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## The Rule Against Perpetuities in Missouri, 1952-1983

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# THE RULE AGAINST PERPETUITIES IN MISSOURI, 1952-1983

HARRY W. KROEGER\*

A little more than thirty years ago, I wrote for this *Quarterly* an article<sup>1</sup> in which I discussed the effect in Missouri of a limitation void for remoteness upon other limitations contained in the same deed or will which, of themselves, were not remote. This Article is not intended to cover the same ground as the earlier article, though occasional references to it may be necessary to gain perspective. The focus at the present time is upon the happenings touching upon the rule against perpetuities since 1952. This focus requires a widening of scope beyond examination of questions concerning the effect of violation of the rule. It also dictates a narrowing of the period being examined which will undoubtedly entail omission of discussion of some important principles which were not dealt with by the cases during the period.

## I.

In 1952, *Lockridge v. Mace*<sup>2</sup> and its progeny<sup>3</sup> darkly beclouded many titles to real estate and other property by declaring, for example: “[W]here portions of a will are void as being in contravention with the rule against perpetuities, and those portions relate to the same property and constitute a part of the same general plan of disposition, the valid, as well as the invalid, portions will fall together.”<sup>4</sup> It seemed, at least to most lawyers and even more importantly to title companies, that the rule against perpetuities was something designed to produce retribution for the sins of a testator, or for the sins of his counsel, in offending its precepts. Intention had nothing to do with the situation. The testator

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1. See Kroeger, *The Effect of Violation of the Rule Against Perpetuities in Missouri*, 1952 WASH. U.L.Q. 297.

2. 109 Mo. 162, 18 S.W. 1145 (1892).

3. *St. Louis Union Trust Co. v. Kelley*, 355 Mo. 924, 199 S.W.2d 344 (1947); *Loud v. St. Louis Union Trust Co.*, 298 Mo. 148, 249 S.W. 629 (1922); *Riley v. Jaeger*, 189 S.W. 1168 (Mo. 1916); *Shepperd v. Fisher*, 206 Mo. 208, 103 S.W. 989 (1907).

4. *Loud v. St. Louis Union Trust Co.*, 298 Mo. 148, 185, 249 S.W. 629, 639 (1922).

may have declared that he was making his will, but the court decreed that he died intestate as to his property.

Happily, this feature of Missouri law was dealt with by the General Assembly of Missouri in 1960, when it enacted what is now subsection 1 of section 442.555 of the Missouri Revised Statutes, which reads as follows:

When any limitation or provision violates the rule against perpetuities or a rule or policy corollary thereto and the instrument containing the limitation or provision also contains other limitations or provisions which do not in themselves violate the rule against perpetuities or any such rule or policy, the other limitations or provisions shall be valid and effective in accordance with their terms unless the limitation or provision which violates the rule against perpetuities or such rule or policy is manifestly so essential to the dispositive scheme of the grantor, settlor or testator that it is inferable that he would not wish the limitations or provisions which do not in themselves violate the rule against perpetuities to stand alone. Doubts as to the probable wishes of the grantor, settlor or testator shall be resolved in favor of the validity of limitations and provisions.<sup>5</sup>

Thus, the statute sweepingly resolved the question as to the effect of invalid limitations upon other limitations that are not in themselves violative of the rule against perpetuities, and thus brought Missouri, in that respect, into substantial conformity with the prevailing American law<sup>6</sup> and with the principles expressed in the American Law Institute's first *Restatement of Property*.<sup>7</sup>

Unhappily, subsection 1 left other problems arising out of invalid limitations to be solved, if at all, under subsection 2 of the statute by recourse to the courts and application of a *cy pres* doctrine.<sup>8</sup> Unhap-

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5. MO. REV. STAT. § 442.555.1 (1978).

6. See Kroeger, *supra* note 1, at 300-03.

7. Section 402 of the first *Restatement* provided as follows:

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 conveyer, 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.

RESTATEMENT OF PROPERTY § 402 (1940). See generally Kroeger, *supra* note 1, at 303-05.

8. Subsection 2 of the statute provides as follows:

When any limitation or provision violates the rule against perpetuities or a rule or policy corollary thereto and reformation would more closely approximate the primary

pily, also, constitutional considerations produced subsection 3, which declared that the section would not be applicable to any limitation or provision as to which the period of the rule against perpetuities began prior to November 1, 1965—the year when the section became effective.<sup>9</sup> These considerations and the steady movement in other states, by statute or judicial decision, to further reform the rule suggest the desirability of scrutinizing at this time developments which have occurred over the past thirty years.

An illustration will serve to introduce the problems. We start, not with the case of the unborn widow or the fertile octogenarian, but with a type of case which more commonly appears. Suppose M, by her will, devised the residue of her estate to T in trust: (a) to pay the income therefrom to M's nephew, N, for his life; (b) after the death of N, to pay such income to the children of N who shall be living from time to time and the descendants of any such children who may have died, they taking per stirpes, until the eldest child of N who lives to attain the age of thirty-five years shall arrive at that age; and (c) upon the happening of such event, to distribute the trust property to the then living descendants of N per stirpes; but (d) if no child of N shall attain the age of thirty-five years, to be distributed to a specified charity. Suppose further that upon the death of M, she was survived by N, aged fifty, and three children of N—A, B, and C, aged respectively twenty-six, twenty-four and eighteen—but by no other child of N or descendant of a deceased child of N.

Under the Missouri cases<sup>10</sup> the foregoing provisions of M's will would violate the rule against perpetuities because, looked at from the viewpoint of M's death, it was possible for N to have an additional child or children born after the death of M so that vesting of the trust corpus might be postponed beyond the period of a life in being and twenty-one years. Prior to the enactment of section 442.555 it was generally supposed and justifiably feared that, under the *Lockridge* doctrine, the entire disposition would fail. Under that statute, however,

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purpose or scheme of the grantor, settlor or testator than total invalidity of the limitation or provision, upon the timely filing of a petition in a court of competent jurisdiction, by any party in interest, all parties in interest having been served by process, the limitation or provision shall be reformed, if possible, to the extent necessary to avoid violation of the rule or policy and, as so reformed, shall be valid and effective.

MO. REV. STAT. § 442.555.2 (1978).

9. *Id.* § 442.555.3.

10. *See supra* notes 2-3.

the life estate of N would be saved, but the remainders to A, B, and C would fail under the prevailing English and American rule which holds that a class gift fails in its entirety if it is possible that any class member's gift might vest beyond the period allowed by the rule against perpetuities.<sup>11</sup> Although the gift might be reformed in accordance with subsection 2 of the Missouri statute to carry out the intention of M, a violation would have occurred which would require the institution of a court action.

Now let us add an additional set of facts to the illustration given above. Suppose further that upon the death of N, he was survived by no child or children, other than A, B, and C, and by no descendant of any deceased child. Under Missouri law, as it stands at this point in time, the foregoing additional facts would be irrelevant. In *Nelson v. Mercantile Trust Co.*,<sup>12</sup> the Supreme Court said just that, specifically: "The fact that no such child was actually born does not change the situation. It is the *possibility* of such a birth, under the rule, that creates the invalidity."<sup>13</sup> More recently, in *Davis v. McDowell*<sup>14</sup> and *Tucker v. Ratley*,<sup>15</sup> this possibilities test has been reiterated—in *Tucker* as follows: "In Missouri the rule is a 'possibilities' test, and not an 'actualities' test; that is, in determining the validity of any future interest, the court cannot take account of subsequent actual events which would have vested an otherwise invalid interest."<sup>16</sup>

This matter of testing validity as of the time of the transfer (whether or not the result is one which the transferor may reasonably be said to have intended), and of disregarding surrounding facts, is one which the Missouri statute does not reach. The thrust of the statute is merely to bring Missouri into conformity with the prevailing common-law rule of separability of interests<sup>17</sup> and to provide for reformation of the instrument of transfer under certain circumstances by a court.<sup>18</sup> Neither does the statute reach problems arising out of conveyances and wills made

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11. *E.g.*, *Thomas v. Citizens & S. Nat'l Bank*, 224 Ga. 572, 163 S.E.2d 823 (1968); *Turner v. Turner*, 260 S.C. 439, 196 S.E.2d 498 (1973); *Leake v. Robinson*, 35 Eng. Rep. 979 (Ch. 1817). *See* Annot., 56 A.L.R.2d 450 (1957).

12. 335 S.W.2d 167 (Mo. 1960).

13. *Id.* at 172 (emphasis added).

14. 549 S.W.2d 619 (Mo. Ct. App. 1977).

15. 568 S.W.2d 797 (Mo. Ct. App. 1978).

16. *Id.* at 799.

17. *See supra* notes 5-7 and accompanying text.

18. *See supra* note 8 and accompanying text.

prior to its effective date,<sup>19</sup> of which there are many still in existence.

Hence, under the statute we have attained the common-law principle of separability; where the statute does not apply, we remain, as we shall observe in dealing with the cases, out in no man's land.

## II.

### A. Possibilities of Reverter

The thirty-year period began, so far as the rule against perpetuities is concerned, with two interesting cases involving possibilities of reverter. Such an interest had been defined in Missouri as the interest which remains in the grantor when he conveys a base fee determinable on a condition subsequent which may or may not eventuate, with the effect of vesting immediately the whole fee title in the grantee, subject to being defeated by breach of the condition.<sup>20</sup>

*Smith v. School District No. 6*<sup>21</sup> was a suit to try title to real estate which had been conveyed in 1877 to a school district. The land, which had been carved out of a larger tract of 290 acres, was passed by a deed which contained the following language: "[W]henever said land shall cease to be used and occupied as a site for a schoolhouse and for school purposes, then this conveyance shall be deemed and considered as forfeited and the said land shall revert to the said party of the first part, his heirs and assigns."<sup>22</sup> The larger tract passed, subject to an exception as to the schoolhouse site, by mesne conveyances to the plaintiff. Defendant school district, having ceased to use the land for school purposes, had obtained a release from the heirs of the original grantor and claimed under that document.<sup>23</sup> The school district prevailed, as the court held that a possibility of reverter had remained in the original grantor and had passed to his heirs; that such possibility of reverter was capable of being released to the holder of the determinable fee; and that the release had the effect of turning the determinable fee into a fee

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19. See *supra* text accompanying note 9.

20. *Davis v. Austin*, 348 Mo. 1094, 156 S.W.2d 903 (1941).

21. 250 S.W.2d 795 (Mo. 1952).

22. *Id.* at 795.

23. The release provided as follows:

This deed being made for the purpose of releasing any and all claims the grantors have as heirs of [the original grantor] to the provisions in a deed dated August 1, 1877, executed by [the original grantor] to [the original grantee].

*Id.* at 796.

simple absolute.<sup>24</sup> The rule against perpetuities was not offended because all interests vested at the date of the original deed.

*Donehue v. Nilges*<sup>25</sup> presented a similar situation. There, the grantors in 1908 conveyed a parcel of real estate, out of a larger tract, to a school district by a deed of conveyance which provided that it was made for the benefit of the school district so long as the parcel should be used for a schoolhouse site, and if the parcel should no longer be so used, it was to revert to the original grantors and those claiming "by, through or under" them.<sup>26</sup> (This the court construed to be a limitation to those claiming by, through or under the grantors as owners of the larger tract.) In a suit to determine title after the schoolhouse site had ceased to be used as such, the issue was between the owners of the balance of the larger tract, who claimed as successors in interest to the original grantor, and the grantee of the heirs of the original grantor, who claimed under a deed executed after the parcel had ceased to be used for school purposes. The court held that the deed in effect created a limitation over upon the termination of the base fee to the then owners of the larger tract; that this limitation was void for remoteness; and that the possibility of reverter remained in the grantor's heirs until condition broken. Hence, title to the former schoolhouse site was decreed in the grantees of such heirs.<sup>27</sup>

To the same group of cases belongs *Shipton v. Sheridan*,<sup>28</sup> decided two decades later. In that case, there was a conveyance made in 1928 of a determinable fee to a school district conditional upon continued use of the property as a school site. Upon cessation of such use, the site was to "revert to and become the property of the then owner of the farm from which said real estate was deeded. . . ."<sup>29</sup> The limitation in the original conveyance to the then owner of the farm was held void for remoteness, and the title was held to have reverted to the heirs of the transferor.<sup>30</sup>

The doctrine of the possibility of reverter cases is not new. They are applications of the basic principle that the rule against perpetuities has reference to the time within which a title vests, and postponement of

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24. *Id.* at 797.

25. 364 Mo. 705, 266 S.W.2d 553 (1954).

26. *Id.* at 708, 266 S.W.2d at 554 (emphasis in original).

27. *Id.* at 711, 266 S.W.2d at 556.

28. 531 S.W.2d 291 (Mo. Ct. App. 1975).

29. *Id.* at 292.

30. *Id.* at 293.

possession, for whatever period, does not violate the rule.<sup>31</sup> In the *Smith* case, the fee simple title was vested in the transferor prior to the conveyance, and the possibility of reverter, not having been conveyed by the deed, remained vested in the transferor. But where the transferor, as in *Donehue*, attempted to limit the future interest to someone else upon condition precedent, the limitation failed.

*B. Commencement of the Period of the Rule, Alternative Remainders, and Savings Clauses*

The first important family-type case to come before the Missouri appellate courts during the thirty-year period was *Nelson v. Mercantile Trust Co.*<sup>32</sup> There, one L. C. Nelson in 1924 executed a trust instrument, revocable by himself and his son, J. M. Nelson, Jr. during their *joint* lives, wherein he provided that the trust income was to be paid to himself and his son during their joint lives and thereafter to the survivor of them during the survivor's life. After the death of such survivor, the income was to be paid to the son's children—the settlor's grandchildren—including those unborn at the time of the execution of the trust. The corpus of each grandchild's share was to become distributable at the discretion of the trustee when the grandchild reached twenty-one, or absolutely when the grandchild reached the age of thirty, except that \$50,000 was to remain in trust for life. Upon the death of a grandchild before (or without) receiving such share, the undistributed corpus of that share was to be paid to the grandchild's lawful descendants, or if there were no such descendants, to collaterals. The settlor died in 1931, and his son died in 1936 survived by three sons, all of whom were in being at the date of the death of the settlor. A grandson, who had then become entitled to the income of a share, sought construction, contending that the instrument violated the rule against perpetuities.

The *Nelson* case is significant for two holdings:

(a) The Court disposed of the question as to when the period of the rule begins to run in the case of a revocable trust, as follows: "The period allowed by the rule began to run on July 15, 1931, when L. C. Nelson died and the trust became irrevocable."<sup>33</sup> This holding was in

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31. *Trautz v. Lemp*, 329 Mo. 580, 602, 46 S.W.2d 135, 142 (1932); *Schee v. Boone*, 295 Mo. 212, 225-26, 243 S.W. 882, 885-86 (1922); *Deacon v. St. Louis Union Trust Co.*, 271 Mo. 669, 695, 197 S.W. 261, 267-68 (1917).

32. 335 S.W.2d 167 (Mo. 1960).

33. *Id.* at 172.



accord with decisions in other states<sup>34</sup> and is consistent with the *Restatement (Second) of Property*, where it is stated:

The period of the rule against perpetuities begins to run in a donative transfer with respect to a non-vested interest in property as of the date when no person, acting alone, has a power currently exercisable to become the unqualified beneficial owner of all beneficial rights in the property in which the non-vested interest exists.<sup>35</sup>

(b) An even more significant holding of the court lay in its approval of the savings clause contained in the trust instrument. The court had determined that, without a savings clause, the provisions of the instrument violated the rule against perpetuities, saying:

This because, in addition to the existing children of J. M. Nelson, Jr., provision was made therein for "such other lawful children as may hereafter be born unto the said J. M. Nelson, Jr." and their descendants. The period allowed by the rule began to run on July 15, 1931, when L. C. Nelson died and the trust became irrevocable. It was possible for a child of J. M. Nelson, Jr. to have been born after that date and for the descendants of said child to have acquired a vested interest in trust assets after the expiration of the period permitted by the rule.<sup>36</sup>

However, the instrument also contained the following language:

The trust hereby created shall in no event continue for a period longer than the lives of all of said children of said J. M. Nelson, Jr., and the survivor of all of them, and twenty-one (21) years thereafter, at the end of which time distribution shall be made in the manner herein provided, irrespective of any other provision of this agreement.<sup>37</sup>

This clause was interpreted as referring to grandchildren who were in being at the time of, and were named in, the trust instrument, and as "saving" the trust from violation of the rule against perpetuities. The clause in essence created a valid alternative remainder which removed the possibility of failure to vest within the allowed period.

In careful legal draftsmanship, the use of such clauses in trust instruments had become widespread long before the decision in *Nelson*, whenever there was a conceivable doubt about a possible violation of

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34. See, e.g., *Cook v. Horn*, 214 Ga. 289, 104 S.E.2d 461 (1958); *Manufacturers Life Ins. Co. v. Von Hamm-Young Co.*, 34 Hawaii 288 (1937); *Schenectady Trust Co. v. Emmons*, 261 A.D. 154, 25 N.Y.S.2d 230 (1941).

35. RESTATEMENT (SECOND) OF PROPERTY—DONATIVE TRANSFERS § 1.2 (1983).

36. 335 S.W.2d at 172.

37. *Id.* at 170.

the rule against perpetuities. The pitfalls still lay, and lie, in the paths of the uninformed and the unwary.

### C. *Remainders and Reversions*

Section 157 of the American Law Institute's *Restatement of Property* succinctly stated:

A remainder can be

- (a) indefeasibly vested; or
- (b) vested subject to open; or
- (c) vested subject to complete defeasance; or
- (d) subject to a condition precedent.<sup>38</sup>

Under the rule against perpetuities, an interest falling within class (d), commonly referred to as a "contingent" remainder, will fail unless the condition precedent must (or under the wait-and-see doctrine, does<sup>39</sup>) occur within the period allowed by the rule. Since 1952 several cases have been decided by the appellate courts in Missouri on this subject.

The first of these, *Hereford v. Unknown Heirs, Grantees or Successors of Adelle Tholozan*,<sup>40</sup> involved a will executed in 1862 by Mrs. Tholozan, who died in 1877. By the terms of the will, she devised her residuary estate in trust for the benefit of her niece, Adelle Philips, for her sole and separate use during her life; and after her niece's death for the sole and separate use of the niece's daughter, Eulalie Philips, and "all other children of said Adelle Philips, if any should be born hereafter";<sup>41</sup> or if the niece (or her children) died unmarried and without issue, then to named sisters and a brother of the testatrix. Adelle Philips died in 1920 at the age of eighty-five, leaving Eulalie as her only surviving child. Eulalie died in 1950 at the age of ninety, without having married and without issue. The court, construing the will to provide for vesting of the trust property at the death of Adelle Philips in her daughter, Eulalie, held that the rule against perpetuities was not violated. The limitations to the named brother and sisters were treated as an "afterthought" based on the possibility of the death of Eulalie, unmarried and without issue, prior to the deaths of the testatrix and Adelle Philips. According to the court, these limitations indicated

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38. RESTATEMENT OF PROPERTY § 157 (1936).

39. See *infra* notes 78-87 and accompanying text.

40. 365 Mo. 1048, 292 S.W.2d 289 (1956) (en banc).

41. *Id.* at 1052, 292 S.W.2d at 291.

merely the intention of the testatrix that, if such event occurred, the named sisters and brother be preferred over testatrix' heirs in general.<sup>42</sup> What rationale the court applied to the provisions of the will which included afterborn children, if any, of Adelle Philips in the remainder limitation is not clear. However, since such children would have been in being at the death of Adelle Philips, and at that point of time would (under the court's construction of the will) have become entitled to vested interests in fee simple, the rule would not have been violated. At that point of time also, the limitation in favor of the named siblings would have become extinguished.

*McGowan v. St. Louis Union Trust Co.*<sup>43</sup> was a case with involved facts and diverse contentions. The principal facet of the case concerned the contention that the rule against perpetuities was violated where the settlor (one George S. Myers) of a trust created in 1904, the assets of which consisted of shares in a corporation, tied the trust's termination to the "expiration of the time for which it (the corporation) is now organized," or to the corporation's dissolution by reason of other causes. The corporation had been organized in 1901 for a period of 60 years. The income of the trust was to be paid to three daughters of the settlor and a son of a deceased daughter, or the survivors of them, but if any of the four died leaving afterborn children, such children were to take the share of their parent. Upon the termination of the trust, the trust assets were to be transferred to the grandson or his heirs. The subsequent facts were: (a) the three daughters died, two of them without issue and one of them leaving an adopted child born in 1897, whose children were the plaintiffs in the instant case; (b) upon the death in 1943 of the last surviving daughter, the grandson directed the trustee to vote for dissolution of the corporation; and (c) the trustee caused the corporation to be dissolved and distributed its assets to the grandson. The plaintiffs claimed that the remainder interest violated the rule against perpetuities and that upon distribution of the corporation's assets a resulting trust arose in their favor as to one-half thereof. The court held that, if there was a resulting trust, it arose in 1904 when the trust was created, and not 1943, i.e., if the rule against perpetuities was violated, the trust failed at the outset.<sup>44</sup>

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42. *Id.* at 1058-59, 292 S.W.2d at 295-96.

43. 369 S.W.2d 144 (Mo. 1963).

44. *Id.* at 150-51. This holding virtually disposed of the case, for the plaintiffs' grandmother had left a will bequeathing whatever interest she had in the trust to her husband, one Downey,

The first Missouri case within the time span of this review to present clearly the distinction between a remainder “vested subject to complete defeasance” and a remainder “subject to a condition precedent,” and illustrating the subtle changes in these concepts, was *Mercantile Trust Co. v. Hammerstein*.<sup>45</sup> In that case, one Mrs. Griffin, who died in 1959, created a testamentary trust which was to continue for a period of not more than twenty-five years but which might be terminated earlier at the discretion of the trustee. During the continuance of the trust, its income was to be allocated to and among a number of named beneficiaries, and at the termination of the trust, distribution of the corpus was to be made to the income beneficiaries in proportion to their respective income interests. In the case of one Mrs. Long, to whom a one-sixth interest was allocated, the will provided that if she were to die before termination of the trust, her share of the income during the balance of the trust period and of the principal upon termination were to be paid in succession to specified members of her family. She died in 1961, during the life of the trust. Her executor claimed her share for her estate, contending that the will violated the rule against perpetuities. The court determined that it was the intention of the testatrix gathered from the will as a whole, that the interests of the beneficiaries were to become vested at the date of her death subject to defeasance in the event of the death of a beneficiary within the trust period; it held accordingly that there was no violation of the rule against perpetuities. The gifts over were stated by the court to be:

in what may be termed several shifting and springing executory devises . . . after the occurrence of the specified conditional limitation (so-called) because of the distinction of that technical term from a “condition subsequent” which gives rise to a right of entry in the grantor or his heirs or the testator’s heirs on condition broken.<sup>46</sup>

The *Hammerstein* case actually announced no new development under the rule against perpetuities. The outcome turned rather upon a construction of the will to determine whether the interest of the first taker was subject to a condition precedent or itself constituted a vested

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and their mother had released *her* claim to Downey as well. In turn, Downey had conveyed his entire interest to the settlor’s grandson, the remainderman. Thereupon the curtain fell, and rose again for an epilogue for which we need not wait.

45. 380 S.W.2d 287 (Mo. 1964).

46. *Id.* at 292 (citation omitted).

interest subject to be divested upon the occurrence of a condition subsequent.

The test whether a remainder is vested or contingent has been variously stated, a classic definition being that of Professor John Chipman Gray, as follows: "A remainder is contingent if, in order for it to become a present estate, the fulfillment of some condition precedent, other than the determination of the preceding freehold estate, is necessary."<sup>47</sup> What words ordinarily produce such result? In a later passage, Gray elucidated as follows: "If the conditional element is incorporated into the description of or into the gift to the remainderman, then the remainder is contingent; but if, *after words giving a vested interest*, a clause is added divesting it, the remainder is vested."<sup>48</sup>

Since the development in Missouri of distinctions between contingent and vested remainders is to be found in a long line of cases, some of which do not involve the rule against perpetuities and others of which do involve the rule<sup>49</sup>—and which are frequently irreconcilable with each other—an analysis of them must remain beyond the scope of this Article. It will suffice to observe that, in the course of time, the rationale of the courts has become less formalistic and founded more upon a search for the intention of the transferor. As was said in *Norman v. Horton*:<sup>50</sup> "Courts now pierce ancient rules of feudal tenure and for the construction of instruments to give effect to the intention of the parties if such intention violates no public policy or positive rule of law."<sup>51</sup> The character of the remainder, therefore, is in each case to be determined as a question of construction of the instrument creating the interest.

Viewed from the standpoint of the foregoing principles, *Prior v. Prior*<sup>52</sup> presented no great difficulty. There, a will devised land to two daughters of the testator "until both shall have died"; and upon the death of the survivor of them, "to the bodily heirs" of three daughters, of whom the third had predeceased the making of the will. The fee was

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47. J. GRAY, THE RULE AGAINST PERPETUITIES § 9 (R. Gray 4th ed. 1942).

48. *Id.* § 108 (emphasis added).

49. *See, e.g.*, *Knox College v. Jones Store Co.*, 406 S.W.2d 675 (Mo. 1966); *Norman v. Horton*, 344 Mo. 290, 126 S.W.2d 187 (1939); *Gardner v. Vanlandingham*, 334 Mo. 1054, 69 S.W.2d 947 (1934); *Eckle v. Ryland*, 256 Mo. 424, 165 S.W. 1035 (1914); *Sullivan v. Garesche*, 229 Mo. 496, 129 S.W. 949 (1910); *Graves v. Hyer*, 626 S.W.2d 661 (Mo. Ct. App. 1981).

50. 344 Mo. 290, 126 S.W.2d 187 (1939).

51. *Id.* at 296, 126 S.W.2d at 190.

52. 395 S.W.2d 438 (Mo. 1965).

held to have vested in the testator's grandchildren upon the death of the survivor of the daughters. Since she was necessarily a life in being at the death of the testator, there was no violation of the rule against perpetuities.

In the foregoing cases decided since 1952, the courts did not, at least overtly, inquire whether a condition was incorporated "into the description of or into the gift to the remainderman" or speak about "words giving a vested interest" (using Gray's words); but in each case, the courts appeared to base their conclusions upon a discerned intent of the transferor,<sup>53</sup> aided, perhaps, by the principle that where more than one construction of an instrument is possible, that construction which favors validity will be preferred over a construction which produces invalidity.<sup>54</sup>

Remarkable as it may seem, the Missouri appellate courts have not been called upon within the last three decades to decide a case in the perpetuities field in which the governing instrument created an estate upon a condition that was *not* susceptible of an interpretation which would have delineated a freehold estate subject to a condition subsequent. The problem did appear recently in *Graves v. Hyer*,<sup>55</sup> a case which did not involve the rule against perpetuities. There, the testator left real estate to his granddaughter Jennie for her life and "at her death, to the heirs of her body"; and in default of the granddaughter's issue, to his son Charles and the "heirs of his body"; and in default of issue of the son, to "my nearest blood kin." Charles predeceased the testator, leaving no issue. Jennie survived the testator, but also died without issue. The court held that vesting occurred at the death of Jennie; that the interests of the "nearest blood kin" were subject to a condition *precedent*; and awarded the property to the testator's "nearest blood kin," determined as of the death of Jennie.

In order for there to have been a divestiture upon the occurrence of a condition subsequent, there must necessarily have been a prior estate capable of divestiture, but neither Jennie nor Charles had such an estate. If Jennie had not been a life in being, we must assume that in

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53. This process, too, has some hazards. Aside from its subjectivity, it assumes—contrary to fact in most cases—that the transferor has given minute attention to the character and incidents of the future interests which the instrument creates and to the language used in the instrument to create them.

54. *E.g.*, *St. Louis Union Trust Co. v. Bassett*, 337 Mo. 604, 621, 85 S.W.2d 569, 578 (1935).

55. 626 S.W.2d 661 (Mo. Ct. App. 1981).

Missouri, which adheres to the possibilities or what-might-happen test of validity under the rule against perpetuities, the result would necessarily have been invalidity.

*D. Options, Preemptive Rights, and Contracts of Sale*

Within the past thirty years, there have been several cases in Missouri which have dealt with the question whether certain types of options or preemptive rights of purchase are interests falling within the rule against perpetuities. The holdings in such cases on the whole do not represent departures from the principles worked out in general American law with respect to such interests. If an option or a preemptive right does fall within the scope of the rule, the issue almost always is whether such a right will terminate within a life in being or within the gross period allowed by the rule.

In *Tucker v. Ratley*,<sup>56</sup> we find a clear recognition of the principle that an option, not limited with respect to the time for its exercise, falls within the restrictions of the rule against perpetuities.<sup>57</sup> In that case, the common source of title to the property involved was in one Harry Tucker, who conveyed to the Ratleys (husband and wife) 120 acres of land, reserving in himself the mineral rights, the rights to ingress and egress, and the right to conduct mining operations, plus an option to repurchase the property at a price not to exceed \$50 per acre. The successors in interest to forty acres of the land brought suit to quiet title. The court held that the option to purchase was subject to the restrictions of the rule and thus invalid.<sup>58</sup> However, it treated as valid the reservation of the mineral rights as a separation of the interests in the surface and the interests in the minerals; and it treated the rights of

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56. 568 S.W.2d 797 (Mo. Ct. App. 1978).

57. The generality of this statement of the rule must be tempered by consideration of cases which hold that when no time is designated for the expiration of an option, it must be exercised within a reasonable time under the particular circumstances. See *Magee v. Mercantile Commerce Bank & Trust Co.*, 343 Mo. 1022, 124 S.W.2d 1121 (1938), where an alleged oral option to require the repurchase of bonds by a seller, without specifying the duration of the option, was held to continue for a reasonable time only. In a later case, *Burg v. Bonne Terre Foundry Co.*, 354 S.W.2d 303 (Mo. Ct. App. 1962), the court interpreted a sales agency contract providing for the continuance, after the contract's termination, of payments to the sales representative for his customers to refer only to orders solicited before the contract's termination. The court said of such a contract, "[W]hen executed for an indefinite period, and by its nature it is not deemed to be perpetual, it may be terminated at will upon reasonable notice. . . ." *Id.* at 308 (quoting *Clarkson v. Standard Brass Mfg. Co.*, 237 Mo. App. 1018, 1032, 170 S.W.2d 407, 415 (1943)).

58. 568 S.W.2d at 800.

ingress and egress as appurtenant to the mineral estate and thus as immediately vested interests.

(As noted earlier,<sup>59</sup> the court in *Tucker* reaffirmed the possibilities test with respect to the rule against perpetuities, rejecting as irrelevant the contention of the defendants that they were ready and willing at any time to exercise the option to purchase within the period permitted by the rule. *Tucker* was also one of the cases in which the courts referred to section 442.555, holding it inapplicable by reason of subsection 3 thereof, which proscribes retroactive application.<sup>60</sup>)

The Missouri courts have, however, been loath to invalidate an option or preemptive right by reason of the rule against perpetuities where it has been possible to construe the grant to be intended in favor of the grantee personally. In *Kershner v. Hurlbert*,<sup>61</sup> there was a contract between a seller of part of his tract of land and a buyer, which provided in part that if either buyer or seller should desire to sell his respective portion of the land, he would give the other first right to purchase at the acquisition price. The court, faced with the contention that the contract violated the rule, sustained its validity on the ground that the preemptive rights of purchase were personal and terminated with the deaths of the parties, i.e., within a life in being.<sup>62</sup>

*Beets v. Tyler*<sup>63</sup> was a case in which the developer of a subdivision conveyed lots by deeds containing covenants, each granting preemptive rights, in favor of the developer and the lot holders adjoining the conveyed land, to purchase the subject lots, upon terms fixed. The covenant was to run for twenty years, subject to renewal for additional twenty-year periods by the owners (at the end of each period) of a majority of front feet in the subdivision. The suit arose out of an attempted sale during the second twenty-year period without compliance with the covenant. The court rejected defendant's claim that the covenant created a perpetuity, noting that it had been renewed by a majority in front feet of the lot owners as provided for in the deeds, and that, as a result, the gross period was one for less than twenty-one years.<sup>64</sup>

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59. See *supra* text accompanying notes 15-16.

60. See *supra* text accompanying note 9.

61. 277 S.W.2d 619 (Mo. 1955).

62. *Id.* at 623. Ultimately the court refused to enforce the terms of the contract, ruling that because there was no social or economic objective to be accomplished thereby, the contract was an unreasonable restraint on alienation. *Id.* at 626.

63. 365 Mo. 895, 290 S.W.2d 76 (1956).

64. *Id.* at 903, 290 S.W.2d at 82.



*Davies v. McDowell*<sup>65</sup> involved a party wall agreement between the owners of two halves of a building in which each party agreed that, if he received an acceptable bona fide offer from a third party to purchase his unit, he would give the owner of the other unit a preemptive right of purchase at the price offered by the stranger. A paragraph of the agreement declared that the agreements "hereby created are and shall be perpetual" and were binding on "each and every purchaser, his heirs and assignees."<sup>66</sup> In a suit for specific performance of the agreement, the defense was made that the agreement constituted a violation of the rule against perpetuities. The court, after noting the distinction between preemptive rights which are personal to the optionee and preemptive rights which are unlimited as to time, declared the controverted provisions in the party wall agreement to be void. The opinion also contained a reaffirmation of the "possibilities" test as to validity, and cited subsection 1 of section 442.555<sup>67</sup> as preventing other provisions of the party wall agreement from being contaminated by the void provisions.<sup>68</sup>

To be distinguished from cases involving options or preemptive rights are those cases in which the interest involved is based upon the advance by one person of money for the purchase of property, title to which is taken in the name of another. Here there can be no basis for invoking the rule against perpetuities because the equitable interest arising from advancing the money is vested at the very inception of the transaction.<sup>69</sup> A somewhat similar situation was presented in *Heald v. Erganian*.<sup>70</sup> There, Heald negotiated the purchase of real estate for Erganian and his wife, who advanced money for the purchase and took title in their names upon an agreement that when the property ultimately was resold, Heald would receive one-half of the profit for his efforts in negotiating the transaction. Subsequently the property was sold at a profit. Heald sued for his share of the profit, and the defense was violation of the rule. The court held that the rule could not apply because the plaintiff, upon the execution and delivery of a deed to de-

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65. 549 S.W.2d 619 (Mo. Ct. App. 1977).

66. *Id.* at 621.

67. *See supra* text accompanying note 5.

68. 549 S.W.2d at 624.

69. No Missouri case on this precise point has arisen in the period under examination. *Cf.* Shirley v. Van Every, 159 Va. 762, 167 S.E. 345 (1933) (treating purchaser as holder of forfeitable vested interest).

70. 377 S.W.2d 431 (Mo. 1964).

fendants, became vested with an equitable interest in the property and there was no further estate to which the rule could apply.<sup>71</sup>

### *E. Charitable Trusts*

The long recognized principle that the rule against perpetuities has no application to charitable trusts found expression within recent years in three Missouri cases.<sup>72</sup> What constitutes a charity, to what extent a court of equity has jurisdiction to alter the directions of the testator or settlor of the trust, and under what circumstances directed accumulations may be ordered distributed (questions touched upon in those cases) involve matters which go beyond the scope of this Article.

This then is the array of cases on perpetuities within the last thirty years.

## III.

The past thirty years have been a placid period in Missouri, so far as the rule against perpetuities is concerned. Section 442.555, while it may have had a psychological influence on the courts, received only passing mention in two of the cases involving the rule which were decided by the appellate courts during those years. More frequently mentioned, sometimes gratuitously, was Missouri's adherence to the what-might-happen approach or possibilities test of violation of the rule. Yet, paradoxically, the validity of nearly all of the family dispositions dealt with since the enactment of the statute has been sustained.

*Nelson v. Mercantile Trust Company*<sup>73</sup> suggested clearly the pitfalls that may still be encountered as a result of the possibilities test. It will be recalled that there the court concluded that the rule against perpetuities had been violated in the transferor's basic plan of disposition, but it upheld the validity of the disposition on the basis of a valid savings clause. Such clauses had, for many years, been extensively employed by draftsmen in wills and trusts as bulwarks against the harsh application of the what-might-happen approach.

But what if the draftsman had been less careful or less knowledgeable and had failed to include a savings clause? Presumably *Nelson*

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71. *Id.* at 440.

72. *Earney v. Clay*, 462 S.W.2d 672 (Mo. 1971); *Epperly v. Mercantile Trust & Sav. Bank*, 415 S.W.2d 819 (Mo.), *modified*, 457 S.W.2d 1 (Mo. 1967) (per curiam); *Mercantile Trust Co. v. Shriners' Hosp. for Crippled Children*, 551 S.W.2d 864 (Mo. Ct. App. 1977).

73. 335 S.W.2d 167 (Mo. 1960). *See supra* notes 32-37 and accompanying text.

would have been decided upon the law as it existed prior to 1952, for the period allowed by the rule began to run in that case on July 15, 1931.<sup>74</sup> Section 442.555 would not have saved the disposition, first, because the section did not apply retroactively, and second, and more importantly, because Missouri followed, and continues to adhere to, the possibilities test.<sup>75</sup>

Prior to the enactment of section 442.555, bills were introduced in the Missouri Legislature which would have had the effect of according to dispositive instruments somewhat the same benefits as were achieved in the *Nelson* case by careful draftsmanship.<sup>76</sup> The bills in each case were opposed in the Senate Judiciary Committee, principally on the ground that in practical effect they enabled the wait-and-see test to be applied within parameters. Ultimately, the bills were not reported out.<sup>77</sup>

As Missouri law now stands (and indeed as it was generally accepted as standing even prior to *Nelson*), a disposition otherwise violative of the rule may be prevented from failing by the insertion of a savings clause which evinces the transferor's intent to accept a valid alternative to his original dispositive scheme, if the latter should, for any reason, be deemed to embody limitations which are too remote; but the same disposition, not supported by such a clause, fails.

Under the "wait-and-see" doctrine, the result in *Nelson* (regardless of whether or not a savings clause was contained in the instrument) could have been achieved quite simply. The difficulty in that case, as will be recalled, was the inclusion of possible unborn descendants among the persons in whom a remainder interest might possibly vest. But there were no grandchildren who were not in being at the death of L. C. Nelson when the period of the rule against perpetuities began to

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74. See *supra* text accompanying note 33.

75. See *supra* text accompanying notes 12-16. Missouri does, however, follow the generally recognized "second look" doctrine, under which a court dealing with a question concerning the validity of the exercise of a power of appointment will examine facts existing at the time of its exercise. See *Rutherford v. Farrar*, 118 S.W.2d 79 (Mo. Ct. App. 1938) (no evidence that actual appointees were not lives in being at time of creation of power). This is true even though the period of the rule is measured from the date of creation of the power. See *St. Louis Union Trust Co. v. Bassett*, 337 Mo. 604, 85 S.W.2d 569 (1935).

76. *E.g.*, H.B. No. 34, 71st Gen. Assem. (Mo. 1961); H.B. No. 341, 70th Gen. Assem. (Mo. 1959).

77. The history of this proposed legislation, the manner in which it was dealt with, and the development of what has become § 442.555 have been outlined in Eckhardt, *Rule Against Perpetuities in Missouri*, 30 Mo. L. REV. 27, 62 n.120 (1965), and in Fratcher, *The Missouri Perpetuities Act*, 45 Mo. L. REV. 240, 251-53 (1980).

run.<sup>78</sup> Because all interests in fact vested within the period of the rule, wait-and-see would have upheld the disposition.

The American Law Institute had before it at its May, 1978 session, Tentative Draft No. 1 and at its May, 1979 session, Tentative Draft No. 2 of the *Restatement (Second) of Property—Donative Transfers*, both of which dealt with the rule against perpetuities and related rules. At the threshold was the question whether the what-might-happen or possibilities test of violation of the rule adopted in the Institute's first *Restatement*<sup>79</sup>—which at the time of its adoption represented the prevailing American law—should be readopted, or whether the wait-and-see or “actualities” test—which specified that an interest in property would fail if it “does not vest” within the period allowed by the rule against perpetuities<sup>80</sup>—should be adopted.

When first presented in 1978, the issue was extensively discussed and debated, with particular attention being given to the views of Professor Richard R. Powell (who had been the Reporter for the first *Restatement*) in favor of the retention of the what-might-happen approach.<sup>81</sup> The issue came to a vote in 1979 and the wait-and-see doctrine was then adopted by a clear majority.<sup>82</sup>

Dissatisfaction had developed with a rule that made the validity of a disposition depend upon the absence of any possibility, however remote, that vesting could be postponed beyond the period allowed by the rule. Twenty-one states had adopted statutes which either incorporated a wait-and-see test in determining the validity of non-vested interests or substantially modified the what-might-happen approach.<sup>83</sup> A

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78. Professor William F. Fratcher, in discussing the *Nelson* case, took the view that the remainder limitations to the descendants of those grandchildren alive at the settlor's death were valid in any event. See Fratcher, *Trusts and Succession in Missouri*, 27 MO. L. REV. 93, 94-95 (1962). This would certainly have been true if Missouri, by statute or decision, had adopted the wait-and-see doctrine. However, the *Nelson* court had expressly reaffirmed the possibilities test, and it may well have premised its holding upon the inclusion among the remaindermen of unborn grandchildren and upon the fact that, at the very least, there were, in the cases of the \$50,000 reservations for the grandchildren, gifts over to collateral takers in the event that an unborn grandchild died without issue. This would raise the possibility, in the case of an afterborn grandchild, of a gift over, and would produce infectious invalidity in the cases of the other members of the class.

79. RESTATEMENT OF PROPERTY § 370 (1944).

80. See RESTATEMENT (SECOND) OF PROPERTY—DONATIVE TRANSFERS § 1.4 (Tent. Draft No. 1, 1978).

81. See *id.* app. A at 127-44.

82. See RESTATEMENT (SECOND) OF PROPERTY—DONATIVE TRANSFERS § 1.4 (1983).

83. These statutes were collected and cited at RESTATEMENT (SECOND) OF PROPERTY—DON-

substantial number of more recent cases<sup>84</sup> had declined to accept the what-might-happen approach. Exemplary of these is *Merchants National Bank v. Curtis*,<sup>85</sup> where the testator's bequest to his grandchildren was in jeopardy due to the possibility of further grandchildren being born to couples with grown children.<sup>86</sup> The New Hampshire Supreme Court there said:

There is no logical justification for deciding the problem as of the death of the testator on facts that might have happened rather than the facts which actually happened. It is difficult to see how the public welfare is threatened by a vesting that might have been postponed beyond the period of perpetuities but actually was not . . . . When a decision is made at a time when the events have happened, the court should not be compelled to consider only what might have been and completely ignore what was.<sup>87</sup>

In Missouri, a situation such as the one which appeared in the New Hampshire case would, if the rule against perpetuities had begun to run after the effective date of section 442.555, be dealt with under the *cy pres* doctrine. But it is difficult to perceive the justification for a court-decreed "reformation" of an instrument—albeit with the purpose of arriving at what the transferor would have intended—in a case where the transferor has clearly and unambiguously stated his intention.

Nor does it seem persuasive to say that the operation of the wait-and-see doctrine would be impeded by the adherence of Missouri courts to the doctrine of "infectious invalidity."<sup>88</sup> Infectious invalidity necessarily presupposes the existence of an invalid limitation which, by reason of its interrelationship with other limitations which of themselves are not too remote, infects the latter, causing the good to fall with the bad. Under the wait-and-see doctrine, the number of potential in-

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ATIVE TRANSFERS § 1.4 reporter's note 2, at 87-92 (Tent. Draft No. 2, 1979). Since the promulgation of the wait-and-see approach by the American Law Institute, Virginia has adopted substantially the position of the *Restatement (Second)*. See VA. CODE § 55-13.3 (1982).

84. Judicial support for the wait-and-see doctrine exists in Colorado, Florida, Massachusetts, Mississippi, New Hampshire, and Pennsylvania. See RESTATEMENT (SECOND) OF PROPERTY—DONATIVE TRANSFERS § 1.4 reporter's note 2, at 96-100 (Tent. Draft No. 2, 1979).

85. 98 N.H. 225, 97 A.2d 207 (1953).

86. Under one permissible construction of the bequest, the representatives of the testator's siblings would take in the event of the death of his grandchildren (including those unborn at his death) without issue. *Id.* at 231, 97 A.2d at 212.

87. *Id.* at 232, 97 A.2d at 212.

88. See Fratcher, *supra* note 77, at 252-53 (suggesting that the doctrines of wait-and-see and of infectious invalidity are necessarily incompatible).

fecting agents is simply reduced. As long as no interest does, in fact, vest too remotely, the entire disposition is valid, as the transferor intended it to be; and no social interest is transgressed by a possibility which does not materialize. Only when the possibility of remote vesting exists and in actuality occurs, would there be a need for invocation of *cy pres*.<sup>89</sup>

Significant variations and some uncertainties have arisen in the states which in one form or another have adopted the wait-and-see principle in respect of the proper selection of the "lives in being" at the time when the period of the rule begins to run. Since under the wait-and-see doctrine the test of validity of an interest would no longer be applied as of the time when the period begins to run, the selection of the measuring lives (from among the lives then in being) would not necessarily be limited to those recognized at common law under the possibilities test. And, it may be noted that even under the common law the number of measuring lives employed was not limited, so long as that number was not such as to render identification difficult or unreasonable.<sup>90</sup> The experience of states in which wait-and-see has been completely or partially adopted and the various alternative approaches to the identification of measuring lives have been discussed extensively elsewhere.<sup>91</sup> The test embodied in the *Restatement (Second)* is set forth in a footnote below.<sup>92</sup>

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89. The American Law Institute adopts substantially this position in RESTATEMENT (SECOND) OF PROPERTY—DONATIVE TRANSFERS § 1.5 (1983). This section applies in cases where, notwithstanding the wait-and-see test, an interest remains which has not vested within the allowed time. It does not contain the term "infectious invalidity," but provides that if an interest does not or cannot vest within the period of the rule,

the transferred property shall be disposed of in the manner which most closely effectuates the transferor's manifested plan of distribution and which is within the limits of the rule against perpetuities.

*Id.*

90. *E.g.*, *Fitchie v. Brown*, 211 U.S. 321, 334 (1908); *In re Villar*, [1929] 1 Ch. 243, 249 (1928).

91. See Note, *Measuring Lives Under Wait-and-See Versions of the Rule Against Perpetuities*, 60 WASH. U.L.Q. 577 (1982); Note, *Understanding the Measuring Life in the Rule Against Perpetuities*, 1974 WASH. U.L.Q. 265.

92. (1) If an examination of the situation with respect to a donative transfer as of the time the period of the rule against perpetuities begins to run reveals a life or lives in being within 21 years after whose deaths the non-vested interest in question will necessarily vest, if it ever vests, such life or lives are the measuring lives for purposes of the rule against perpetuities so far as such non-vested interest is concerned and such non-vested interest cannot fail under the rule. A provision that terminates a non-vested interest if it has not vested within 21 years after the death of the survivor of a reasonable number of persons named in the instrument of transfer and in being when the period of the rule begins to run is within this subsection.

### THE FUTURE

The Missouri courts, over the last three decades, have demonstrated kinder feelings with regard to the rule against perpetuities than the courts of half a century ago. By construing a gift as one upon condition subsequent (even though there was no freehold estate to be cut down by the occurrence of the condition<sup>93</sup>), or by relying more extensively upon the rule of construction that when there are two or more possible constructions, one which would render the disposition valid is to be preferred over another which would render it invalid,<sup>94</sup> or generally by cultivating a benign approach, the courts have, without the aid of wait-and-see, achieved results congruous therewith. Concerning such a tendency, Professor Casner has said:

In connection with the adoption of the wait-and-see approach, it should be noted that, in the past, courts frequently strained the construction of language employed in a disposition to eliminate the possibility of an interest vesting too remotely. In one sense, this was adopting a wait-and-see approach.<sup>95</sup>

However, there will undoubtedly appear one day a transfer which cannot be construed in two ways. Having heretofore desisted from doing so, let us now look at the "unborn widow" case.

Suppose that T, by his will, leaves property to his fifty-five year old son S for life, then to S's widow for her life, with remainder over to S's

(2) If no measuring life with respect to a donative transfer is produced under subsection (1), the measuring lives for purposes of the rule against perpetuities as applied to the non-vested interest in question are:

- (a) The transferor if the period of the rule begins to run in the transferor's lifetime; and
- (b) Those individuals alive when the period of the rule begins to run, if reasonable in number, who have beneficial interests vested or contingent in the property in which the non-vested interest in question exists and the parents and grandparents alive when the period of the rule begins to run of all beneficiaries of the property in which the non-vested interest exists, and
- (c) The donee of a nonfiduciary power of appointment alive when the period of the rule begins to run if the exercise of such power could affect the non-vested interest in question.

A child in gestation when the period of the rule begins to run who is later born alive is treated as a life in being at the time the period of the rule begins and, hence, may be a measuring life.

RESTATEMENT (SECOND) OF PROPERTY—DONATIVE TRANSFERS § 1.3 (1983).

93. See *Mercantile Trust Co. v. Hammerstein*, 380 S.W.2d 287 (Mo. 1964), discussed in *supra* text accompanying notes 45-46.

94. See *supra* note 54.

95. RESTATEMENT (SECOND) OF PROPERTY—DONATIVE TRANSFERS § 1.4 reporter's note 2, at 68 (1983).

issue, or in default of issue to the children of T's nephew, N, in fee. Suppose further that at the time of the execution of the will and at the time of T's death, S was a widower, but later married a woman who was alive at the death of T and survived S as his widow. Suppose further that S died without issue.

Will a Missouri court, with continuing fidelity to the possibilities test, declare the remainder to the children of T's nephew N to be violative of the rule against perpetuities because S, after the death of T and at the age of fifty-five, might have married a woman who was not born when the testator died and who might have outlived S by more than twenty-one years? Or will it make a new will for the testator? Or will the appellate courts in the meantime have worked out some principle based upon, or having an effect similar to, the wait-and-see approach? Or will the legislature in the meantime have become appreciative of the absurdity of the what-might-happen approach and have enacted another subsection to section 442.555 adopting wait-and-see or some variation thereof?

The imponderables have been stated. The most that can be conjectured is that the courts will, pending further legislation, apply section 442.555 (as far as it goes) in cases where it is applicable, and will evince a kindlier approach toward cases in which a transferor by inadvertent or ill-advised words might have offended, but in actual fact did not offend, the majesty of the rule against perpetuities.



