Item Four created shall continue for a period longer than 21 years from and after the death of the last to die of [ten named persons], and if upon the expiration of the aforesaid period there shall be any property held in my trust estate hereunder then each such trust estate shall thereupon terminate and the Trustees thereof shall thereupon transfer, and deliver, free of trust, to the income beneficiary of said trust estate all the

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72. Transcript, p. 149: “The Court further finds that Clause Sixth (e) of said Will is not violative of the Rule Against Perpetuities; that the said sub-paragraph places a discretionary power of termination in the trustees indicating an intent of testatrix to preserve the trust estate against contingencies, involving possible invalidity by operation of law and rather than invalidating the trust does in fact and law constitute a saving clause which the trustees or this Court, as a court of equity, would invoke, if it were necessary, to sustain the trust and carry out the testatrix’s intent.”

73. Transcript, p. 149: “The Court further finds that Clause Sixth (e) of said Will is not violative of the Rule Against Perpetuities; that the said sub-paragraph places a discretionary power of termination in the trustees indicating an intent of testatrix to preserve the trust estate against contingencies, involving possible invalidity by operation of law and rather than invalidating the trust does in fact and law constitute a saving clause which the trustees or this Court, as a court of equity, would invoke, if it were necessary, to sustain the trust and carry out the testatrix’s intent.”

74. Appellant’s Brief, pp. 55-65, Point III; Respondent’s Brief, pp. 13-18, Point II; and Appellant’s Reply Brief, pp. 11-13, Point II.

75. 280 S.W.2d 27, 31 (Mo. 1955).
property both principal and income then constituting said trust estate.

The court stated that the inclusion of this saving clause made it unnecessary for the court to determine whether certain contingent interests, absent such clause, might vest too remotely and violate the Rule Against Perpetuities.76

Another Missouri case, Nelson v. Mercantile Trust Co.,77 had a similar saving clause, as follows:

The trust hereby created shall in no event continue for a period longer than the lives of all of said children of said J. M. Nelson, Jr., and the survivor of all of them, and twenty-one (21) years thereafter, at the end of which time distribution shall be made in the manner herein provided, irrespective of any other provision of this agreement.

Certain contingent interests, absent such clause, would have violated the Rule Against Perpetuities.78 The saving clause was defectively drafted in that although J. M. Nelson, Jr., had three children on the date the perpetuities period started to run, he was alive and there could be afterborn children; the court first saved the saving clause by construing "all of said children" to mean only the three children living on the critical date and to exclude afterborn children. Having saved the saving clause, the court then saved the trust from the Rule Against Perpetuities.79

Gilbert T. Stephenson has an excellent discussion of the reasons for using vesting provisions as a matter of routine, sets out several different vesting clauses, and has a perceptive analysis thereof.80 Insofar as routine use of such clauses is concerned, Professor Lewis M. Simes takes the opposite position: "Such a clause is rarely to be recommended because it is likely to produce results which the testator did not anticipate."81 Assuming

76. 280 S.W.2d at 34 [5].
77. 335 S.W.2d 167, 170 (Mo. 1960). See Fratcher, Trusts and Succession in Missouri, 27 Mo. L. Rev. 93, 93-97 (1962), for an extended analysis of this case.
78. See Fratcher, supra note 77, at 94-95, n.3, for the argument that the contingent future interests would not violate the Rule Against Perpetuities in any event. My statement in the text above simply restates the court's view, and is not intended to indicate that I disagree with Professor Fratcher's analysis.
79. 335 S.W.2d at 172-173 [2-9].
81. SIMES & SMITH, FUTURE INTERESTS § 1295 (2d ed. 1956). Professor Simes would make an exception where a complicated will is drawn up in haste for a dying testator.
the draftsman is competent, I am inclined to agree with Professor Simes in cases where the provisions dispose of the settlor's or testator's own property, and in cases where a power of appointment is being consciously exercised; but where there may be the exercise of a power of appointment without deliberately doing so, particularly where a will has a routine residuary clause which purports to exercise any powers of appointment the testator may have and the testator uses the residue to create a family trust, the use of a power of appointment saving clause as a routine matter would seem to be desirable.

Having viewed saving clauses generally, let us come back to the "saving clause" in the principal case, quoted at the beginning of this section and there stated to be one of the hotly contested issues in the case. Obviously the clause does not on its face appear to be a saving or vesting clause, and I have not been able to think of any plausible reason for including this clause where, as in the principal case, the residuary clause in effect sets up multiple trusts for a number of primary beneficiaries and early termination of the trust would affect all of the shares, not just one selected share. If there were only one primary beneficiary as to income for life and corpus if he lives for twenty-five years, then a clause permitting the trustee to invade the corpus for the benefit of the income beneficiary and to terminate the trust early for the benefit of the income beneficiary would be plausible provision; there would be flexibility also if invasion of corpus and early termination were permitted independently as to each share where there are several shares. My guess would be that a clause originally designed for such a purpose was misused in the different situation of the principal case, or was not adapted by redrafting to cover the special situation of the principal case.

Appellant argued strongly, and in my opinion very persuasively, that the clause providing for early termination was in effect a special power of appointment, viz., a power to appoint the corpus to a limited group, the current income beneficiaries, which in and of itself might be exercised too remotely and therefore violates the Rule Against Perpetuities and is void. The respondent argued that it was the intention of the testatrix that if

82. See text accompanying notes 73-74 supra.
83. Appellant's Brief, pp. 58-61, Point III B.
84. Appellant's Brief, pp. 55-58, Point III A.
Appellant's Point III C, at pp. 61-65, is based on RESTATEMENT, PROPERTY § 383, comments e-f (1944), and is plausible, but would take too much space to brief here.
See also Appellant's Point III B, at pp. 58-61, supra note 83.
the trust violated the Rule Against Perpetuities, the trustees should exercise their discretion to terminate the trust within the period of the rule and thereby save the trust; and that if the trustees would not so act, a court of equity would compel them to so act. The trial court accepted this view.

The supreme court rejected the appellant's contention on the ground that discretion in the trustees to shorten the period of the trust did not cause the interests to be contingent. The opinion on this issue is too short to be satisfactory, but the court cites Moran v. Sutter and this gives a clue to the court's theory, a theory having nothing to do with a saving or vesting clause for the Rule Against Perpetuities as such. Moran v. Sutter was concerned with the somewhat related incipient rule against indestructible private trusts of which there are some overtones in the principal case. A power in a trustee to terminate a trust at discretion might well avoid a related rule on indestructible private trusts, but would not necessarily save an interest from the Rule Against Perpetuities.

There is an alternative analysis of the alleged saving clause not suggested by the briefs or by the court. There is a doctrine generally to the effect that the period of the Rule Against Perpetuities does not begin

86. ¶ 14 of decree, quoted in note 73 supra.
87. 380 S.W.2d at 292 [61].
88. 360 Mo. 304, 313 [41], 228 S.W.2d 682, 687 [5] (1960).

In Moran v. Sutter the trust provision was drawn by the testator, a layman, and was as follows: "To my beloved daughter, Mary Catherine Reardon, 40/100% [sic, 40% or 40/100] [of a block of stock which constituted the controlling interest in a family corporation], which is to be held in trust for her by my executors, with power to sell or otherwise dispose of as they may see fit, but retain the proceeds or invest same for her sole benefit either before or after she becomes of age, as they may deem advisable or necessary."

It seems clear that the interest in the daughter vested at the testator's death and that the maximum period of the trust would be for the daughter's lifetime (the court did not discuss this latter point), and consequently there could be no violation of the Rule Against Perpetuities nor of any related rule on indestructible trusts.

The daughter, wanting the legal fee free of trust, advanced a number of grounds as to why there was no valid trust at all, e.g., that it was a dry trust, that it was too ambiguous, and that it was so vague and indefinite that it was void for uncertainty. Another ground advanced was "that the trust is void because it is unlimited in duration."

The court rejected the argument on unlimited duration: "It is true no definite time limit is fixed therein. But that does not make it void. A discretion in the trustees as to the time limit is provided." The court went on to indicate that the discretionary power was not perpetual, and that the trustees would be subject to the control of a court of equity.

Respondent's Brief, p. 16, cites Moran v. Sutter almost as an afterthought at the end of Point II (A).
89. This related rule is discussed in text accompanying note 68 supra.
to run as to a contingent future interest so long as the interest is fully destructible. The classic case is an inter vivos (living) trust with future interests which may vest too remotely measured from the date the trust is created, but which cannot vest too remotely measured from the settlor’s death; if the trust is fully revocable by the settlor at any time for his sole benefit, the perpetuities period begins to run at the settlor’s death when the power of revocation terminates and the contingent future interests are no longer fully destructible. The authorities are too uncertain and scanty to say with confidence where the line may be drawn if the power of revocation is more circumscribed. It could have been argued in the principal case that the power in the trustees to terminate the trust satisfied this exception and that so long as the power continued the perpetuities period does not run.  

VIII. The Rule in Whitby v. Mitchell—Gift to Unborn Child of Unborn Person

In the principal case, after counsel for appellant stated two hypothetical cases showing how the shifting executory interest in lineal descendants might vest too remotely, he said: "These examples show: . . . (2) an unborn child of an unborn person may be the one in whom the corpus vests; . . . Under such circumstances, the trust is invalid because it violates the Rule against Perpetuities." In appellant’s reply brief counsel also said: "The same [survivorship requirement] is true of second, third, fourth, etc., takers." Appellant cited no specific authority on this problem, but undoubtedly he had in mind the much-debated rule in *Whitby v. Mitchell* where it was unanimously held, both below and on appeal, that there still existed, and always had existed, independently of the Rule Against Perpetuities, a separate rule invalidating a gift to the issue of a life tenant if the latter was unborn at the time of the creation of the interests. The particular limitation in *Whitby v. Mitchell* did not violate the Rule.

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90. See generally the following: Leach & Tudor, 6 American Law of Property § 24.59 (Casner ed. 1952); Restatement, Property § 370, comment j (1944); Simes & Smith, Future Interests § 1252 n.74 (2d ed. 1956).

In 5 Powell, Real Property § 767A [5] (1962), the author says (emphasis added): "A trust causes no fettering of property when some one person, such as settlor, the holder of a general power presently exercisable, the trustee, or a beneficiary has an unqualified power to end the trust and to transfer complete legal ownership." It is not clear whether this statement is intended to cover the perpetuities problem as well as the indestructible trust problem.

91. Appellant’s Brief, p. 15.
93. 42 Ch. Div. 494 (1889), 44 Ch. Div. 85 (C.A. 1890).
Against Perpetuities but was held void under the independent rule. In *Whitby v. Mitchell* such a limitation was referred to as a “possibility on a possibility” and as “double possibilities,” and is what Judge Pritchard refers to as “beyond second takers.”

In most cases the question whether there are two separate rules is moot because a gift to the unborn issue of an unborn life tenant will violate the Rule Against Perpetuities and be void, and there is no occasion to determine whether the gift also would be void under a separate rule. For example, *A transfers Blackacre to his son B (a childless bachelor) for life, then to B’s eldest son for life, then in fee to such eldest son’s eldest son.* In this case the present life estate in B is valid, and the contingent remainder for life in B’s eldest son also is valid because it cannot vest more remotely than B’s death, at the end of a life in being, but the contingent remainder in fee to the eldest son’s eldest son might vest too remotely and is void because he might not be born until more than twenty-one years after B’s death.

The following hypothetical case illustrates the infrequent situation where the end limitation in a disposition on the above general pattern would not violate the Rule Against Perpetuities, but would be void if at all only under an independent rule: *A transfers Blackacre to his son B (a childless bachelor) for life, then to B’s eldest son for life, then in fee to such eldest son’s eldest son if he is born within twenty-one years after the death of the survivor of X, Y, and Z.* Because of the addition of the last clause, the contingent remainder in fee cannot vest too remotely; it will either vest or cease to exist within the period of the rule.

The following is a useful rule of thumb for a draftsman: Beware of a gift to the unborn issue of an unborn person because the gift probably will violate the Rule Against Perpetuities. No trouble arises so long as this is taken simply as a rule of thumb and is not taken to express a rule of law applicable regardless of remoteness of vesting.

The rule in *Whitby v. Mitchell* was abolished by statute in England in 1925. The rule never has been applied in the United States.

Missouri is one of the few states where the rule in *Whitby v. Mitchell*

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95. *Leach & Logan, 6 American Law of Property* § 24.68 (Casner ed. 1952) [extremely brief treatment].
*Powell, Real Property* (1949-1962), apparently does not cover the rule, but the absence of a table of cases makes it difficult to verify this. See *Powell, Cases on Future Interests* 798-799 (2d ed. 1937), on the rule of *Whitby v. Mitchell*; the 3d ed. 1961 drops this material.
*Restatement, Property* § 370, comment q (1944).
*Simes & Smith, Future Interests* §§ 1218-1219 (2d ed. 1956). § 1218 has
has received considerable attention from the courts. The reason for the number of Missouri cases raising the issue no doubt is because the doctrine was stated in *Lockridge v. Mace*, the leading case in Missouri on perpetuities, and thus was constantly in view of the bar. The doctrine did not come into Missouri law through the case of *Whitby v. Mitchell*, 1889 and 1890, but through the 1887 edition of *Washburn on Real Property*, and this may be the reason why the doctrine so often is stated as an abstract principle rather than as the rule in *Whitby v. Mitchell*. Emory Washburn was a Harvard Law School professor, and his excellent treatise on real property was much relied on and quoted by the courts in opinions of the period.

In *Lockridge v. Mace* the following is quoted from Washburn (emphasis added, but also deleted from the Law French phrase):

Still the policy of the law is against clogging the free alienation of estates, and, as will be shown hereafter, it has become an imperative, unyielding rule of law, first, that no estate can be given to the unborn child of an unborn child; and second, that lands cannot be limited in any mode so as to be locked up from alienation beyond the period of a life or lives in being and twenty-one years after, allowing the period of gestation in addition, of a child en ventre sa mère, who is to take under such a limitation.

Washburn continued, in a sentence not quoted by the court:

This [the period of lives in being and twenty-one years] is borrowed from the rule above stated [in the next preceding paragraph].

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96. See Mo. Dig., Perpetuities § 4 (10); additional Missouri cases are cited in Simes & Smith, Future Interests § 1219 nn. 57-58 (2d ed. 1956).

97. 109 Mo. 162, 166, 18 S.W. 1145, 1146 (1891). The perpetuities aspects of this case are considered at note 4 supra, at text accompanying notes 65-67 supra, and at text accompanying note 112 infra.

98. 1 Washburn, Real Property *22, p. 115 (5th ed. 1887 by Willard & Croswell). The 1st ed. 1860 and the 2nd ed. 1864 are not locally available, but the 3d ed. 1868 and the 4th ed. 1876 (the last edition by Professor Washburn) both have text identical with that quoted from the 5th ed. 1887. No change was made in § 217 in the 6th ed. 1902 by Wurts (no star paging); *Whitby v. Mitchell* was not noticed in the 1902 edition.

Actually, the matter quoted appears in an early chapter on estates tail, and is simply a teaser, a preview of coming attractions.
as to settlements where the first tenant in tail, after an estate for life, as soon as he arrives at twenty-one years, could convey the entailed estate. 99

It should be noted that the “rule” on the unborn child of an unborn child, as stated by Washburn, did fit in Lockridge v. Mace, where there was a gift by will to widow for life, then to children for life [all lives in being at testator’s death], then to grandchildren for life [could include lives in being and afterborn grandchildren provided any child of the testator survived the testator], and then to great-grandchildren in fee [could include afterborn great-grandchildren who were the children of afterborn grandchildren], but a regular application of the Rule Against Perpetuities also would invalidate the gift to great-grandchildren.

The rule in Whitby v. Mitchell was definitely repudiated in Missouri by a clear holding in 1922 in Lane v. Garrison, 100 where the court’s discussion of the problem was brief, but nevertheless positive:

But it is urged that the whole provision as to the trust fund in question is void because it violates the rule as to perpetuities, in that an unborn child of an unborn child of said Clark Garrison might take

99. Professor Washburn in discussing estates tail had come to a consideration of the English strict settlement whereby land could be effectively tied up for a period of lives in being and twenty-one years, but no longer, unless there was a resettlement each generation. From 1285 to 1473 a fee tail effectively tied up land in perpetuity, but after 1473 a tenant in tail had the power to convey a fee simple absolute. The technique employed under the strict settlement depended on a tenant in tail voluntarily cutting himself back to a life estate and creating a new fee tail in the next generation, and so on by resettlements generation after generation.

100. 293 Mo. 530, 540, 239 S.W. 813, 816 (1922).
thereunder (an entire departure from the theory of the petition). But we do not regard this fact as in and of itself violating the rule as to perpetuities if said unborn child must be born and take, if it takes at all, within a life or lives in being and twenty-one years and the period of gestation thereafter.

The actual case was the unusual one where the limitation violated the rule in *Whitby v. Mitchell* but not the Rule Against Perpetuities.

In spite of the clear holding in *Lane v. Garrison* the ghost of *Whitby v. Mitchell* still haunts us. The next year in *Loud v. St. Louis Union Trust Co.* the matter came up again and the court said:

>[C]onsequently we would have a case where the unborn child of an unborn child might take under the will in question, an interest in and to the trust estate created thereby. This is so obviously a violation of the rule against perpetuities that it is only necessary to copy what this court said upon the subject in . . .

The actual case was the usual one where the limitation violated both the Rule Against Perpetuities and the rule in *Whitby v. Mitchell*; the decision was correct, but the decision helped keep alive lip service to the rule in *Whitby v. Mitchell*.

There is an extended and scholarly discussion of the rule in *Whitby v. Mitchell* in *Greenleaf v. Greenleaf* but the court clearly states that the discussion is dictum because the limitation in question was to the unborn issue of an ascertained existing (born) life tenant, and hence there was no need to determine whether the rule in *Whitby v. Mitchell* was still in effect in Missouri; *Lane v. Garrison*, the case which in 1922 had clearly repudiated the rule in *Whitby v. Mitchell*, was not noticed by the court.

I have mentioned several cases after 1922 which treated the rule in *Whitby v. Mitchell* as if it were still in effect, but this list is not exhaustive. The principal case is simply the last case which does so. Appellant having raised the applicability of the rule in *Whitby v. Mitchell* in the principal case, Judge Pritchard says: "Nor do we adopt appellant's argument that the limitation here might be 'beyond second takers.'"
then points out that the several executory interests are in the alternative. His reason would seem to be sound, that the interests are substitutional, not successive, and therefore not within the rule of *Whitby v. Mitchell*; this was the common law view.\(^{107}\) It would have been preferable in the principal case (as it would have been preferable in so many previous cases) if the court had made a flat rejection of appellant's argument, citing *Lane v. Garrison*,\(^{108}\) but respondent completely ignored the point and did not bring *Lane v. Garrison* to the court's attention. There is a limit on how much an appellate judge can do in briefing a case before him on appeal.

What is the status of the rule in *Whitby v. Mitchell* today in Missouri? As late as 1949 McCune Gill stated that the existence of the rule in *Whitby v. Mitchell* "seems to be still undecided in Missouri."\(^{109}\) As a practical matter, it makes very little difference whether Mr. Gill was right or wrong in this statement; his opinion carries great weight with most Missouri lawyers who deal with title problems. I am inclined to think that Mr. Gill is right from the title examiner's point of view; there is still so much talk about the rule that a title examiner could not pass as marketable a title which depends on a limitation which does not violate the Rule Against Perpetuities but which does violate the rule in *Whitby v. Mitchell*. There cannot be much doubt that such a title is good in fact and could be sustained in litigation; it is the real possibility of litigation that makes the title unmarketable.\(^{110}\)

What advice to the estate planner who is considering a gift to the unborn child of an unborn person? Obviously such a gift is apt to violate the Rule Against Perpetuities as such, and care must be taken to avoid any such violation. Even if violation of the Rule Against Perpetuities is avoided

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107. See SIMES & SMITH, *FUTURE INTERESTS* § 1218 n.54 (2d ed. 1956), where it is stated: "[The rule in *Whitby v. Mitchell*] did not apply to a limitation to the grandchild of an unmarried person, but was strictly limited to remainders preceded by life estates to unborn persons."

108. *Supra* note 100.

109. 2 GILL, *REAL PROPERTY LAW IN MISSOURI* 808 (1949). I have not found a later opinion of Mr. Gill's on this problem.

110. Too many people do not understand that the property lawyer has a fundamentally different approach than the personal injury lawyer. The property lawyer, whether he be the draftsman of an instrument affecting property or the title examiner of an instrument someone else has drawn, is not so much concerned with his chances of success in litigation as he is with avoiding the possibility of litigation or with determining that there is no real possibility of litigation. For the property lawyer it is not enough to be morally certain that he would win in litigation.

The personal injury lawyer of course is concerned with winning litigation, but his immediate problem in case he does not settle is to get past the trial judge to the jury.
by careful drafting, still it would be better not to make such a gift because of the possibility of litigation over the rule in *Whitby v. Mitchell*. If such a gift is essential to the dispositive scheme, I would be inclined to include a saving clause broad enough to cover "the Rule Against Perpetuities or any other rule or policy corollary thereto." In addition I would be inclined to include a pre-brief citing *Lane v. Garrison*\(^{111}\) and reciting that the gift has been made in view of and reliance on the holding in that case.

**IX. The Doctrine of Lockridge v. Mace**

In *Lockridge v. Mace*\(^{112}\) a testator devised a farm to his wife for life, remainder to his children for life, remainder to his grandchildren for life, and "upon the death of my grandchildren the title in fee simple is to vest absolutely in my great grandchildren, their heirs and assigns." Clearly the interests through grandchildren of the testator could not vest too remotely, but the remainder in fee to great-grandchildren could vest too remotely and without doubt violated the Rule Against Perpetuities.\(^{113}\)

Most courts would have struck down the void remainder in fee in the great-grandchildren and would have saved the valid parts; "infectious invalidity" would have affected the otherwise valid parts only if striking out the interest which violates the Rule Against Perpetuities would have the effect of upsetting the entire dispositive scheme. Missouri, however, struck down the entire clause disposing of the farm, and the farm went by intestate descent to the testator's children.

The remainder in fee to the great grandchildren being void, it must, therefore, remain in the heirs-at-law, and cannot be divested by anything the will contains. Upon this premise these questions arise: What becomes of the estate to Mary Lockridge, widow for life, to Charles R. Lockridge, son for life, remainder to his children for life? Do they share the fate of the clause which attempts to give to the great-grandchildren an estate in fee, or is the will void only in so far as it exceeds the limitation prescribed by law? [Citations of authorities omitted.] Guided by these authorities, it must be held that the third clause of the will, constituting, as it

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111. *Supra* note 100.
112. 109 Mo. 162, 18 S.W. 1145 (1891). *Lockridge v. Mace* has been considered previously in this paper at note 4 *supra*, at text accompanying notes 65-67 *supra*, and at text accompanying note 97 *supra*.
113. See Eckhardt & Peterson, *Possessory Estates, Future Interests and Conveyances in Missouri* § 70, 23 V.A.M.S. 61 (1952), for an analysis at a very elementary level of the remoteness of vesting problem in *Lockridge v. Mace*. 
does, but one disposition of the “home farm,” must fail in toto, and that piece of property must go to the heirs-at-law.\textsuperscript{114}

The authorities cited by the court did not support its conclusion.\textsuperscript{115} From this case comes the doctrine that if any part of a limitation violates the Rule Against Perpetuities the entire limitation fails as a matter of course. This is decidedly a minority view, only Illinois and Pennsylvania (formerly) joining with Missouri.\textsuperscript{116}

McCune Gill in 1949 briefed and reviewed the Missouri cases on perpetuities with special attention to the doctrine of \textit{Lockridge v. Mace}.\textsuperscript{117} Mr. Gill develops an interesting point of view that it made a great difference whether a perpetuities case went to Division No. 1 with Judge Archelaus M. Woodson on that side of the bench, or to Division No. 2 with Judge Robert Franklin Walker on that side of the bench. Judge Woodson was an early trustbuster.

Harry W. Kroeger, a distinguished member of the St. Louis bar, recently made a thorough and scholarly review of the doctrine of \textit{Lockridge v. Mace} in the Washington University Law Quarterly, and there is no need to cover the ground again here.\textsuperscript{118}

Recently attention has turned toward eliminating the doctrine of \textit{Lockridge v. Mace} by legislation. I know of no lawyer who thinks that the doctrine is a good one or that it ought to continue to be the law in Missouri, but there is some difference of opinion as to the scope of the reform legislation.\textsuperscript{119} Bills have been introduced in Missouri in 1959, 1961, and 1963, and another bill will be introduced in 1965.\textsuperscript{120}

\textsuperscript{114} 109 Mo. at 168-169, 18 S.W. at 1146.
\textsuperscript{116} The general rule as to infectious invalidity, as distinguished from this local variant, has been considered briefly at text accompanying note 66 \textit{supra}.
\textsuperscript{118} Kroeger, \textit{The Effect of Violation of the Rule Against Perpetuities in Missouri}, 1952 Wash. U. L. Q. 297.
\textsuperscript{119} Fratcher, \textit{Trusts and Succession in Missouri}, 27 Mo. L. Rev. 93, 96-97 nn.10-13 (1962), considers the doctrine of \textit{Lockridge v. Mace} and reform legislation.
\textsuperscript{120} House Bill No. 341, 70th General Assembly, 1959. § 1 was taken almost verbatim from Mr. Kroeger’s article in 1952 Wash. U. L. Q. 297, 319-320. § 2 dealt with the effective date of an instrument and attempted to handle the very complex problems of powers of appointment and revocable trusts. I heartily approved of the bill insofar as it did away with \textit{Lockridge v. Mace}; but I was opposed to that part of the bill which in a very obscure way attempted to adopt the “wait and see” doctrine (§ 1, lines 10-13 of official bill; p. 320, lines 5-7 of Mr. Kroeger’s article).
To date the application of the doctrine of *Lockridge v. Mace* has created no great injustice. Typically the result has been that the members of the first generation, natural objects of bounty, get the property absolutely by descent, and more remote generations who do not take under the limitation by purchase ultimately will take in the normal course of devolution; trust companies, of course, have lost some very lucrative fees because the trust was voided. In no case of which I am aware has the application of the rule diverted the property to an undesired recipient or cut out natural

The bill was reported out favorably with Committee amendments by the House Judiciary Committee but failed on the House floor.

House Bill No. 34, 71st General Assembly, 1961. This was the same as House Bill No. 341, 70th G.A., 1959, noted next above. The bill was reported out "do not pass" by the House Judiciary Committee and died.

House Bill No. 33, 71st General Assembly, 1961. This was a very short bill. The first sentence was a cy pres provision requiring reformation of any limitation which violates the Rule Against Perpetuities (on the whole desirable, but should be discretionary, not mandatory). The second sentence was a clear adoption of the "wait and see" doctrine (very undesirable). The bill was defective in that it lacked any transition provisions and in that it did not abolish the doctrine of *Lockridge v. Mace*. The House passed the bill but it died in the Senate Judiciary Committee.

The copy for House Bill No. 33 evidently was taken from LEACH, PERPETUITIES IN REAL ESTATE: LEGISLATIVE REFORM, 6 PRACTICAL LAWYER 36, 37 (No. 8, Dec. 1960). In this paper Professor Leach abstracted and reprinted one section from VT. LAWS 1957, No. 177, §§ 1-3; VT. STAT. ANN., Titl. 27, §§ 501-503 (which Professor Leach had drawn), but he omitted from his paper two sections of transitional provisions. Of course these transitional provisions should have been included in House Bill No. 33.

Senate Bill No. 263, 72nd General Assembly, 1963. The bill was prepared by the Trusts Committee of The Missouri Bar (now superseded by the Probate and Trusts Committee), it had the informal approval of the Property Law Committee of The Missouri Bar, and was approved by the Board of Governors of The Missouri Bar. The first section abolished the doctrine of *Lockridge v. Mace* (desirable), and the second section was a cy pres provision permitting reformation (desirable). The third section was a transition provision (essential). This bill passed both the Senate and the House, but by reason of a House Judiciary Committee amendment the two versions differed and there was no time at the end of the session for the differences to be resolved by conference.

The bill to be introduced in the 73d General Assembly, 1965, will be essentially Senate Bill No. 263, 1963, discussed next above, but improved as to detail. This bill will have Bar support.

Professor William F. Fratcher, University of Missouri School of Law, has been the capable principal draftsman of the "Bar" bills, but the substance of the bills has been determined by the Committees. Both Professor Fratcher and I would prefer more flexible discretionary powers in the trial courts than are provided by the bills, but we will support the legislation as an acceptable compromise.

I also have in reserve my own 1959 version of a bill abolishing the doctrine of *Lockridge v. Mace* which is available to anyone in need of a good bill on the problem.

Appellant's Reply Brief, pp. 21-28, has the text of these severable perpetuities bills and the legislative history of each. This material was included in answering the contention in Respondent's Brief, pp. 20-23, Point IV, that the supreme court should adopt the "wait and see" doctrine without benefit of legislation.
objects of bounty. Lawyers generally are confident that if the case arises where the application of *Lockridge v. Mace* would cut out the primary objects of bounty and divert the property to others, the Missouri supreme court will overrule *Lockridge v. Mace*.

The supreme court has been careful in recent years not to gratuitously reaffirm by dictum the doctrine of *Lockridge v. Mace*, but to expressly reserve the question. The discussion of the rule by Coil, C., in *McGowan v. St. Louis Union Trust Co.* is typical of this caution. Indeed, Barrett, C., goes even further in *Thomson v. Union Nat'l Bank* and in a refreshing aside suggests that *Lockridge v. Mace* may already have been overruled.

In my opinion the principal case goes far in overruling the doctrine of *Lockridge v. Mace*. This will be discussed in detail in the last part of the next section.

**X. WHAT DID THE TRIAL AND SUPREME COURTS HOLD?**

**Is Lockridge v. Mace Overruled?**

**A. Introduction**

In ¶ 13 of its decree the trial court in the principal case found as follows:

13. The Court further finds that the Last Will and Testament of Mrs. J. M. Griffin, Deceased, and the trust estate created by Clause Sixth thereunder is not violative of the Rule Against Perpetuities in that all of the interests provided for under said will and trust vested on the date of said Testatrix death in the named beneficiaries of said trust.

The supreme court states this finding in slightly different words but with the same meaning, as follows:

The trial court found that the trust estate created under Clause Sixth of Mrs. Griffin's will is not violative of the rule against perpetuities in that all of the interests thereunder vested on the date of her death in the named beneficiaries of said trust...

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122. 291 S.W.2d 178, 181 col. 2 (Mo. 1956). Judge Barrett says: "And incidentally, if *Lockridge v. Mace*, 109 Mo. 162, 18 S.W. 1145, has not been overruled by having been so frequently distinguished from other cases . . . ."

123. Transcript, p. 149. Appellant's Brief, p. 68, quotes the last part of this finding, beginning with the word "all."

124. 380 S.W.2d at 289, col. 2, last paragraph.
The supreme court affirmed the trial court's finding and decree on this point.

Unfortunately, whoever prepared the findings and decree did not speak with precision, and the decree and holding are open to several different interpretations. In fact, in the course of preparing this paper I have read the decree in three different ways, two of which were superficial first and second impressions, and the last of which was reached after some deliberation. Regardless of the exact holding as to the interests of the parties litigant, the supreme court made it clear that the initial gifts of corpus were vested subject to divestment, and this analysis will be helpful to the bar in future cases involving similar limitations. But the exact holding is important in determining whether *Lockridge v. Mace* has been overruled in fact though not expressly.

What did the trial court mean when it said “all the interests provided for under said will and trust”? Does this mean “the several beneficial interests” or does it mean “the entire corpus”? What did the trial court mean by the “named beneficiaries”? Did it mean the beneficiaries whose given and surnames were used, or did it mean “indicated beneficiaries,” i.e., “all the beneficiaries”? If “named beneficiaries” means individuals identified by name and if “all the interests” means merely the several beneficial interests, are the interests the court holds to be vested only the initial gifts of corpus to the named individuals, or all interests in the named individuals, substitutional as well as initial?

B. “Named Beneficiaries”

Although the trial court may have used the term “named beneficiaries” in the sense of “indicated beneficiaries” so that the term would be broad enough to include widows and lineal descendants, many things indicate that “named beneficiaries” was used in its ordinary sense of individuals identified by name.

First, the supreme court uses the term several times, and in context it seems clear that each time the term refers to individuals whose names are stated. What is more significant is that both appellant and respondent in their briefs take the term “named beneficiaries” to have its ordinary plain meaning. Appellant's Point IV^{125} alleges error in that the trial court did not make a declaration of the rights of all parties to the action. Appellant points out that the trial court's decree did make a finding as to the

125. Appellant's Brief, pp. 65-68.
interests of "the named beneficiaries," but asserts that "This appellant and other parties to the action including the unknown and unborn heirs of Mrs. Griffin and the named beneficiaries have not had a full declaration of their rights . . ." (emphasis added). Respondent did not contest this point, and the supreme court did not mention the point, but respondent's brief has one significant statement indicating that respondent thought "named beneficiaries" meant "named beneficiaries;" respondent stated (emphasis in original):

What was the plan of the Textatrix if some of the named beneficiaries did not survive until the date of termination of the Trust? Testatrix provided . . . that the order of taking would be surviving widow or widower of the named beneficiaries, children or their descendants, survivors in the respective groups, equally to remaining two groups.126

In view of the above, I do not think there is much room for argument as to the meaning of the term "named beneficiaries" as used in the decree in the principal case, insofar as the supreme court is concerned.127

C. "All the Interests"

What the courts meant by "all the interests" is not so clear, and it is not unlikely that the trial court had one meaning and the supreme court another. The term could mean "the entire corpus" or "the entire residuary estate" and this would seem to be the prima facie meaning, because if the trial court meant less the finding should have been that "all of the interests in the named beneficiaries [or preferably, the initial interests in corpus in the named beneficiaries] vested at the testatrix' death in the named beneficiaries." No notice of this problem as to the meaning of "all the interests" was taken in the briefs or by the supreme court.

One indication that "all the interests" did not mean the entire corpus

126. Respondent's Brief, p. 11.
127. The will itself gives little or no help on the meaning of the term "named beneficiaries" because the will does not use that term.

At the beginning of ¶ 6 (c) on payment of income, the testatrix directs payment to "the persons therein named or other persons hereinafter named."

¶ 6 (d) refers to "beneficiaries."

¶ 6 (e) refers to "any beneficiary herein named or any contingent beneficiary," and also refers to "the above-named persons, as their respective interests may appear, or such other persons, as hereinafter provided."

¶ 6 (f) begins: "In the event that any of the persons named in groups one and two, and refers to "such beneficiary."

¶ 6 (g) speaks of Dorothy Weber Long, "named in" group three, and ¶ 6 (h) makes a similar reference to Nelson Weber.
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is found in the fact that the attorney who represented "the unknown and unborn heirs at law" of the testatrix, and also "the unknown and unborn descendants" of the beneficiaries identified by name, filed an appellate brief in effect adopting the respondent's brief in which he supports the trial court's judgment and urges that it be affirmed. In so doing he must have been of opinion that the trial court's decree did not adversely affect the interests of the unborn lineal descendants, either because there was no ruling on the validity of the interests or because the interests were held valid by the trial court. If he had thought the trial court's decree extinguished these interests he would have been compelled to urge that the trial court's decree be modified to protect the interests of the unborn lineal descendants he was representing.\footnote{128}

Apparently there was no representation of unascertained or unborn widows or widowers, unless the doctrine of virtual representation could be invoked by reason of the joinder of an existing wife or husband.\footnote{129}

The difficulty with virtual representation in such a case, insofar as the

\footnote{128. Apparently the attorney was appointed pursuant to Mo. R. Civ. P. 54.08 (d) on unknown or unborn parties. His status was ambivalent. The brief at the beginning purports to be an argument "On Behalf of Unknown and Unborn Defendants on Appellant's Cross-Appeal," but the brief is signed "Attorney for the Unknown and Unborn Heirs of Mrs. J. M. Griffin."

The trial court's findings at ¶ 7, Transcript, p. 147, are that the attorney was duly appointed as counsel for the "unknown and unborn heirs at law" of testatrix, and the "unknown and unborn descendants" of Dorothy Weber Long, Nelson Weber, and other named persons.

The problem is that the interests of these three classes are in conflict. The unknown heirs at law of testatrix could take as such only if the residuary trust were held invalid. The unborn heirs at law of the testatrix could not take on any theory readily apparent, unless one would imply that the reversionary interest (the resulting trust) goes not to heirs determined as of the testatrix' death but to the persons who would be testatrix' heirs if she had died at some later time, and this would seem to make the interest a shifting executory which would violate the Rule Against Perpetuities. The interests of the unknown heirs and of the unborn heirs would seem to be opposed to each other, because if one class takes the other cannot take. The unborn lineal descendants of named beneficiaries could take as such only if the residuary trust were held valid (and that their interests did not violate the Rule Against Perpetuities).

My best guess would be that the attorney really represented the unborn lineal descendants of named beneficiaries, and that representation of unknown and unborn heirs of the testatrix was thrown in for good measure and without any thought as to the conflicting positions of the three groups. The brief of this attorney adopted the respondent's brief which supported the validity of the trust.

\footnote{129. On virtual representation, see the leading case of Brown v. Bibb, 356 Mo. 148, 201 S.W.2d 370 (1947), and the analysis thereof in Eckhardt, Work of Missouri Supreme Court for 1947—Property, 13 Mo. L. Rev. 382, 382-386 (1948).

¶ 5-6 of the trial court's findings and decree, Transcript, p. 146, name many persons who were served with process by registered mail or by publication and by registered mail, and who defaulted. Whether these named persons included spouses could be ascertained only by examining the pleadings.}

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Rule Against Perpetuities is concerned, is that the status of the existing spouses living at the testatrix' death is not necessarily the same as the status of other potential spouses, born or unborn. There is the further problem as to whether virtual representation could be invoked where the class representative defaults, as may have been the case here.\textsuperscript{130}

D. Is Lockridge v. Mace Overruled?

The most likely construction of the decree of the trial court as affirmed by the supreme court is that the supreme court at least was ruling only on the validity of the initial gifts of corpus to beneficiaries individually named, held these gifts defeasibly vested and valid, and expressed no opinion (in the main opinion) on the validity of the several shifting executory interests which might divest the initial vested interests.\textsuperscript{131} If this is the correct view of the opinion, the supreme court in effect is holding (but not saying expressly) that in any event the initial interests are valid regardless of the validity of the executory interests, and therefore the supreme court is holding (but not saying expressly) that the doctrine of Lockridge v. Mace is no longer the law in Missouri, that no longer will the valid part of a limitation necessarily fail if any part of a limitation fails because it violates the Rules Against Perpetuities.

If the correct (but unlikely) construction of the decree of the trial court as affirmed by the supreme court is that the courts hold that the executory interests in unnamed beneficiaries were extinguished (because they violated the Rule Against Perpetuities) and that the entire corpus vests indefeasibly in the first-named takers (reading “all the interests” in its broadest sense), then the supreme court in fact has overruled Lockridge v. Mace and the cases following its doctrine, because the court has struck the limitations voided by the Rule Against Perpetuities and has saved and enlarged the valid limitations. Under the doctrine of Lockridge v. Mace the court was required to strike the whole, the good along with the bad. The answer to this second possible interpretation of the opinion is that first, the supreme court treated the initial interests as defeasibly

\textsuperscript{130} It should be stated that the supreme court's attention was not called to the fact that a “widow” or “widower” cannot be identified until the death of the named spouse. However it was made clear in the briefs that the class of “lineal descendants” could include persons as yet unborn.

\textsuperscript{131} In Appellant's Motion for Rehearing or Transfer to Banc, p. 2, appellant asserts error in the supreme court's “implied holding” that the executory interests are valid. Also on pp. 6-7 of the suggestions, appellant asserts that the main opinion "established the validity of the successive limitations over."

I do not so read the main opinion.
vested, not indefeasibly vested, and second, the supreme court in the main opinion did not indicate anything as to the validity of the executory interests.\textsuperscript{132}

If the correct (but unlikely) construction of the decree of the trial court as affirmed by the supreme court is that both courts hold that all of the interests under the trust in both named and unnamed persons are valid under the Rule Against Perpetuities, then there was no occasion to consider or apply the doctrine of \textit{Lockridge v. Mace}, and the principal case is of no authority or help in getting rid of the doctrine.\textsuperscript{133} One argument in support of the view that the supreme court thought that all of the limitations under the trust were valid is the unfortunate per curiam opinion on motion for rehearing which lends support to the proposition that all of the beneficial interests are valid, in both named and unnamed beneficiaries.\textsuperscript{134} Furthermore, the supreme court in another case might review the "saving clause" in the principal case and take the position that it was effective as a saving clause, and thus distinguish the principal case on the ground that there really was no violation of the Rule Against Perpetuities in it.\textsuperscript{135} Lastly, the attorney for the unborn lineal descendants may have considered that the interests of his unborn clients were validated.\textsuperscript{136}

\textbf{E. Conclusion}

My conclusion as to what the supreme court really held is as follows: the initial gifts of corpus to individuals identified by name are vested, subject to divestment on the condition subsequent of failure to survive, not subject to a condition precedent and contingent, and these initial gifts of corpus do not violate the Rule Against Perpetuities; the divesting interests in surviving spouses, lineal descendants, other named individuals, etc., are shifting executory interests, but the court saith not as to the validity thereof insofar as the Rule Against Perpetuities is concerned; nor

\textsuperscript{132} Note 131 \textit{supra}.
\textsuperscript{133} That the trial court probably considered all interests valid is supported by \S 14 of the findings and decree that the "saving clause" was effective. The "saving clause" is considered at length in text accompanying note 73 \textit{supra}.
\textsuperscript{134} This opinion is considered at length in text accompanying note 56 \textit{supra}. In another case involving executory interests in unascertained persons who may be ascertained too remotely, there is no possibility that the court will follow this per curiam opinion if the case is properly briefed.
\textsuperscript{135} The supreme court's consideration of the "saving clause" is discussed in text accompanying note 87 \textit{supra}. It is clear that in the principal case the supreme court did not consider the saving clause to be effective as a saving clause, but only considered that the saving clause had no adverse effect.
\textsuperscript{136} Note 128 \textit{supra}.
doth the court saith what effect the invalidity of any or all of these divest-
ing interests would have on enlarging prior interests; but in any event the
invalidity of any or all of these divesting interests will not invalidate other-
wise valid prior interests.

In my opinion the supreme court in fact has overruled *Lockridge v. Mace* and the principal case can be cited on that point in cases litigated in the future.