The Period of the Rule

A. COMMENCEMENT OF THE PERIOD

The Rule Against Perpetuities was developed to restrict the creation of remote future interests which were not destructible by the holder of the present interest. The Rule makes void any limitation of a future interest unless, at the moment when the interest becomes indestructible, it is certain that it must vest, if at all, within the period of the Rule. That period is, speaking generally, lives in being and twenty-one years. Ordinarily a future interest is indestructible from the time of its creation. Consequently the period of the Rule is normally computed from the time when the instrument creating the interest becomes effective. In the case of a deed, this is the time of delivery; in the case of a will, the death of the testator. If John Stiles transfers prop-

62 Gray, Rule Against Perpetuities, 3rd ed., §214 (1915); 2 Simes, Law of Future Interests, §496 (1936); Property Restatement, §370, Comment k. (1944). The meaning of the requirement of certainty of vesting will be discussed in the next chapter.

The period of the rule 281

Property by deed to James Thorpe upon trust to pay the income to John for life, then to pay the income to John's youngest son for life, and then to transfer the property to the youngest grandson of John, the equitable contingent remainder of the grandson is void under the rule. John's youngest grandchild cannot be ascertained until the death of the last of John's children which, since John may have children after the delivery of the deed to James Thorpe, may not occur within lives in being and twenty-one years. The same limitation would, however, be valid in a will, because all of John's children must necessarily come into being before the death of John, and the youngest of their children will certainly be ascertainable and in being before the death of the last of John's children.

Future interests limited to follow, or in defeasance of, an estate tail are destructible by the tenant in tail. Because of this, the English courts held that contingent remainders on estates tail and executory interests limited in defeasance of estates tail need not comply with the Rule Against Perpetuities. Andrew Baker could convey land to James Thorpe and the heirs of his body, remainder to the youngest descendant of John Stiles in being at the death of the last descendant of James. Likewise, Andrew Baker could convey land to James Thorpe

and the heirs of his body, but if any tenant in tail fail to bear the name and arms of the grantor, then to John Stiles and his heirs. Michigan abolished estates tail in 1821, but the principle that destructible future interests are not restricted by the Rule Against Perpetuities, although established by cases involving estates tail, is not limited to them.

It is clear from the cases involving estates tail that, if a future interest will be destructible at all times until it vests, the Rule Against Perpetuities has no application to it. It would seem, moreover, that if a future interest is so limited as to be destructible for a time and then indestructible for a time before it vests, the Rule does apply to it, but the period of the Rule does not commence until the interest becomes indestructible. In jurisdictions where estates tail are permitted, an interest which follows an interest limited on or in defeasance of an estate tail would fall into this category. Andrew Baker might convey land to James Thorpe and the heirs of his body, remainder to Lucy Baker and her heirs, but if Lucy dies unmarried, to the youngest descendant of John Stiles in being at the expiration of the estate tail. In such a case the final executory interest would be de-

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69 Part Two, note 67 supra.

70 PROPERTY RESTATEMENT, §§878, 879 (1944); 2 Simes, LAW OF FUTURE INTERESTS, §§516, 517 (1936), 516, 517 (1936). Contra: Gray, RULE AGAINST PERPETUITIES, 3rd ed., §446 (1915). Professor Gray appears to have thought that if, in the absence of destructibility, the future interest would be void under the Rule, destructibility would not save it unless it was certain to vest at or before the termination of the period of destructibility. No Michigan authority on the point has been found.
structible during the continuance of the estate tail but indestructible thereafter during the life of Lucy. In all jurisdictions, including Michigan, a future interest may be destructible because of the existence of an unlimited power of appointment or of revocation.\textsuperscript{71} Andrew Baker might transfer property by deed to John Stiles for life, remainder to the youngest son of John Stiles for life, remainder as John may by will or deed appoint and, in default of appointment, to the youngest grandson of John. John Stiles might transfer property by deed to James Thorpe upon trust to pay the income to John for life, then to pay the income to the youngest son of John for life, then to transfer the property to the youngest grandson of John, reserving to the settlor an unlimited power to revoke the trust.\textsuperscript{72} In each of these examples, in the absence of the power, the period of the Rule Against Perpetuities would commence with the delivery of the deed and the ultimate remainder to the youngest grandson of John Stiles would, accordingly, be void. In each example, however, the presence of the power enables John Stiles to destroy the ultimate remainder during his lifetime. This being so, it would seem that the period of the Rule Against Perpetuities

\textsuperscript{71} A power unlimited as to objects is ordinarily referred to as a general power. However, as the Michigan statutes confine the term "general power" over land to powers to appoint the full fee, it is best to avoid use of the term "general power" in Michigan when considering the question under discussion. Rev. Stat. 1846, c. 64, \textsection 6; Comp. Laws (1857) \textsection 2663; Comp. Laws (1871) \textsection 4146; Comp. Laws (1897) \textsection 8861; How. Stat., \textsection 5595; Comp. Laws (1915) \textsection 11597; Comp. Laws (1929) \textsection 13000; Mich. Stat. Ann., \textsection 26.96; Comp. Laws (1948) \textsection 556.6.

\textsuperscript{72} A similar type of destructibility would exist if John Stiles insured his life and designated James Thorpe as beneficiary of the policy, upon the trusts described in the text, reserving power to change the designation of beneficiary. \textit{Property Restatement}, \textsection 373, \textit{Comment e.} (1944); Smith, \textit{Personal Life Insurance Trusts}, \textsection 34.2 (1950).
should be calculated from the death of John Stiles, in which case the ultimate remainder to the youngest grandson of John would be valid.\(^73\)

It would seem that a future interest is destructible for purposes of the Rule Against Perpetuities only while some living person has unlimited and unconditional power to vest it in himself for his own exclusive benefit.\(^74\) In jurisdictions where estates tail still exist with the incidents they had in seventeenth-century England, a tenant in tail has such power over the future interests limited to follow, or in defeasance of, the estate tail. The holder of such an unlimited power of appointment or of revocation as those involved in the examples in the preceding paragraph does also. But a future interest is not destructible for the purpose under discussion merely because some living person may defeat it by the exercise of a power of appointment if the power may be exercised only by will,\(^75\) if it may be exercised only

\(^73\) Property Restatement, §373, Comment c. (1944); 2 Simes, Law of Future Interests, §516 (1936). Another possible situation is that of a future interest which is so limited as to be indestructible for a period, then destructible for a period, then indestructible again for a period before it vests. Andrew Baker might transfer property by deed to John Stiles for life, remainder to the youngest son of John Stiles for life, remainder as the youngest son of John may, by deed or will becoming effective within twenty years after the death of John, appoint and, in default of appointment, to the youngest grandchild of John. In such a case the Restatement takes the position that the period of the Rule Against Perpetuities is to be computed from the end of the period of destructibility, i.e., twenty years after the death of John or upon the earlier death of John’s youngest son. §373, Comment d. (1944).

\(^74\) Property Restatement, §373, Comment d. (1944). Professor Simes thinks that it is sufficient if a group of cotenants have jointly, as co-owners, such a power, 2 Law of Future Interests, §515 (1936).

upon performance of a condition precedent, such as the payment of money, or if the exercise of the power is restricted to objects other than the holder of the power. If Andrew Baker transfers property to John Stiles for life, remainder to the youngest son of John for life, remainder as John may by will appoint and, in default of appointment, to the youngest grandson of John, the ultimate remainder is void under the Rule Against Perpetuities. If Andrew Baker transfers property to John Stiles for life, remainder to the youngest son of John for life, remainder as John may by will appoint after paying $1,000 to St. Paul's Cathedral and, in default of appointment, to the youngest grandson of John, the ultimate remainder is likewise void. The same is true if Andrew Baker transfers property to John Stiles for life, remainder to the youngest son of John for life, remainder to such descendant of John as John may appoint and, in default of appointment, to the youngest grandson of John.

A future interest is not destructible for this purpose

(1948) §556.12, provides: "When a general and beneficial power to devise the inheritance, shall be given to a tenant for life or years, such tenant shall be deemed to possess an absolute power of disposition, within the meaning, and subject to the provisions of the last three preceding sections." It would seem that future interests subject to such a power are destructible for purposes of the Rule Against Perpetuities. See Part Two, notes 293, 304, 305, 321 infra.

76 Property Restatement, §373, Comment e. (1944); 2 Simes, Law of Future Interests, §518 (1936). An option to purchase would be such a power. In Michigan Trust Co. v. Baker, 226 Mich. 72, 196 N.W. 976 (1924) a testatrix devised land to her husband until his death or remarriage, "with right to spend the income and so much of the principal as he might desire for his support and comfort, and with power to sell and give conveyance," remainder to a trustee to convert into personality and hold on trust for successive beneficiaries. The Court held that the period of the Rule Against Perpetuities commenced at the death of the testatrix rather than at the death of the husband.

77 Property Restatement, §373, Comment d. (1944); 2 Simes, Law of Future Interests, §516 (1936).
merely because its owner is in being and ascertained and so can release or convey it. If Andrew Baker conveys land "to James Thorpe and his heirs so long as the Penobscot Building shall stand and then to John Stiles and his heirs," the executory interest of John Stiles is void under the Rule although John could at any time release it to James Thorpe or unite with James to convey an absolute fee simple. Neither is a future interest destructible for this purpose merely because some living person has power to sell the property involved free of the future interest if the proceeds of the sale will be subject to the future interest. A trustee can defeat future interests in the trust property by selling it wrong­fully to a bona fide purchaser or by selling it rightfully for reinvestment purposes under a power conferred by the trust instrument or an order of a court of equity, but he cannot do so for his own exclusive benefit because the proceeds of such a sale are subject to the future interest in trust. Statutes of many jurisdictions, including Michigan, authorize sale of property in which future interests exist, free of such interests, on petition


of the owner of the present interest and judicial order. But such statutes provide that the proceeds of the sale shall be subject to the future interests, so the owner of the present interest does not have unlimited and unconditional power to destroy the future interest for his own exclusive benefit. 81

The application of the Rule Against Perpetuities to future interests which are subject to destruction by the exercise of a power of appointment has been touched upon. The Rule also applies to powers of appointment themselves and to future interests created by their exercise. In the application of the Rule to future interests created by the exercise of a power of appointment, the period of the Rule is in some cases computed from the effective date of the instrument creating the power and in others from the effective date of the instrument exercising the power. 82 The commencement of the period of the Rule Against Perpetuities in cases involving future interests created by the exercise of a power of appointment will be discussed in a later chapter in connection with the application of the Rule to such powers themselves. 83

**B. COMPUTATION OF THE PERIOD**

In *St. Amour v. Rivard* 84 the Supreme Court of Michigan held that an attempt to create a “perpetual free-
"At first it was held that the contingency upon which the estate was to vest must happen within the compass of a life or lives in being, or a reasonable number of years; afterwards it was further extended to a child en ventre sa mere, at the time of the death of the father; subsequently it was extended to twenty-one years after the death of a person in being. * * * The period of limitation as now recognized is that laid down by Lord Kenyon, in Long v. Blackall, 85 7 T.R., 102, and is stated in these words: 'It is an established rule that an executory devise is good if it must necessarily happen within a life or lives in being, and twenty-one years and the fraction of another year, allowing for the time of gestation.' In an opinion distinguished for its learning and careful research, delivered by the Judges of England upon questions submitted to them by the House of Lords, in 1833, it was considered that twenty-one years was the limit, and that the period of gestation was to be allowed in those cases only in which gestation existed. Cadell v. Palmer, 86 10 Bing., 140."

Gardner v. City National Bank & Trust Co. 88 was a suit to construe a will which created two trusts. The income from each trust was to be paid to a named daughter of the testator for life. On the death of each life beneficiary, the corpus of the trust was to be divided into equal parts, one for each of her children. Each child was

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87 2 Mich. 294 at 297.
88 267 Mich. 270, 255 N.W. 587 (1934). As the testator died in 1931 and the trusts included both land and other property, compliance with both the statute prohibiting the suspension of the absolute power of alienation and the common-law Rule Against Perpetuities was required. Part Two, note 53 supra.
to receive the income from his part until twenty-five, then half the corpus, the income from the other half until thirty, and then the balance of the corpus. If any child died under thirty leaving issue, his share was to pass to his issue, subject to trust during minority. If any child died under thirty without surviving issue, his share was to pass to the trusts for the surviving children of the life beneficiary or, if there were none, to the trust for the other daughter of the testator. As the testator's daughters might have children after his death and the takers of the ultimate remainders could not be ascertained until the youngest of their children reached the age of thirty, the vesting of these remainders might not occur for lives in being (those of the two daughters) and thirty years. The Court accordingly held that they violated the common-law Rule Against Perpetuities, quoting the following from Halsbury's *Laws of England* as to the period of the Rule:

" 'The rule stated more fully is as follows:

'First, subject to the exceptions hereafter mentioned every future estate or interest in any kind of property, the rights in which are governed by the law of England, must be such that, at the time when the instrument creating it comes into operation, it can be predicated that, if the estate or interest vests at all, it must necessarily vest not later than at the end of a certain period.

'Secondly, this period is the life of a person or the survivor of any number of persons in being at the time of creation of such future estate or interest, and ascertained for that purpose by the instrument creating the same, and 21 years to be computed from the dropping of such life; but if no such person or persons are ascertained by the instrument, the period is 21 years computed from the time of creation of the future estate or interest."
"‘In the following paragraphs this period is called “the perpetuity period.

‘Thirdly, a child who is en ventre sa mère at the time of creation of an estate or interest, and is afterwards born alive, is deemed to be a person in being for the purposes both of the vesting of the estate or interest in him, and of being a life chosen to form the perpetuity period. The perpetuity period may, therefore, be apparently extended by a period or periods for gestation, but only in those cases where gestation actually exists. This branch of the rule is applied whether it is for the advantage of the unborn child or not. * * *

‘Fifthly, any estate or interest which does not necessarily satisfy the above rule is void from its creation, and events, subsequent to the date of the instrument which, or subsequent to the death of the testator whose Will, created the estate or interest, which in fact make the vesting take place within the perpetuity period, have no effect so as to make the estate or interest valid.’” 89

As the passage quoted by our Supreme Court from Halsbury’s Laws of England indicates, the measuring lives in being must be those of persons “ascertained for that purpose by the instrument creating” the future interest. This does not mean either that the persons whose lives are to be used as a measure must be named in the instrument or that the instrument must manifest an intention that the lives of particular persons should be used for that purpose; it means only that it must appear from the instrument that the future interest thereby limited must vest, if at all, within twenty-one years after ascertainable lives.90 Thus if John Stiles devises property to James Thorpe and his heirs “until my youngest grand-

90 PROPERTY RESTATEMENT, §374, Comment j. (1944); 2 Simes, LAW OF FUTURE INTERESTS, §491 (1936).
son reaches twenty-one and then to such grandson and his heirs," the measuring lives are those of John's children, although they are not mentioned in the instrument and John may never have heard of the Rule Against Perpetuities. Even if the grantor or testator expressly manifests an intention to suspend vesting for a period in excess of that permitted by the Rule, a future interest is valid if it must vest within the permissible period. If John Stiles devises property to James Thorpe upon trust to pay the income to John's children during their lives, then to pay the income to John's grandchildren until the youngest reaches twenty-five, then to transfer the property to the youngest grandson, "it being my intention to suspend the vesting of the ultimate remainder until twenty-five years after the death of the survivor of my children," the ultimate remainder will be valid if all of John's children predecease him because, in that event, the measuring lives in being will be those of John's grandchildren.

The measuring lives in being must be those of human beings; lives of animals, regardless of their life expectancies, or of corporations will not do. Although the measuring lives are usually those of persons who take something under the instrument creating the future interest or their ancestors, and all of the reported Michigan cases involve measurement by the lives of such persons,

91 PROPERTY RESTATEMENT, §374, Comment h. (1944); Gray, RULE AGAINST PERPETUITIES, 3rd ed., §231 (1915).
93 Fitchie v. Brown, 211 U.S. 321 (1908); PROPERTY RESTATEMENT, §374, Comment h. (1944); 2 Simes, LAW OF FUTURE INTERESTS, §491 (1936).
the instrument may by apt language designate as measuring lives those of persons who take nothing under it and are not related to persons who do. John Stiles may devise property to James Thorpe and his heirs “until the death of the survivor of the present members of the Supreme Court of Michigan and then to my youngest male descendant living at the time of such death.” Although there is no definite limit to the number of measuring lives in being which is permissible, they must be the lives of persons who are not so numerous or so situated that evidence of their deaths is likely to be unreasonably difficult to obtain. John Stiles may devise property

94 In re Villar, [1928] Ch. 471, aff’d., [1929] 1 Ch. 243 (C.A.); Property Restatement, §374, Comment l. (1944); Gray, Rule Against Perpetuities, 3rd ed., §216 (1915); 2 Simes, Law of Future Interests, §491 (1936).

95 Thellusson v. Woodford, 11 Ves. Jr. 112, 32 Eng. Rep. 1030 (H.L. 1805). In his opinion in this case, the Lord Chancellor (Lord Eldon) made the classic statement of the rule: “The language of all the cases is, that property may be so limited as to make it unalienable during any number of lives, not exceeding that, to which testimony can be applied, to determine, when the survivor of them drops.” 11 Ves. Jr. at 146, 32 Eng. Rep. at 1043. Gray, Rule Against Perpetuities, 3rd ed., §216 (1915); 2 Simes, Law of Future Interests, §491 (1936). In Cadell v. Palmer, 1 Cl. & F. 372, 6 Eng. Rep. 956 (1833), twenty-eight lives, and in Fitche v. Brown, 211 U.S. 321 (1908), forty-odd lives, were held not too numerous, but in In re Moore, [1901] 1 Ch. 936, measurement by the lives of “all persons who shall be living at my death” was held to be too indefinite. In re Villar, [1928] Ch. 471, aff’d., [1929] 1 Ch. 243 (C.A.), involved measurement by the lives of the descendants of Queen Victoria living in 1926, of whom there were some 120. It was held valid. Accord: In re Kho Cheng Teow, [1932] Straits Settlements L.R. 226; In re Leverhulme, [1943] 2 All Eng. L.R. 274, 169 L.T. 294. Property Restatement, §374, Comment l. (1944) takes the position that the lives of the descendants of Queen Victoria living in 1941 would be too numerous. Cf. In re Leverhulme, [1943] 2 All Eng. L.R. 274 at 280-281, 169 L.T. 294 at 298. As the Restatement points out, the obscurity of the persons whose lives are involved has a bearing on the difficulty of proving their deaths. It is interesting to note that the future interests involved in Cadell v. Palmer, supra, created by the will of a testator who died in 1818, did not vest until 1918. [1928] Ch. 478, note. In Hay v. Hay, 517 Mich. 370, 26 N.W. (2d) 908 (1947), personality was bequeathed to a trustee to pay certain annuities and accumulate the rest of the income “for 21 years after the death of
to James Thorpe and his heirs "until the death of the survivor of my fourteen law partners and then to my youngest male descendant living at the time of such death." But the executory interest of John's youngest living male descendant would be void if he is to be ascertained on the death of the survivor of "the persons listed in the Lansing City Directory on January 1, 1954" or "those persons who crossed the Ambassador Bridge from Detroit to Canada on July 4, 1954," because these groups are too large and, in the case of the last example, too difficult to identify, to make proof of the deaths included reasonably convenient.

The Rule Against Perpetuities permits suspension of vesting until the expiration of a life or lives in being. In Palms v. Palms 66 property was bequeathed to trustees to pay half the income to the testator's son and half to his daughter for life. On the death of either, half the principal was to be paid to the children of the deceased child, if any. If the child who first died had no surviving issue, the entire income was to be paid to the surviving child for life and, on his death, the principal was to go to his children. As all interests would necessarily vest on the

my last surviving grandchild that shall be living at the time of my death," then to distribute the accumulated fund to the testator's heirs to be determined at that time. There were seven grandchildren living when the testator died. The bequest was treated as valid.

66 68 Mich. 355, 36 N.W. 419 (1888). This case involved a disposition which included both land and personalty and so was subject to the common-law Rule Against Perpetuities. Part Two, note 53 supra. In Michigan Trust Co. v. Baker, 226 Mich. 72, 196 N.W. 976 (1924), a silver tea set was bequeathed to the testatrix's husband for life. The will further provided, "The Baker silver tea set shall go to my son Stuart for his use only for his life, at his death it is to go to his child or children, if any, if none, to his brother Looe, if living, if not to his child or children, if any, and if none, to the said Marie Grampp." If Marie and her children were dead on the death of Stuart, the set was to go to two other named persons. These provisions were held valid because vesting was not postponed beyond the lives of the husband and Stuart.
death of the surviving child, it was held that the limitations did not violate the Rule Against Perpetuities. In *McLain v. Howald* 97 a bequest to grandchildren of the testator to be ascertained on the death or remarriage of his wife was held valid. In *Floyd v. Smith* 98 property was bequeathed to a trustee to pay the income to four named children of the testator’s sister and their issue until the death of the survivor of the four, and then to transfer the principal to the issue of the four living at the time of such death. A codicil transferred the interest of one of the four to his children. The Court held that the codicil was not intended to change the measuring lives, which were those of the four children of the sister and that, as the interests would all vest on the death of the survivor of these four, they were valid under the Rule.

The Rule Against Perpetuities permits suspension of vesting for part or parts of a life or lives in being at the commencement of the period. Thus in *Walton v. Torrey* 99 a devise to descendants of the testator to be ascertained when the youngest of his children reached twenty-one was treated as valid. So, likewise, in *In re Dingler’s*

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97 120 Mich. 274, 79 N.W. 182, 77 Am. St. Rep. 597 (1899). In Cheever v. Washtenaw Circuit Judge, 45 Mich. 6, 7 N.W. 186 (1880), a bequest to a daughter for life, remainder to her children and grandchildren, was treated as valid, it being construed to be to children and grandchildren in being at the death of the daughter.

98 303 Mich. 137, 5 N.W. (2d) 695 (1942). Both land and personalty were involved but, as the will contained a mandatory direction for conversion of land into personalty, the common-law Rule Against Perpetuities was alone applicable. Part Two, notes 59, 60 supra.

99 Harr. Ch. 259 (Mich. circa 1840). The limitation was of land, but, as the testator died in 1825, its validity was governed by the common-law Rule Against Perpetuities. Similarly, in Toms v. Williams, 41 Mich. 552, 2 N.W. 814 (1879) the vesting of property bequeathed by a will was validly suspended until “the expiration of the minority of the youngest of the said children of my deceased brother, Gen. Thomas Williams.” There were three such children, one of whom was of age when the testatrix died.
Estate a bequest to descendants of the testatrix to be ascertained when two granddaughters, who were named in the will and alive when it took effect, reached the age of thirty, was held good. The Rule also permits suspension of vesting for lives in being at the commencement of the period plus part or parts of a life or lives not then in being which cannot exceed twenty-one years. Thus in Wilson v. Odell, a bequest to grandchildren of the testator to be determined after the death of the survivor of his children and on the majority of his youngest grandchild was held valid under the Rule.

The Rule Against Perpetuities does not permit suspension of vesting for lives in being plus part or parts of a life or lives not in being which may exceed twenty-one years. This is one of the commonest types of violation of the Rule. In Michigan Trust Co. v. Baker, testatrix devised land to her husband until death or remarriage, then to a trustee to sell the land and hold the proceeds in trust to pay half the income to a son, Stuart, for life. The will, as construed by the Court, gave the remainder in half the corpus, after the death of Stuart, to those daughters of Stuart who reached twenty-five and those sons of Stuart who reached thirty. It was held that this

100 319 Mich. 189, 29 N.W. (2d) 108 (1947). The disposition was in a residuary clause which included both land and personalty and so was subject to the common-law Rule Against Perpetuities. Part Two, note 53 supra. In Post v. Grand Rapids Trust Co., 255 Mich. 436, 238 N.W. 206 (1931), a bequest of personalty to issue of a daughter to be determined when the youngest issue of the daughter in being at the death of the testatrix reached twenty-five was treated as valid.


102 226 Mich. 72, 196 N.W. 976 (1924). This was a devise of land, but the will contained a mandatory direction to convert into money upon the death or remarriage of the testatrix's husband. It was held that this direction worked an equitable conversion to personalty, effective upon the death of the husband, so that the common-law Rule Against Perpetuities governed the validity of the subsequent limitations. See Part Two, notes 59, 60 supra.
disposition violated the Rule because Stuart might have children who would not reach the stipulated ages within twenty-one years after his death. In *Gettins v. Grand Rapids Trust Co.*, the property was bequeathed to a trustee to pay the income to the testatrix's daughter Belle for life and thereafter to her children, and to transfer a share in the corpus to each child of Belle on reaching twenty-five, with limitations over in the event of any child dying under twenty-five. The limitations over on death under twenty-five were held void because they might postpone vesting until more than twenty-one years after Belle's death. *Gardner v. City National Bank & Trust Co.*, which has already been discussed, involved the same type of violation of the Rule Against Perpetuities.

As the English authorities quoted by our Supreme Court indicate, the period of the Rule Against Perpetuities may include any period or periods of gestation involved in the situation to which the limitation applies. That is, a child *en ventre sa mère* who is subsequently born alive is treated as a life in being under the Rule,

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103 249 Mich. 238, 228 N.W. 703 (1930). The will contained a mandatory direction to convert land into personalty. The same result was reached on similar facts in *Burke v. Central Trust Co.*, 258 Mich. 588, 242 N.W. 760 (1932). Because the trust there included both land and personalty and there was no direction to convert, the Court based its decision on the statute forbidding suspension of the absolute power of alienation, saying that it was unnecessary to consider the application of the common-law Rule Against Perpetuities.

104 267 Mich. 270, 255 N.W. 587 (1934), discussed above at Part Two, note 88. This aspect of the Rule has been modified in England by Stat. 15 Geo. V, c. 20, §163 (1925), which provides that any gift contingent upon a beneficiary or class of beneficiaries attaining or not attaining an age over twenty-one, and for that reason too remote, is to take effect by substituting twenty-one for the age stated.

both for the purpose of receiving interests limited to it and for that of serving as a measuring life in being as to interests limited to others. In *Chambers v. Shaw*, a testator devised his estate to his wife for life with a provision that if a posthumous child should be born it would take half the estate, to commence in possession when it reached twenty-one, and that the wife would take the other half if she lived until the child was twenty-one, otherwise the child would take the whole. The testator died in September, 1860, a son was born in December, 1860, the son died in April, 1862, and the wife died in September, 1862. The Court held that the wife took the entire estate as sole heir of her son, saying that the first interest to the posthumous son vested on the testator's death. This case illustrates both the purposes mentioned. The posthumous son was treated as a life in being for the purpose of the vesting of the half given him unconditionally and as a measuring life for the purpose of the vesting of the other half. It is permissible under the Rule to suspend vesting for any number of periods of gestation actually involved in addition to lives in being and twenty-one years. It is possible to have as many as three such periods. John Stiles might

106 52 Mich. 18, 17 N.W. 223 (1883). The will contained a mandatory direction to convert the land into personalty so the common-law Rule Against Perpetuities applied. Rev. Stat. 1846, c. 62, §§30, 31; Comp. Laws (1857) §§2614, 2615; Comp. Laws (1871) §§4097, 4098; Comp Laws (1897) §§8812, 8813; How. Stat., §§5546, 5547; Comp. Laws (1915) §§11548, 11549; Comp. Laws (1929) §§12950, 12951; Mich. Stat. Ann., §§26.30, 26.31; Comp. Laws (1948) §§554.30, 554.31, provide: "When a future estate shall be limited to heirs, or issue, or children, posthumous children shall be entitled to take, in the same manner as if born before the death of their parents.

"A future estate depending on the contingency of the death of any person without heirs or issue, or children, shall be defeated by the birth of a posthumous child of such person, capable of taking by descent."

devise property to James Thorpe and his heirs "until my youngest grandchild is of age and then to my youngest descendant in being." If John has a posthumous child which has a posthumous son who is the father of a *child en ventre sa mère* when he comes of age, the unborn child could take the executory interest limited to the youngest descendant of John in being. Periods of gestation are allowed under the Rule Against Perpetuities only if gestation in fact exists; it is not permissible to suspend vesting for lives in being plus twenty-one years and nine months in gross. 108 If John Stiles devises property to James Thorpe and his heirs "until twenty-one years and nine months after the death of my youngest child and then to my youngest descendant in being," the executory limitation is void although it must necessarily vest within a period which might well be shorter than that involved in the preceding illustration.

As the passage quoted by our Supreme Court from Halsbury's *Laws of England* 109 indicates, the period of the Rule Against Perpetuities is the life of a person or the survivor of a group of persons in being and ascertained for that purpose by the instrument creating the future interest in question and twenty-one years, but if no such person or persons are ascertained by the instrument, the period is twenty-one years. Whether the term of years follows lives in being or is itself the sole measure of the period, it may be in terms of a minority or minorities, as was the case in *Wilson v.*

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The period of the rule

Odell,\textsuperscript{110} or a gross period of twenty-one years or less unrelated to minorities.\textsuperscript{111} Toms v. Williams\textsuperscript{112} was a suit to construe the will of a testatrix who died in 1876 owning the reversion under a forty-year lease given in 1854 which required the lessor, at the expiration of the term in 1894, to pay for the lessee's improvements (a building costing some \$50,000) or renew the lease for another forty years. The will gave the entire estate, including personality, to trustees who were to accumulate \$5,000 per year of the income, use it to pay for the lessee's improvements in 1894, and then to transfer the corpus of the trust to three named persons “or the survivor of them, and to their heirs and assigns forever, as tenants in common.” The Court held that the provision for accumulation for eighteen years did not exceed the period of the common-law Rule Against Perpetuities, which the Court said was “any number of lives in being and twenty-one years, and of course for twenty-one years as a distinct period, independent of lives.”\textsuperscript{113} In Markham v. Hufford,\textsuperscript{114} testatrix bequeathed \$500 to the petitioner “to be paid to him at the expiration of two years from the date of my demise: Provided that he shall be deemed a reformed man, in the judgment of the executors of this will,” otherwise to the Women's Chris-

\textsuperscript{110} 58 Mich. 533, 25 N.W. 506 (1885), Part Two, note 101 \textit{supra}.


\textsuperscript{112} 41 Mich. 552, 2 N.W. 814 (1879). The surplus income above \$5,000 per annum was to be accumulated until the expiration of the minority of the youngest of the three named persons and then paid over to them or the survivor of them. One of them was of age when the testatrix died.

\textsuperscript{113} 41 Mich. 552 at 571.

\textsuperscript{114} 123 Mich. 505, 82 N.W. 222, 48 L.R.A. 580 (1900).
tian Temperance Union. It was held that this was a condition precedent which suspended vesting for only two years in gross and so was valid. In re De Bancourt's Estate involved a bequest to a trustee to pay the income to the testator's heirs for fifteen years and then to transfer the corpus to the heirs of the testator determined according to the statute then in force. It was treated as valid.

It will be recalled that if lives in being are to be used as all or part of the measure of the period of the Rule Against Perpetuities, they must be the lives of persons ascertained for that purpose by the instrument creating the future interest; courts will not select lives not designated by the instrument or connected with its limitations. As to the twenty-one year period, the Rule is not quite so strict. Thus if Andrew Baker devises property to James Thorpe and his heirs "for the lives of James and all of his descendants living at the time of my death and for such period thereafter as the law permits suspension of vesting and then to the youngest living descendant of John Stiles" the words "such period thereafter as the law permits" are construed to mean twenty-one years, and the future interest of the youngest descendant of John Stiles is, accordingly, valid.

115 279 Mich. 518, 272 N.W. 891, 110 A.L.R. 1346 (1937). Both land and personality were involved. In Otis v. Arntz, 198 Mich. 196, 164 N.W. 498 (1917), land and personality were devised to descendants of the testator to be ascertained twenty-five years after his death. The disposition was held void as violating the statute prohibiting suspension of the absolute power of alienation. Of course, it also violated the common-law Rule Against Perpetuities.

The computation of the permissible period under the Rule Against Perpetuities may involve one, two, or all of the three elements, lives in being, periods of gestation, and twenty-one years. When more than one of these elements is involved in a situation, a period of gestation may precede or follow either or both of the others. Thus, as has been seen, if John Stiles devises property to James Thorpe and his heirs "until my youngest grandchild is of age and then to my youngest descendant in being at that time," a period of gestation may precede the measuring life in being of John's child, a second period of gestation may follow the life and precede the minority of the grandchild, and a third period of gestation may follow that minority. The element of twenty-one years, however, although it may follow lives in being, may not precede them, because the only permissible lives in being are lives in being at the commencement of the period of the Rule.117 If John Stiles devises property to James Thorpe and his heirs "until the death of all of my descendants living twenty-one years after my death and then to my youngest descendant living at that time," the executory interest is void. John may have descendants in being twenty-one years after his death who were not in being when he died.

Even though an instrument in terms suspends the vesting of a future interest until the happening of an event which may not occur within the period of the Rule, the interest is not void if it could not vest beyond the period, because the duration of the estate out of which it is created is limited. If Andrew Baker, owning an estate in Blackacre for the lives of Thomas Kempe, Roger White and Edward Willis, conveys his estate "to

117 Property Restatement, §374, Comment e. (1944); 2 Simes, Law of Future Interests, §493 (1936).
James Thorpe and his heirs so long as the Penobscot Building shall stand and then to John Stiles and his heirs," the executory interest of John Stiles is valid because it cannot vest after the death of the survivor of Thomas Kempe, Roger White, and Edward Willis.\(^{118}\) This is probably an exception to the rule that the measuring lives must be ascertained by the instrument creating the future interest.

If an instrument postpones the vesting of a future interest until the happening of both of two conditions, one of which must occur within the period of the Rule and the other of which may not so occur, the future interest is void. If John Stiles devises property to James Thorpe and his heirs "for thirty years and until my children are all dead and then to my youngest descendant living at that time," the future interest is invalid.\(^{119}\) If, on the other hand, the instrument postpones vesting only until the happening of that one of two alternative conditions which first occurs, the fact that one of the conditions might not be performed within the period of the Rule will not invalidate the future interest. *In re Lamb's Estate*\(^{120}\) involved a will which left the estate to nine brothers and sisters of the textatrix and provided:

"But in case of the death of any of the above-named legatees previous to the probating or execution of this,

\(^{118}\) Low v. Burron, 3 P. Wms. 262, 24 Eng. Rep. 1055 (1784); Gray, *Rule Against Perpetuities*, 3rd ed., §§225, 226 (1915); *Property Restatement*, §370, Comment k. (1944). If the estate conveyed is one for the lives of ascertained living persons, it cannot violate the Rule because it cannot vest after the death of the survivor of those persons.

\(^{119}\) *Property Restatement*, §374, Comment g. and Illustration 7 (1944).

my last will and testament, then I desire, will and bequeath that the share of such deceased brother or sister shall revert to, and become the property of, the children of said deceased legatee; but, if said deceased legatee has no children living at the time of my decease, then the said deceased legatee's share of the property bequeathed to him or her by the terms of this will shall revert to, and become a part of, the general fund to be divided among the surviving legatees named in this will."

One of the brothers assigned his interest under the will and died before the estate of the testatrix was ready for distribution. The Court held that "execution" meant distribution and that the children of the brother, not his assignee, were entitled to the share which would have been his. This was a sound result because, although distribution might not occur within the period of the Rule,121 the gift over would necessarily vest, if at all, on the death of the survivor of the brothers and sisters.