

Washington University Law Review

Volume 21 | Issue 3

January 1936

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Recommended Citation

McCune Gill, *The Rule Against Perpetuities as it Affects Contingent Future Interests in Missouri*, 21 ST. LOUIS L. REV. 209 (1936).

Available at: https://openscholarship.wustl.edu/law_lawreview/vol21/iss3/2

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THE RULE AGAINST PERPETUITIES AS IT AFFECTS
CONTINGENT FUTURE INTERESTS IN MISSOURI

BY MCCUNE GILL

It was not until 1891 that the Missouri Supreme Court was asked to decide a perpetuity case involving a contingent future interest. From that time until 1935, twenty cases have been brought before it. These decisions differ greatly from the decisions in other States and from each other and form an interesting chapter in the history of our local jurisprudence.

I.

The first case, *Lockridge v. Mace*, 109 Mo. 162, 18 S. W. 1445, involved a will devising land to the testator's children for life, remainder to grandchildren for life, remainder to great-grandchildren in fee. The case went to Division No. 1 and Judge Sherwood, one of our ablest judges, wrote the opinion. He somewhat surprised the real property lawyers of that day by deciding that not only was the remainder to the great-grandchildren void (because vesting after the death of possible future-born grandchildren), but that this partial invalidity destroyed the other estates (although they must vest immediately or at the end of lives in being, and therefore were valid). The rule against perpetuities given by Washburn that a perpetuity is any estate vesting (1) in unborn children of unborn children, or (2) after lives and twenty-one years, is quoted and approved.

The next case, *Gates v. Seibert*, 157 Mo. 254, 57 S. W. 1065, was decided in banc in 1900. It involved a devise to testator's son and to any future wife of the son, for their lives, with remainder to the son's children in fee. Although this is obviously valid because all estates vest at the son's death, it was so decided by only a bare majority (four to three), Judge Sherwood and two other judges, Burgess and Marshall, being the dissenters.

In the second edition of *Gray on Perpetuities*, published in 1906, the author takes issue with the foregoing views and says that he "hopes the learned Court of Missouri will come into line with other States in later decisions," and not hold an entire will void for a partial invalidity. *Gray on Perpetuities* 2nd Edition, Sec. 249a.

II.

By 1907 Judge Sherwood had left the bench, but his ideas on perpetuities were completely taken over by Judge Woodson, who was later, during a long and distinguished career on the bench, to write or concur in seven majority and minority opinions denouncing perpetuities. His first opinion was in a case, *Shepperd v. Fisher*, 206 Mo. 208, 103 S. W. 989, which went to Division No. 1, and involved a will devising property to testator's daughter for life with remainder to her bodily heirs forever if they have issue, otherwise to revert to testator and his heirs. It would have been easy for the court to say that all the estates vested in time, the remainder to bodily heirs subject to be divested in favor of a vested reversion. But Judge Woodson held the entire will void, including even certain other devises in fee. Two of the other judges of the Division, Valliant and Lamm, concurred.

The next case, *Bradford v. Blossom*, 190 Mo. 110, 140, 88 S. W. 721, (1905), 207 Mo. 177, 233, 105 S. W. 289 (1907), involved a complicated situation, where it was contended that a will was obtained by fraud and did not express the intention of the testatrix. The case went to the Supreme Court twice, and on the second appeal in banc Judge Woodson solved the difficulty by declaring the will wholly void as containing perpetuities, although it provided that distribution should be made when the youngest of the children of the life tenants became twenty-one years of age. All of the judges concurred, including Judges Gantt, Burgess, Valliant and Lamm.

A conveyance in trust (rather than a will) next came before the Court in 1908, *Buxton v. Kroeger*, 219 Mo. 224, 117 S. W. 1147, and Judges Graves, Burgess and Lamm joined with Judge Fox in deciding the case without considering the question of perpetuities. Woodson, Valliant and Gantt dissented. Woodson thought the deed was void as a perpetuity, and said that "the law against perpetuities is conceded by all to be one of the best and wisest laws extant." The conveyance provided a trust for the present and future children of the grantors until ten years after the youngest child should become of age whereupon the trustees were to convey to children living and the heirs of children deceased. Some courts would have held only the transgressive ten years void and would have saved the rest of the trust.

The next will was a simple affair devising lands to daughters for life with remainders to the heirs of their bodies but if any one of them should die without heirs of her body then to the testator's other heirs. The only claim to a perpetuity was that "any one of them" might apply to the heirs of the body as well as to the daughters, but this claim was so flimsy that Division No. 1, including Judge Woodson, very properly held the will valid, *Cox v. Jones*, 229 Mo. 53, 129 S. W. 495 (1910).

At this juncture Professor Hudson of Missouri University wrote a lengthy article, *University of Missouri Law Series*, Vol. 3, page 3 (1914) protesting against the trend of these decisions, whereby an entire will was held void because of a partial invalidity. He also thinks there is no rule as to an unborn child of an unborn life tenant apart from the lives and twenty-one years period, of the rule against perpetuities, and surely no rule invalidating an estate to an "unborn child of an unborn child," (erroneously) believed to exist by Washburn and the Missouri court.

In 1915 the third edition of *Gray on Perpetuities* was published and the author repeats his former comment on total invalidity for partial remoteness, but admits that his previous advice was not accepted by the Missouri Court, *Gray on Perpetuities*, 3rd Edition (1915), Section 249a.

In 1916 a will came before Division No. 1 whereby a testatrix devised her property to her eight children, "but in case any of them, or their descendants die, then to the survivors, and in no event to become the property of strangers to my blood." This might have been construed to refer to death during the life of the testatrix, but Judge Blair, (Woodson and Graves concurring), held the entire will void, *Riley v. Jaeger*, 189 S. W. 1168.

This decision inspired Professor Hudson again to comment unfavorably on the Court's view of the effect of partial perpetuities, *University of Mo. Law Series*, Vol. 14, page 53 (1917). But his suggestions again went unheeded.

III.

The next case went to Division No. 2, composed of Judges Walker, Williams and Faris, all eminent jurists. It seems that Judge Walker's views on perpetuities differed from those of Judge Woodson, who sat in No. 1, and this is the first of four

decisions joined in by Walker denying claims of perpetuities. The case, *Deacon v. Trust Co.* 271 Mo. 669, 197 S. W. 261 (1917), was a thirty year trust, to be distributed at the end of that period to children then living or the issue of those dead. Judge Walker held the trust valid. This decision might have been put on the ground that only the excess over 21 years was void. However, the Judge chose to construe the word "issue" to mean immediate issue at the time of the children's death, thus vesting the beneficial interests at the end of an existing life. Judges Faris and Williams concurred. Washburn's definition of a perpetuity appears to have been abandoned and Gray's definition substituted, namely, that "the right to future enjoyment of an estate must vest within 21 years after a life in being at the time of the creation of the interest."

The next will in *Walter v. Dickmann*, 274 Mo. 135, 202 S. W. 537 (1918), provided that trustees were to pay income to a named person for life and after his death to be paid to his children and their heirs and assigns forever. The claim that this trust continued during the lives of possibly future born children was denied by Division No. 2 (Judges Walker, Faris and Williams), and the children were held to have vested interests because a gift of income from personal property is a gift of an absolute estate in the property.

In 1919, a deed came before Division No. 1 and was held valid in an opinion written by Commissioner Ragland (*Hudspeth v. Grumke*, 214 S. W. 865). It sets up various estates in named persons with remainders to their "children and the children of deceased children." The Commissioner's opinion holding the deed valid was concurred in by Judges Woodson, Blair, Graves and Bond.

The next problem arose in a case, *Melvin v. Hoffman*, 290 Mo. 464, 235 S. W. 107 (1922), involving a deed creating a life estate to a possibly future born wife of the life tenant; there was also a twenty-one year trust for children and a final remainder to living sisters. The Court in banc held that all of the estates must vest in time. Judge Woodson dissented, as Judge Sherwood had done in a previous similar case. The trust contained a provision for accumulation but the court held that this only applied during the grantor's life estate. In this way the

learned Judges avoided passing on accumulations during a future born life.

The next will came before the court in 1922, *Lane v. Garrison*, 293 Mo. 530, 239 S. W. 813. It provided for the accumulation of a large part of income during a living grandson's life and during the minority of his children, with prohibition against alienation. The case went to Division No. 1. Commissioner Small wrote the opinion holding the trust valid. Judges Blair, Graves, Elder, and Woodson concurred.

Immediately following the preceding case, a will was presented to Division No. 2, which taxed the ingenuity of Judge Walker, who, following his usual inclinations, sought to uphold it. The devise (*Schee v. Boone*, 295 Mo. 212, 243 S. W. 882, [1922]), was to the testator's widow for life, remainder to a daughter for life, remainder to the heirs of her body, but if any of the bodily heirs died without issue then to the others living, or to the issue of any of the others who had died. It is obvious that the latter interest is void, and (in Missouri) the whole will thereby should fail. But Judge Walker saved it, by holding that the last estate was void as repugnant to the fee of the heirs of the body of the daughter. Incidentally, in the sixty Missouri cases involving shifting executory devises, thirty of such shifting interests have been held good, and thirty bad.

In 1922, a case, (*Loud v. Trust Co.* 298 Mo. 148, 249 S. W. 629) which must have delighted the heart of the learned Judge Woodson, veteran enemy of perpetuities, came before Division No. 1. It involved a will creating a trust for a daughter (aged 54), for life, with remainder to three living grandchildren, and any thereafter born, to become their absolute property at age 40, or if they had died, to their issue at age 21. Judge Woodson wrote the opinion, Judges Graves and Ragland concurring. The court held that the daughter might have other children and their issue would be unborn children of unborn children. The court also held (contrary to the previous ruling of Division No. 2) that "issue" meant remote and not immediate issue. Whereupon the entire will was held to be void. Professor Gray's definition of a perpetuity is again quoted and approved.

A year later Judge Woodson made his last appearance as the foe of perpetuities. Commissioner Small wrote the opinion,

adopted by Judges Woodson, Blair, Graves and Ragland. The case, *Mockbee v. Grooms*, 300 Mo. 446, 254 S. W. 170 (1923), devised real estate to a daughter for life, remainder in trust for her present or future children until the youngest became twenty-five, then to be divided between such children, otherwise to charity. The entire clause was held void. Because of the fact that previous decisions had held entirely separate clauses in wills, devising other property in fee, to be void, a similar claim was made here, but the court denied the contention.

Here a testator gave his large dry goods business to trustees to conduct the same and pay the proceeds to numerous beneficiaries or their descendants, *Plummer v. Roberts*, 315 Mo. 627, 287 S. W. 316 (1926). There was no time stated for the termination of the trust. The court in banc including Judges Walker, White, Atwood and Ragland held the trust valid on the theory that the testator must have intended it to terminate before twenty-one years had elapsed.

Five years later, in 1931, Division No. 2 considered one of the new "living" trusts which was very much like a will but which fortunately created remainders to descendants of children named by name, instead of designating them as the class "children." This made the remainders valid even though the period was to be measured from the delivery of the deed. What seemed to be life estates to possibly future born husbands and wives of children, were created, which would be void in a deed; but the Court held them to terminate at the death of the last surviving named child, thus making them good. Judge Henwood wrote the opinion which was concurred in by Judges Blair and White; *Davis v. Rossi*, 326 Mo. 911, 34 S. W. 2nd 8. The court says its "duty is to adopt a construction which will not offend the rule against perpetuities," a new view in Missouri.

The next case, decided in 1932, *Trautz v. Lemp*, 329 Mo. 580, 46 S. W. 2nd 135, involved a will creating a trust for children and their "lineal descendants" until 20 years after the final settlement of the testator's estate. Although this is obviously void as written, the court in banc held it to be valid by construing that "descendants" means immediate issue, and that "final settlement of the estate" means the date of testator's death. Judge Frank wrote the opinion. Judges Atwood, Gantt, White,

Henwood and Ellison concurred. The court again says that "a doubtful trust will be upheld if possible."

The next case, *Greenleaf v. Greenleaf*, 332 Mo. 402, 58 S. W. 2d 449, (1933), was rather free from difficulties except only the contention that the "unborn child of an unborn child" doctrine should invalidate a trust for sons and their heirs until the death of the survivor of the sons. Division No. 1 (Judges Frank, Gantt, and Atwood, opinion by Ferguson), held the estates valid. The honorable Court says that the rule does not destroy this trust because the rule applies only to an unborn child of an unborn "life tenant."

Thus do we see how four cases were decided, by both divisions and by the court in banc, in favor of validity, over a period of twelve years. In some of these decisions somewhat strained constructions were used to make the estates comply with the rule, as such constructions had previously been used to defeat similar estates. Hence it seemed to some observers that the learned Missouri Court with its new judges had departed from its former strict views on the perpetuity question. But in the next case, decided in 1935 (the last one to date), *Trust Company v. Bassett*, 85 S. W. 2d 569, the Court returned to its former principles. Judges Gantt and Frank (who had theretofore leaned toward validity), and Judges Collet and Hays held the will void per curiam in No. 1. It involved a complicated trust continuing until living named beneficiaries should attain the age of 40, for such beneficiaries or their descendants, with remainders upon death without descendants to the other "beneficiaries named." The court held that "attain age 40" meant when they would attain such age even though dead, and that "beneficiaries named" included not only those mentioned by name but also those not named but merely designated by class. The entire trust, including the valid provisions, was held void. The court also announces that it will follow the rule that estates created by the exercise of a power to appoint by will, must be construed as of the date of the original will creating the power, although many States hold otherwise as to general powers of appointment.

IV.

From the above comments one sees something of the variant views on perpetuities, of the two divisions of the Missouri Su-

preme Court, and of the learned and distinguished judges who have occupied the bench at different times. After twenty decisions over a period of forty-four years it seems that we are still far from a determination of what the Rule against Perpetuities in Missouri is, or how the Court will construe limitations in wills and deeds. Hence we are quite unable to hazard a guess as to whether difficult contingent future interests will be held valid or invalid. But we do know that, by successive decisions, our honorable Court has firmly established the doctrine that the merest possibility of invalidity in the smallest future interest will render the entire devise void.