

Winter 1966

## Perpetuities Reform by Legislation

Willard L. Eckhardt

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Willard L. Eckhardt, *Perpetuities Reform by Legislation*, 31 Mo. L. REV. (1966)

Available at: <https://scholarship.law.missouri.edu/mlr/vol31/iss1/11>

This Article is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact [bassettcw@missouri.edu](mailto:bassettcw@missouri.edu).

# PERPETUITIES REFORM BY LEGISLATION

WILLARD L. ECKHARDT\*

## I. INTRODUCTION

Harvard's W. Barton Leach is largely responsible for the current trend toward perpetuities reform by legislation. In his *Perpetuities in a Nutshell*<sup>1</sup> he explained the Rule Against Perpetuities so lucidly that any lawyer could understand the basic applications of the rule, and he gave colorful and memorable names to the more absurd applications of the rule.<sup>2</sup> Once the absurdities were clearly in view, reform was almost inevitable. In addition to perpetuities problems haunting other common law states, Missouri had its own local perpetuities problem, the doctrine of *Lockridge v. Mace*, infectious invalidity in its most extreme form.<sup>3</sup>

Absent reform by the courts, there are several avenues of legislative reform. The first attacks the problem broadside; the controversial "wait and see"<sup>4</sup> approach advocated by Professor Leach and adopted by a number of states will save most limitations, but appears to some of us to have undesirable side effects. A piecemeal approach is to deal individually with each type of case, e.g., to reduce a stated age above twenty-one to twenty-one. Another broadside approach is a general cy pres provision that permits reformation of a limitation to bring it within the period of the rule and

---

\*Professor of Law, University of Missouri.

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

2. For example, fertile octogenarian, unborn widow, precocious toddler, and magic gravel pit. Several of these terms appeared in publications subsequent to 1938.

Missouri courts have shown a commendable willingness to avoid the absurdities by a process of free construction. For example, in an "administration contingency" type of case where a gift was limited "to commence immediately upon the termination of the administration of my estate," an event possibly too remote in time, the court construed the time as "at my death": *Trautz v. Lemp*, 329 Mo. 580, 46 S.W.2d 135 (1932), noted in 17 ST. LOUIS L. REV. 370 (1932).

3. 109 Mo. 162, 18 S.W. 1145 (1891). For an extended consideration of this doctrine and for the opinion that the case has been overruled in fact, see Eckhardt, *Rule against Perpetuities in Missouri*, 30 MO. L. REV. 27, 48, 61-70 (1965).

4. This approach is to wait and see what actually happens during the perpetuities period rather than to imagine in advance what might happen during the period. The objection to this approach is that it may leave titles unsettled for a very long period. In my opinion cy pres reformation is preferable.

to approximate as nearly as possible the intention of the grantor or testator.<sup>5</sup>

## II. 1965 MISSOURI REFORM LEGISLATION—IN GENERAL

The first perpetuities reform bill was considered by the Missouri General Assembly in 1959, but it was not until 1965 that a bill was enacted, now classified as section 442.555 RSMo.<sup>6</sup> The first subsection abolishes the doctrine of *Lockridge v. Mace* (infectious invalidity in its most extreme form), and the principal motivation for reform legislation in Missouri was to abolish this doctrine. The second subsection provides for cy pres reformation to salvage that part of a limitation which violates the Rule Against Perpetuities, and in a sense is a bonus; the inflexibility of the first subsection made the second subsection highly desirable even though not absolutely necessary. The third subsection is on the effective date, the problem considered below in detail. It is hoped in subsequent articles to consider the first two subsections at length.

## III. EFFECTIVE DATE—IN GENERAL

The third subsection of section 442.555, on the effective date of the act, provides as follows:

This section shall not apply to any limitation or provision as to which the period of the rule against perpetuities has begun to run prior to the first day of November in the year [1965] in which this section becomes effective.

One of the first problems that will face a lawyer concerned with a perpetuities problem is whether the old law governs his case or whether the new statute applies. It is the purpose of this article to explore that problem.

It should be noticed first that the act in effect provides specific dates,

---

5. For a review of recent legislation, see Leach, *Perpetuities: The Nutshell Revisited*, 78 HARV. L. REV. 973, 987-990 (1965).

6. S.B. 318, 73d Gen. Assem. (1965).

See Eckhardt, *supra* note 3, at 62, n.120, for a discussion of the 1959 bill, two 1961 bills, and the 1963 and 1965 "Missouri Bar" bills. In the cited discussion I commented on the very able contribution of Professor William F. Fratcher of the University of Missouri School of Law as the principal draftsman of the Bar bills. Another person deserving special credit is Charles C. Oliver, Jr., Senior Vice President & Executive Trust Officer of the Traders National Bank, Kansas City, who was Chairman of the 1964-65 Probate and Trusts Committee of The Missouri Bar. I was privileged to assist in the drafting and support of the bill.

Governor Warren E. Hearnes approved the bill on August 20, 1965, after a long and careful study of it.

through October 31, 1965, and on and after November 1, 1965. This avoids the problem, which may arise many years hence, of searching for the exact day in October 1965 when most of the new laws became effective.

It also should be noticed that the effective date provision is in very general terms, the key point being when the perpetuities period starts to run, with nothing to indicate when this is. This is in contrast to very specific provisions in earlier perpetuities bills.<sup>7</sup> The reason for the retreat from specifics to generalities is discussed in the last section in this article.

#### IV. THE DUE PROCESS PROBLEM

Section 442.555(3) makes the new perpetuities statute prospective only in operation. This is to avoid the problem of taking property without due process of law.<sup>8</sup> If the act were applied retroactively there could be a taking of property. For example, in 1960 *A duly conveys to B in fee, and on too remote a contingency over to C in fee*. The orthodox common law analysis is that *A* has nothing, *B* has a defeasible fee which is enlarged into a fee simple absolute because of the failure of the divesting interest, and *C* has nothing, his shifting executory interest being void *ab initio* because it violates the Rule Against Perpetuities. If thereafter a retroactive statute validates *C*'s void shifting executory interest by reforming the period, a part of *B*'s fee simple absolute is taken away from *B* and transferred to *C*. In Missouri, if the doctrine of *Lockridge v. Mace* were applied to the same limitation, the entire limitation would be void, *A* would still have the fee simple absolute, and neither *B* nor *C* would have any interest in the land. If thereafter a retroactive curative statute validates *B*'s defeasible fee by abolishing *Lockridge v. Mace* and validates *C*'s shifting executory interest by reforming the period, all of *A*'s fee simple absolute is taken away from him and transferred to *B* and *C*. In either case, under the orthodox view or under the doctrine of *Lockridge v. Mace*, there would be a taking of property without due process.

In the case of some curative statutes due process is achieved by providing a grace period of a year or two during which the owner of an interest can protect it fully either by filing for record a notice of claim or by instituting suit; if the owner does nothing, his interest will be extinguished and there is a taking of property, but the taking is with due process.

---

7. S.B. 263, 72d Gen. Assem. (1963); House Comm. Amend. No. 1; H.B. 34, 71st Gen. Assem. (1961); and H.B. 341, 70th Gen. Assem. (1959).

8. U.S. CONST. amend. XIV; Mo. CONST. 1945, art. 1, § 10.

Typical of the grace period technique are sections 516.060 and 516.065 RSMo extinguishing inchoate dower and dower consummate in the cases therein specified. Another example is section 516.150 RSMo which extinguishes a mortgage lien twenty years after the mortgage is due on its face unless a notice is filed for record.<sup>9</sup>

The grace period technique to permit retroactive application would seem to be unsuitable for settling interests where there is a perpetuities violation; hence the Missouri act was drawn to be prospective only and thereby avoid the due process problem.

#### V. RUNNING OF THE PERPETUITIES PERIOD

Some earlier versions of a Missouri perpetuities bill achieved prospective operation by applying the act only to instruments becoming "effective" after the effective date of the act, and then making an elaborate definition of the "effective date" of a deed, will, or other instrument.<sup>10</sup> These provisions are considered in detail in the last section of this article.

The draftsmen of the 1965 Missouri act chose a different method in attempting to achieve the same end result. Section 442.555(3) provides the act shall not apply to any limitation or provision as to which "the period of the rule against perpetuities has begun to run" prior to November 1, 1965. The phrasing is a well-accepted method of putting the matter, but it might cause some confusion to the uninitiated because the perpetuities period does not really run as does a statute of limitation (disregarding those jurisdictions which have adopted "wait and see" by decision or statute). What we are really talking about is the critical date as of which the existing facts are ascertained and as of which the validity of the limitation under the Rule Against Perpetuities is determined by imaginatively projecting a possible sequence of events that might cause a contingent interest to vest more remotely than the permissible period. Once this imaginative projection is made, no one (except an excluded beneficiary or trustee deprived of fees) is concerned with what really comes to pass or with how long the period actually runs. This critical date for testing validity usually is the date of delivery of a deed or the date of a testator's death, with exceptions as noted hereafter.

---

9. Eckhardt, *Mortgages—Twenty-Year Limitation*, 16 Mo. L. REV. 372, 383-85 (1951); Strom, *Mortgages—Twenty-year Limitation on Foreclosure*, 19 Mo. L. REV. 186 (1954); MO. TITLE EXAMINATION STANDARDS, No. 23, ch. 442 App. V.A.M.S. (1964 Supp.).

10. Bills cited in note 7 *supra*.

A. *Inter Vivos Transactions*

*Irrevocable deeds.* In the case of a deed, ordinarily the perpetuities period begins to run at the effective date of the deed, this being the date of delivery. In most cases nothing of record indicates whether there has been a delivery in fact, or the date of delivery; the fact of delivery, if any, is proved by parol evidence, and in many cases delivery is presumed. In most commercial transactions proof of delivery is easy and the exact date may not be critical, but in a family "settlement" where a perpetuities problem is apt to arise the exact time of delivery can be crucial because a significant person may have been alive or dead at that time. For example, *A duly conveys to such of B's grandchildren as reach 21.* If *B* is alive at the time of delivery the gift violates the Rule Against Perpetuities because *B* may have afterborn children who are not lives in being, but if *B* is dead at the time of delivery the gift is good because all of the children *B* ever can have are alive or in gestation at *B*'s death.

A deed may show as many as three dates, the date recited on the face of the deed, the date of the acknowledgment, and the date of filing for record. In the absence of proof as to the true date of delivery, there is a presumption in Missouri that the deed was delivered on the date of the acknowledgment.<sup>11</sup>

*Delivery to third person—in escrow.* Frequently in family settlements a deed absolute on its face is delivered to a third person for delivery to the named grantee after the death of the grantor, thus in effect reserving a life estate to the grantor. The basic problems of delivery into escrow have been ably analyzed by Dean Emeritus Glenn A. McCleary.<sup>12</sup> Courts have applied two theories to make the transaction effective in the grantor's lifetime and validate such a delivery. One theory, preferred by many scholars, is that the transaction is immediately effective on the first delivery, the grantor's previous fee simple absolute forthwith being cut back to a defeasible fee, and the grantee forthwith receiving a springing executory interest. Under such theory, the perpetuities period would start running at the first delivery.

The other theory, preferred by perhaps most of the courts that have considered the problem, is a relation back theory, that title does not really

---

11. *Breshears v. Breshears*, 360 Mo. 1057, 1064, 232 S.W.2d 460, 462 (1950); MO. TITLE EXAMINATION STANDARDS, No. 13, ch. 442 App. V.A.M.S. (1964 Supp.); MO. DIG., DEEDS § 194(3).

12. McCleary, *Some Problems Involved in Conditional Deliveries of Deeds*, 32 U. MO. BULL. L. SER. 5, 21-26 (1931).

pass until the second delivery, but by fiction relates back to the first delivery to validate the conveyance. Where the issue is one other than the basic validity of the conveyance, relation back is applied or not applied depending on what equitable result should be reached in the type of case. Thus where a fire insurance policy is voided by any change in title other than by reason of death of the insured, a court may hold in an escrow case that title passed at the death of the insured grantor and there is not a relation back to the first delivery which would have the effect of voiding the insurance coverage.<sup>13</sup> Missouri cases appear to follow the relation back theory,<sup>14</sup> but I have not made a critical analysis of the cases.

From the perpetuities point of view, if the court applies relation back the perpetuities period starts running on the date of the first delivery, but if relation back is rejected in this situation the perpetuities period would not begin to run until the date of the second delivery, or more probably from the date of the grantor's death by a limited relation back. I express no opinion as to whether relation back should be applied where the issue is one of perpetuities, but merely call attention to the possibilities.

*Fully revocable living trust.* A relatively new doctrine is that where the settlor of a living trust reserves full powers of revocation or the unlimited power to draw on corpus, the perpetuities period begins to run at the settlor's death rather than on the date the trust is created, unless the power is released in the meantime. The leading case is *Manufacturer Life Ins. Co. v. Bon Hamm-Young Co.*,<sup>15</sup> which was concerned with a life insurance trust agreement. The problem is ably and exhaustively considered

13. *Gridley v. Home Ins. Co.*, 226 App. Div. 596, 236 N.Y. 205 (1929).

14. See MO. DIG., DEEDS § 58 (1).

15. 34 Hawaii 288 (1937).

Although not completely free from doubt, it is assumed for the purposes of the present perpetuities discussion that a revocable trust is a valid inter vivos transfer in Missouri and is not testamentary in nature: see Lowe, *Transfers in Fraud of Marital Rights*, 26 MO. L. REV. 1, 14-15, nn. 60-65 (1961). This doctrine is expressly recognized in *Coon v. Stanley*, 230 Mo. App. 524, 527[31, 94 S.W.2d 96, 98[5] (1936); this case is cited in Casner, *Estate Planning—Avoidance of Probate*, 60 COL. L. REV. 108, 109, n. 7 (1960), for the contrary proposition, but is distinguishable.

A related but independent problem is that a revocable inter vivos trust may be a fraud on the marital rights of the surviving spouse and the surviving spouse may be able to reach trust assets to satisfy marital rights, but this doctrine does not depend on the trust being testamentary in nature. This problem in Missouri is considered in detail by Professor Lowe in the article cited above. See also Casner, *op. cit. supra*, at 125, n.68.

In Missouri in creating the inter vivos trust, the marital rights problem can be avoided by joinder or other written express assent by the other spouse, thus satisfying both the common law and the requirements of § 474.150 RSMo 1959.

in *Ryan v. Ward*.<sup>16</sup> There appear to be no Missouri cases. This doctrine is a specialized application of a much broader doctrine;<sup>17</sup> another application of the same broad doctrine will be considered *infra* under general powers of appointment.

The above exception does not apply to living trusts which are only partially revocable, and as to them the perpetuities period begins to run at the creation of the trust.

*Fully revocable deed.* If an instrument in the form of a deed runs directly to a grantee and not through a trustee, and if the instrument is fully revocable, it is not effective as a deed, but is effective only as a will if at all. In such a case the perpetuities period would run from the "grantor's" death.

*Partially revocable deed.* If an instrument in the form of a deed runs directly to a grantee and not through a trustee and is only partially revocable, it may be effective as a deed, or it may be considered testamentary in nature and effective only as a will if at all. In the former case the perpetuities period would run from the date of delivery of the deed, and in the latter case from the death of the "grantor." The line beyond which an instrument in the form of a deed ceases to be a deed and becomes a will is obscure, but Missouri has some authority in this area.<sup>18</sup>

### B. Wills

A will is revocable or subject to change until the death of the testator and speaks from his death. The perpetuities period starts running from the date of the testator's death. Ordinarily wills present no problem as to effective date.

On the other hand, contracts to make individual or reciprocal wills, contracts to keep specific wills in force, and joint and mutual wills present special problems not here explored. Speaking generally, in any of these cases the perpetuities period may begin to run at a point of time earlier than the death of the particular decedent.

---

16. 192 Md. 342, 64 A.2d 258 (1949). The case is also reported in 7 A.L.R.2d 1078 (1949), followed by a ten page annotation on the problem.

17. GRAY, RULE AGAINST PERPETUITIES § 203 (3d ed. 1915; 4th ed. by Roland Gray 1942); § 524.1 (4th ed. 1942). See also RESTATEMENT OF PROPERTY § 373 (1944).

18. See *Goins v. Melton*, 343 Mo. 413, 121 S.W.2d 821 (1938), discussed in Eckhardt, *Work of Mo. Sup. Ct. 1938—Property*, 4 Mo. L. REV. 419, 419-21 (1940). On the issue in question, *Goins v. Melton* was overruled by *St. Louis County Nat. Bank v. Fielder*, 364 Mo. 207, 260 S.W.2d 483 (1953), discussed in Eckhardt, *Transactions Reserving Life Estate and Power over Fee*, 18 Mo. L. REV. 374-76 (1953).



Occasionally the exact time of death or the exact sequence of deaths can be very important, not only in determining generally the devolution of property and the incidence of death taxes, but also in determining whether there has been a violation of the Rule Against Perpetuities. For example, if *A* duly devises to such great-grandchildren of *A* as reach 21; the Rule Against Perpetuities is violated if any of *A*'s children are alive or in gestation at *A*'s death. If *A* and his only child *C-1* are killed in an automobile accident, the violation of the rule depends on whether *C-1* predeceases or survives *A* and proof may be difficult or impossible. The simultaneous death law does not solve this particular problem.<sup>19</sup>

### C. Powers of Appointment

The discussion above assumed a gift directly by an inter vivos or testamentary transaction and not through the medium of a power of appointment. The law on the application of the Rule Against Perpetuities to gifts made by way of powers of appointment is complex, and the standard treatises should be consulted, as well as specialized law review articles. A brief search has not disclosed any Missouri case involving an application of the Rule Against Perpetuities to a power of appointment.

*Validity of the power—in general.* Powers of appointment may be void at their inception because they violate the Rule Against Perpetuities. Very briefly, the general rules are as follows.

The initial validity of a general power to appoint by deed, or by deed or will (*i.e.*, a power which is the equivalent of ownership), is determined by whether the power might vest in the donee more remotely than the period of the rule. Thus, if a 1965 deed purports to create a general power of appointment exercisable by deed, or by deed or will, in that person who shall be President of the University of Missouri on January 1, 2000, the power is void at its inception.

The initial validity of a special power of appointment, or of a general testamentary power of appointment, is determined by whether it is so limited that it might be exercised more remotely than the period of the rule.

*Validity of the appointment—in general.* Even though a power of appointment is valid at its inception (and most of them are), the appointment made pursuant to the power may violate the Rule Against Perpetuities and thus be void.

---

19. Sections 471.010-080, RSMo. See V.A.M.S. § 471.010 *et seq.* for citations of discussions in the local law reviews of the simultaneous death problem and its ramifications.

The usual analysis of the operation of a power of appointment is that when the donee of a power makes the appointment, his act of appointing is the event that causes title to shift or spring to the appointee. Additional dogma is that the appointment is read back into the instrument creating the power, and that the appointee derives his title from the donor of the power, not from the donee of the power. Subject to the exception hereinafter noticed, in testing the validity of an appointment insofar as the Rule Against Perpetuities is concerned, the critical date from which the perpetuities period runs is the effective date of the instrument creating the power, and the validity of the appointed interest is determined by looking forward from that date. However, the application of the "second look" doctrine provides some amelioration, *viz.*, we look not only at the facts at the date of the creation of the power, but also at the time of the appointment take a "second look" at the facts.

A hypothetical case will illustrate the basic doctrines. Suppose that *A* devises to his child *B* for life, then as *B* shall appoint by will, and in default of appointment to *B*'s lineal descendants *per stirpes*. Thereafter, *B* by will appoints corpus with accumulated income to such of *B*'s grandchildren [*A*'s great-grandchildren] as reach 21, the class to remain open to include all possible grandchildren of *B*. Upon reading *B*'s appointment back into *A*'s will, the limitation reads: *A* devises to his child *B* for life, then corpus with accumulated income to such of *B*'s grandchildren [*A*'s great-grandchildren] as reach 21, the class to remain open to include all possible grandchildren of *B*. Having read the appointment back into the instrument creating the power, and testing its validity by looking forward from the effective date of the instrument creating the power, the appointment violates the Rule Against Perpetuities because interests might vest too remotely in *A*'s great-grandchildren; there also might be a violation of the related rule limiting accumulations.

However, the "second look" exception might save the above appointment, if on the effective date of *B*'s appointment the facts are such that no interest could vest too remotely, *e.g.*, at his death *B* is a widower and all of *B*'s children have predeceased *B*, so that all possible grandchildren of *B* [great-grandchildren of *A*] are alive or in gestation at *B*'s death, and therefore all possible grandchildren of *B* will reach 21, if at all, within twenty-one years after the death of *B* who is a life in being. (Of course the problem and possible litigation should have been avoided at the time *B* made the appointment; instead of appointing to *B*'s "grandchildren," the appointment should have been to named grandchildren.)

In applying the Rule Against Perpetuities to the exercise of powers, there is one well-recognized exception, *viz.*, a person who has a general power presently exercisable (a power to appoint by deed, or by deed or will), is considered to be the owner for perpetuities purposes; the period of the rule begins to run at the date of the exercise of the power and the validity of the appointment is determined by the circumstances existing at that time. A leading American case is *Miffin's Appeal*.<sup>20</sup> The justification for this exception is that the donee of the power has the equivalent of ownership because he could appoint to himself and make himself absolute owner; at any moment he can "loose the bonds."

There is some conflict, but the great weight of case authority is that the "equivalent of ownership" exception does not apply in the case of a general power exercisable only by will. It is clear that the exception does not apply in the case of special powers.

*Powers of appointment created and exercised before 1965 act.* Where an instrument creating a power of appointment and the instrument exercising the power both became effective prior to November 1, 1965, clearly section 442.555 is not applicable either to validate the power of appointment or to save an appointment made under a valid power.

*Powers of appointment created after 1965 act.* Where the effective date of an instrument creating a power of appointment is on or after November 1, 1965, clearly section 442.555 is applicable to validate insofar as possible the power of appointment and to validate insofar as possible an appointment made under the power.

*Powers of appointment created before 1965 act, exercised after act.* If an instrument effective before November 1, 1965, purports to create a power of appointment but the power itself violates the Rule Against Perpetuities, the 1965 Missouri act would not be applicable to validate the power of appointment, and necessarily any attempted exercise of the power would be ineffective. On the other hand, if the power was validly created before November 1, 1965, but is exercised on or after November 1, 1965, section 442.555 ought to apply to save appointments, whether the power was general or special. The Maine and Vermont perpetuities acts expressly so provide.<sup>21</sup> No doubt the Missouri act should have been specific on at least this point, but the Missouri act was silent.<sup>22</sup>

---

20. 121 Pa. 205, 15 Atl. 525 (1888).

21. ME. REV. STAT. ANN., tit. 33, § 106; VT. STAT. ANN., tit. 27, § 502.

22. In extenuation it should be stated that § 442.555(3) was drafted hurriedly to meet a deadline, with no time available for research and with little time available for reflection.

Where the power is a general power presently exercisable, the donee thereby having the equivalent of ownership, the perpetuities period begins to run on the date the power is exercised, and section 442.555 is fully applicable where such power is exercised on or after November 1, 1965.

Subject to this exception as to general powers presently exercisable, the usual view is that where a power is exercised the perpetuities period runs from the effective date of the instrument creating the power, by a reading back of the appointment into the instrument creating the power. This reading back, however, is really a fiction and is not necessarily followed for all purposes.

At a time when *Lockridge v. Mace* was in effect in Missouri, it could not have been successfully argued that an appointment which violated the Rule Against Perpetuities would have the effect of invalidating the entire limitation creating the power. At most, *Lockridge v. Mace* would have invalidated the entire appointment. Hence, at least for this purpose, there would not have been a complete reading back in Missouri.

It would be in the spirit of section 442.555 to apply subsection 1 (abolishing the doctrine of *Lockridge v. Mace*) to any appointment made on or after November 1, 1965, and to save the part of the appointment that does not violate the Rule Against Perpetuities. It also would be in the spirit of the act to apply subsection 2 and reform the appointment insofar as possible to avoid violation of the rule. The application of the act to all appointments made on or after November 1, 1965, is not constitutionally objectionable. By applying the act to save the appointment, the appointees are benefited, not harmed; and those who would take in default of appointment initially had interests which would be divested by a valid appointment, and applying the act to validate an attempted appointment leaves those who would take in default of appointment in no worse position than they were in originally.

It is my opinion that the saving provisions of section 442.555 should be applied to any appointment made on or after November 1, 1965, even though the power of appointment was created before November 1, 1965.

## VI. CAVEAT ON SPECIFICS AS TO EFFECTIVE DATE

House Bill No. 341, 70th General Assembly, 1959, and House Bill No. 34, 71st General Assembly, 1961, both applied only to instruments effective thereafter, and both included an elaborate section defining the effective date of an instrument. Senate Bill No. 263, 72nd General Assembly, 1963, did not include a transition provision in the original bill, but House Com-

mittee Amendment No. 1 added the same effective date provision that appeared in the earlier bills, as follows:

Section 3. For the purposes of this act the effective date of a deed, will or other instrument means:

(1) In the case of an irrevocable conveyance or transfer inter vivos, the date of the conveyance or transfer;

(2) In the case of a will, the date of the death of the testator;

(3) In the case of a revocable conveyance or transfer inter vivos, the date of the death of the conveyor or transferor, unless the power to revoke such conveyance or transfer shall have expired or been relinquished during the lifetime of the conveyor or transferor, in which event the effective date shall be the date of such expiration or relinquishment; and

(4) In the case of an instrument which exercises a power to appoint conferred by a prior deed, will or other instrument, the date of such exercise, provided, that, if the power is restricted by the prior deed, will or other instrument, either as to the time of its exercise or as to the type of instrument by which it may be exercised, or as to the persons and corporations who may be appointees thereunder, the instrument of appointment shall be treated as having the same effective date as the deed, will or other instrument conferring the power.

These provisions were drawn by a highly skilled lawyer, and probably are as well drawn as could be done in a few words, but nevertheless would require considerable litigation to determine what they really mean. The reason the Missouri Bar draft in 1965 sought refuge in generalities instead of reintroducing the specific provisions above was simply that the specifics were too incomplete and too inaccurate and would require extended judicial construction to fill in the gaps and to cure insofar as possible the inaccuracies.

For example, subsection 1 refers to "the date of the conveyance or transfer." As indicated above, three dates are usually involved, but the proposed act does not indicate which one of the three is intended unless it points to the date on the face of the instrument. No attempt is made to cover the problem of deeds in escrow.

Subsection 1 deals with "irrevocable" transfers, and subsection 3 deals with "revocable" transfers, but between the extremes of completely irrevocable deeds and fully revocable deeds there are all degrees of partial revocability. The gray areas are not noticed at all. In addition, Missouri has no authority on the problem of revocability with reference to the appli-

cation of the Rule Against Perpetuities, and no one can be sure what view Missouri courts might be inclined to follow.

Subsection 2 on wills would seem to be accurate and not apt to raise any new problems in the case of an ordinary will.

Subsection 4 on powers of appointment is an attempt in ninety-seven words to state the rules on a very complex problem, and to state them for a jurisdiction which has no case authority. The result leaves much to be desired. For example, it is provided there can be no restriction by the instrument creating the power "as to the type of instrument by which it may be exercised." If this wording were followed literally, the equivalent of ownership doctrine would not apply to a general power exercisable by "deed" only, nor to a general power exercisable only by "deed or will," but would apply only to a general power exercisable by "deed, will or other instrument." This is not helpful, and could be very harmful.

Those who worked on the 1965 Missouri Bar draft tried their hands at revising the effective date provisions of the earlier bills, but ended with a feeling of complete frustration; thereupon they abandoned the attempt to accomplish the impossible and resorted to a generality which could be accurately stated, which the courts could fill in, and which would not hamper the courts. As indicated at note 22 *supra*, they too fell short of perfection.