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THE MISSOURI PERPETUITIES ACT*

William F. Fratcher

In 1816 Missouri Territory received the law in force in England prior to the fourth year of the reign of James the First, which commenced on 24 March 1605, Old Style, and 3 April 1606, New Style. England then had a rule, laid down by an unreported 1576 case which has been referred to since 1890 as the Rule in Whitby v. Mitchell, that a remainder could not be limited to the unborn child of an unborn remainderman for life. Like those of most other states, the Missouri courts have ignored the Rule in Whitby v. Mitchell, perhaps on the theory that a decision is not part of the common law unless published in the official reports. Although no hint of the modern common law Rule Against Perpetuities was published in the official reports until Lord Nottingham’s 1682 opinion in The Duke of Norfolk’s Case, the Missouri courts have treated the Rule

*This article has been adapted from the author’s contribution to a panel discussion on current developments in perpetuities law conducted by the Section on Property during the annual meeting of the Association of American Law Schools at Phoenix, Arizona, on January 5, 1980.

The Missouri Perpetuities Act, RSMo § 442.555 (1978) provides:

1. When any limitation or provision violates the rule against perpetuities or a rule or policy corollary thereto and the instrument containing the limitation or provision also contains other limitations or provisions which do not in themselves violate the rule against perpetuities or any such rule or policy, the other limitations or provisions shall be valid and effective in accordance with their terms unless the limitation or provision which violates the rule against perpetuities or such rule or policy is manifestly so essential to the dispositive scheme of the grantor, settlor or testator that it is inerrible that he would not wish the limitations or provisions which do not in themselves violate the rule against perpetuities to stand alone. Doubts as to the probable wishes of the grantor, settlor or testator shall be resolved in favor of the validity of limitations and provisions.

2. When any limitation or provision violates the rule against perpetuities or a rule or policy corollary thereto and reformation would more closely approximate the primary purpose or scheme of the grantor, settlor or testator than total invalidity of the limitation or provision, upon the timely filing of a petition in a court of competent jurisdiction, by any party in interest, all parties in interest having been served by process, the limitation or provision shall be reformed, if possible, to the extent necessary to avoid violation of the rule or policy and, as so reformed, shall be valid and effective.

3. This section shall not apply to any limitation or provision as to which the period of the rule against perpetuities has begun to run prior to the first day of November in the year in which this section becomes effective.


1. 1 Mo. Terr. Laws 436 (current version at RSMo § 1.010 (1978)).
3. 44 Ch. D. 85 (1890).
as in force in the state. This may be on the theory advanced by Judge Woodward in his 1818 opinion in the case of Grant v. The Earl of Selkirk that the common law “became complete and insusceptible of any additions” upon the first coronation of Richard the Lion-Hearted, which occurred on Sunday, 3 September 1189, Old Style. From this it follows that the modern common law Rule Against Perpetuities, although not announced until 1682 or completed until 1833, was already in existence, in its most fully developed form, in gremio legis, on Thursday the 24th of March 1605, Old Style.

A future interest of someone other than the grantor or testator which is to follow immediately an estate or interest measured by a human life created by the same deed or will is a remainder. An indestructible remainder which may possibly vest in interest after the expiration of the perpetuity period is void under the Rule Against Perpetuities. Thus a bequest to “my daughter Mary Bull for life, remainder to her children who reach the age of twenty-three” is void as to the remainder. An indestructible future interest of someone other than the grantor or testator which is not a remainder is void under the Rule if it may become possessory after the expiration of the perpetuity period. Thus an option to purchase without time limit is invalid. So is a lease to commence “when the convention hall which the lessor plans to build is completed.” And if land is conveyed to “John Stiles and his heirs but if liquor is sold on the premises the fee simple shall pass to Roger White and his heirs,” the shifting executory interest of Roger White is void under the Rule Against Perpetuities. An indestructible trust for a purpose (e.g., care of graves or pet animals) or a non-charitable society is void if it may possibly last longer than the perpetuity period.

Like most other American courts, those of Missouri have not applied the Rule Against Perpetuities to such reversionary interests as

6. Cadell v. Palmer, 131 Eng. Rep. 859 (House of Lords 1833), was the decision which finally established the perpetuity period. The period begins on the effective date of the deed or will which creates the interest in question unless some person has power to destroy the interest for his own benefit, in which case the period begins when his power expires. The perpetuity period is human lives in being when the period begins, plus 21 years, plus any period of human gestation involved in the disposition. L. Sims & A. Smith, The Law of Future Interests §§ 1223-1227 (2d ed. 1956).
7. L. Sims & A. Smith, supra note 6, §§ 102, 103.
11. Proprietors of the Church in Brattle Square v. Grant, 69 Mass. (3 Gray) 142 (1855); L. Sims & A. Smith, supra note 6, § 1236.
possibilities of reverter and rights of entry on breach of condition subsequent (known to devotees of the *Restatement of Property* as powers of termination). The Missouri courts have applied the Rule to executory interests, indestructible contingent remainders, options to purchase land, and honorary trusts. The acceptance of the Rule so far as it relates to honorary trusts presumably includes the principle of antediluvian caninity. This principle, based on knowledge that the average life of a dog is from 16 to 18 years, or a quarter of that of humans, reckons the possible life of a dog at a quarter of the longest reported human life span, that of Methuselah, who lived 969 years, as reported in Genesis 5:27 (Authorized Version 1611). A quarter of 969 is 242. It follows that a trust to support my 12-year old dog Fido so long as he lives is wholly void because, according to the mysterious and unchallengeable wisdom of the courts, Fido may live another 230 years and three months.

Before discussing the pre-1965 perpetuities decisions which influenced the Missouri Perpetuities Act of 1965, the creation of future interests in Missouri and their effect require mention. At common law a conveyance to John Stiles for life, remainder to his heirs, did not create a future interest; John Stiles took a present estate in fee simple.


15. Lockridge v. Mace, 109 Mo. 162, 18 S.W. 1145 (1892).


17. See Clark v. Crandall, 319 Mo. 87, 5 S.W.2d 383 (1928).

18. 16 *Encyclopædia Britannica* 976 (11th ed. 1911) ("Longevity"). But see 10 *Encyclopædia Britannica* 913 (15th ed. 1974) ("Life-Span").

19. *In re* McNeill's Estate, 230 Cal. App. 2d 449, 41 Cal. Rptr. 139 (1964) (two dogs and one cat); *In re* Estate of Searight, 87 Ohio App. 417, 95 N.E.2d 779 (1950) (one dog); *In re* Kelly, Cleary v. Dillon, [1932] 1 I.R. 255 (four dogs); L. SIMES & A. SMITH, *supra* note 6, § 1223. But see *In re* Dean, Cooper-Dean v. Stevens, 41 Ch. D. 552 (1889). The courts do not define the principle in the same terms as this writer does but the effect is the same.


in the persons who turn out to be his heirs at his death. The contingent remainder is indestructible during John's lifetime. Under the English law in force from 1285 a conveyance to John Stiles and the heirs of his body did not create a future interest; John Stiles took a present estate in fee tail.

Under a Missouri statute which originated in 1816, John Stiles takes only an estate for life, followed by a remainder in fee simple absolute in the persons who turn out to be the heirs of his body at the time of his death. Illinois, with the same type of statute, holds that the remainder vests in John's children as born; in Missouri the remainder is contingent and cannot be destroyed until John's death.

Moreover, a shifting executory interest which would cut off the fee simple of the heirs of the body is absolutely void for repugnancy even though it does not violate the Rule Against Perpetuities. As you may have guessed by now, all other types of contingent remainder are indestructible in Missouri.

When a legal future interest has been created, the person in possession is usually either a tenant for life or a tenant in fee simple subject to a shifting executory interest. In either case, it is important to the tenant and to the public weal that the tenant be able to make and finance improvements needed to make the land useful and productive under current conditions or to effect its sale to a purchaser who will be able to make and

22. Lewis v. Lewis, 345 Mo. 816, 136 S.W.2d 66 (1940); Green v. Irvin, 309 Mo. 274, 274 S.W. 684 (1925). This means that no one can convey a merchantable title to the land while John Stiles is alive.


25. Moore v. Reddel, 259 Ill. 36, 102 N.E. 257 (1919); Voris v. Sloan, 68 Ill. 588 (1873). But see RESTATEMENT OF PROPERTY § 99, Comment b and Illustrations (1936). If the life tenant is over 60 and the remainder is vested in his children, a purchaser may be willing to accept a conveyance from the life tenant and his children because the risk of more children being born is small.

26. Moore v. Moore, 329 S.W.2d 742 (Mo. 1959), cited in Fratcher, Trusts and Succession in Missouri, 25 Mo. L. Rev. 417, 438 (1960); Schee v. Boone, 295 Mo. 212, 243 S.W. 882 (1922); Emmerson v. Hughes, 110 Mo. 627, 19 S.W. 979 (1892). No one can convey merchantable title while John Stiles is alive. John's children will take the remainder only if they survive their father, hence a conveyance from them will be worthless if they predecease John and grandchildren are the heirs of his body.

27. Schee v. Boone, 295 Mo. 212, 243 S.W. 882 (1922). This does not, however, prevent the limitation of an alternative contingent remainder. A devise to John Stiles and the heirs of his body but if John dies without issue him surviving to Roger White and his heirs would give Roger a valid contingent remainder which would become a possessory estate in fee simple if John dies without issue him surviving. Tapley v. Dill, 358 Mo. 824, 217 S.W.2d 369 (1949).

28. Lewis v. Lewis, 345 Mo. 816, 136 S.W.2d 66 (1940); Eckhardt, The Destructibility of Contingent Remainders in Missouri, 6 Mo. L. Rev. 263 (1941). This means that no one can convey merchantable title while the life tenant is alive.
finance such improvements. The devastating results of a life tenant's inability to adjust to the annexation of rural land into a growing city will be familiar to some readers from Dean Gulliver's discussion in his future interests casebook of the New York case of Moore v. Littel.29

The Statute of Gloucester of 127830 provided that a tenant for life or years who committed waste should pay triple damages and forfeit his estate. It could be enforced only by a reversioner or remainderman in fee and then only when there was no intervening freehold estate in a living person.31 Missouri adopted the Statute in 181632 and amended it in 185533 to allow a remainderman for life or years to sue and to permit a reversioner or remainderman in fee to do so even though there was an intervening freehold estate in a living person. The English courts held that it was waste to convert cultivated land to pasture or pasture to cultivated land34 and that the erection of improvements was waste even though the tenant bore their cost and they increased the value of the reversion or remainder. For example, in City of London v. Greyme,35 decided in 1607, it was held

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29. 41 N.Y. 66 (1869), discussed in A. GULLIVER, CASES AND MATERIALS ON THE LAW OF FUTURE INTERESTS 301-23 (1959). John Jackson was tenant for life of a farm, with remainder to his heirs. When he was in his 60s the City of Brooklyn annexed the farm, constructed a grid of streets across it, and increased the taxes greatly. John's cows could not reach water and his plow could not be moved where it was needed because of the streets. His income dropped so low that he could neither pay for the fencing required to keep animals within the new city blocks nor pay the higher taxes. At the age of 76 John gave up and conveyed his life estate to his 11 children. The children could not convey merchantable title to lots because they might not be his heirs. In consequence, by the time of John's death at the age of 89, his family, which should have been wealthy, was ruined. The farm was worthless to everyone for 30 years.

30. 6 Edw. I, c. 5, § 2 (1278). "And he which shall be attainted of Waste, shall lose the Thing that he hath wasted, and moreover shall recompense thrice so much as the Waste shall be taxed at." The remainder was not recognized until 1305. Fitz William v. Anonymous, R.S.Y.B. 35 Edw. I 20 (1305). The contingent remainder to unborn or unascertained persons was not recognized until shortly before 1500. 3 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 134-36 (5th ed. 1942); 7 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 82-101 (2d ed. 1957). It follows that the draftsmen of the Statute of Gloucester were not thinking of estates for life followed by remainders but only of those followed by reversions. A reversioner is a landlord with whom a tenant is connected by a tenurial relationship and with whom he usually has frequent dealings. There is no disagreement with the draftsmen of the statute that a tenant under a five-year lease who is paying rent monthly to his landlord ought not to build a pig sty or paint the barn purple without asking the landlord's permission. When a life estate is followed by a remainder held by a stranger with whom the life tenant has had no dealings or by unborn or unascertained contingent remaindermen, there is no tenurial relationship or history of prior contacts. The situation is very different from that contemplated by the draftsmen of the statute. How can a life tenant possibly secure permission from the unborn heirs of his body to install plumbing, electric wiring, or central heating?

31. COKE ON LITTLETON f. 53b (1628).

32. See note 1 supra.

33. Mo. Laws 1855, at 1018, §§ 42-51 (current version at RSMo § 537.430 (1978)).

34. COKE ON LITTLETON ff. 53a, 53b (1628).

35. 79 Eng. Rep. 158 (K.B. 1607). The tenant could not operate the mill by
that a tenant who improved a hand-operated mill so that it could be operated by a horse was subject to the penalties of the Statute. The Missouri decisions are in full accord. In a 1924 case\textsuperscript{36} it was held that the erection, at the tenant's expense, of an outdoor privy was waste. In 1975 it was decided that a tenant's installation of wiring, air conditioning, and central heating, which cost him $50,000, was waste which would forfeit his estate if not expressly permitted by the terms of the instrument creating it.\textsuperscript{37} The Missouri courts hold, of course, that it is waste for a life tenant to cut timber\textsuperscript{38} or open mines.\textsuperscript{39}

\textit{Stephens v. Gillette,}\textsuperscript{40} decided in 1971, involved an unimproved, unfenced forty acre tract of land near a main highway leading from St. Louis. It had been devised in 1926 to the plaintiff with a gift over, in the event of her death without bodily heirs, to another descendant of the testator. The plaintiff, who was a sixty-year-old crippled spinster earning her living as a typist, sued the heirs of the executory devisee to secure sale of the fee simple and investment of the proceeds under a statute permitting such sale "when the life or other estate of immediate enjoyment is burdensome and unprofitable."\textsuperscript{41} It was shown that the land produced no income hand because of his landlord's breach of a promise to provide eight men for the purpose. His use of a horse was a necessity under the circumstances. See also Cole \textit{v. Green}, 83 Eng. Rep. 422, \textit{aff'd}, 85 Eng. Rep. 1022 (House of Lords 1671) (remodeling building so as to increase its rental value by some 66%); Lord Darcy \textit{v. Askwith}, 80 Eng. Rep. 380 (C.P. 1618).

40. 464 S.W.2d 507 (St. L. Mo. App. 1971).
41. H.B. 693, 53d \textit{GA}, Mo. Laws 1925, at 159, provided:
[\textit{A}ny person or persons holding the estate or an interest in the estate, carrying the right of immediate use and enjoyment of such lands, may sue in equity for sale of such lands or any of the same upon the ground that the life or other estate of immediate enjoyment is burdensome and unprofitable \textit{for} that the cost of paying the taxes and assessments thereon and holding, maintaining, caring for and preserving the lands from waste, or injury, and deterioration, exceeds the reasonable value of the rents and profits thereof, and that a greater income can probably be had from proceeds of a sale thereof invested in bonds of the United States or of Missouri or some municipality or school district thereof or first lien mortgage loans upon land situate in this state.\ldots]

Recognizing that the italicized word "\textit{for}" was almost certainly a typographical error, the Revisor of Statutes changed it to "\textit{or}" in § 528.010 of the official Missouri Revised Statutes of 1969 and 1978. The court, however, cited V.A.M.S. vol. 36, which was printed in 1953 and used the word "\textit{for}." This may explain its decision that, however burdensome and unprofitable the life estate might be, it would not order sale of the fee simple if the land would produce enough income to pay taxes and maintenance costs. \textit{Mo. Sup. Cr. R.} 96.02 restates § 528.010, but uses the word "\textit{because}" instead of "\textit{for}" or "\textit{or}." This would seem to favor the narrow basis of relief indicated by the court of appeals. The reference to the statute in Keim \textit{v. Mattes}, 507 S.W.2d 397, 404 (Mo. 1974), does not clarify the matter.

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at all, the taxes were $83.68 a year, that it could be sold for $32,000, and that this would give the plaintiff some $1,900 a year income. Relief was denied on the ground that it should be possible to rent the small part of the tract which had been cleared for agricultural purposes at a rental great enough to pay the taxes.

It is, thus, evident that a tenant in possession is unable to meet changed conditions which require improvements to the land if there is an outstanding remainder or executory interest in persons who are unborn, unascertained, or uncooperative. It is sometimes stated that the situation is much better when the future interests are created as beneficial interests under a trust. In the absence of statute it is a breach of trust for a trustee to make improvements or even to rebuild a building destroyed by fire unless the terms of the trust authorize such action. In Cozart v. Green Trails Management Corp., decided in 1973, a Missouri court held that it was a breach of trust for a trustee expressly authorized to construct paths and stables to build a road. The court said, "[T]he powers of the trustee are limited by the terms of the trust. These powers are strictly construed." In Cozart v. Green Trails Management Corp., decided in 1973, a Missouri court held that it was a breach of trust for a trustee expressly authorized to construct paths and stables to build a road. The court said, "[T]he powers of the trustee are limited by the terms of the trust. These powers are strictly construed."

The Missouri decisions hold that a trustee may not give a lease which will extend beyond the term of the trust. It would seem that an implied power to sell land is never found and the court indicated in an 1895 case that it could not under any circumstances authorize an act not permitted by the terms of the trust. This view may have been relaxed.

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43. 501 S.W.2d 184 (Mo. App., D. St. L. 1973).
44. Id. at 187.
45. St. Louis Union Trust Co. v. Van Raalte, 214 Mo. App. 172, 259 S.W. 1067 (St. L. 1924). Cf. Carter v. Boone County Trust Co., 338 Mo. 629, 92 S.W.2d 647 (1936) (court found an implied power to lease for 50 years). The will directed the trustees to keep a commercial building insured against fire so that they could rebuild. The building burned and the insurance proceeds were insufficient to erect a suitable building. The tenant under the 50-year lease covenanted to erect a building that was appropriate.
46. Garesche v. Levering Invest. Co., 146 Mo. 436, 445, 48 S.W. 653, 657 (1898). Cf. Restatement (Second) Trusts § 190 (1959) (implied power to sell land would be found if necessary or appropriate to carry out the purposes of the trust). An implied power to sell corporate stock was found in First Nat'l Bank v. Hyde, 363 S.W.2d 647 (Mo. 1962).
47. Drake v. Crane, 127 Mo. 85, 29 S.W. 990 (1895). But see Restatement (Second) Trusts § 167 (1959). Section 190, Comment f, provides:

Although by the terms of the trust the trustee is not empowered to sell trust property, or even if he is directed not to sell it, yet if owing to circumstances not known to the settlor and not anticipated by him the purpose of the trust would be defeated or substantially impaired unless the property is sold, a sale can be made with the permission of the court.

48. Seigle v. First Nat'l Co., 338 Mo. 417, 90 S.W.2d 776 (1936) (trustee authorized to defer carrying out a mandatory direction to sell securities in view of bad market condition during the depression). But see Thomson v. Union Nat'l Bank, 291 S.W.2d 178 (Mo. 1956) (court will not permit trustee to sell securities merely because income from them has dropped from six to three percent and is insufficient to support life beneficiary).
but I have not found a judicial authorization to sell land. An express power of sale does not include a power to mortgage.49

In a case decided in 1914,50 land was devised to A for the use of B upon trust to pay the income to C for life and, after her death, to convey to C's children, whenever born. It was held that, despite the fact that the whole trust was a use on a use, the Statute of Uses executed the remainder of the children of C into a legal remainder in view of the Missouri rule that an expressly imposed duty to convey to the beneficiaries is not an active duty.51 Hence a conveyance by the trustee, purportedly made under an express power of sale conferred by the will, conveyed only an estate for the life of C. From this case it would seem that a trustee can seldom convey or mortgage the fee simple because the future beneficial interests under the trust are usually executed by the Statute of Uses and powers expressly conferred upon him tend to be construed to be limited to the estate _pur autre vie_ which he holds by virtue of the Statute of Uses. In Missouri, the effort to create future interests as beneficial interests under trusts may be insufficient to ensure that the land can be improved, mortgaged, or sold as circumstances require. In sum, the creation of any kind of a future interest, legal or equitable, usually acts as a virtually complete restraint on improvement and alienation.

The Missouri law of future interests and trusts, as described in the preceding five paragraphs, is archaic, obsolete, and contrary to the interests of both property owners and the public. There is no good reason why subjecting land to a future interest or a trust should act as a prohibition on improvement, development, change in use to meet new circumstances, leasing, mortgage, or sale. In England the Statute of Gloucester and the Statute of Uses have been repealed.52 Every tenant for life and trustee of land has statutory power to make improvements, to mortgage the fee simple to finance them, to give long leases, and to sell the full fee simple

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49. Price v. Courtney, 87 Mo. 387 (1885).
51. Cornwell v. Orton, 126 Mo. 355, 27 S.W. 536 (1894) (trust for sole and separate use of a married woman under the terms of which the trustee was expressly required to convey, mortgage, and lease as directed by the beneficiary inter vivos or by will). This decision represents an extreme minority view. Rarick, _The Trustee's Estate and the Ultimate Interest_, 8 OKLA. L. REV. 1, 35 (1955).
52. Chapter 5 of the Statute of Gloucester, _supra_ note 30, which was deemed to provide that a tenant for life who improved or changed the mode of use of the land should forfeit his estate, was repealed by the Civil Procedure Acts Repeal Act, 42 & 43 Vict., c. 59 (1879). The Statute of Uses, 27 Hen. 8, c. 10 (1555), which was designed to increase the feudal revenues of King Henry VIII, was deemed to provide that the interest of a beneficiary of a trust of land was "executed" into a legal estate if the trustee had no active duties with respect to that beneficiary. See Fratcher, _Uses of Uses_, 34 Mo. L. Rev. 39 (1969). This statute, which serves no purpose but causes much trouble, was repealed in England by the Law of Property Amendment Act, 1924, 15 & 16 Geo. 5, c. 5, § 1. It is, however, still in force in Missouri. RSMo § 456.020 (1978).
The proceeds of sale are held on trust for the life tenant or beneficiary and the remaindermen. Progressive states in this country have conferred like statutory powers on trustees and enabled legal life tenants to secure judicial sale of the fee simple and investment of the proceeds, upon trust for the life tenant and remaindermen, whenever this is desirable under the circumstances. The unsatisfactory state of the Missouri law of future interests and trusts may explain, in part, the peculiar approach of the Missouri courts to the problem of the effect of violation of the Rule Against Perpetuities.

The landmark perpetuities case in Missouri is Lockridge v. Mace, decided in 1892. It involved a devise of a farm to the testator’s children for life, remainder to his grandchildren for life, remainder to his great-grandchildren in fee. The remainder to the great-grandchildren was held to violate the common law Rule Against Perpetuities, in consequence of which not only it but the prior life estates of the children and grandchildren were void. The court indicated that whenever any part of a disposition of particular property violates the Rule, all of that disposition is ipso facto void. This doctrine of automatic infectious invalidity was extended by the court in 1907 to a rule that the whole will is void if any provision in it violates the Rule Against Perpetuities and all of its provisions are part of a general plan. This is consistent with the Missouri approach in other areas. In a 1930 case involving a pecuniary bequest to a stranger and a devise of the residue to a family trust, it was indicated that the family trust would fail if the wholly unrelated pecuniary bequest was procured by undue influence. A 1931 case involved a twenty-year lease under which the lessee was to pay ten cents per ton for any coal mined and $50 per month for maintaining a railroad switch on the land. There was no coal but the lessee constructed and used the switch. It was held that the lessor could not recover the $50 a month rent because, he


54. The Uniform Trustees’ Powers Act (1964) or similar legislation has been enacted in some 20 states. 7A U.L.A. 761 (1978). The need for such legislation is explained in Fratcher, Trustees’ Powers Legislation, 97 N.Y.U.L. Rev. 627 (1962).

55. This has been achieved in some states by legislation and in others by judicial decision. The statutes and cases are collected in Fratcher, A Modest Proposal For Trimming the Claws of Legal Future Interests, 1972 Duke L.J. 517, 537-42; L. SMITH & A. SMITH, supra note 6, §§ 1941-1946.

56. 109 Mo. 162, 18 S.W. 1145 (1892).


being a life tenant, the provision as to coal was illegal and therefore the whole lease was void.59

Under English law the invalidity of a contingent remainder under the Rule Against Perpetuities does not affect the validity of prior interests in the same property which have vested or are certain to vest within the perpetuity period. It has no effect whatever on dispositions of other property made by the same will or deed. The invalidity of a shifting executory interest which follows a fee simple determinable does not affect the fee simple determinable. The failure of a shifting executory interest limited to cut off an otherwise absolute fee simple makes the fee simple absolute. In other words, the will or deed takes effect as if the language purporting to create the interest which violates the Rule had never been included.60 In this country, however, some courts have developed a doctrine of infectious invalidity under which interests that do not themselves violate the Rule Against Perpetuities may fail because other interests created by the same will or deed do violate the Rule. Most of the courts which have accepted this doctrine do not apply it unless it is quite apparent that the grantor or testator would prefer, if he knew that part of his disposition would fail, that some other part or parts also should fail. Courts in Illinois, Missouri, and Pennsylvania, however, took the position represented by Lockridge v. Mace61 that failure of a future interest destroys all prior interests in the same property.62

Section 402 of the Restatement of Property also declares that invalidity of a remote future interest under the Rule Against Perpetuities may entail the infectious invalidity of prior interests in the same property or of the entire deed or will, including codicils.63 In some cases total invalidity of the will may be preferable to partial invalidity. Suppose a will devises the bulk of the estate to a family trust and the residue to a home for elderly cats. If the family trust fails, the testator might well prefer to have his estate distributed as on intestacy to having it all pass to the home for elderly cats.64 The Restatement enjoins consideration of the testator's probable preference in determining whether infectious invalidity should occur. The Missouri rule of automatic infectious invalidity did not.

The forgetfulness of lawyers who draft wills and deeds results in violations of the Rule Against Perpetuities. Some forget that there is such

61. See note 56 supra.
62. L. SAMES & A. SMITH, supra note 6, § 1262.
63. RESTATEMENT OF PROPERTY § 402, (b) and (c) (1944); RESTATEMENT (SECOND) OF PROPERTY (Tent. Draft No. 2, § 1.5, Comments a, b, 1979).
64. See Fratcher, Bequests for Purposes, 56 IOWA L. REV. 773, 779-80 (1971).
a rule. Some forget that an option to purchase without a time limit is void under the Rule. Some forget that the proposed municipal convention hall may take twenty-two years to complete. Some forget the principle of antediluvian caninity. Some forget that old men occasionally marry young women, who usually survive their husbands. Worst of all, some lawyers forget that, because Methuselah begat a child at the age of 187, and Abraham and Sarah had their first child when he was 100 and she was 90, there is a conclusive presumption that every human being is capable of having a child as long as she lives. Suppose that the client, speaking in 1980 from a bed in a nursing home, tells the lawyer that she wants to give Blackacre to Uncle John Stiles, who is 80, for life, then to his wife, Aunt Lucy Stiles, who is 78, for her life, and then to their children, Bob and Molly. By the time the lawyer has returned to his office he has forgotten all of the names except that of John Stiles, who belongs to his Rotary Club. Accordingly he drafts a paragraph of the will reading, “I devise my farm called Blackacre, comprising 640 acres, more or less, situated on the south bank of the Missouri River, to my uncle, John Stiles, for and during the full term of his natural life, remainder to his widow, for and during the full term of her natural life, remainder to his children who survive both him and his widow.” Forgetfulness has made the remainder void under the Rule Against Perpetuities. The lawyer has forgotten that Aunt Lucy may die next week and that Uncle John may marry a woman born in 1982 and have ten children by her.

Some thirty years ago thoughtful lawyers began to worry about possible malpractice liability for lawyer forgetfulness. Some astute lawyers proposed a modification of the Rule Against Perpetuities called the “wait and see” doctrine. Under this doctrine, the validity of future interests, instead of being determined at the beginning of the perpetuity period on the basis of the facts and possibilities then existing, is determined at the end of the period on the basis of the facts as they then are. The “wait and see” doctrine has been adopted by statute or judicial decision in some twenty-one jurisdictions. It is a virtually foolproof protection against lawyer

65. See notes 9 & 16 supra.
66. See note 10 supra.
67. See notes 12, 17 & 19 supra.
68. Genesis 5:25.
69. Genesis 17:17, 21:5.
70. Jee v. Audley, 29 Eng. Rep. 1186 (1787), laid down a conclusive presumption that everyone, regardless of age, sex, or physical condition, is capable of having a child so long as he lives. This presumption was criticized in the famous article, Leach, Perpetuities in a Nutshell, 51 HARV. L. REV. 638 (1938).
71. L. SIMES & A. SMITH, supra note 6, § 1411 (1979 Supp.). In Connecticut, Florida, Maine, Maryland, and Massachusetts, the waiting is only until the termination of life interests created by the disposition. The waiting is for the full perpetuity period in England, Hong Kong, Kentucky, New Hampshire, New Zealand, Northern Ireland, the Northwest Territories, Ohio, Ontario, Pennsylvania, Queensland, Vermont, Victoria, Wales, Washington, Western Australia, and the Yukon Territory. Waiting for the full perpetuity period is proposed by RESTATEMENT (SECOND) OF PROPERTY (Tent. Draft No. 2, § 1.4, 1979).
malpractice liability for forgetfulness. If the devisees must wait a hundred years before the invalidity of the will can be determined, the forgetful lawyer who drafted it, not being antediluvian, will be dead and the non-claim statute will have barred all claims against his estate.

A 1952 article\textsuperscript{72} discussed the Missouri perpetuities cases and proposed legislation which was introduced in 1959.\textsuperscript{73} This bill would “wait and see” until the expiration of the perpetuity period. If the future interest in question had vested by then, it was valid; if it had not, it passed to whoever was then entitled to the income. In 1961 a bill based on part of the Vermont statute was introduced in Missouri.\textsuperscript{74} Under this bill there would be “waiting and seeing” until the end of the perpetuity period, followed by judicial reformation \textit{cy-pres} of any future interest which had not vested by the end of the period. Neither of these bills was approved by the interested committees of the Missouri Bar.

Because my colleague, Professor Willard Eckhardt, was busy writing a book, I was asked to prepare a bill to be sponsored by the Missouri Bar. My draft bill of 21 March 1960 contained thirteen sections providing: (1) That if an instrument is susceptible to two constructions, one of which avoids violation of the Rule Against Perpetuities, that one is to be preferred.\textsuperscript{75} (2) That infectious invalidity should operate only if the settlor or testator would have preferred it to validity of those parts of the disposition which do not violate the Rule.\textsuperscript{76} (3) That a class gift should be good as to those members of the class whose interests could not vest too remotely, even though the interests of other members of the class could do so.\textsuperscript{77} (4) That age contingencies should be reduced to age twenty-one

\textsuperscript{72} Kroeger, \textit{The Effect of Violation of The Rule Against Perpetuities in Missouri}, 1952 Wash. U.L.Q. 297.

\textsuperscript{73} House Bill 341, 70th GA (1959). This was reintroduced in 1961 as House Bill 84, 71st GA. Under this bill, Fido, note 19 \textit{supra}, would be told, “If you die in less than 21 years, the whole accumulated income will be paid to your estate; if you live more than 21 years, you get the principal as well as the income; but, in either event, you get nothing at all before your death or the end of 21 years, whichever comes first.”

\textsuperscript{74} House Bill 33, 71st GA (1961). The bill was based on Vt. Stat. Ann., tit. 27, § 501 (1975). The Vermont statute was drafted by Professor W. Barton Leach. It contained two other sections, one of which gave it purely prospective effect and the other of which provided, “This act shall not be construed to invalidate or modify the terms of any interest which would have been valid prior to its enactment.” Vt. Stat. Ann., tit. 27, §§ 502, 503 (1975).

\textsuperscript{75} This was based on Restatement of Property § 375 (1944). It was really unnecessary because the Missouri Supreme Court had already adopted the rule of the Restatement. Trautz v. Lemp, 329 Mo. 580, 46 S.W.2d 135 (1932).

\textsuperscript{76} This is the rule of Restatement of Property § 402 (1944), note 63 \textit{supra}.

\textsuperscript{77} This was designed to abolish the much-criticized rule in Leake v. Robinson, 35 Eng. Rep. 979 (1817), that a class gift is wholly void if the interest of any possible member might vest too remotely, even though the interests of some members are already vested or could not vest too remotely, \textit{e.g.}, a remainder to “my great-grandchildren” when there are already several in being.
when necessary to avoid violation of the Rule.\textsuperscript{78} (5) That the possibility of a person over fifty having a child in the future should not invalidate an interest.\textsuperscript{79} (6) That the possibility of a person now in being marrying a person not yet born should not invalidate an interest. This was to eliminate the "unborn widow" trap. (7) That a limitation which violates the Rule should be reformed, if possible, to come within the Rule. If reformation would more closely approximate the intent of the settlor or testator than total invalidity. (8) An express rejection of "wait and see." (9) That possibilities of reverter and rights of entry on breach of condition subsequent on estates in fee simple should expire after thirty years.\textsuperscript{80} (10) That these reversionary interests should be alienable. (11) That a trust for specific animals or a noncharitable purpose could be carried out for twenty-one years. This was to take care of Fido. (12) That all beneficiaries of a trust may compel its termination, despite its terms. This was designed to prevent trusts for noncharitable corporations and societies from failing under the Rule Against Perpetuities.\textsuperscript{81} (13) That the Act should be retroactive.\textsuperscript{82}

Discussions in Missouri Bar committees and with members of the bar Board of Governors and the legislature indicated that the bill was too long to get through and that retroactivity was unacceptable. Willard Eckhardt and I cut it down to three sections: (1) to shift from automatic infectious invalidity to the Restatement view that infectious invalidity should occur only if the settlor or testator would wish it; (2) to permit judicial reformation cy-pres if the settlor or testator would wish it; (3) to provide that the Act would be prospective only except as to revocable inter vivos trust instruments and wills of settlors and testators who were alive on the effective date.

Why did we reject "wait and see"? In view of the attitude of Missouri courts, total elimination of infectious invalidity seemed impossible. "Wait and see" means that the validity of provisions cannot be determined until the end of the measuring lives (Massachusetts type statute) or twenty-one years after the end of these lives (Pennsylvania type statute). With infectious invalidity, the validity of the present estates for life or years cannot be determined while they are in existence. A recent Connecticut case\textsuperscript{83} involved a will which gave life income interests in part of the residue to

\textsuperscript{78} This was based on Law of Property Act, 1925, 15 & 16 Geo. 5, c. 20, § 163.
\textsuperscript{79} See notes 68-70 supra.
\textsuperscript{80} See note 13 supra.
\textsuperscript{81} See notes 12 & 17 supra.
\textsuperscript{82} 1978 Pennsylvania legislation making the 1947 Pennsylvania "wait and see" statute (20 PA. STAT. ANN. § 6104) retroactive was held constitutional in \textit{In re Frank}, 480 Pa. 116, 389 A.2d 536 (1978).
the testator's children and grandchildren, with remainder to his great-grandchildren. The validity of these dispositions was not litigated until the first grandchild died. The court struck down not only the remainder to the great-grandchildren but also the life interests of the grandchildren, which could not vest too remotely. As the grandchildren had been receiving income for some years, it would seem that they or the trustee would have to pay over the amount already received by them to the successors in interest of the children, who might well be legatees under their stepparents' wills to whom they and the testator were not related. What good is a life income interest if the life beneficiary dare not spend the money because it cannot be ascertained until his death whether it is valid?

In applying the Rule in Whitby v. Mitchell,84 the English courts reformed the remainder to the unborn child of the unborn life tenant cy-pres by giving the life tenant an estate tail.85 Reformation cy-pres was used by the New Hampshire court in 1891 to cut the age contingency in a class gift to grandchildren from forty to twenty-one and thus save it under the Rule Against Perpetuities.86 Such judicial reformation cy-pres was advocated in a 1946 article by James Quarles87 and a masterly 1963 article by Olin Browder88 that served as a brief in support of the Missouri Bar bill. This bill failed in the 1963 session of the General Assembly89 but passed in 1965.90 As Professor Browder pointed out, immediate reformation cy-pres can do anything that "wait and see" could do without forcing life tenants to wait until their deaths to find out whether their life interests are valid. Secondly, it deprives heirs of the motive to attack wills on perpetuities grounds. Browder suggested as a third advantage the possibility of tailoring the disposition to the existing family situation. For example, instead of changing a class gift to grandchildren who reach forty to one to those who reach twenty-one, a court could, in a case where the likelihood of more grandchildren is highly unlikely, limit the gift to grandchildren in being at the testator's death.

Last but not least, judicial reformation cy-pres can free us from the

84. 44 Ch. D. 85 (1890); notes 2 & 3 supra.
89. S. 263, 72d GA (1963).
90. S. 318, 73d GA (1965); RSMo § 442.555 (1978). Governor Hearnes approved the bill after conferring with Professor Eckhardt and this writer. Eckhardt, Perpetuities Reform by Legislation, 31 Mo. L. REV. 56 (1966), discusses the extent to which the act is retroactive.
horrible principle of antediluvian caninity.91 A trust to support my old
dog Fido as long as he lives can be reformed cy-pres so as not to last longer
than twenty-one years after the death of the survivor of the descendants
of Queen Victoria in being when Fido's master died. This would ensure
comfortable support for Fido during the first hundred of his remaining
230 years.

91. Judicial reformation cy-pres of an interest which violates the Rule Against
Perpetuities is now permitted at the beginning of the perpetuity period in Cali-
fornia, Hawaii, Idaho, Mississippi, Missouri, Oklahoma, and Texas. It is per-
mitted at the end of the "wait and see" period in Kentucky, New Hampshire,
New Zealand, Ohio, Vermont, and Washington. Restatement (Second) of Prop-
erty (Tent. Draft No. 2, § 1.5, 1979) would permit such reformation at the end
of the "wait and see" period. L. Simes & A. Smith, supra note 6, §§ 1256, 1411
(1979 Supp.). "Wait and see" legislation of the Massachusetts type does not help
poor Fido. The waiting is limited to the period of human lives involved in the
disposition and Fido is not a human being. Eaton v. Miller, 250 A.2d 220 (Me.
1969). Under the Pennsylvania type of legislation the waiting may be for 21 years.
Presumably Fido should be told, "If you die within 21 years you get the money but
if you live for more than 21 years you get nothing." Under either type of "wait
and see," Fido starves to death.