SATISFYING MISSOURI'S PERPETUITY RULES*

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INTRODUCTION

Satisfying the so-called perpetuity rules enjoys the undeserved reputation of being one of the most troublesome problems encountered in designing transfers of property. Although the learning about such rules may seem intricate and confusing, this is due, not to any complexities inherent in the rules themselves, but rather to the construction problems so often associated with the application of such rules, and to the confusion necessarily incident to the explorations of the courts as they seek to determine the objectives, the operational areas, and the permissible period of such rules. From the standpoint of the draftsman of a deed or a will, the perpetuity rules seldom present serious difficulties once they are clearly defined in the law. Usually a conveyor's scheme for the disposition of his property is safely within the confines of the perpetuity rules. Sometimes his plans are so ambitious that they overstep these bounds, and must be changed accordingly.

That same compelling urge to curtail future transfers of the property which they have conveyed that has characterized English landowners throughout the centuries is manifest on the part of many conveyors in the United States, despite the absence of the same impelling inducement, land scarcity. Diminishing litigation in this field of the law does not necessarily imply any lessening of these desires; more probably it indicates a comprehension on the part of landowners that the hostile attitude of the courts towards these restraints has become crystallized in the law. Such restraints may be desired by conveyors in order to continue the ownership of the conveyed property in the conveyor's family, either for sentimental reasons or to enhance the financial prestige of his descendants; to assure more adequate support and maintenance of the conveyor, the conveyee, or others; to prevent the acquisition of the property by one disliked by the

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* This discussion is limited to the rule against restraints on alienation and the common law rule against perpetuities.

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conveyor; to preserve the homogeneity of the group residing in a particular area; to prevent the loss of the property for the satisfaction of the conveyee's debts; and for other similar purposes. Where a conveyor's plans for the disposition of his property do not conform to the requirements of social policy with respect to restraints upon alienation, they must, of course, be changed. However, a conveyor should always be afforded the advantage of all of the available means at his disposal for carrying out his scheme of disposition in as substantial a manner as is permissible within the limits prescribed by the law.

The Origin and Development of the Perpetuity Rules

The designing of conveyances which satisfy the perpetuity rules, and which afford to conveyors the leeway which they desire in their property dispositions, in so far as the law permits, requires, among other things, an understanding of the objectives of the perpetuity rules, their permissible periods, their operational areas, and the manner of their application. Since our modern perpetuity rules are substantially identical with the earlier rules, except in so far as new situations have caused some changes, a thumbnail sketch of their origin and development should prove helpful in understanding them.

While the degree of restraint which the early English law imposed on a landowner's right to transfer his land is more or less lost in obscurity prior to the twelfth century, by that time the free inter vivos transferability of land was affected by at least two sets of causes. In the first place, an owner of land could not transfer his land in a manner that would defeat his heirs. By the middle of the thirteenth century, however, this restriction had disappeared, and the term "heirs," in a conveyance to "A and his heirs," came to be regarded as a word of limitation, defining the duration of A's estate, but creating no interest in the land in favor of A's heirs. Where land was conveyed to "A and the heirs of his body," the courts, always alert to promote the free alienability of land, treated this as a conveyance to A upon condition that he have an heir of his body, and, after the birth of such heir, A was permitted to convey a fee simple estate in the land free from any claims of the heirs of his body. In the second place, in order to maintain the rights and duties embodied in the lord and tenant relation, a transfer of land by a tenant required

the consent of his lord. Gradually, as the feudal law of property lost its aspects of public law, this restraint disappeared. The Statute of Quia Emptores (1296) permitted a tenant to alienate freely without the consent of his lord.

At the same time that these liberalizing forces were making substantial headway in freeing the alienation of real property from the restraints which the early feudal law had imposed, there were also certain reactionary forces busy, not only in opposing the removal of the earlier restrictions, but in seeking legislative permission for the imposition of new restraints. After the courts had decided that a conveyance to "A and the heirs of his body" gave to A a conditional fee, which enabled him to convey a fee simple absolute after the birth of an heir to his body, the landowners, anxious to continue the ownership of their land in their families, persuaded Parliament to pass the Statute De Donis Conditionalibus (1285) converting such conditional fees into fees tail, and thus greatly restricting their alienation. The restraints imposed on the alienation of land by means of the fee tail estates continued for about two hundred years after the passage of the statute De Donis, and the greater part of the land of England was rapidly becoming tied up, and removed from commerce, by means of the fee tail estates. There was constant objection to this, and the courts finally devised methods for barring entails by means of fictitious law suits whereby an owner of a fee tail estate was enabled to convey a fee simple estate in the land. This was a serious blow to those landowners who wished to continue the ownership of their lands in their descendants, since the fee tail estate was the most effective device for this purpose ever made available to English landowners. Following the success of the fine and recovery in barring entails, attempts were made by conveyors, in the creation of a fee tail estate, to impose a condition that, upon any attempt to levy a fine or recovery, the estate could be forfeited. This expedient failed, since such conditions were held by the courts to be invalid restraints upon alienation.

When estates tail lost their effectiveness for curtailing the alienation of land, another method soon devised by conveyors for this purpose was to include in the conveying instrument an express provision attempting to limit, in such manner as the conveyor wished, the free alienability of the conveyed land. These

provisions were, in the main, declared by the courts to be void. Then conveyors sought to accomplish the same purpose by declaring in the conveyance that upon an alienation, or an attempted alienation, contrary to the terms of the conveyance, the estate therein conveyed might be forfeited. But again, these methods of restraining alienation by means of a forfeiture were declared by the courts to be invalid. The rule applied by the courts to meet these cases of express declarations against alienability developed into what is now generally recognized as the rule against restraints on alienation. This rule was in its formative stages by the fifteenth century. As time went on, this policy of the courts in refusing to sanction express restraints against the alienability of land was extended to certain indirect restraints. These indirect restraints include some which are such in substance but not in form, and certain indirect restraints upon testate and intestate succession.

Besides the use of the fee tail estate and the imposition of direct restraints, various other means, operating in an indirect fashion to restrict alienation more or less effectively by the use of inalienable interests in land, were devised by landowners. By splitting up the ownership of land, by means of a use, or by means of successive interests, or by means of a combination of these, the alienation of such land might be greatly impeded. One of the earliest attempts of this kind on the part of landowners was their transferring land to one for life with remainder in fee simple to the life tenant's heirs, with the hope that the heirs might take as purchasers. The rule in *Shelley's Case* was evolved by the courts to meet this situation. It declared that the first taker's interest was a fee simple estate, and immediately alienable as such, thus precluding the heirs from taking as purchasers. Other attempts to curtail alienation by the use of contingent remainders were met by the courts by the rule permitting the destruction of contingent remainders, by the rule against double possibilities, and by rules of construction favoring the early vesting of remainders.

These various rules proved sufficient to cope with the dangers which had up to that time arisen from attempts to create perpetuities by the use of inalienable property interests. However, with the advent of the Statute of Uses (1536) and the Statute of Wills (1540), interests in land which the law had previously forbidden now became permissible. By means of springing and

shifting uses, executory devises, and powers of appointment, it became possible to settle property in such a fashion that it might for an indefinite period of time be enjoyed by a series of limited owners, no one of whom had complete powers of alienation. After the courts had decided that these new property interests did not come within the rule of destructibility applied to contingent remainders, it seemed that the ambition of the landowners to tie up their property indefinitely was again to be realized. Since Parliament took no action to prevent this, the courts were put to their mettle to devise some means of frustrating these attempts. The outcome was a rule commonly known today as the common law rule against perpetuities to distinguish it from some present day statutory rules against perpetuities. Having its inception as early as 1682 in the *Duke of Norfolk's Case*, its development may be traced through the English cases until *Cadell v. Palmer* (1832) where the rule was finally formulated substantially as it exists today.

This brief historical sketch discloses that throughout the centuries there has been exhibited on the part of English landowners an unquenchable desire to exercise some control over the ownership and enjoyment of their property after they had made a transfer of it. As soon as any one method devised by them for these purposes lost its effectiveness, either through governmental regulation, prohibition, or otherwise, resort was had to another means. These restraints which the English landowner sought to impose upon the alienation of the conveyed property fell, in the main, into one, or the other, of two general types. The direct restraints were attempts to restrain alienation in a direct fashion by expressly declaring in a conveyance that the property was not to be later conveyed in a manner contrary to the declaration. The indirect restraints were attempts to restrain alienation by creating interests in the conveyed land which were denied alienability by the law, or which by their nature were unlikely to be readily alienable as a practical matter.

These attempts to restrain the free alienation of land met with strong opposition from the courts, since they were deemed inimical to the best interests of society as a whole. As England progressed from a rural to a commercial country, such restraints became more and more objectionable. It was only gradually that the early English courts came to appreciate fully the nature of

their problem and the rules of law which would be needed to deal adequately with them. Because of the changing methods employed by the landowners, and because of the manner in which the courts maneuvered in formulating rules to thwart these plans, we find different rules existing at different periods of time. Often these rules had little in common except the general objective of preventing perpetuities and rendering land more freely alienable.

Besides the methods designed for barring the fee tail estate, and besides certain other rules which helped to prevent the creation of perpetuities, such as the rule in *Shelley's Case*, the rule of destructibility, and the rule against double possibilities, the English courts, as we have already noticed, evolved two major rules as direct curbs upon conveyors who were attempting to restrain alienation of conveyed property in a manner deemed hostile to the best interests of a sound public policy. While these two rules are often confused with each other, they are nevertheless separate and distinct rules, although it is entirely possible to have both such rules involved in the same property disposition.[1] One, the rule against restraints on alienation, is designed to deal with direct restraints arising from the use of a disabling or a defeasing provision in the conveying instrument, and also with certain types of indirect restraints. The other, the common law rule against perpetuities, is designed to cope with certain indirect restraints imposed by the use of property interests which are legally, or practically, inalienable to a greater or lesser extent. The rule against restraints voids all types of restraints which violate the rule, leaving the property free from the restraint. Time is no factor in this rule as it is generally applied. The rule against perpetuities, on the other hand, declares void all property interests which come within its operational area, and which fail to conform to its permissible time period. It does not prohibit the creation of inalienable property interests, but it does require that all such interests be confined in their duration within the time limits imposed by the rule. Thus it will be seen that the major objective of each of these rules is the same. They both seek to prevent the tying up of land and the taking of it out of commerce in a manner deemed hostile to a sound public policy. They differ in their operational areas, *i. e.*, the situations to which they apply; they differ in the manner in which they apply,

1. *E.g.*, Lockridge v. Mace, 109 Mo. 162, 18 S.W. 1145 (1892).

the one voiding the restraint, the other voiding the property interest; and they differ in their time element, the one allowing no permissible period as generally applied, the other permitting of a permissible period which, with proper manipulation, may serve to tie up property for at least a century. While in their origin they were aimed at real property, both rules today apply to personal property as well.

THE RULE AGAINST RESTRAINTS ON ALIENATION

I. *Direct Restraints*

Various explanations have been offered for the rule against restraints on alienation. A reason sometimes given is that the Statute of Quia Emptores, by putting an end to subinfeudation, abolished any reversionary interest after an estate in fee simple absolute, and that therefore the conveyor of such an estate has no interest in the conveyed property entitling him to obstruct its alienation in the hands of his conveyee. Another reason often suggested for the invalidity of disabling restraints is that, in most cases, there is no one who can take advantage of a failure to abide by them. But the reason most often advanced for the existence of the rule against restraints on alienation is that of repugnancy.[2] The object can not be given, and one of its most important attributes retained. Upon close examination, all of these reasons will be found to be specious. Ordinarily, courts offer no explanation for the rule preferring to decide each case upon precedent. In truth, the rule seems not to allow, nor to call for, any reason other than that of public policy.[3] The practical effect of such provisions, if they were upheld in their entirety, would be to remove property from commerce in a manner contrary to the best interests of society.

Direct restraints against inter vivos alienation or incumbrance are often sought to be imposed by means of a mere prohibition or direction, a so-called disabling restraint, to the effect that the conveyed property shall not be aliened nor incumbered in any manner specified.[4] This type of restraint is especially objection-

2. *E.g.*, Triplett v. Triplett, 332 Mo. 870, 60 S.W.2d 13 (1933); Kessner v. Phillips, 189 Mo. 515, 88 S.W. 66 (1905); McDowell v. Brown, 21 Mo. 57 (1855).

3. *E.g.*, Koehler v. Rowland, 275 Mo. 573, 205 S.W. 217 (1918); Kessner v. Phillips, 189 Mo. 515, 88 S.W. 66 (1905).

4. *E.g.*, Clark v. Ferguson, 346 Mo. 933, 144 S.W.2d 116 (1940); Keller v.

able because of an almost complete lack of any suitable means of enforcement. Direct restraints against inter vivos alienation or incumbrance are often sought to be imposed by means of a defeasing provision, such as a condition subsequent or an executory limitation, whereby, upon an attempt to make a prohibited transfer, the ownership of the property may be lost.[5] Restraints of this sort do embody sufficient means of legal enforcement, and a few courts are more friendly toward them in certain situations, but, in the main, the validity of a restraint is not determined by the manner in which it is sought to be imposed. Direct restraints are sometimes sought to be imposed by means of an agreement between adjoining landowners,[6] but this choice of means adds nothing to their validity.

One type of direct restraint is a perpetual (either absolute or unqualified) restraint upon the inter vivos alienation or incumbrance of fee simple estates in real and personal property. Attempts to impose such unqualified restraints are comparatively rare, and the reason for refusing to recognize their validity seems obvious. The usual purpose of such restraints is to continue the ownership of the property in the conveyor's family.

Another type of direct restraint is that qualified as to duration. While the validity of a restraint upon the inter vivos transfer or incumbrance of property might well be thought to vary with respect to the duration of the restraint, nevertheless, by the overwhelming weight of authority, such restraints, regardless of their duration, are declared to be void. To most courts, time is no element in the rule against restraints. While restraints of limited duration are declared to be void by most courts, nevertheless, it cannot be conceded that such results serve public policy any better, if as well, than the efforts of a small minority of the courts in holding valid those restraints whose duration is deemed reasonable. To demarcate reasonable and unreasonable restraints

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Keller, 338 Mo. 731, 92 S.W.2d 157 (1936); Triplett v. Triplett, 332 Mo. 870, 60 S.W.2d 13 (1933); Gannon v. Albright, 183 Mo. 238, 81 S.W. 1162 (1904); McDowell v. Brown, 21 Mo. 57 (1885); Dougal v. Fryer, 3 Mo. 40 (1831); Millard v. Beaumont, 194 Mo. App. 69, 185 S.W. 547 (1916); Pratt v. Saline Valley Ry., 130 Mo. App. 175, 108 S.W. 1099 (1908).

5. *E.g.*, Koehler v. Rowland, 275 Mo. 573, 205 S.W. 217 (1918); Kessner v. Phillips, 189 Mo. 515, 88 S.W. 66 (1905); Lockridge v. Mace, 109 Mo. 162, 18 S.W. 1145 (1892).

6. *E.g.*, Kraemer v. Shelley, 355 Mo. 814, 198 S.W.2d 679, *rev'd* 334 U.S. 1 (1947); Swain v. Maxwell, 355 Mo. 448, 196 S.W.2d 780 (1946); Porter v. Johnson, 232 Mo. App. 1150, 115 S.W.2d 529 (1938).

is not an impossible, nor even an especially difficult, task, though not one so simple as the following of an arbitrary precedent and the declaring of all such restraints to be void. That such restraints are desired is demonstrated by the amount of litigation that has arisen over them. That they may perform a useful and meritorious service cannot be denied. A conveyor may wish to restrain a transfer by his conveyee for a reasonable period of time in order to protect some interest which the conveyor may have in the property conveyed or in adjoining property, or to assure the maintenance of the conveyee, or to protect the conveyee from his own improvidence. Somewhat similar restraints are permitted through various mediums recognized in the law. If these are not violative of public policy, then restraints in a more direct fashion can not be so subversive of the same policy as many are inclined to believe. A liberalization of the policy of the law which refuses validity to restraints on alienation of reasonable duration is worthy of consideration.

A third type of restraint is an attempt by the conveyor of property to restrain alienation by seeking to limit the persons to whom his conveyee may transfer. Classified with respect to permissible alienees, such restraints fall conveniently into three groups: those permitting alienation to a relatively small group only; those allowing alienation to all but a small group; and those which refuse alienation to a comparatively large social group. To confine permissible alienees to a relatively small group is substantially as objectionable as a total restraint. Permitting alienation to all but a small group seems comparatively harmless, but in a given case this may impose a very substantial restraint, and the purpose which these restraints invariably attempt to serve, that of allowing a conveyor to vent his spite, is a most reprehensible one. Refusing alienation to a comparatively large social group, in order to preserve the homogeneity of a given group, is a highly controversial matter.

Any attempt to impose a perpetual and absolute restraint upon the voluntary inter vivos transfer or incumbrance of a fee simple estate in either real or personal property, by means of either a disabling or a defeasing restraint, will be declared void and unenforcible by the courts.[7] An exception is sometimes recognized where the conveyee is a charity.[8]

7. Koehler v. Rowland, 275 Mo. 573, 205 S.W. 217 (1918) (dicta).
8. Dickenson v. City of Anna, 310 Ill. 222, 141 N.E. 754 (1923).

Any attempt to restrain the voluntary, inter vivos transfer or incumbrance of a legal fee simple estate in either real or personal property for a particular number of years,[9] or until the conveyee, or another, shall attain majority, or other designated age,[10] or during the lifetime of some designated person[11] will be declared void and unenforceable by the courts.[12] Prohibiting a named conveyee's making an inter vivos transfer or incumbrance of a legal fee simple estate in either real or personal property is in effect a restraint during a lifetime and will be declared void.[13] To require the conveyee of a legal fee simple estate in either real or personal property to secure the consent of another before transferring or incumbering it imposes a restraint which, in effect, may endure for a lifetime, and while these restraints are by no means absolute, they are not generally permitted.[14] Where a grantor retains a substantial interest in the conveyed property, there are decisions recognizing as valid a provision that the conveyee shall neither alien nor incumber his interest without the conveyor's consent.[15]

To permit alienation to all but a small group seems comparatively harmless, and courts disagree on the validity of such restraints.[16] To confine permissible alienees to a relatively small

9. Clark v. Ferguson, 346 Mo. 933, 144 S.W.2d 116 (1941); Kessner v. Phillips, 189 Mo. 515, 88 S.W. 66 (1905); Pratt v. Saline Valley Ry., 130 Mo. App. 175, 108 S.W. 1099 (1908).

10. Triplett v. Triplett, 332 Mo. 870, 60 S.W.2d 13 (1933); Gannon v. Albright, 183 Mo. 238, 81 S.W. 1162 (1904).

11. McDowell v. Brown, 21 Mo. 57 (1850).

12. In a few states, including Indiana, Kentucky, Minnesota, Nebraska, Texas and Wyoming, decisions are to be found recognizing restraints which are reasonably limited in duration as valid.

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

14. Dodd v. Rotterman, 330 Ill. 362, 161 N.E. 756 (1928); Smith v. Smith, 290 Mich. 143, 287 N.W. 411 (1939).

15. Keller v. Keller, 338 Mo. 731, 92 S.W.2d 157 (1936). The deed in this case provided that, if the grantee should die without children, the land was to revert to the grantor. The deed further provided that grantee was not to sell or dispose of the real estate without first obtaining the consent of the grantor. The court said that this restraining clause was consistent with the title conveyed to the grantee, and that no occasion existed to discuss its further effect. The import of this case is not entirely clear.

A provision in a land contract that the contract shall not be assigned by the vendee during the life of the contract has been upheld. Sloman v. Cutler, 258 Mich. 372, 242 N.W. 735 (1932); Larson v. Johnson, 175 Minn. 502, 221 N.W. 871 (1928). *Cf.* Edson v. Hudson Motor Car Co., 228 N.Y. Supp. 582 (1928) (contract for sale of an automobile).

16. Provision held void: Jenne v. Jenne, 271 Ill. 526, 111 N.E. 540 (1916); Morse v. Blood, 68 Minn. 442, 71 N.W. 682 (1897). Provision held valid: Blevins v. Pittman, 189 Ga. 789, 7 S.E.2d 662 (1940); Overton v. Lea, 108 Tenn. 505, 68 S.W. 250 (1902).

group is substantially as objectionable as a total restraint, and is not permitted.[17] While restraints prohibiting transfers to Negroes have been recognized as valid in Missouri,[18] the United States Supreme Court has declared that their direct enforcement by state courts is contrary to the Constitution of the United States.[19]

Restricting the voluntary, inter vivos transfer or incumbrance of legal vested remainders and reversions in fee simple is not permitted.[20] These estates have been freely alienable in the law from earliest times, and the rule against restraints applies to them in a manner similar to its application to possessory estates in fee simple. Although legal contingent remainders and executory interests were not freely alienable inter vivos in the early law, they are now alienable in that fashion in Missouri.[21] It would seem that while such interests were inalienable, a provision against their transfer or incumbrance would have no particular effect. However, when they become freely alienable inter vivos, the rule against restraints might well apply.[22]

Where a fee simple estate is placed in trust, the trustee's power to alienate or incumber such property is derived from the express or implied consent of the trustor,[23] and, consequently, the trustor may withhold his consent if he so desires. In general, the rule against restraints on alienation applies to equitable fee simple estates in a manner similar to the way it applies to legal

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17. Johnson v. Preston, 226 Ill. 447, 80 N.E. 1001 (1907); Bank of Powhatan v. Rooney, 146 Kan. 559, 72 P.2d 993 (1937); Moffitt v. Williams, 116 Neb. 785, 219 N.W. 138 (1928).

18. Kraemer v. Shelley, 355 Mo. 814, 198 S.W.2d 679, *rev'd* 334 U.S. 1 (1947); Swain v. Maxwell, 355 Mo. 448, 196 S.W.2d 780 (1946); Koehler v. Rowland, 275 Mo. 573, 205 S.W. 217 (1918).

19. Shelley v. Kraemer, 334 U.S. 1 (1947); Hard v. Hodge, 334 U.S. 24 (1947). The United States Supreme Court has thus far forbidden only the direct enforcement of such restrictive covenants. The Missouri Supreme Court, in Weiss v. Leaon, 359 Mo. 1054, 225 S.W.2d 127 (1949), deemed Shelley v. Kraemer not to prohibit the awarding of damages for the breach of such a covenant. See Comment, [1950] WASH. U.L.Q. 437.

20. Graham v. Johnson, 49 N.W.2d 540 (Iowa 1951); Watkins v. Minor, 214 Mich. 380, 183 N.W. 186 (1931).

21. Schee v. Boone, 295 Mo. 212, 243 S.W. 882 (1922).

22. Millard v. Beaumont, 194 Mo. App. 569, 185 S.W. 547 (1916). *But see* Gordon v. Tate, 314 Mo. 508, 284 S.W. 497 (1926).

23. Carter v. Boone County Trust Co., 338 Mo. 629, 92 S.W.2d 647 (1935).

fee simple estates,[24] except such differences as courts recognize for married women[25] and spendthrift trusts.[26]

The general rule seems to be that the voluntary, inter vivos transfer or incumbrance of a legal life estate may not be restricted by means of a disabling restraint,[27] but that it may be restricted by means of a defeasing provision.[28] While this distinction might reduce the objections of repugnancy, it does not affect the arguments of public policy, and does not seem sound. Equitable life estates are treated in much the same manner as legal life estates.[29] A late Missouri case[30] recognized as valid a restraint against the transfer of an equitable life estate, although whether the restraint was imposed by a disabling, or a defeasing, provision was not made clear.

Public policy opposes any effort to restrict very closely a creditor's right to subject his debtor's property to the satisfaction of the creditor's just claims. Consequently, by the weight of authority, any attempt to remove a fee simple from the reach of conveyee's creditors will be denied enforcement by the courts. It does not matter whether the estate be legal or equitable, whether it be in real or personal property, or whether the restraint be by means of a disabling or a defeasing provision.[31] In a few jurisdictions,[32] courts have recognized as valid, defeasing provisions designed to exempt conveyed property from the conveyee's debts when such restraints operate as defeasing provisions divesting the debtor's title, and shifting it to another, should the property be sought to be subjected by creditors to the satisfaction of debts owed them. To make such an exception seems reasonable enough. There appears to be a large element of injustice in permitting full and complete ownership of property which is exempt from

24. Flanders v. Parker, 80 N.H. 566, 120 Atl. 558 (1923); Fisher v. Wister, 154 Pa. 65, 25 Atl. 1009 (1893); McCreery v. Johnston, 90 W. Va. 80, 110 S.E. 464 (1922).

25. Hauser v. City of St. Louis, 170 Fed. 906 (8th Cir. 1909).

26. A few courts, including those of Illinois and Massachusetts, extend the doctrine of spendthrift trusts to fee simple estates.

27. Millard v. Beaumont, 194 Mo. App. 569, 185 S.W. 547 (1916).

28. Henderson v. Harness, 176 Ill. 302, 52 N.E. 68 (1898); Hayward v. Kinney, 84 Mich. 591, 48 N.W. 170 (1891); Barnes v. Gunter, 111 Minn. 383, 127 N.W. 398 (1910).

29. Farkas v. Farkas, 200 Ga. 886, 38 S.E.2d 924 (1946).

30. Odom v. Langston, 355 Mo. 115, 195 S.W.2d 466 (1947).

31. Kessner v. Phillips, 189 Mo. 515, 88 S.W. 66 (1905).

32. Hinshaw v. Wright, 124 Kan. 792, 262 Pac. 601 (1928); Scott v. Ratliff, 179 Ky. 267, 200 S.W. 462 (1918); Lynch v. Lynch, 161 S.C. 170, 159 S.E. 26 (1931).

the debts of the owner thereof. Courts, recognizing this fact, generally denounce attempts aimed directly at accomplishing this purpose. However, to deprive a debtor of his property if he fails to pay his debts greatly reduces this apparent unfairness, partially satisfies the conveyor by saving the conveyed property from creditors, and indirectly benefits creditors since a debtor will be inclined to make a reasonable effort to pay his just debts rather than lose his property.

The courts might well apply the same rule to the involuntary transfer of legal life estates that they apply to the voluntary alienation of such estates.[33] Most American jurisdictions, including Missouri,[34] recognize restraints upon the voluntary and involuntary alienation of equitable life estates if imposed by means of a spendthrift trust, though one may not create such a trust over his own property for his own benefit.[35] A trustor may also protect a beneficiary against the beneficiary's creditors and against his own improvidence by giving the trustee wide discretion over the distribution of the benefits, or by blending the interests of two or more beneficiaries in such a manner that no one beneficiary can claim any particular interest as his own.[36]

II. *Restraints in Substance, Though Not in Form*

As a practical matter any apportionment among different persons of the totality of the rights, privileges, powers, and immunities, which exist with reference to property and which constitute ownership thereof, restrains alienation to some degree. However, the convenience served by divided ownership clearly outweighs any hindrance which such ownership imposes upon alienation. Furthermore, the rule against perpetuities exists to keep the more objectionable of such split ownerships within reasonable durational limits.

Any diminution of an owner's enjoyment of land will effect some degree of restraint upon its alienability as a practical matter, but again, the benefits balance the inconveniences. Prohib-

33. Hartwell v. Mobile Towing & Wrecking Co., 212 Ala. 313, 102 So. 450 (1924); Bramhall v. Ferris, 14 N.Y. 41 (1856); Miller v. Miller, 127 W.Va 140, 31 S.E.2d 844 (1944).

34. Bixby v. St. Louis Union Trust Co., 323 Mo. 1014, 22 S.W.2d 813 (1929); McIlvaine v. Smith, 42 Mo. 45 (1867).

35. McIlvaine v. Smith, 42 Mo. 45 (1867).

36. BOGERT, THE LAW OF TRUSTS & TRUSTEES § 193 (1935).

iting a particular use of conveyed land,[37] or restricting it to a particular use[38] is permitted, although such a restriction may seriously impair alienation. Building restrictions of a reasonable nature may be imposed.[39] Restricting the occupancy of land by prohibiting members of a given race from occupying it imposes a restraint upon alienation to the extent that it removes members of such groups from the class of possible purchasers. Restraints of this character have normally been upheld in the past,[40] although their direct enforcement is now denied by the courts.[41]

The terms of a conveyance may require that before conveyed land may be sold, a designated person, usually the grantor, must be given the first refusal. The extent of the restraint thus imposed upon the conveyee's freedom of alienation by such preemptive provisions will vary with the amount of the refusal price, which may or may not be set forth in the conveying instrument. If the price to be fixed must compare favorably with the value of the land, at the time alienation is sought, the restraint will be slight, and might well be upheld.[42] However, if the price may be fixed at a price substantially lower than the then value of the land, the conveyee will be loath to sell, and a substantial restraint may thus be imposed which should not be permitted.[43] Closely allied to these preemptive provisions are those provisions in a conveyance which require that the conveyee of the land pay a prescribed portion of the sale price to some person designated in the conveyance, usually the original conveyor. Such provisions may prove to be a serious impediment to a transfer, especially if they are designed to operate upon all subsequent transfers, and it would seem that they should not be given effect.[44]

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37. St. Joseph Lead Co. v. Fuhrmeister, 353 Mo. 232, 182 S.W.2d 273 (1944); Robinson v. Cannon, 346 Mo. 1126, 145 S.W.2d 146 (1940).
38. University City v. Chicago, R.I. & P. Ry., 347 Mo. 814, 149 S.W.2d 321 (1941); Chouteau v. City of St. Louis, 331 Mo. 781, 55 S.W.2d 299 (1932).
39. Stevens v. Annex Realty Co., 173 Mo. 511, 73 S.W. 505 (1903); Noel v. Hill, 158 Mo. App. 426, 138 S.W. 364 (1911).
40. See note 18 *supra.*
41. See note 19 *supra.*
42. Libby v. Winston, 207 Ala. 681, 93 So. 631 (1922); Dodd v. Rotterman, 330 Ill. 362, 161 N.E. 756 (1928).
43. Maynard v. Polhemus, 74 Cal. 141, 15 Pac. 451 (1887); Hardy v. Galloway, 111 N.C. 519, 15 S.E. 890 (1892).
44. De Peyster v. Michael, 6 N.Y. 467 (1853); Dunlop v. Dunlop's Ex'rs, 144 Va. 297, 132 S.E. 351 (1926).

A restraint upon partition does not operate as a direct restraint upon alienation. Each (co-tenant) may transfer his undivided share, or all such tenants may unite their interests, by joining in a conveyance, thus removing the restraint. However, a restraint upon partition may indirectly operate as a serious handicap to alienation. If the assignee of an undivided share has no power to compel a partition, the restraint is an obstacle to alienation, since the great majority of prospective purchasers desire an ownership in severalty. If the assignee be given power to force a partition, then a restraint may be removed by a nominal transfer, with a re-transfer after partition. Restraints upon partition, reasonable in their duration, are normally declared to be valid.[45] When a restraint prohibits both a sale and a partition, there seems to be no good reason why, if reasonable in duration, it should not be upheld insofar as partition is restrained.[46] However, in the majority of cases, the courts seem inclined to treat both restraints together, and declare them to be void, although usually this exact question is not at issue.[47]

III. *Restraining Testate and Intestate Succession.*

Where a fee simple estate in either real property or personal property is conveyed, the law does not permit a gift over of the identical property of the conveyee,[48] since such gift over, if given effect, would operate as a total restraint upon any inter vivos transfer of the conveyed property, and would also prevent testate and intestate succession. If the restraint upon the inter vivos transfer of a fee simple estate is objectionable in the law *a fortiori*, a total restraint upon all transfer is more objectionable. In these situations a conveyor can accomplish his purpose in a larger degree by giving the first taker a life estate in the property, and it is not unreasonable to conclude that this was the intention in many cases where the court has declared the gift over to be void. It may also be that the notion that a fee simple

45. Whiteley v. Babcock, 249 S.W. 930 (Mo. 1923); Flournoy v. Kirkman, 270 Mo. 1, 192 S.W. 462 (1917). *But see* Haeuseler v. Missouri Iron Co., 110 Mo. 188, 19 S.W. 75 (1892). See MO. REV. STAT. § 528.130 (1949).

46. Cox v. Johnson, 242 Ill. 159, 89 N.E. 697 (1909); Porter v. Tracy, 179 Iowa 1295, 162 N.W. 800 (1917).

47. Greene v. Greene, 125 N.Y. 506, 26 N.E. 739 (1891); Boudlin v. Miller, 87 Tex. 359, 28 S.W. 940 (1894).

48. Melies v. Beatty, 313 Ill. 418, 145 N.E. 146 (1924); Williams v. Boul, 92 N.Y. Supp. 177, 101 App. Div. 593 (1st Dep't 1905), aff'd, 184 N.Y. 605, 77 N.E. 1198 (1906).

estate may be limited in its duration by a life has not been entirely eradicated.

A restraint upon the inter vivos transfer of a fee simple estate in either real or personal property is not permitted, and such a restraint is not validated by authorizing the conveyee to make a testamentary disposition of the property.[49] Similarly, a gift over of the property if the first taker fails to dispose of the same by will is not permitted,[50] for such a gift over impliedly denies to the first taker the power of inter vivos alienation and also prevents the operation of laws of descent and distribution.

A conveyor of a fee simple estate in real or personal property may not provide for a gift over of the property upon the first taker's not disposing of the property during his lifetime.[51] Although such a gift over, if valid, would allow complete freedom of inter vivos alienation, it would prevent both devisability and descendibility. Where a gift over is made if the first taker fails to dispose of the property by deed or will, if the gift over were upheld, intestate succession would be denied, and such gifts over are therefore void.[52] The restraining of both testate and intestate succession might seem more obnoxious than the restraining of either alone, but the courts draw no distinction here, and in either case the gift over is void. Consequently, where a conveyance of real or personal property is made in fee simple, with a gift over of what remains undisposed of by the first taker at his death; or a gift over is made of as much property as the first taker still has undisposed of at his death; or a gift over is made of what remains at the death of the first taker; or a gift over is made of the rest, residue and remainder of the conveyed property which the first taker may have left at his death; or a gift over is made of all the conveyed property which belongs to, or is in the possession of, the first taker at his death, the gift over is declared to be void.[53] While the purposes of the conveyor in cases of this kind will be frustrated if sought to be accomplished in any of the above manners, nevertheless, such objectives may be largely obtained by giving the first taker a

49. Kessner v. Phillips, 189 Mo. 515, 88 S.W. 66 (1905).
50. Wilson v. Wilson, 268 Ill. 270, 109 N.E. 36 (1915); Crutchfield v. Greer, 113 Va. 232, 74 S.E. 166 (1912).
51. Wead v. Gray, 78 Mo. 59 (1883).
52. Middleton v. Dudding, 183 S.W. 443 (Mo. 1916).
53. Vaughn v. Compton, 361 Mo. 467, 235 S.W.2d 328 (1950); Roth v. Rauschenbusch, 173 Mo. 582, 73 S.W. 664 (1903).

life estate with a power to consume or appoint, or both, with a gift over of any property neither appointed nor consumed. There is little doubt that in many of the cases cited *supra* it was the conveyor's intention to give the first taker a life estate with a power to appoint and/or consume with a gift over upon failure to exercise the power, but such intention could not be effectuated because it was not properly incorporated into the conveying instrument.

While the decisions are practically unanimous in voiding gifts over for a failure upon the part of the first taker to make an inter vivos transfer, it is not clear that restricting either testate or intestate succession, or both, is so obnoxious to a properly conceived public policy as the decisions might lead one to believe. In denying validity to such gifts over, the courts are inclined to follow precedent, without much effort to justify their decisions on other grounds, and the reasons they have advanced have been successfully refuted.[54] The unsoundness of the doctrine that a gift over in these cases is void stands out in bolder relief in those cases in which there is not only a gift over for failure to alienate, but an added contingency providing for a gift over if the first taker should die without issue surviving him.[55]

IV. *Summary*

This brief survey discloses that the Missouri cases are inclined to follow the majority line in a strict interpretation of the rule against restraints on alienation. Little, if any, attempt is made to discriminate between restraints which may fairly be deemed reasonable and restraints which may fairly be deemed unreasonable, on the basis of the degree to which they violate sound public policy. In those areas of property law where direct restraints are definitely declared to be void, any attempted use of such restraints avails nothing. In the uncertain areas, the use of a restraint of questionable validity may be justified in the hope that it will be pronounced valid. Spendthrift trusts do afford a medium for curtailing alienation, although a greatly restricted one. A gift over after the death of a prior taker may be accomplished by limiting the prior taker to a life estate. The first taker's interest in the property may be increased in substance almost to a fee simple by adding proper powers.

54. GRAY, RESTRAINTS ON ALIENATION OF PROPERTY (2d ed. 1885).
55. See Wead v. Gray, 78 Mo. 59 (1883).

THE COMMON LAW RULE AGAINST PERPETUITIES

I. *The Rationale of the Rule*

Unless the common law rule against perpetuities belies its name, its aim is to prevent the creation of perpetuities. But what is a perpetuity? Considerable confusion has undoubtedly arisen from an inability to define a perpetuity with precision. Perhaps a completely accurate definition has never been given. However, there appears to be a generally accepted policy in common law jurisdictions which frowns upon the total exclusion of quantities of property from commerce for long periods of time. Yet it has been difficult to reach an accord as to what constitutes a violation of this policy. Naturally, any generally conceived notion of what constitutes a perpetuity violative of public policy will vary from time to time as property owners adopt varying tactics for "tying up" their property. Such notion will also vary from place to place depending upon the general character and utilization of the property involved, and upon other factors.

In a general sense, it may be said that any rule of law designed to further this public policy, and there are several such rules, is a perpetutity rule. In a specific sense, the term "rule against perpetuities" has been reserved for a particular one of these rules. The earliest recognized use of the term "perpetuity" was its application to unbarrable entails.[56] The term was also early applied to a perpetually inalienable property interest, *i. e.*, "an estate inalienable, though all mankind join in the conveyance."[57] Still later, the term "perpetuity" was applied to certain future interests which were too remote, *i. e.*, future executory interests which were so created that they acorded an opportunity for taking land out of commerce for periods of time long enough to be deemed harmful to the public interest. Thus it will be seen that the term "perpetuity" has been employed by the English courts and text writers, in a rather limited sense, to cover at least three different situations, the first being of little importance today. The English rule against perpetuities has been aimed at these particular situations. The American courts have felt constrained to apply this specific rule without being very concerned with attempting any exact definition of a perpetuity. Insofar as

56. Duke of Norfolk's Case, 3 Ch. Cas. 1, 22 Eng. Rep. 931 (1682); Chudleigh's Case, 1 Co. 120a, 76 Eng. Rep. 261 (1595).

57. Scatterwood v. Edge, 1 Salk. 229, 91 Eng. Rep. 203 (1697).

they have deigned to define perpetuities, they have been satisfied to follow the definitions of the English courts and the text writers.[58]

Although the courts are in accord with reference to most aspects of the common law rule against perpetuities, disagreement does exist as to the exact scope and objective of the rule. This may be attributed partially to a failure to reach any accord as to what constitutes a perpetuity. In the beginning, the essence of a perpetuity was inalienability. The rules, devised by the earlier courts to thwart attempts on the part of landowners to project their control over their property too great a distance in the future, all sought an increased freedom of alienability. Such rules as those permitting entails to be barred, the rule of destructibility, the rule against restraints on alienation, the rule in *Shelley's Case,* and associated rules, were aimed at combating the various devises which landowners employed for hampering the alienation of property which they had conveyed. The advent of the executory interests presented the courts with new situations which the then existing rules of law did not control. Here, then, were non-vested interests in property, inalienable because of their contingent nature, and, consequently, available for the tying up process because they were unchecked in this respect by the then existing rules of law. In devising means to control their use, the courts were inclined to overstress their contingent nature, rather than their inalienability. Since both remoteness in vesting and inalienability were so closely associated so far as executory interests were concerned, it made little difference whether the courts emphasized one approach or the other. However, when contingent interests become alienable in the law, or when vested interests are employed for perpetuity purposes, a rule thought of as one opposed to remoteness in vesting is bound to present some inconsistencies when adapted to these new situations.

The common law rule against perpetuities applies to both real and personal property,[59] and to both legal and equitable property

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58. Loud v. St. Louis Union Trust Co., 298 Mo. 148, 249 S.W. 629 (1923); Stevens v. Annex Realty Co., 173 Mo. 511, 73 S.W. 505 (1903).

59. St. Louis Union Trust Co., v. Kelley, 355 Mo. 924, 199 S.W.2d 344 (1947); St. Louis Union Trust Co., v. Bassett, 337 Mo. 604, 85 S.W.2d 569 (1935); Plummer v. Brown, 315 Mo. 627, 287 S.W. 316 (1926).

interests.[60] The rule is not one of construction, but a peremptory command of the law.[61] If by any possible combination of circumstances there is a chance that it may be violated by a given property disposition, it is deemed violated.[62] It is not a probability of violation, but the possibility of violation, that renders a property interest void under the rule. The property interest involved must vest, if it is ever to vest at all, within the permissible period of the rule in order to be valid, but once vested it may continue indefinitely so far as the rule is concerned.[63] It is not necessary that the vesting entail the right to immediate possession; the rule is satisfied if the contingent interest is certain to be converted into a vested interest, if at all, within the rule's permissible period.[64]

II. *The Permissible Period of the Rule*

Courts are in general accord in asserting that the permissible period of the common law rule against perpetuities is lives in being, a period for gestation when proper, and in addition a gross term up to twenty-one years.[65] The permissible period is measured from the effective date of the conveyance, which is the date of delivery in the case of a deed, and of the testator's death in the case of a will.[66] An exception is made in the case of a conveyance under a special power of appointment and, by some authorities, a general power of appointment exercisable by will

60. See note 59 *supra*. See also Loud v. St. Louis Union Trust Co., 298 Mo. 148, 249 S.W. 629 (1923); Melvin v. Hoffman, 290 Mo. 464, 235 S.W. 107 (1921); Deacon v. St. Louis Union Trust Co., 271 Mo. 669, 197 S.W. 261 (1917).

61. St. Louis Union Trust Co. v. Bassett, 337 Mo. 604, 85 S.W.2d 569 (1935).

62. St. Louis Union trust Co., v. Bassett, 337 Mo. 604, 85 S.W.2d 569 (1935); Loud v. St. Louis Union Trust Co., 298 Mo. 148, 249 S.W. 629 (1923); Shepperd v. Fisher, 206 Mo. 208, 103 S.W. 989 (1907); Gates v. Seibert, 157 Mo. 254, 57 S.W. 1065 (1900); Lockridge v. Mace, 109 Mo. 162, 18 S.W. 1145 (1892).

63. St. Louis Union Trust Co., v. Kelley, 355 Mo. 924, 199 S.W.2d 344 (1947).

64. St. Louis Union Trust Co., v. Bassett, 337 Mo. 604, 85 S.W.2d 569 (1935); Deacon v. St. Louis Union Trust Co., 271 Mo. 669, 197 S.W. 261 (1917).

65. Greenleaf v. Greenleaf, 332 Mo. 402, 58 S.W.2d 448 (1933); Lane v. Garrison, 293 Mo. 530, 239 S.W. 813 (1922); Melvin v. Hoffman, 290 Mo. 464, 235 S.W. 107 (1921); Deacon v. St. Louis Union Trust Co., 271 Mo. 669, 197 S.W. 261 (1917); Stewart v. Coshow, 238 Mo. 662, 142 S.W. 283 (1911); Shepperd v. Fisher, 206 Mo. 208, 103 S.W. 989 (1907); Lockridge v. Mace, 109 Mo. 162, 18 S.W. 1145 (1892).

66. Melvin v. Hoffman, 290 Mo. 464, 235 S.W. 107 (1921).

alone. The permissible period is, in those cases, measured from the creation of the power rather than its execution.[67] While the courts have fixed no arbitrary limitation on the number of measuring lives, nevertheless, there are practical limitations which the number of lives may not exceed.[68] While the measuring lives are normally the lives of beneficiaries under the property disposition, they need not be, and the lives of any living persons may used for this purpose.[69] The measuring lives must be lives of persons in existence at the effective date of the conveyance, but this rule does not require that the beneficiaries under the property dispositions be in existence at that time, unless they are measuring lives. A portion of a life in being may be treated as a life, but a portion of a life not in being must be treated as a gross term.

III. *The Rule as Applied to Future Interests.*

It is generally recognized that at least one objective of the modern common law rule against perpetuities is to prevent a too remote vesting of certain contingent interests in real and personal property.[70] In fact, the greatest exponent of the rule, Professor Gray, suggests that the rule against perpetuities is more accurately described as a rule against too remote vesting.[71] Professor Gray has stated the rule solely with reference to non-vested interests, as follows: "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."[72] This statement of the rule has been quoted with approval in many cases.[73]

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67. St. Louis Union Trust Co., v. Bassett, 337 Mo. 604, 85 S.W.2d 569 (1935); Rutherford v. Farrar, 118 S.W.2d 79 (Mo. App. 1938).

68. "... the number of lives in being must not be so numerous that there is not some reasonable way of proving the decease of the survivor of them." Greenleaf v. Greenleaf, 332 Mo. 402, 407, 58 S.W.2d 448, 450 (1933); Dodd v. McGee, 354 Mo. 644, 190 S.W.2d 231 (1945).

69. Thelluson v. Woodford, 11 Ves. 112 (1805).

70. Mockbee v. Grooms, 300 Mo. 446, 254 S.W. 170 (1923); Schee v. Boone, 295 Mo. 212, 243 S.W. 882 (1922); Stewart v. Coshow, 238 Mo. 662, 142 S.W. 283 (1911); Shepperd v. Fisher, 206 Mo. 208, 103 S.W. 989 (1907); Gates v. Seibert, 157 Mo. 254, 57 S.W. 1065 (1900); Lockridge v. Mace, 109 Mo. 162, 18 S.W. 1145 (1892).

71. GRAY, THE RULE AGAINST PERPETUITIES §§ 2, 3 (3rd ed. 1915).

72. *Id.* at § 201.

73. St. Louis Union Trust Co., v. Kelley, 355 Mo. 924, 199 S.W.2d 344 (1947); Greenleaf v. Greenleaf, 332 Mo. 402, 58 S.W.2d 448 (1933); Loud v. St. Louis Union Trust Co., 298 Mo. 148, 249 S.W. 629 (1923); Rutherford v. Farrar, 118 S.W.2d. 79 (1938).

In its inception, the common law rule against perpetuities was ostensibly aimed at a too remote vesting of certain contingent future interests. However, the main objection to these non-vested interests was their inalienability. At the early law, such non-vested interests as executory interests and contingent remainders were inalienable inter vivos by any of the ordinary methods of conveyancing, other than the release. Their releasability, however, did not render them immune to the operation of the common law rule against perpetuities.[74] Recent legislation or court decisions in many states now render these interests freely alienable inter vivos.[75] It might seem that such alienable contingent interests should be immune from the operation of the common law rule against perpetuities,[76] if the essence of the rule is its opposition to perpetuities caused by inalienability. However, the fact that these contingent interests have recently been rendered freely alienable inter vivos has not affected the application of the rule to them.[77] This seemingly bears out the contention that the rule is aimed at a too remote vesting of certain future interests.[78]

Despite the fact that such non-vested interests are legally alienable, the dangers of a perpetuity are only partially removed by this alienability. Alienation is deemed suspended unless it is possible to unite all of the interests in a given piece of property enabling an estate in fee simple indefeasible to be conveyed. But while each interest existing with reference to a given piece of property may be legally capable of alienation, as a practical matter it may be largely impossible to alienate such property because the owners of the various interests may be unable to reach an accord for the distribution of the proceeds of the sale. The greater the number of persons among whom ownership is divided, the more difficult an agreement for the distribution of the proceeds of a sale normally becomes. Although all of the property interests in a given piece of property may be legally alienable, the transfer of an indefeasible fee simple estate in the

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74. GRAY, THE RULE AGAINST PERPETUITIES, ch. 7 (3rd ed. 1915).

75. See note 21 *supra*.

76. See Shepperd v. Fisher, 206 Mo. 208, 103 S.W. 989 (1907); Stevens v. Annex Realty Co., 173 Mo. 511, 73 S.W. 505 (1903).

77. Deacon v. St. Louis Union Trust Co., 271 Mo. 669, 197 S.W. 261 (1917); Stewart v. Coshow, 238 Mo. 662, 142 S.W. 283 (1911).

78. See note 70 *supra*.

property may be practically impossible. Since it is so highly probable that a postponed vesting will greatly hamper alienation, it seems desirable to make such vesting amenable to the common law rule against perpetuities, despite the fact that alienation has not been legally suspended.

If we approach the rule from the standpoint of the future property interests affected thereby, since the rule was designed in its inception for controlling the springing and shifting uses and the springing and shifting devises, there seems to be no question but that all executory interests in real or personal property, legal or equitable, whether alienable inter vivos or not, come within the rule.[79] Consequently, whenever any provision is made in a transfer of real or personal property for shifting title to such property from one designated conveyee to another, or from the conveyor or his heir to another, upon the happening of some future event, such event must be so restricted in its creation that it is certain to occur, if at all, within the permissible period of the rule.

Considerable controversy has arisen in recent times over the question whether contingent remainders come within the purview of the common law rule against perpetuities. It is argued that the rule in its inception was designed for controlling executory interests, and that contingent remainders were recognized in the law for two centuries before the rule against perpetuities first appeared. It is argued further that other rules, such as the rule of destructibility of contingent remainders and the rule against double possibilities, were sufficient to control contingent remainders and that there was no need to apply the common law rule against perpetuities to them. However, since these rules are no longer law in many states, it would seem that wherever they no longer apply, contingent remainders should be subjected to some other control, and the common law rule against perpetuities is well adapted to this purpose. The Missouri courts seem to have recognized the rule against double posibilities, often known as the rule of *Whitby v. Mitchell*, at least by way of

79. Shepperd v. Fisher, 206 Mo. 208, 103 S.W. 989 (1907); Riley v. Jaeger, 189 S.W. 1168 (Mo. 1916); Gates v. Seibert, 157 Mo. 254, 57 S.W. 1065 (1900); Chism's Adm's v. Williams, 29 Mo. 288 (1860); Vaughn v. Guy, 17 Mo. 429 (1853).

dicta,[80] but this rule now seems to have been definitely repudiated.[81] Regardless of whether the rule of destructibility may still be law in Missouri, contingent remainders are held to come within the common law rule against perpetuities.[82]

Vested remainders created in favor of individual remaindermen, whether vested absolutely or vested to divest wholly, are not within the operational area of the rule against perpetuities.[83] The same is true of reversions. However, a remainder to a class, even though vested for other purposes, is within the operational area of the rule if it is vested to divest partially by virtue of possible increases in membership.[84] If there is a possibility of increase in class membership after the permissible period of the rule, such possible afterborn class members have an interest akin to a shifting executory interest which may not vest in time. Likewise, if the class remains open to decrease in membership beyond the period of the rule, then each member has a shifting interest in each other member's share which may not vest within the proper time. It is generally conceded that, if the rule against perpetuities is violated as to one member of a class, it is violated as to all. Consequently, in the creation of any class gift the class must be so fixed in its creation that it can neither increase nor decrease in membership beyond the permissible period of the rule.

Powers of termination[85] and possibilities of reverter[86] do not come within the common law rule against perpetuities. These

80. Shepperd v. Fisher, 206 Mo. 208, 103 S.W. 989 (1907); Lockridge v. Mace, 109 Mo. 162, 18 S.W. 1145 (1891).

81 Lane v. Garrison, 293 Mo. 530, 239 S.W. 813 (1922).

82. St. Louis Union Trust Co. v. Kelley, 355 Mo. 924, 199 S.W.2d 344 (1947); St. Louis Union Trust Co., v. Bassett, 337 Mo. 604, 85 S.W.2d 569 (1935); Greenleaf v. Greenleaf, 332 Mo. 402, 58 S.W.2d 448 (1933); Mockbee v. Grooms, 300 Mo. 446, 254 S.W. 170 (1923); Loud v. St. Louis Union Trust Co., 298 Mo. 148, 249 S.W. 629 (1923); Schee v. Boone, 295 Mo. 212, 243 S.W. 882 (1922); Cox v. Jones, 229 Mo. 53, 129 S.W. 495 (1910); Shepperd v. Fisher, 206 Mo. 208, 103 S.W. 989 (1907); Naylor v. Goodman, 109 Mo. 543, 19 S.W. 56 (1892); Lockridge v. Mace, 109 Mo. 162, 18 S.W. 1145 (1892).

83. Greenleaf v. Greenleaf, 532 Mo. 402, 58 S.W.2d 448 (1933); Schee v. Boone, 295 Mo. 212, 243 S.W. 882 (1922); Melvin v. Hoffman, 290 Mo. 464, 235 S.W. 107 (1921); Shepperd v. Fisher, 206 Mo. 208, 103 S.W. 989 (1907); Gates v. Seibert, 157 Mo. 254, 57 S.W. 1065 (1900).

84. Greenleaf v. Greenleaf, 332 Mo. 402, 58 S.W.2d 448 (1933); Gates v. Seibert, 157 Mo. 254, 57 S.W. 1065 (1900).

85. Koehler v. Rowland, 275 Mo. 573, 205 S.W. 217 (1918).

86. Institutions for Savings v. Roxbury Home, 244 Mass. 583, 139 N.E. 301 (1923); Leonard v. Burr, 18 N.Y. 96 (1858).

interests are definitely as contingent as are the executory interests and were inalienable at the common law, and would seem to be as objectionable. No satisfactory reason is given for their exclusion from the rule. Perhaps the answer is partially historical and partially practical. These interests existed in the law of England for some centuries before the rule originated, and they were never considered hostile to public policy, even though they were uncontrolled in their duration. As a practical matter, they are not normally used for the express purpose of tying up property.

IV. *The Rule as Applied to Trust Duration*

The common law rule against perpetuities is applied by the courts to curtail the period of time in which a non-vested future interest in real or personal property may continue in a non-vested character, regardless of whether or not legal alienation is suspended thereby. It is often asserted that vested interests are outside the scope of the common law rule against perpetuities.[87] However, it is entirely possible for vested property interests, if inalienable, and even though legally alienable, if they are inalienable as a practical matter, to create undesirable situations in the law by removing property from commerce. It is conceivable for instance, that the ownership of a possessory fee simple estate may be so split up among concurrent owners as to render such estate inalienable indefinitely.[88]

A trust may, and often does, present a situation in which alienation of property may be legally or practically suspended, even though all of the property interests involved are vested. Of course, where equitable interests are contingent, they are as readily amenable to the common law rule against perpetuities as are their legal counterparts.[89] A trust may be wholly void because the equitable interests involved are contingent and too remote. A trust may be wholly void because the equitable

87. Melvin v. Hoffman, 290 Mo. 464, 235 S.W. 107 (1921); Deacon v. St. Louis Union Trust Co., 271 Mo. 669, 197 S.W. 261 (1917); Stewart v. Coshow, 238 Mo. 662, 142 S.W. 283 (1911).

88. See State v. McGee, 200 Iowa 329, 204 N.W. 408 (1925), where an owner of land in order to prevent a mortgage foreclosure, conveyed such land "to each and every member of the American Legion of Iowa,... each and every member of the Knights of Pythias of Iowa, and each and every attorney at law in Iowa." The court held the conveyance void, although its reasoning was very vague.

89. See note 60 *supra*.

interests which are contingent and too remote are too closely associated with the otherwise valid interests. A trust may be partially void because some of the equitable interests involved are contingent and too remote. Contingent property interests created to begin after the termination of a trust must vest, if at all, within the permissible period of the rule if they are to be valid.

That the duration of a private trust, involving vested interests only, is subject to some control under the law seems admitted by all authorities. Where both the legal and equitable interests in any given trust, though vested, are rendered inalienable for one reason or another, such a trust, thus suspending alienation, become obnoxious to a sound public policy if continued for too long a time. Even though the trust res is freely alienable, so that there is no suspension of alienation as to it, nevertheless, if a transfer of such a trust res does not end the trust, but merely substitutes other property in its stead, such a trust may well be contrary to a sound public policy if it is to continue for too long a time. Furthermore, to deprive beneficiaries who are of full age and sound mind of the direct enjoyment of their property for a protracted period may well be deemed objectionable.

It is well recognized in the American jurisdictions that the duration of charitable trusts is not within the scope of the common law rule against perpetuities.[90] Consequently, charitable trusts may be created to continue indefinitely or for any period of time. The social advantages secured thereby are deemed to outweigh any disadvantage arising from tying up the property, and the large measure of control that equity courts exercise over charitable trusts renders them socially harmless. However, the rule as sometimes stated, to the effect that charitable trusts do not come within the rule against perpetuities, is an understatement of the law and incorrect. Correctly stated, the duration of charitable trusts is not confined to the permissible period of the rule against perpetuities. Charitable trusts to be valid must begin within the permissible period of the rule, and a contingent gift over after the ending of a charitable trust must be certain to vest, if at all, within the permissible period of the

90. Newton v. Newton Burial Park, 326 Mo. 901, 34 S.W.2d 118 (1930); Stewart v. Coshow, 238 Mo. 662, 142 S.W. 283 (1911); Farmers' and Merchants' Bank v. Robinson, 96 Mo. App. 385, 70 S.W. 372 (1902).

rule.[91] To this latter rule one exception is recognized. Property may be made to shift from one charitable trust to another charitable trust at any time in the future,[92] on the theory that since the duration of a charitable trust is not objectionable, it makes no difference that this duration is shared by more than one trust.

In England,[93] and in a few American jurisdictions,[94] are to be found decisions providing a sufficient control over the duration of private trusts by permitting the beneficiaries, under proper circumstances, to terminate such trusts and call for a conveyance of the trust res, although the trust purposes be not yet fulfilled. Where a trust is thus destructible, there is little danger of its continuance for too long a time, and no rule limiting its duration seems necessary. In those jurisdictions where trusts are thus destructible, there is authority that such trusts need not be limited in their duration. However, most American jurisdictions, including Missouri,[95] prefer to follow the Massachusetts case of *Claflin v. Claflin*,[96] and refuse to recognize the doctrine of the destructibility of private trusts.

Certain trusts, the so-called honorary trusts, lack beneficiaries and, consequently, are indestructible. Included in these honorary trusts are those trusts for the maintenance of cemeteries, the saying of masses, the care of animals, and the repair of buildings. Such trusts, if they are deemed to be charitable trusts, are recognized as valid despite an indefinite duration.[97] Where such trusts are private trusts, they are invariably declared to be void if unlimited in duration. Most American jurisdictions, including Missouri,[98] now have statutes dealing with the application of the perpetuity rules to cemetery trusts. Trusts for the saying of masses are now generally upheld on the theory that they are

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91. Institution for Savings v. Roxbury Home, 244 Mass. 583, 139 N.E. 301 (1923); Yarbrough v. Yarbrough, 151 Tenn. 221, 269 S.W. 36 (1925).
92. Dickenson v. City of Anna, 310 Ill. 222, 141 N.E. 754 (1923).
93. Saunders v. Vautier, 4 Beav. 115, 49 Eng. Rep. 282 (1841).
94. California, New Jersey, North Carolina, Pennsylvania and Virginia. However, in some of these states there are also cases to the contrary.
95. Evans v. Rankin, 329 Mo. 411, 44 S.W.2d 644 (1931); Owen v. Gilchrist, 304 Mo. 330, 263 S.W. 423 (1924); Dwyer v. St. Louis Union Trust Co., 286 Mo. 481, 228 S.W. 1068 (1921).
96. 149 Mass. 19, 20 N.E. 454 (1889).
97. See note 90. *supra*.
98. Mo. Rev. Stat. §§ 214.130, 214.020 (1949). Newton v. Newton Burial Park, 326 Mo. 901, 34 S.W.2d 118 (1930); Stewart v. Coshow, 238 Mo. 662, 142 S.W. 283 (1911).

charitable trusts for religious purposes, whether the masses are to be offered for the testator's soul alone, for the souls of designated persons only, or for all souls generally.[99] Private trusts for the care of animals and for the maintenance of buildings are regularly declared void unless properly limited in their duration.[100]

One reason sometimes advanced for declaring honorary private trusts which are unlimited in their duration to be void is the lack of a beneficiary. This reasoning seems specious when we recognize that honorary trusts are upheld generally if they are charitable trusts, and they are upheld as private trusts if properly limited in their duration. The courts themselves seldom advance any reason for declaring honorary private trusts unlimited in duration to be void, being content to rest their decisions on precedent, or they merely state that such trusts tend to create a perpetuity.

It might well be asked whether there has ever been any urgent need for limiting the duration of honorary trusts by law. A trust for saying masses, for example, is none the less objectionable as a perpetuity when called a charitable trust, and yet the courts recognize it as such a trust and surely no serious public policy is affected thereby. The legislatures in most states see no serious objection to cemetery trusts unlimited in duration. Trusts for the care of certain designated animals can not seriously offend public policy since their purpose is fulfilled upon the death of the animal beneficiaries. This leaves only the trusts for the care of buildings, and buildings, even with the best of care, do pass into decay or become outmoded. Nevertheless, so long as honorary private trusts are required to be limited in duration to be valid, proper precaution requires that they be so created that they will not continue beyond the permissible period of the rule against perpetuities.

It seems reasonable to expect that private trusts which are indestructible under the doctrine of *Claflin v. Claflin* will be subject to some form of control in the law with respect to their permissible duration, since they may become serious threats to a

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99. Minturn v. Conception Abbey, 227 Mo. App. 1179, 61 S.W.2d 352 (1933).

100. Kelly v. Nichols, 17 R.I. 306, 21 Atl. 906 (1891); Smith v. Heyward, 115 S.C. 145, 105 S.E. 275 (1920).

sound public policy by taking property out of commerce, or by denying the direct enjoyment of the property to the beneficiaries thereof, for a protracted period of time. However, the law is far from settled in this respect. The cases vary from jurisdiction to jurisdiction, and within a jurisdiction. In two of its aspects the law here seems clear. Private trusts created to continue perpetually, or for an indefinite period, are invariably declared to be void because of their duration.[101] On the other hand, private trusts which satisfy the permissible period of the rule against perpetuities as regards their duration have never been declared void because of their duration.[102] Many private trusts, indestructible under the doctrine of *Claflin v. Claflin,* have been upheld as valid even though their duration did not satisfy the permissible period of the rule against perpetuities. In several cases, such trusts have been upheld as valid even though they were created to continue for a gross term of more than twenty-one years.[103] In other cases they have been upheld even though their duration was measured by lives not in being when the trust commenced.[104] Just how long such trusts may validly continue, the cases failed to disclose. In isolated instances, statutes clarify the law in this respect.[105] As a precautionary measure in drafting private trusts, it is desirable to limit their duration to the permissible period of the common law rule against perpetuities. Regardless of the natural term of trust duration, a trust may be created with an alternative duration by virtue of which it cannot possibly continue for a period longer than the permissible period of the rule against perpetuities, and it will be upheld.[106]

If indestructible private trusts involving only vested interests are to be subjected to some control over their duration, the nature of such control becomes important, but unfortunately, is

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101. Buchanan v. Kennard, 234 Mo. 117, 136 S.W. 415 (1911).

102. Plummer v. Brown, 315 Mo. 627, 287 S.W. 316 (1926); Whitely v. Babcock, 202 S.W. 1091 (Mo. 1918); Walter v. Dickman, 274 Mo. 185, 202 S.W. 537 (1918).

103. Deacon v. St. Louis Union Trust Co., 271 Mo 669, 197 S.W. 261 (1917).

104. Loud v. St. Louis Union Trust Co., 298 Mo. 148, 249 S.W. 629 (1923); Melvin v. Hoffman, 290 Mo. 464, 235 S.W. 107 (1921). *But see* Mockbee v. Grooms, 300 Mo. 446, 254 S.W. 170 (1923); Bradford v. Blossom, 207 Mo. 177, 105 S.W. 289 (1907).

105. Mo. Rev. Stat. §§ 456.060, 456.070 (1949).

106. Wilson v. D'Atro, 109 Conn. 563, 145 Atl. 161 (1929); McCutcheon v. Pullman Trust & Savings Bank, 251 Ill. 550, 96 N.E. 510 (1911).

not clearly disclosed by the cases. There are some dicta [107] attributing such control to the rule against perpetuities, but many cases, and many leading text writers deny any application of the rule against perpetuities to trust duration on the theory that this rule applies only to non-vested interests. It is true that indestructible private trusts of indefinite duration are invariably declared to be void, the courts often advancing the reason that such trusts tend to create perpetuities. However, in many of these cases the rule against perpetuities will be found to be violated because the property dispositions involve contingent interests so closely associated with the vested interests that the whole disposition failed.

It has been suggested that, although the common law rule against perpetuities does not apply to the duration of indestructible private trusts involving vested interests only, because the rule applies only to contingent interests, nevertheless, there does exist a companion rule, the object of which is to prevent undue postponement of the direct enjoyment of property.[108] Many objections may well be raised to any resort to an additional rule to limit the duration of private trusts. The attributes of the common law rule against perpetuities are well known and understood by the legal profession. The permissible period of the rule has stood the test of years. The adoption of another rule to limit the duration of private trusts would require fixing a permissible period. That a better working permissible period can be devised seems questionable. If the same period is to be adopted in another rule, why a new rule? The English courts developed the common law rule against perpetuities and molded it to suit their needs. They had no particular need to apply it to vested interests and trust duration because of their doctrine of destructible trusts. There seems no sufficient reason why the American courts should not do here what they have done in other situations, *i.e.*, mold the English rule to American needs by extending its operational area and making it more truly a rule against perpetuities.

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107. Davis v. Rossi, 326 Mo. 911, 34 S.W.2d 8 (1930).
108. 1 BOGERT, TRUSTS & TRUSTEES § 218 (1935).

V. *The Rule as Applied to Miscellaneous Situations*

An option in gross for the purchase of property is usually held to come within the common law rule against perpetuities.[109] Since such options partake of the nature of springing executory interests, and since such options tend to take property out of commerce, it seems that as both a logical and practical matter they should come within the permissible period of the rule. With a twenty-one year leeway such a rule does not hamper the creation of options. Where such options are personal to the optionee, they satisfy the rule by being limited to a life in being.[110] Options in a lease for the purchase of the reversion are usually treated the same as options in gross.[111] Where land is not readily saleable, a lease with an option of purchase may promote alienability, though courts do not usually make this distinction. Courts disagree whether options in a lease for a renewal of the lease come within the rule, Missouri courts holding that they do not.[112] Covenants that run with the land and agreements creating servitudes in equity are not generally regarded as coming within the rule against perpetuities since their general tendency is to promote alienation rather than to restrain it.[113] Personal covenants do not come within the rule.[114]

VI. *Summary*

From the standpoint of the draftsman of a deed or will, the common law rule against perpetuities is not difficult to satisfy. Contingent remainders and executory interests must be so created that they are bound to vest in interest or possession, if at all, within the permissible period of the rule. The duration of all private trusts should be confined to the permissible period of the rule, unless a different period has been clearly established

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109. Henderson v. Bell, 103 Kan. 422, 173 Pac. 1128 (1918); Winsor v. Mills, 157 Mass. 362, 32 N.E. 352 (1892); Barton v. Shaw, 246 Pa. 348, 92 Atl. 312 (1914).

110. Elliott v. Delaney, 217 Mo. 14, 116 S.W. 494 (1909).

111. Keogh v. Peck, 316 Ill. 318, 147 N.E. 266 (1925); Hollander v. Central Metal & Supply Co., 109 Md. 131, 71 Atl. 442 (1908).

112. Haeffner v. A. P. Green Fire Brick Co., 76 S.W.2d 22 (Mo. 1934); Diffenderfer v. Board, 120 Mo. 447, 25 S.W. 542 (1894); Blackman v. Boardman, 28 Mo. 420 (1859).

113. Pierce v. St. Louis Union Trust Co., 311 Mo. 262, 278 S.W. 398 (1925); Noel v. Hill, 158 Mo. App. 426, 138 S.W. 364 (1911).

114. Walsh v. Sec'y of State of India, 10 H.L. Cas. 367, 11 Eng. Rep. 1068 (1863).

by statute or court decision. Class gifts should be so created that all increases and decreases in membership will take place, if at all, within the permissible period of the rule. In exercising all special powers of appointment, and all general powers exercisable by will, the permissible period of the rule should be counted from the creation of the power rather than from its execution. All measuring lives must be lives in being; and special care must be used when a portion of a life beyond the age of twenty-one years is used as a life, in order to make sure that it is a portion of a life in being when the instrument went into effect. When a gross term greater than twenty-one years is desired, an alternative period measured by lives in being must be used.