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THE EFFECT OF VIOLATION OF THE RULE AGAINST PERPETUITIES IN MISSOURI

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Thirty-seven years ago Professor Manley O. Hudson, in a penetrating commentary,[1] analyzed the trend of Missouri decisions on the rule against perpetuities and observed a marked deviation by the Missouri courts from the principles developed by the English courts and by the courts of other states upon the question of the effect of a limitation void for remoteness upon other limitations contained in the same deed or will which of themselves were not too remote.

At the time of Professor Hudson's writing, *Lockridge v. Mace*[2] and *Shepperd v. Fisher*[3] had been decided. In each of these cases, as we shall observe, a void limitation was held destructive of an entire property disposition.

Later, *Riley v. Jaeger*[4] evoked from the same writer the following comment:

> One is led to ask whether in the future the existence of one void remote limitation in a will is going to be held to be sufficient to invalidate the whole will. Surely our law should not be developed toward such a position. Yet, if as in *Riley v. Jaeger*, wills are declared *wholly* void because of the application of the rule against perpetuities to some of the limitations, it will not be long until such an extreme position will be contended for.[5]

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1. *The Rule Against Perpetuities in Missouri*, 3 U. OF MO. BULL. L. SER. 1 (1914).
2. 109 Mo. 162, 18 S.W. 1145 (1891).
3. 206 Mo. 208, 103 S.W. 989 (1907).
4. 189 S.W. 1168 (Mo. 1916).
5. *Perpetuities—Effect of Remoteness*, 14 U. OF MO. BULL. L. SER. 55 (1917).

Loud v. St. Louis Union Trust Company[6] was yet to come. There the court made the following statement, which epitomizes the approach to the problem made in the earlier cases:

> We have repeatedly held that where portions of a will are void as being in contravention with the rule against perpetuities, and as those portions relate to the same property and constitute a part of a general plan of disposition, the valid, as well as the invalid, portions will fall together. [Lockridge v. Mace, 109 Mo. 162; Shepperd v. Fisher, 206 Mo. 208.][7]

to which the reporter added the marginal note, "Entirely Void."

Do these decisions mean that whenever under the provisions of a deed or will the vesting of title to the property disposed of may be deferred for a period longer than twenty-one years (plus periods of actual gestation) after a life or lives in being, the entire property disposition is void, so that not only the limitations void for remoteness, but also all prior and subsequent limitations, not of themselves too remote, will fail?

The answer to that question remains, at this late date, a matter of speculation. . . .

It will suffice to observe at this point that there is a wide disposition among lawyers to conclude that in Missouri a limitation void for remoteness contaminates and renders void the entire property disposition of which the void limitation is part. That view is shared by that eminent authority on Missouri real property law, Mr. McCune Gill.[8] It has undoubted pragmatic force because it is the governing principle for title examiners, under whose scrutiny fall property dispositions far more numerous than those which come before the courts.

From an equitable standpoint, there is little to commend such a concept of total invalidity.

Suppose that T, the father of three children, A, B, and C, by his will were to make a gift of property to his daughter A for life with remainder over upon the death of A to the then living descendants of A per stirpes, provided that if any such descendant should die before attaining the age of thirty years the share of such descendant should go to his or her issue per stirpes or in

6. 298 Mo. 148, 249 S.W. 629 (1923).
7. *Id.* at 185, 249 S.W. at 639.
8. 1 TREATISE ON REAL PROPERTY LAW IN MISSOURI 27 (1st ed. 1949). Volume 2 contains, pp. 808-822, an invaluable digest of Missouri cases involving the rule against perpetuities.

default of such issue to the other descendants of A per stirpes. The gifts of the life estate to A and of the remainders to A's descendants, standing alone, would be valid, but the attempted limitation over in the nature of an executory devise[9] to take effect upon the death of such a descendant before attaining the age of thirty years would be void because it would not necessarily take effect within a period of twenty-one years after a life or lives in being at the time of T's death.

If the prophets of total voidity are correct in assuming that, under the Missouri rule, any void limitation contaminates the entire property disposition of which it is part—regardless of the form of the void limitation and without judicial determination that the testator would, had he been aware of the invalidity of the limitation, have preferred that the balance of the disposition fail—then, in the case above hypothesized, A's life estate would not take effect and the remainder to A's descendants would not take effect.

Such an interpretation of the rule against perpetuities would expunge all that a testator willed with respect to his property because he had willed more than the law allowed. To the extent that such deletion is in disregard of the primary purposes of the testator as disclosed by the will as a whole, it would render the rule against perpetuities, not only an instrument to prevent suspension of vestiture beyond the stipulated period, but also an instrument of retribution for attempted violation.

Rarely, in professional experience, is a lawyer called upon, at his client's behest, to make testamentary provisions which flout the rule against perpetuities. Rarely do ultimate limitations in favor of unborn, and to the testator unknown, beneficiaries weigh heavily in the testamentary plan. Almost universally they are provisions which conform to the testator's general concept of maintaining family succession, but which are waived without regret upon the suggestion of illegality. Hence the penalty of total destruction of a testamentary plan is one which falls most usually upon the unwary and the ill-advised, whose plight and that of the primary objects of their bounty should be of particular concern to a court of equity.

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9. As to the construction of such interests, see Deacon v. St. Louis Union Trust Co., 271 Mo. 669, 691, 197 S.W. 261, 266 (1917); Sullivan v. Garesche, 229 Mo. 496, 509, 129 S.W. 949, 953 (1910).

THE TRADITIONAL CONCEPT OF THE EFFECT OF VIOLATION

The rule against perpetuities was not in the beginning one of retribution. It was a rule developed by the courts of England at a comparatively late date to check the creation of successive interests in property over an indefinite period of time through the devices of shifting and springing uses and executory devises which had been rendered possible by the Statute of Uses (1535) and the Statute of Wills (1540). English conveyancers had turned to those devices in the sixteenth and seventeenth centuries in order to give effect to the desires of landowners to pass property down to successive generations, because estates tail had, despite the Statute de Donis Conditionalibus (1285), lost their effectiveness for that purpose when the courts allowed them to become barred by common recovery[10] and when subsequent statutes rendered them destructible by fine or forfeiture. By the procedures of common recovery and fine it had become possible for a tenant in tail to cut off not only his issue but also remainders and reversionary interests.

When the courts in the sixteenth century were confronted with the new devices of conditional limitations, which were not destructible by common recovery or fine,[11] there were immediate rumblings of judicial discontent. But it was not until 1682 that the Court of Chancery in the *Duke of Norfolk's Case*[12] developed the doctrine that the validity of a contingent interest depended upon its "distance in time."[13]

Yet neither in the *Duke of Norfolk's Case,* nor in that procession of cases[14] which established step by step the period allowed for the vesting of future interests, was there a holding or discernible contention that interests which became vested within the allowed period would fall because of interests which were not to vest within the allowed period. Indeed, it was the prior taker

10. Taltarum's Case, Y. B., Mich., 12 Edw. IV 19, pl. 25 (1472). See GRAY, THE RULE AGAINST PERPETUITIES § 141 (4th ed. 1942); 2 POWELL, REAL PROPERTY § 193 (1st ed. 1950). For a description of the procedure of common recovery, see Ewing v. Nesbitt, 88 Kan. 708, 129 Pac. 1131 (1913).

11. See GRAY, *op. cit. supra* note 10, § 152 *et seq.*

12. 3 Ch. Cas. 1, 22 Eng. Rep. 931 (1682).

13. GRAY, *op. cit. supra* note 10, § 168.

14. Lloyd v. Carew, Show. P. C. 137, 1 Eng. Rep. 93 (1697); Jee v. Audley, 1 Cox 324, 29 Eng. Rep. 1186 (1787); Thelluson v. Woodford, 11 Ves. Jun. 112, 32 Eng. Rep. 1030 (1805); Beard v. Westcott, 5 Taunt. 393, 128 Eng. Rep. 741 (1810); Cadell v. Palmer, 1 Cl. & F. 372, 6 Eng. Rep. 956 (1833).

who usually sought to have his estate enlarged. The rationale of the early cases was implicit in the language of the bench and bar which spoke, not of "void settlements," but of "void limitations." Hence when the question of the effect of remote limitations upon prior limitations came into issue, the general rule sustaining the latter developed as a matter of course.[15]

Broadly viewed, the courts in developing the rule against perpetuities followed a path earlier trodden by the courts in the development of the devices of barring entails—that of preventing the creation of successive limited interests in property to take effect over an indefinite period of time. That the rule bore a definite relationship to the barring of entails by common recovery and fine is clearly suggested by the cases.[16]

Such relationship might seem merely a matter of historical interest, bearing only remotely upon the matter in hand, were it not for the fact that in the prototype the effect of the recovery or fine was to render the tenant in tail capable of conveying a fee simple. The device of common recovery was an apotheosis of the rights of the prior takers, and there is nothing in the origin or development of the rule against perpetuities which suggests that it was aimed at interests which were to take effect in proximity.

The prevailing American law follows the English law as to the effect of void conditional limitations and executory devises, and holds that where a conveyor[17] limits an estate in terms which

15. Doe d. Blesard v. Simpson, 3 Man. & G. 929, 133 Eng. Rep. 1414 (1842); Taylor v. Frobisher, 5 De. G. & Sm. 191, 64 Eng. Rep. 1076 (1852); James v. Wynford (Lord), 1 Sm. & G. 40, 65 Eng. Rep. 18 (1852); Courtier v. Oram, 21 Beav. 91, 52 Eng. Rep. 793 (1855); Webster v. Parr, 26 Beav. 236, 238, 53 Eng. Rep. 888 (1858); Hodgson v. Halford, 11 Ch. D. 959 (1879); Goodier v. Johnson, 18 Ch. D. 441, 446 (1881). It became settled quite early, however, in England that a limitation subsequent to and expectant upon a limitation void under the rule against perpetuities was likewise void, not from any infirmity in itself, but from the infirmity existing in the preceding limitation. Beard v. Wescott, 5 B. & Ald. 801, 106 Eng. Rep. 1383 (1822).

16. Long v. Blackall, 7 T. R. 100, 102, 101 Eng. Rep. 875 (1797); Cadell v. Palmer, 1 Cl. & F. 372, 6 Eng. Rep. 956 (1833). In comment *a* to § 374 of the *Restatement of the Law of Property*, it is stated that the period permissible under the rule against perpetuities corresponded roughly with the period of tie-up normally caused by a type of settlement commonly current in England at the time of the development of the rule, *viz.*, a settlement by A, upon the marriage of his son B, to B for life and thereafter to C, wife of B, for life, followed by an estate tail in the children of the marriage, under which two lives and a minority elapsed before a disentailing conveyance became possible.

17. The use of the term "conveyor" is intended to conform to the usage employed in the *Restatement of the Law of Property* and to include a testator.

if standing alone would create a valid fee and then attempts to cut down the fee by a limitation in the nature of an executory devise, which is void for remoteness, the fee takes effect divested of the void limitation.[18] This is the situation inherent in the hypothetical case posed on page 298, *supra.*

Both English and American courts generally hold likewise that where a conveyor limits estates upon alternative contingencies, and upon the happening of one of the conditions the estate dependent thereon must vest within the prescribed period, then if that condition in fact occurs the limitation of that estate will be given effect even though the limitation dependent upon the other contingency would have been void for remoteness.[19] For example, T creates by her will a trust for the life benefit of her daughter A, with provision that if A dies leaving a child or children the property shall be held for the benefit of such child or children and be paid over to it or them upon the arrival of the youngest child at the age of thirty years, or if A dies without leaving any children or if all such children should die before arriving at the age of thirty years, distribution is to be made to T's daughter B. If A dies childless, the gift to B would take effect.[20]

In both the fee-executory devise situation and in the alternative contingencies situation it is apparent that the valid provisions may be given effect without defeating the primary or dominant purpose of the conveyor. Indeed it may be presumed, in the absence of an expression of contrary intent, that had the conveyor known of the invalidity of the executory devise or of the void alternative he would have preferred that the valid provisions take effect.

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18. Farnam v. Farnam, 83 Conn. 369, 77 Atl. 70 (1910); Nevitt v. Woodburn, 190 Ill. 283, 60 N.E. 500 (1901); Chapman v. Cheney, 191 Ill. 574, 61 N.E. 363 (1901); Church in Brattle Square v. Grant, 69 Mass. 142, 156 (1855); Bunting v. Hromas, 104 Neb. 383, 177 N.W. 190 (1920); Betts v. Snyder, 341 Pa. 465, 19 A.2d 82 (1941); Smith v. Townsend, 32 Pa. 434, 441 (1859); Saxton v. Webber, 83 Wis. 617, 53 N.W. 905 (1892); 2 RESTATEMENT, PROPERTY § 229 (1936); 2 POWELL, *op. cit. supra* note 10, § 306; Note, 75 A.L.R. 127 (1931); Note, 28 A.L.R. 394 (1924).

19. Perkins v. Fisher, 59 Fed. 801 (4th Cir. 1894); Quinlan v. Wickman, 233 Ill. 39, 84 N.E. 38 (1908); Armstrong v. Armstrong, 53 Ky. (14 B. Mon.) 333, 346 (1853); Springfield Safe Deposit & Trust Co. v. Ireland, 268 Mass. 62, 167 N.E. 261 (1929); Jackson v. Phillips, 96 Mass. (14 Allen) 539, 572 (1867); *In re* Trevor, 239 N.Y. 6, 145 N.E. 66 (1924); Crompe v. Barrow, 4 Ves. Jun. 681, 31 Eng. Rep. 351 (1799); Vachel v. Vachel, 1 Cas. Ch. 129, 130, 22 Eng. Rep. 727 (1669); *Perpetuities* § 59, 41 AM. JUR. 102 (1941); Note, 64 A.L.R. 1077 (1930).

20. *Cf.* Quilan v. Wickman, 233 Ill. 39, 84 N.E. 38 (1908).

Void executory devises and void alternative contingencies do not, however, make up the entire ambit of cases in which the rule against perpetuities may be offended. The rule applies to all types of future interests including remainders.

Obviously, where a void remainder is involved, there is a greater degree of integration of such remainder with the balance of the property disposition, and a more general statement of the effect of the partial invalidity is required. No longer can the problem be solved by the expedient of saying, as in the case of the void executory devise, that the previously granted fee is divested of the void limitation. No longer can it be taken for granted that the conveyor, had he known of the partial invalidity, would have sanctioned the balance of the property disposition.

Yet a liberal view of the effect of the partial invalidity has emerged. It may be stated thus: Where by a property disposition various estates are created, some of which are valid and others of which are invalid, the valid ones will be given effect unless they are so dependent upon the invalid provisions that they cannot be separated therefrom without defeating the primary or dominant purpose of the deed or will.[21]

Sometimes the principle has been stated thus: If a limitation in a will or deed violates the rule against perpetuities, the instrument is to be read and given effect as if such limitation has been stricken out, unless the invalid limitation is so essential to the dispositive scheme that it may be inferred that the conveyor would not have sanctioned the valid provisions without effect being given to the void.[22]

In the American Law Institute's *Restatement of the Law of Property*, the effect of invalid upon valid limitations is clearly made to depend upon judicial ascertainment of the conveyor's preference assuming that he had known of the partial invalidity. Section 402 of the *Restatement* is as follows:

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21. Shepard v. Union & New Haven Trust Co., 106 Conn. 627, 138 Atl. 809 (1927); Equitable Trust Co. v. Snader, 17 Del. Ch. 203, 151 Atl. 712 (Ch. 1930); Millikin Nat. Bank of Decatur v. Wilson, 343 Ill. 55, 174 N.E. 857 (1931); Graham v. Whitridge, 99 Md. 248, 57 Atl. 609 (1904); Minot v. Paine, 230 Mass. 514, 120 N.E. 167 (1918); *In re* Trevor, 239 N.Y. 6, 145 N.E. 66 (1924); *In re* Whitman's Estate, 248 Pa. 285, 93 Atl. 1062 (1915).

22. *Cf.* Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638, 656 (1938).

§ 402. *PARTIAL INVALIDITY—EFFECT ON BALANCE OF ATTEMPTED DISPOSITION.*

When part of an attempted disposition fails as a direct consequence of the rule against perpetuities, the effect, if any, of this partial invalidity upon the balance of the attempted disposition is determined by judicially ascertaining whether the conveyor, if he had known of this partial invalidity, would have preferred that

(a) all the balance of the attempted disposition take effect, in accordance with its terms; or that

(b) certain parts of the balance of the attempted disposition fail, but the rest thereof take effect in accordance with its terms; or that

(c) all the balance of the attempted disposition fail.

The basic rationale of Section 402 is rendered clear by the comments thereunder. Thus in Comment *a* "judicially ascertained intent" of the conveyor is said to take into account "whatever the language or circumstances may reveal as to the conveyor's desires but rests chiefly upon judicially crystallized conclusions as to what a conveyor normally would have intended if he had actually considered the possibility of the partial ineffectiveness of his complete plan." And in Comment *a* also appears the statement:

> The dispositive planning of conveyors is thus given the fullest possible effectiveness consistent with the social regulation implicit in the rule against perpetuities.

That the constructional preference in a case of partial invalidity is in favor of the sustension wherever possible of the interests which are limited to vest within the allowed period is stated in Comment *c* as follows:

> c. *Preferences as between Clauses (a)-(c):* The constructional preference stated in § 243 (c), for the 'legally more effective construction' is a factor which causes most disputed cases to be included within the rule of Clause (a) (see Comment d). Sometimes the close connection between the invalid part and some other part of the attempted disposition broadens the resultant invalidity and thus makes applicable the rule stated in Clause (b), (see Comments e and f). The rule stated in Clause (c) is not applied unless either the close connection between the invalid part and the balance of the disposition requires this result or additional language or circumstances are present which require an affirmative finding of this intent on the part of the conveyor (see Comment g).

Related sections of the *Restatement* set forth principles of interpretation to be applied in determining whether limitations, not of themselves too remote, are to be treated as being separable from void limitations, or as being so subordinate to the void limitations as to render it unreasonable to suppose that the conveyor would have wished the valid to stand without the invalid. Such principles take into account the relationship of the donees to the conveyor, the extent of the conveyor's property which is involved and the degree of distortion in the dispositive plan caused by the partial invalidity. Distortion between the stirpes of the conveyor resulting from the invalidity of limitations in favor of one or more of them would, for example, justify a finding that the conveyor would have preferred failure of all of the limitations to the class, had he known of the partial invalidity. Such judicially developed conclusions as to what a conveyor normally would have preferred would, of course, yield to language contained in the instrument, if there be such, from which an actual preference may be inferred.

A study of the situations in which the interpretive principles are applied is beyond the scope of this paper. It would not be germane to this discussion, unless it appear that the constructional preference, evident elsewhere, for the "fullest possible effectiveness" in the face of partial invalidity resulting from the rule against perpetuities obtains in Missouri.

THE DECISIONS IN MISSOURI

Reverting now to the Missouri decisions on the effect of partial invalidity, an analysis of the more important cases in their chronological order seems preferable. No other approach would seem to show as clearly the alternating currents of decision, which at times supported the concept of resultant total invalidity and at other times tended to flow in more traditional channels.

The story begins with *Lockridge v. Mace*[23] in which a testator devised land to his wife for life, then to his children for life and then to his grandchildren for life, with remainder over to his great-grandchildren in fee. The Missouri Supreme Court held that the ultimate limitation to the great-grandchildren was void, not only because it was susceptible of taking effect more than

23. 109 Mo. 162, 18 S.W. 1145 (1891).

twenty-one years after a life or lives in being, but also because it constituted a limitation to unborn children of unborn life tenants,[24] and that such invalidity destroyed the entire property disposition. The life estates in the children and grandchildren necessarily vested within the prescribed period, but the court concluded that they failed because they were so bound up with the disposition that fell beyond the prescribed period as to constitute with it "but one disposition of the property." This test constitutes a clear deviation from the test applied in other states,[25] and marks the starting point for the approach made by the court in a number of subsequent cases. In practice it seems to leave little room for the sustention in any case of prior valid limitations, for almost any disposition of property providing for a series of interests therein would in a broad sense constitute "one disposition of the property." Yet the court did not go so far as to make a pronouncement that the effect of a void limitation is total invalidity.

Shepperd v. Fisher[26] involved a will in which the testator devised certain real estate: to his widow for life; thereafter in trust for the benefit of his daughter for life; thereafter to the bodily heirs of the daughter "if the said bodily heirs have issue, forever"; but if such bodily heirs should die without issue, then by way of reversion to the testator's heirs. The limitation to the bodily heirs was treated by the court as consisting of a gift of life interests which were to be enlarged into fees should the bodily heirs die leaving issue. According to such interpretation, not only the life estates to the widow and to the daughter, but also the life estates to the bodily heirs of the daughter, were limited to vest within the period allowed by the rule against perpetuities and not of themselves invalid. It is suggested that under the language of the will the limitation to the bodily heirs might have been treated as a limitation of remainders in fee to vest within the allowed period subject to a defeasance limited to take effect beyond that period, which, being void, would render the fees indefeasible. But the court held that not only the dis-

24. As to the doctrine that no estate can be given to the unborn child of an unborn child, see Whitby v. Mitchell, 44 Ch. D. 85 (1890). The doctrine was limited in Greenleaf v. Greenleaf, 332 Mo. 402, 58 S.W.2d 448 (1933), and it is doubtful whether it has any effect in Missouri.

25. See Hudson, *supra* note 1, at 23-26, for an analysis of the cases relied upon by the court as sustaining the test.

26. 206 Mo. 208, 103 S.W. 989 (1907).

position of the particular property, but also all other provisions of the will, including devises in fee, were void because all of the provisions were part of a "general plan of the testator." Ironically, the opinion of the court in *Shepperd v. Fisher* contained one of the clearest and most succinct restatements of the general rule of separability:

> The books are full of cases which hold that when the will contains distinct and independent provisions so that different portions of the property or different estates in the same are created, some of which are valid and others of them invalid, the valid ones will be preserved unless those which are valid are so dependent upon the invalid that they cannot be separated without defeating the general intention of the testator[27]

Riley v. Jaeger[28] involved a will in which the testatrix left all of her property to her eight children in equal shares, but annexed a further provision that in the event of the death of any one of the eight children without issue, or in case the direct descendants of any one of the children should all die, then the share of such child should "revert to the survivor of the eight direct legatees named and to the descendants of such as may be deceased." Interpreting the latter provision as one intended to take effect upon indefinite failure of issue, the circuit court had held the will void for conflict with the rule against perpetuities. The Supreme Court, after holding that the devise over was clearly violative of the rule against perpetuities, proceeded to affirm the judgment without any discussion of the effect of the invalid limitation over upon the balance of the will. This failure to consider the point might have implied that total intestacy was the necessary result of partial invalidity, or it may have meant no more than that the court deemed it unnecessary to consider the point, since the property would go to the eight children in any event, *i.e.*, either if the limitations divesting their interests alone were invalid, or if the result of such invalidity was total intestacy.

Concerning the Missouri cases cited above, the Fourth Edition of Gray's *The Rule Against Perpetuities*[29] made the following comment:

> In some of these cases, the language of the Court suggested that the Missouri doctrine was based upon a presumption of

27. *Id.* at 245, 103 S.W. at 999.
28. 189 S.W. 1168 (Mo. 1916).
29. § 249, p. 262.

> intent that all of the provisions of the trust should stand or fall together. But in all the cases the doctrine has been applied in such a sweeping manner, without any apparent consideration of what the testator would have wished in the particular case, that the presumption, if so it is called, seems to amount to a positive rule of law.

After *Riley v. Jaeger* came two cases bearing upon the effect of violation of the rule against perpetuities which held forth some promise of conformity with traditional concepts.

Deacon v. St. Louis Union Trust Company,[30] involving the will of Lily Lambert, laid what might have been the foundation for a decision conforming with the majority rule with respect to fee-executory devise situations. Mrs. Lambert left her property, including a controlling interest in Lambert Pharmacal Company, in trust for a period of thirty years upon the termination of which division of the property was to be made among her six children. A subsequent clause of the will provided that if a child died before final distribution of the trust the issue of the child should take all the rights of the parent, or if the child left no issue his or her share should pass to the survivors of textatrix' children or their issue. The court construed the will as creating in the children interests which became immediately vested subject to being divested in the case of a child who died within the thirty year period. Further determining that the executory devise in favor of the issue of a child or in favor of the surviving children or their issue would necessarily take effect upon the death of the child as unqualified fees (*i.e.*, not subject to successive defeasances), it held that there was no violation of the rule against perpetuities. Note that the key to the result here was the treatment of the interests of children and issue of children as becoming vested within the allowed period, although possession was postponed for a period of thirty years. From such a holding it would not have been too difficult to reach the further holding, in an appropriate case, that the creation of vested interests in fee satisfied the requirements of the rule against perpetuities, even though they were defeasible upon a condition which might occur beyond the allowed period; with the result that the executory devises limited upon the void condition would fail and the vested interests would be indefeasible.

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30. 271 Mo. 669, 197 S.W. 261 (1917).

The appropriate case soon arose, but a different rationale was employed in its solution.

In *Schee v. Boone*,[31] the testator by his will left 811 acres of land to his daughter "and to the heirs of her body at her death." This limitation, which at common law would have created an estate tail, operated under the statute abolishing estates tail to create a life estate in the first taker with remainder in fee to those to whom the estate would have passed upon the death of the first taker according to the course of the common law. A subsequent limitation provided, however, that if any of the bodily heirs of the daughter should die without issue after the death of their mother, the surviving spouse of such heir should have no interest in the property, but the share of such heir should vest "in his brothers and sisters who may be living, or who may have died leaving issue." The court upheld the disposition, as against the contention that it violated the rule against perpetuities, on the ground that the limitation over upon the death of a bodily heir after the death of the life tenant, and after such bodily heir had taken the fee, was inconsistent with the prior estate, "the creation of which was the paramount purpose of the testator," and should, therefore, be rejected for repugnancy. In result, although not in reasoning, this case was in line with the holdings in other states respecting the effect of a remote executory devise upon a previously limited fee.

In *Loud v. St. Louis Union Trust Company*[32] a testatrix disposed of her residuary estate in trust for the following purposes: to pay stipulated amounts of income to her daughter for life; after the death of the daughter to hold the trust estate for the equal benefit of testatrix' grandchildren with power to apply income for their benefit during minority and to make allowances to them after attainment of majority; and to distribute to each grandchild one-half of his or her share of the principal upon attainment of the age of thirty-five years and the balance thereof upon attainment of the age of forty years. If a grandchild were to die before receiving all of his or her share, the share was to be held for the grandchild's issue until attainment of the age of twenty-one years, or in default of issue was to be divided per stirpes among the other surviving grandchildren and the issue of

31. 295 Mo. 212, 243 S.W. 882 (1922).
32. 298 Mo. 148, 249 S.W. 629 (1923).

deceased grandchildren, subject to the same conditions as affected their original shares. The court held that, since the testatrix' daughter might have children born after testatrix' death, the limitations in favor of their issue were such as would not necessarily take effect within the prescribed period. Without, upon this occasion, referring to the rules respecting separability of prior estates, the court proceeded directly to the conclusion that the entire will was void. The postulate of the decision again appears to have been that the will provided for "but one disposition of the property."

In *Mockbee v. Grooms*[33] the court had before it a complicated will, in which a testatrix made a series of devises of specific lands. Three such devises in favor of members of testatrix' family were affected by like ultimate limitations. One such devise, which will serve as an example, was to a daughter for life and was followed by directions that at the daughter's death the land should be sold and the proceeds deposited with a named trust company, there to remain and to draw interest until the youngest child of the daughter should attain the age of twenty-five years, whereupon the proceeds, with accrued interest, were to be divided among the daughter's then living children, descendants of a deceased child to take in place of their father or mother. In the event of the death of all of the daughter's children before the youngest should attain the age of twenty-five years, the proceeds were to become the property of the children of another daughter of the testatrix subject to like provisions for retention and ultimate distribution, and in the event that all of the grandchildren of the testatrix should die before attaining the age of twenty-five years, the proceeds were to be paid to charity. The court held that the three interrelated property dispositions were wholly void. But in sustaining devises of other property contained in the same will, the court, after reviewing *Shepperd v. Fisher* and other Missouri cases, said:

> From the above quotations, it is clear that the doctrine of this court is, that before we can hold void other devises in a will because certain devises are void as violating the rule against perpetuities, such other devises must be in some manner connected with the void provisions, or be dependent upon them, or the court must be convinced that the whole will was made pursuant to one general plan of disposition, and that

33. 300 Mo. 446, 254 S.W. 170 (1923).

the valid devises would not have been made by the testator without his intention that the invalid part should also take effect in manner and form as in his will provided.[34]

Mockbee v. Grooms was followed by a series of cases[35] in which the court adopted liberal constructions of property dispositions which avoided application of the rule against perpetuities. As if to shield such dispositions from its rigid precedents as to the effect of violation of the rule, the court during this period softened the impact of the rule by announcing and applying the principle that where an instrument is susceptible of two possible interpretations, one of which would result in the instrument's being rendered void, and the other of which would result in sustention of the instrument, that construction should be adopted which would uphold the instrument.[36]

One of these cases is, however, of significance upon the question of the effect of violation of the rule, namely *Davis v. Rossi.* There the court had before it a deed creating a trust, one of the provisions of which directed that certain income be distributed to the grantor's ten children (named in the deed) and that upon the death of a child during the trust period such child's share of the income be distributed to his or her descendants, or in default of descendants, as to one-half thereof, to his or her widow or widower for life, and another provision of which directed termination of the trust at the death of the last survivor of the grantor's wife and children. Since the wife (or husband) of a child of the grantor might be a person who was not alive at the time of the creation of the trust, the provision for the payment of income to the widow (or widower) of a child would, standing by itself, have suspended the vesting beyond the allowed period. The court, following the rationale of *Schee v. Boone,* rejected for repugnancy so much of the grant of income to the widow (or widower) of a child as required payment of such income beyond the period otherwise prescribed for the termination of the trust.

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34. *Id.* at 472, 254 S.W. at 176.

35. Trautz v. Lemp, 329 Mo. 580, 46 S.W.2d 135 (1932); Niedringhaus v. Williams F. Niedringhaus Investment Co., 329 Mo. 84, 46 S.W.2d 828 (1931); Davis v. Rossi, 326 Mo. 911, 34 S.W.2d 8 (1930); Plummer v. Roberts, 315 Mo. 627, 287 S.W. 316 (1926).

36. Trautz v. Lemp, 329 Mo. 580, 46 S.W.2d 135 (1932); Davis v. Rossi, 326 Mo. 911, 34 S.W.2d 8 (1930); Plummer v. Robert, 315 Mo. 627, 287 S.W. 316 (1926). See also Carter v. Boone County Trust Co., 338 Mo. 629, 92 S.W.2d 647 (1936).

In effect, this was a sustention of the valid provisions of the deed through the partial extinguishment of an offending interest.

St. Louis Union Trust Company v. Bassett[37] was a reversion to the line of decision exemplified by *Riley v. Jaeger, Loud v. St. Louis Union Trust Company* and *Mockbee v. Grooms.* The *Bassett* case involved a will by the residuary clause of which trusts were created for the benefit of certain named beneficiaries (including a nephew and nieces of the testatrix) to continue until they should respectively attain the age of forty years, subject to a provision (among others) that if any beneficiary should die before becoming entitled to distribution, leaving descendants, the share of the one so dying should be held for the benefit of such descendants until the youngest of the beneficiaries named in the will should attain the age of forty years. The word "beneficiaries" was construed (by reference to the language of a spendthrift provision) to mean not only the original named beneficiaries but also children (including unborn children) of the latter, and the interests of all such beneficiaries were treated as remaining contingent until the youngest of the original named beneficiaries attained, or would, if he or she survived, have attained, the age of forty years. Under such construction, there was a possibility that all of the original named beneficiaries might die shortly after the death of the testatrix and that a child of one of them, born after the death of testatrix, might have to wait more than twenty-one years after the death of the last to survive the named beneficiaries before title would vest in him or her. After holding that ultimate vesting was too long postponed, the court said:

> It is our conclusion that the residuary clause, under the facts pleaded, violates the rule and that as to the individual estate of the testatrix the residuary clause is void.[38]

Reference was made in the opinion to an issue raised in the briefs as to whether the disposition, if violative of the rule against perpetuities, was void in part or in toto, but the principles of separability were not further discussed.[39]

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37. 337 Mo. 604, 85 S.W.2d 569 (1935).

38. *Id.* at 623, 85 S.W.2d at 579.

39. The case is frequently cited upon a secondary point, arising out of an exercise in the will of a power of appointment, to the effect that upon exercise of a power other than a general power to appoint by deed or will the period allowed by the rule against perpetuities is reckoned from the date of the creation of the power.

St. Louis Union Trust Company v. Kelley[40] illustrates the same tendency to treat any void limitation as contaminating the entire property disposition of which it is part, without precedent judicial determination as to what might have been the testator's preference had he known that such limitation was void. The situation presented was this: Testatrix left her residuary estate in trust for the benefit in equal shares of her two daughters for their respective lives. Upon the death of a daughter leaving children or descendants of children her surviving, the trustees were directed to convey and transfer the "fee simple title" of such daughter's share to such children or descendants of children, share and share alike, the descendants of any deceased child taking the share that their parent would have taken if living, provided "that he or she shall have attained the age of thirty years." If the child (or descendant) should not have attained that age, his or her share was to be distributed to him or her in two installments at age twenty-five and age thirty, respectively, and if he or she should die before receiving complete distribution of the share, the undistributed portion of the share was to go to his or her heirs "on the maternal side." There was express language to the effect that the fee simple title should vest only at the times and to the extent prescribed. The court held that since it was not certain that all of the remainders in testatrix' grandchildren or their descendants would vest within a life or lives in being at testatrix' death and twenty-one years thereafter, there was a violation of the rule against perpetuities and the entire trust was void.

The opinion of the court in the *Kelley* case was remarkable for its almost complete avoidance of discussion of the issues upon which the case was primarily presented as to the effect of the ulterior limitation which it held void upon the prior limitations. It did, indeed, touch upon a contention of the proponents of the trust that the void limitation was an executory devise and its voidity had the effect of rendering previously limited fees indefeasible, by saying:

> Another rule, more of law than construction, is that where a deed or will *vests* a fee simple title in remainder upon the termination of a preceding life estate, and within the time allowed by the rule against perpetuities, the title is good not-

40. 355 Mo. 924, 199 S.W.2d 344 (1947).

> withstanding the instrument by a condition subsequent annexes a limitation whereby the fee may possibly be divested. For the rule against perpetuities is concerned with when the vested estate begins, not when it ends. [Citing *Schee v. Boone* as upholding the proposition.][41]

But the court did not undertake to construe the trust from the standpoint of the nature of the interests created by the various limitations. Nor did it embark upon a judicial determination whether testatrix, had she known of the invalidity of the ulterior limitation, would have preferred that the balance of the trust provisions should take effect or that they should fail. It proceeded directly from a determination that the rule against perpetuities had been violated to an affirmance of a decree that had held the entire residuary trust to be void.

The view that under the Missouri decisions the presence of a single void limitation in a deed or will results in total invalidity of the property disposition derives substantial support from a line of cases in which the court proceeded from a determination that the rule against perpetuities had been violated directly to a holding that the entire disposition was void, without any discussion of the effect of the void limitation upon the balance of the disposition and without any apparent recognition that an issue concerning such effect existed. The prophets of total voidity may well argue that, in our jurisprudence, that which the court did is more expressive of the law than what it said. The mere fact that in such cases as *Lockridge v. Mace* and *Loud v. St. Louis Union Trust Company* the valid, as well as the invalid, portions of the disposition were held to fall together, because they constituted parts of a single plan of disposition, would scarcely refute the conclusion that in Missouri partial invalidity results in total invalidity. Such a test is so vague and uncertain that it taxes one's imagination as to what kind of a void limitation would be so separable from the "general plan of disposition" as not to invalidate the balance of the disposition.

Yet the state of the law is incongruous. The court has not only refrained from making an express pronouncement that one void limitation in a deed or will renders the whole disposition void, but has from time to time uttered dicta expressing its assumed

41. *Id.* at 934, 199 S.W.2d at 350.

adherence to the general law in other jurisdictions. Even in such a case as *Shepperd v. Fisher,* which in result suggests that partial invalidity produces total invalidity, the court stated the general principles as to separability or inseparability of prior valid limitations from a void ulterior limitation in consonance with the assumed preference of the testator, and it purported to render its decision consistently with those principles.

This much, however, must be conceded: the court has never in any case made a judicial determination, in conformity with the principle of Section 402 of the American Law Institute's *Restatement of the Law of Property,* with respect to the testator's preference as to the effect of a void ultimate limitation upon prior limitations, if he had known of the invalidity of the ulterior limitation; and, except possibly in *Schee v. Boone* and *Davis v. Rossi,* it has never upheld a prior valid limitation where the ulterior limitation was held void.

The Missouri Supreme Court has been most zealous in its pronouncements, even in perpetuities cases, that in the construction of a will the intention of the testator as gathered from the four corners of the will is controlling.[42] Since no more eloquent testimony of an intent not to die intestate is conceivable than that embodied in the solemn act of making a will, it would be reasonable to expect that the principle that testamentary intent is controlling should be given application also in relation to the effect of partial invalidity. Yet the court has, in a number of cases, decreed total invalidity whenever a property disposition contained a limitation which overstepped the period allowed by the rule against perpetuities, without attempting by construction to ascertain what, under the circumstances, might have been the conveyor's preference. Granting that cases may arise in which there is so close a connection between the invalid limitation forming part of the disposition and the balance of the disposition that it can be fairly determined that, had the conveyor known of the partial invalidity, he would have preferred that the entire disposition fail, the court has never seen fit to make a judicial ascertainment of testamentary preference.

Only two conclusions concerning the law of Missouri on the

42. Trautz v. Lemp, 329 Mo. 580, 46 S.W.2d 135 (1932); Plummer v. Roberts, 315 Mo. 627, 287 S.W. 316 (1926); Schee v. Boone, 295 Mo. 212, 243 S.W. 882 (1922).

effect of partial invalidity are possible: the first, that one void limitation in a deed or will destroys the entire property disposition of which it is a part; the second, that the Missouri Supreme Court, although it has dealt severely in a number of cases with property dispositions affected by void limitations, has never closed the door completely on the doctrine that the conveyor's preference, had he known of the voidity, should be given effect, and would in the proper kind of a case apply that doctrine.

Whichever of these conclusions be correct, the need of remedial legislation is clearly suggested.

The view of complete voidity implies that if a conveyor transgresses the rule against perpetuities in the slightest degree, his entire property disposition is void and whatever might under the circumstances have been his preference is immaterial. As applied to a case where it could reasonably be inferred that, had the conveyor known of the partial invalidity, he would have preferred that the balance of the disposition, or portions thereof, should stand, such an application of the rule against perpetuities is penal —it punishes the conveyor because of his transgression, and the intended objects of his bounty because of no sin whatsoever, by vesting the property in a manner contrary to the conveyor's intention. The punishment simply does not fit the crime, and particularly is this so where the transgression, as in most cases, is the result of inadvertence. Nor does the concept of total invalidity conform with the historical function of the rule against perpetuities. Even in Georgian England when conveyors were still endeavoring to perpetuate family importance by the creation of successive limited interests in property, the rule was applied as a bar and not as a penalty. Surely in the milder social climate of present day Missouri, the establishment of penal sanctions for the rule against perpetuities has no place.

The view that the law of Missouri as to the effect of partial invalidity is still unsettled—that the Missouri court waits, with appropriate dicta from its prior decisions, the appearance of a proper kind of case in which to apply the test of conveyor's preference—is scarcely an encouraging view. Thirty-seven years have transpired since Professor Hudson protested against the trend of the decisions in *Lockridge v. Mace* and *Shepperd v. Fisher*. Since then only about twenty cases involving the rule against perpetuities have been presented, without producing the

kind of case in which the court was impelled to give full and adequate consideration to the effect of a void limitation upon valid limitations forming part of the same property disposition. The better hope of settlement of the law, if that is what is needed, would seem to lie in remedial legislation, rather than in the appearance of the proper kind of case.

A Suggestion for Statutory Relief

In the present state of the law concerning the effect of violation of the rule against perpetuities, Missouri stands isolated, and it is earnestly submitted that consideration should be given by the Missouri Bar to the proposal of legislation which would either bring the state law into conformity with that prevailing elsewhere, or otherwise relieve against the penalty for violation which the current of decisions either imposes or leaves to be inferred.

At first glance, it would seem that such remedial legislation might take the form of adopting the principle of Section 402 of the American Law Institute's *Restatement of the Law of Property*. This, however, does not seem feasible. The *Restatement* was never intended as a codification. Section 402 is, moreover, not self-implementing. It states broadly that the effect of partial invalidity is to be determined by judicially ascertaining whether the conveyor, if he had known of the partial invalidity, would have preferred that all of the balance of the attempted disposition take effect, or that parts of such balance fail, or that all of it fail; but the application of the principle is dependent upon rules of constructional preference which are to be derived not only from the comments under Section 402 but also from related sections. To enact Section 402 alone would do no more than reexpress some of the dicta of the Missouri Supreme Court. To embody the rules of constructional preference would involve an Herculean task of codification of portions of the Law of Property.

A somewhat simpler approach would seem to lie in adopting the principle of cutting down by statutory fiat the limitations of a deed or will which result in violation of the rule against perpetuities, so that the conveyor's expressed intent may be effectuated to the extent, but only to the extent, that it does not transgress the rule.

In England this principle was adopted in Section 163 of the Law of Property Act of 1925[43] to further ameliorate the harsh effect of violation of the rule in certain types of cases. That statute reads as follows:

> 163.—(1) Where in a will, settlement or other instrument the absolute vesting either of capital or income of property, or the ascertainment of a beneficiary or class of beneficiaries, is made to depend on the attainment by the beneficiary or members of the class of an age exceeding twenty-one years, and thereby the gift to that beneficiary or class or any member thereof, or any gift over, remainder, executory limitation, or trust arising on the total or partial failure of the original gift, is, or but for this section would be, rendered void for remoteness, the will, settlement, or other instrument shall take effect for the purposes of such gift, gift over, remainder, executory limitation, or trust as if the absolute vesting or ascertainment aforesaid had been made to depend on the beneficiary or member of the class attaining the age of twenty-one years, and that age shall be substituted for the age stated in the will, settlement, or other instrument.
>
> (2) This section applies to any instrument executed after the commencment of this Act and to any testamentary appointment (whether made in the exercise of a general or special power), devise, or bequest contained in the will of a person dying after such commencement, whether the will is made before or after such commencement.
>
> (3) This section applies without prejudice to any provision whereby the absolute vesting or ascertainment is also made to depend on the marriage of any person, or any other event which may occur before the age stated in the will, settlement, or other instrument is attained.

Obviously, such a statute would fall short of affording the relief which is needed in Missouri. It presupposes a judicial climate, such as has prevailed in England from the inception of the rule against perpetuities, in which void ulterior limitations were held not to affect valid prior limitations unless it otherwise appeared that the conveyor would have preferred the valid to fall with the void. The statute corrected merely the inequity which arose from the adoption by the conveyor of age requirements which resulted or might result in too long a suspension of vesting.

But the statute is a clear precedent for legislation which would overcome the strict application of the doctrine of contamination

43. Law of Property Act, 1925, 15 & 16 Geo. 5, c. 20, § 163.

of the valid by the invalid, by simply cutting down the provisions of the instrument to permissible limits.

This principle, applied with broader scope, is inherent in the perpetuities savings clauses which are widely employed in the drafting of deeds and wills creating trust estates. Where a draftsman is conscious of a limitation contained in the instrument which may possibly not take effect within the allowed period, or where he is simply imbued with the idea of superabundant precaution, it is not uncommon for him to insert in the instrument a clause to the effect that, notwithstanding any provision therein contained to the contrary, each trust thereby created which is still in existence at the termination of a period of twenty-one years after the death of the last to survive of certain designated persons (who are living at the effective date of the instrument) shall forthwith end, and any trust property which shall not theretofore have been distributed pursuant to other provisions of the instrument shall upon the termination of such twenty-one year period be forthwith distributed to the persons, and in the proportions in which such persons, are then entitled to the income or the benefit of the income of such remaining trust property. Such savings clauses have generally been held effective to avoid application of the rule against perpetuities.[44] In professional experience, one rarely encounters an objection on the part of a conveyor to the insertion thereof in the deed or will.

The enactment of a statute in Missouri, which would embody the principle of the perpetuities savings clauses, would seem to be precisely the remedy which is needed to overcome the harsh results of decisions which have thus far failed to apply the principles elsewhere adhered to that the effect of partial invalidity on the balance of the property disposition is to be determined by judicially ascertaining the conveyor's preference. Such a statute would in effect provide that: where in a deed or will the vesting of any property is or may be postponed beyond a period of twenty-one years (plus actual periods of gestation) after the death of the last to survive of all persons who (a) are or were in being at the effective date of the instrument, and (b) either became entitled under the instrument to some legal or equitable

44. Friday's Estate, 313 Pa. 328, 170 Atl. 123 (1933); Boston Safe Deposit & Trust Co. v. Collier, 222 Mass. 390, 111 N.E. 163 (1916); Note, 91 A.L.R. 771 (1934).

interest, vested or contingent, in such property, or were named in the instrument—no interest created by the instrument which is limited to vest prior to the termination of said period of twenty-one years shall fail by reason of the rule against perpetuities, and, if at the termination of said period of twenty-one years such property or any interest therein shall not become vested pursuant to the terms of the instrument, it shall immediately after such termination become vested in the persons, and in the proportions in which such persons, are then entitled to the income from such property or interest therein. The "effective date of the instrument" might be defined as the date of its delivery in the case of an irrevocable transfer inter vivos and as the date of the death of the testator or grantor in the case of a will or revocable transfer inter vivos. In order to avoid constitutional questions the statute would, advisedly, be made applicable only to instruments becoming effective after the enactment of the statute.

The following considerations are offered in favor of such a statute:

1. It would in no way lessen the restrictions imposed by the rule against perpetuities or impair the force of the public policy which it embodies. The rule which forbids the suspension of vesting for a period longer than that measured by lives in being, plus twenty-one years plus any period of actual gestation, by the same token sanctions a suspension which is no longer than that period, even though it extends to its utmost limit.[45] Since the effect of the proposed statute, where operative, would be merely that of accelerating the vesting to a point of time legally permissible for a voluntary conveyance, it could not be said to be socially objectionable, unless the objection be on the ground that an attempted transgression should be punished. Such a motive would be completely foreign to the public policy which produced the rule.

2. The proposed statute would in no way affect the provisions of any deed or will which contains no violation of the rule against perpetuities in its present form. It would operate solely upon

45. An extreme example of permitted suspension may be found in Villar, Public Trustee v. Villar, (1929) 1 Ch. 243, where a testator created a trust to continue until the termination of a twenty year period after the death of the last to survive of the descendants of Queen Victoria who were living at the time of the testator's death.

property dispositions which contain void limitations, *i.e.* those whose validity is now in question.

3. Where, in the case of a deed or will, violation of the rule against perpetuities is postulated upon a mere possibility of postponement of vesting beyond the allowed period, which does not in fact transpire, the proposed statute would produce no modification of the provisions of the deed or will and the conveyor's intent therein expressed would be completely effectuated. This result implies, to be sure, the supersession of the principle that violation of the rule is to be tested by the possibility under the instrument, rather than by the actuality, of remote vesting. However, that principle was never socially necessary, but only administratively necessary because the court could not at the time when it was called upon to act foretell whether a future contingency would or would not occur—a forecast which the proposed statute would not require. The principle, moreover, often produces harsh results. In a number of the Missouri cases cited above, for example, violation of the rule against perpetuities resulted from the existence of a possibility that a female life tenant of advanced age might have children who were unborn at the effective date of the instrument and that the interests of such unborn children would postpone ultimate vesting for too long a period, when in fact no such children were subsequently born and indeed the legal possibility was a scientific improbability. A similar harsh result would ensue from the creation of a life estate for a child's widow (who might possibly be a person unborn at the effective date of the instrument) and an attempted limitation over upon the death of such widow, when in fact the child is already married at the effective date of the instrument and the possibility of the unborn future wife is an Hogarthian concept. In such cases, the proposed statute would substitute complete effectuation of the conveyor's intent (without actual violation of the rule against perpetuities) in the place of complete or partial destruction of the conveyor's intent.

4. Where a deed or will contains a void limitation to take effect upon a contingency which does in fact occur, the proposed statute would produce a modification of the provisions of the deed or will by requiring a vesting of the property in the persons who at the termination of the allowed period are currently entitled to the income. But from the standpoint of affecting property rights,

the question in such a case is whether less violence to the conveyor's intent would be done by such an ultimate vesting under the provisions of the statute, or by the application of the rule (considered by many to exist in Missouri) which would completely disregard the conveyor's expressed intent and would invalidate the entire property disposition. The statute would seem to be the instrument of lesser violence. The interests limited by the instrument to vest within the allowed period would under the statute be given full effect, and only twenty-one years after all beneficiaries living at the effective date of the instrument had passed out of existence, if at all, would the substitutionary provisions of the statute take effect. In view of the fact that such substitutionary provisions would require the vesting at the termination of the allowed period of all previously unvested property in persons on whom the conveyor conferred the enjoyment, it cannot be said that great violence is done to his intention. He has merely been restrained from providing for a change in the enjoyment beyond the allowed period.

5. The proposed statute, by producing a certainty of vesting within the allowed period, would tend to reduce ligitation. Although the provisions of a deed or will, if of uncertain meaning, would be open to construction by a court, issues based upon the effect of limitations void for remoteness would be eliminated. The removal of the overhanging threat of litigation concerning the validity of a property disposition by reason of the rule against perpetuities would not only be of advantage to the beneficiaries of the disposition, but, where a trust has been created, would constitute an assurance to the trustee of his right to carry out the provisions of the trust according to its terms. As it now stands, the liability of a trustee who acts under an instrument of doubtful validity is not clearly defined,[46] and this in itself constitutes an inducement to litigation, although none is otherwise contemplated.

6. The statute would restore the rule against perpetuities to its historical function as a bar against the creation of interests limited to take effect after the termination of the allowed period.

This proposal is submitted with the hope that it will contribute

46. *Cf.* Schuyler, *Payments under Void Trusts*, 65 HARV. L. REV. 597 (1952).

to the study of a problem with respect to which Missouri stands in a unique position. The law of Missouri ought not to persist in its present state.[47]

47. After the foregoing article was prepared, two articles on perpetuities by Professor W. Barton Leach were published. *Perpetuities: Staying the Slaughter of the Innocent*, 68 L. Q. REV. 35 (1952); and *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721 (1952). These articles, although not touching specifically upon the unique situation in Missouri, deal with the unrealistic and superfluous technicalities of the rule against perpetuities and suggest the need for the development of a more rational case law or correctives by legislation. They are most valuable contributions to any study directed to a reshaping of the rule.