CHAPTER 13 

Powers of Appointment 

If Andrew Baker devises land to John Stiles for life, remainder to such children of John as John may appoint and, in default of appointment, to Lucy Baker in fee simple, Andrew is the donor of a power of appointment, John is the donee of the power, John's children are the objects of the power, and Lucy is the taker in default. When a power of appointment is created, problems as to validity under the Rule Against Perpetuities may arise as to (1) the power itself, (2) interests appointed under the power, and (3) the limitation in default of appointment. As the validity of limitations in default of appointment has been considered before, it may be best to treat this problem first.

A. Interests Limited in Default of Appointment

A limitation in default of appointment may be vested, subject to defeasance by the exercise of the power.\textsuperscript{292} The limitation to Lucy Baker in the example given in the preceding paragraph is of this type. A future interest which is vested subject to defeasance does not offend the Rule Against Perpetuities. But a limitation in default of appointment may be contingent. Such a limitation violates the Rule unless it is certain to vest, if at all, within the period of the Rule. If the power of appointment is limited as to objects or restricted to exercise by will, so that the donee cannot appoint to himself for his

\textsuperscript{292} McCarty v. Fish, 87 Mich. 48, 49 N.W. 513 (1891), Part Two notes 160, 234 \textit{supra}. 

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own exclusive benefit, the period of the Rule Against Perpetuities is computed, so far as the validity of the limitation in default of appointment is concerned, from the time when the instrument creating the power became effective. If Andrew Baker bequeaths property to John Stiles, who has no children, for life, remainder to such children of John as John may appoint and, in default of appointment, to those children of John who reach the age of twenty-five years, the period of the Rule is computed from the death of Andrew. At that time it

293 Michigan Trust Co. v. Baker, 226 Mich. 72, 196 N.W. 976 (1924); Part Two, notes 75-77 supra. Although agreeing that, in this situation, the period of the Rule commences upon the effective date of the instrument creating the power, Professor Leach thinks that facts occurring between that date and the time when the power expires may be considered in determining the validity of the limitation in default of appointment. Leach and Tudor, "The Common Law Rule Against Perpetuities," 6 American Law of Property, §24.36 (1952). Compare Part Two, notes 127, 128, supra. He cited no authority for this view and conceded that there was none at the time he wrote, but the Supreme Judicial Court of Massachusetts later adopted his view. Sears v. Coolidge 329 Mass. 340, 108 N.E. (2d) 563 (1952), noted, 33 Boston Univ. L. Rev. 119 (1953), 66 Harv. L. Rev. 937 (1953). Michigan Trust Co. v. Baker, supra, is opposed to the Leach view. There the limitations were (1) to testatrix's husband for life, with power to consume so much of the principal as he might desire for his support and comfort, (2) to a trustee to pay the income to testatrix's son Stuart for life, (3) to the daughters of Stuart who reach twenty-five and the sons who reach thirty, (4) in default of such children of Stuart, to other persons. Stuart predeceased the husband, leaving no issue, so if facts occurring before the expiration of the husband's power had been considered, the subsequent limitations would have been valid. They were held void.

It should be recalled that when a future interest is destructible by someone for his own benefit, the period of the Rule does not commence until the destructibility ceases. Part Two, note 70 supra. This doctrine applies to limitations in default of appointment and so qualifies the statement in the text in situations where such limitations are destructible by virtue of some other power than that in default of which they are limited. Moreover, Rev. Stat. 1846, c. 64, §12, Part Two, note 304 infra, provides that when a tenant for life has an unlimited power to dispose of the fee by will, he shall be deemed to possess an absolute power of disposition. The effect of the statute would seem to defer the commencement of the period of the Rule, as to interests limited in default of appointment, to the death of the donee. Compare Part Two, notes 297, 321, infra.
is not certain that any of John's children will reach the age of twenty-five within twenty-one years after John's death. Hence the limitation in default of appointment is void. That is, the existence of such a limited power of appointment has no bearing on the validity of interests limited in default of its exercise. If, on the other hand, the power is unlimited as to objects and purpose and presently exercisable by deed, so that the donee of the power could at any time appoint to himself for his own exclusive benefit, the period of the Rule Against Perpetuities is computed from the time when the power ceases to be exercisable. If Andrew Baker bequeathes property to John Stiles, who has no children, for life, remainder to such person or persons as John may by deed or will appoint and, in default of appointment, to those children of John who reach the age of twenty-five years, the period of the Rule is computed from the death of John because John could appoint to himself for his own exclusive benefit. At that time all of John's children are in being and all will reach twenty-five or die within their own lives. Hence the limitation in default of appointment is valid. That is, the existence of an unlimited power to destroy a future interest for the sole benefit of the holder of the power postpones the commencement of the period of the Rule Against Perpetuities.

B. POWERS OF APPOINTMENT THEMSELVES

A power of appointment itself, whether limited or unlimited, violates the Rule Against Perpetuities unless it...
is certain to be exercisable, if at all, within the period of the Rule, computed from the effective date of the instrument creating the power. If Andrew Baker devises land to John Stiles, who has no children, for life, remainder to James Thorpe in fee, subject to a power in the first son of John who reaches twenty-five to appoint the fee by deed or will to any person or persons, the power is void. It is not certain that a son of John will reach twenty-five and so be able to exercise the power within the period of the Rule. However, even though a power is limited to take effect on a contingency which may not occur within the period of the Rule, if the donee of the power is an ascertained, living human being, the power is valid because it will be exercisable, if at all, within the lifetime of the donee. If Andrew Baker

repugnancy. Part Two, notes 182, 183, supra. If the power permits disposition by deed or will, there should be no possible basis for the application of this repugnancy doctrine.

Wollaston v. King, L.R. 8 Eq. 165 (1868); Re Hargreaves, 43 Ch. D. 401 (C.A. 1890); Gray, Rule Against Perpetuities, 3rd ed., §475 (1915); 2 Simes, Law of Future Interests, §535 (1936); Property Restatement, §390 (1) (1944). The Rule Against Perpetuities regulates only interests in property. Strictly speaking, a power of appointment is not an interest in property. Simes, "The Devolution of Title to Appointed Property," 33 Ill. L. Rev. 480 at 488-490 (1928); Property Restatement, §390, Comment b, (1944). Accordingly, instead of saying that a power violates the Rule, it might be technically more accurate to say that, because any exercise of it would violate the Rule, the power is incapable of effective exercise. Foulke, "Powers and the Rule Against Perpetuities," 16 Col. L. Rev. 537 at 539-540 (1916); Bettner, "The Rule Against Perpetuities as Applied to Powers of Appointment," 27 Va. L. Rev. 149 at 151 (1940). The end result is the same, and the courts tend to use the language of the text.

Gray, Rule Against Perpetuities, 3rd ed., §476 (1915); 2 Simes, Law of Future Interests, §535 (1936); Property Restatement §390, Comment c. (1944). See: Re Hargreaves, 43 Ch. D. 401 at 405 (C.A. 1890). There is some doubt as to the soundness of this proposition in Michigan when the objects of the power are limited to persons other than the donee of the power because our statutes provide that when the disposition which a power authorizes is limited to be made to any particular person or class of persons, other than the donee of the power, the court of chancery shall exercise the power after the
devises land to John Stiles, who has no children, for life, remainder to James Thorpe in fee, subject to a power in John to appoint the fee by deed or will to any person or persons when and if John has a son who reaches twenty-five, the power is valid. It cannot be exercised unless John has a son who reaches twenty-five during the lifetime of John and so must be exercisable, if at all, within a life in being.

A power of appointment which is limited as to objects or exercisable only by will, so that the donee cannot appoint to himself for his own exclusive benefit, violates the Rule Against Perpetuities if it could possibly be exercised at a time beyond the period of the Rule, computed from the effective date of the instrument creating the power. If Andrew Baker bequeaths property to John Stiles, who has no son, for life, remainder to such death of the donee unless the exercise of the power is made expressly to depend on the will of the donee. Rev. Stat. 1846 c. 64, §§23, 24, 28; Comp. Laws (1857) §§2680, 2681, 2685; Comp. Laws (1871) §§4163, 4164, 4168; Comp. Laws (1897) §§8878, 8879, 8883; How. Stat., §§5612, 5613, 5617; Comp. Laws (1915) §§11614, 11615, 11619; Comp. Laws (1929) §§13017, 13018, 13022; Mich. Stat. Ann., §§26.113, 26.114, 26.118; Comp. Laws (1948) §§556.23, 556.24, 556.28. If Andrew Baker devises land to John Stiles, who has no children, for life, remainder to James Thorpe in fee, subject to a power in John to appoint the fee to such of his issue as he may select when and if John has a son who reaches twenty-five, it might be argued that the statute permits the power to become exercisable more than twenty-one years after the death of John and so that it violates the Rule Against Perpetuities. See: Matter of Christie, 133 N.Y. 473, 31 N.E. 515 (1892); Battelle v. Parks, 2 Mich. 531 (1853); American Brass Co. v. Hauser, 284 Mich. 194, 278 N.W. 816, 115 A.L.R. 1464 (1938).

Webb v. Sadler, L.R. 14 Eq. 533 (1872), L.R. 8 Ch. App. 419 (1873); Gray, RULE AGAINST PERPETUITIES, §§474, 477 (1915); 2 Simes, LAW OF FUTURE INTERESTS, §536 (1936); PROPERTY RESTATEMENT, §390 (2) (1944); Leach and Tudor, "The Common Law Rule Against Perpetuities," 6 AMERICAN LAW OF PROPERTY, §24.32 (1952). But Rev. Stat. 1846, c. 64, §12, Part Two, note 304 infra, provides that when a tenant for life has an unlimited power to dispose of the fee by will, he shall be deemed to possess an absolute power of disposition. The effect of the statute would seem to be that such a power will be treated as if the donee could appoint to himself for his own exclusive benefit. Compare Part Two, notes 293 supra, 321 infra.
female issue of John as John's eldest son may appoint, the
power will certainly be exercisable, if at all, within a life
in being and twenty-one years and so does not offend
the rule stated in the preceding paragraph, but, since
it may possibly be exercised more than twenty-one years
after the death of John, it is void under the rule just
stated. This means, in effect, that an unborn person
cannot be the donee of a power which is limited or testa-
mentary unless the exercise of the power is restricted
by other terms of the instrument to a period measured
by lives in being and twenty-one years. As a power of ap-
pointment limited to a living person cannot be exercised
after his death, such a power does not violate the rule
even though it is subject to a condition precedent which
may never occur.298 A power of appointment which is un-
limited as to objects and exercisable by deed, so that the
donee can appoint to himself for his own exclusive bene-
fit, does not offend the Rule Against Perpetuities merely
because it could possibly be exercised at a time beyond
the period of the Rule, so long as it will certainly be
exercisable, if at all, within the period.299 If Andrew
Baker bequeathes property to John Stiles, who has no son,
for life, remainder to such persons as John's eldest son

298 But see Part Two, note 296 supra. A power of appointment which
is not limited in duration to the life of the donee is bad unless its
execution is restricted to the period of the Rule. Thus if Andrew
Baker devises land to John Stiles and his heirs, subject to a power in
Lucy Baker and her heirs to appoint the fee to any issue of the tes-
tator, the power is void. See Gray, id., §475. It is not necessary to the
validity of a power, however, that the donee have any other interest
in the property. Ostrander v. Muskegon Finance Co., 230 Mich. 310,
202 N.W. 951 (1925).

299 Bray v. Hammersley, 3 Sim. 513, 57 Eng. Rep. 1090 (1830),
sub nom. Bray v. Bree, 2 Cl. & F. 453, 6 Eng. Rep. 1225 (1834); Gray,
RULE AGAINST PERPETUITIES, 3rd ed., §477 (1915); 2 Simes, LAW OF
FUTURE INTERESTS, §596 (1936); PROPERTY RESTATEMENT, §390, Com-
ment a. (1944); Leach and Tudor, "The Common Law Rule Against
may appoint, the power is valid even though, by its terms, the son may possibly exercise it more than twenty-one years after John’s death.

If a power of appointment does not offend the rules stated in the preceding two paragraphs, it is not made invalid by the fact that, within its terms, an appointment could be made which would violate the Rule Against Perpetuities. If Andrew Baker bequeathes property to John Stiles for life and then to such issue of John as John may appoint, John might appoint to “my oldest male descendant living ninety years after the Penobscot Building falls.” As will be seen, such an appointment would be void. But if John appoints to “my children in equal shares,” the appointment is valid.

C. INTERESTS APPOINTED UNDER POWERS

Under general Anglo-American law, if a power of appointment is unlimited as to objects and exercisable by deed, so that the donee can appoint to himself for his own exclusive benefit, the period of the Rule Against Perpetuities is computed, for the purpose of determining the validity of interests appointed under the power, from the effective date of the appointment rather than that of the instrument creating the power. If Andrew Baker


bequeaths property to John Stiles, who has neither children nor grandchildren, for life, remainder to such persons as John may by deed or will appoint, and John appoints by will to "my children for life, remainder to my grandchildren," the appointment is valid although all of John's children were born after Andrew's death and all of his grandchildren are born after his own death. In other words, a power of appointment under which the donee can at any time appoint to himself is the equivalent of absolute ownership for purposes of the Rule Against Perpetuities. An appointment under such a power is treated as if it were a limitation by the donee of his own property.

The applicability of the rule stated in the preceding paragraph to appointments of Michigan land is rendered somewhat doubtful by two sections of our statutes:

"Sec. 55. The period during which the absolute right of alienation may be suspended by any instrument in execution of a power, shall be computed from the time of the creation of the power, and not from the date of such instrument.

"Sec. 56. No estate or interest can be given or limited to any person, by an instrument in execution of a power, which such person would not have been capable of taking, under the instrument by which the power was granted." 302


302 Rev. Stat. 1846, c. 64, §§55, 56; Comp. Laws (1857) §§2712, 2713; Comp. Laws (1871) §§4195, 4196; Comp. Laws (1897) §§8910, 8911; How. Stat., §§5644, 5645; Comp. Laws (1915) §§11646, 11647; Comp. Laws (1929) §§13049, 13050; Mich. Stat. Ann., §§26.145, 26.146; Comp. Laws (1948) §§556.55, 556.56. These provisions do not appear to have been construed by the Michigan Supreme Court. Other provisions of the statutes on powers were construed in Bates v. Leonard, 99 Mich. 296, 58 N.W. 311 (1894), to reach the same result which would have obtained at common law.
These statutory provisions were taken from the New York Revised Statutes of 1829.\footnote{Part Two, c. I, Art. Third, §§128, 129. Because of the doubt as to its meaning raised in Dempsey v. Tylee, 3 Duer (10 N.Y. Super.) 73 (1854), Part Two, note 310 infra, Section 129 was amended by Laws 1909, c.52, to read: “An estate or interest can not be given or limited to any person, by an instrument in execution of a power, unless it would have been valid, if given or limited at the time of the creation of the power.” The sections are now Real Property Law, §§178, 179.} The New York Court of Appeals has indicated that these two sections are modified by other sections of the statutes which, as in force in Michigan, provide:

“Sec. 9. When an absolute power of disposition, not accompanied by any trust, shall be given to the owner of a particular estate, for life or years, such estate shall be changed into a fee, absolute in respect to the rights of creditors and purchasers, but subject to any future estates limited thereon, in case the power should not be executed, or the lands should not be sold for the satisfaction of debts.

“Sec. 10. When a like power of disposition shall be given to any person to whom no particular estate is limited, such person shall also take a fee, subject to any future estates that may be limited thereon, but absolute in respect to creditors and purchasers.

“Sec. 11. In all cases where such power of disposition is given, and no remainder is limited on the estates of the grantee of the power, such grantee shall be entitled to an absolute fee.

“Sec. 12. When a general and beneficial power to devise the inheritance, shall be given to a tenant for life or for years, such tenant shall be deemed to possess an absolute power of disposition, within the meaning, and subject to the provisions of the three last preceding sections.

“Sec. 13. Every power of disposition shall be deemed absolute, by means of which the grantee is enabled, in
his lifetime, to dispose of the entire fee for his own benefit.”

In the view of the New York Court, if the donee of a power has an absolute power of disposition of the entire fee within the meaning of Sections 9-13, Sections 55 and 56 have no application, and the validity of appointments made by him is determined as if he were in fact an absolute owner disposing of his own property. If the donee does not have an absolute power of disposition of the entire fee within the meaning of Sections 9-13, Sections 55 and 56 do apply and the validity of appointments is judged from the time of the creation of the power.

If the donee of the power has unlimited ca-

304 Rev. Stat. 1846, c 64, §§9 to 13; Comp. Laws (1857) §§2666 to 2670; Comp. Laws (1871) §§4149 to 4153; Comp. Laws (1897) §§8864 to 8868; How. Stat., §§5598 to 5602; Comp. Laws (1915) §§11600-11604; Comp. Laws (1929) §§13003 to 13007; Mich. Stat. Ann., §§26.99-26.103; Comp. Laws (1948) §§556.9-556.13. N.Y. Rev. Stat. 1829, Part II, Art. Third, §§81-85 were identical, except as to section numbers. N.Y. Real Property Law, §§149 to 153, as presently in force, are virtually identical. These sections operated to eliminate the strange fiction of powers appendant, under which one person might have both the whole fee and a power to appoint the fee which would enable him to defeat dower and creditors. See: Simes, “The Devolution of Title to Appointed Property,” 22 ILL. L. REV. 480 at 493-497 (1928).

The following section provides: “Sec. 14. When the grantor in any conveyance shall reserve to himself, for his own benefit an absolute power of revocation, such grantor shall still be deemed the absolute owner of the estate conveyed, so far as the rights of creditors and purchasers are concerned.” Such a power of revocation is not a power of appointment but, as it makes powers of appointment created by the conveyance, appointments under them, and limitations in default of appointment, destructible, it postpones the commencement of the period of the Rule Against Perpetuities, as to these interests, until its expiration. Part Two, notes 70, 293, supra, 322 infra. Bettner, “The Rule Against Perpetuities as Applied to Powers of Appointment,” 27 VA. L. REV. 149 at 167-171 (1940).

Although these statutes purport to apply only to land, there is a tendency to extend them, by analogy, to personality. Townsend v. Gordon, 308 Mich. 438, 14 N.W. (2d) 57 (1944); In re Pilsbury’s Will, 50 Misc. 367, 113 App. Div. 893, 99 N.Y. Supp. 62, aff’d., 186 N.Y. 545, 79 N.E. 1114 (1906).

Pacity to convey the *entire fee* to anyone, including himself, the New York view coincides with the common-law rule. If, however, the donee's unlimited power of disposition is limited to a future estate, it does not come within Sections 9-13, so Sections 55 and 56 apply. If Andrew Baker devises land to James Thorpe upon trust to pay the rents and profits to John Stiles for life, remainder as John Stiles may by deed or will appoint, John cannot dispose of the entire fee because, under New York and Michigan law, his equitable life interest as beneficiary of the trust is inalienable. Hence, even though his power to dispose of the remainder is unlimited and presently exercisable by deed, the validity of any appointment which he makes will be judged, under the New York view, from the death of Andrew.

The reference in Section 55 to the "period during which the absolute right of alienation may be suspended" is to the provisions of Chapter 62 of the Revised Statutes of 1846 which prohibited suspension of the absolute power of alienation for more than two lives. Those provisions were repealed in 1949, so Section 55 no longer has any meaning in Michigan. It thus becomes important to know whether Section 56 is a mere adjunct or addendum to Section 55 which has ceased to have meaning or whether it is a provision of independent significance which invalidates any appointment made under a power unless the power is an absolute power of disposition of the entire fee within the meaning of Sections 9-13 or the donor of the power could have con-

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veyed or devised directly to the appointee by the instrument creating the power. That question was raised in Dempsey v. Tylee, a New York case decided in 1854, where the problem involved was whether a married woman could create a power to appoint to her husband although she could not, in the then existing state of the law, convey directly to him. If Section 56 is read literally and is independent of Section 55, she could not do so. The majority of the court took this view, but Justice Duer, who had been one of the draftsmen of the New York Revised Statutes, filed an opinion in which he said:

"From the construction, however, which my brother has given to § 129 [Michigan § 56], in the article "Of Powers", it seems proper that I should now say, that I entirely dissent. As I construe that section, it only means that no person shall take an estate under a power that, if limited to him by the instrument creating the power, would have involved an undue suspense of the power of alienation; in other words, where its direct limitation would have been void, as too remote. Section 129 merely declares the legal consequence of the rule which § 128 [Michigan § 55] establishes, and is to be construed, precisely as if the word 'hence' had connected the sections, by following the first, and preceding the second and both the sections are expressed very nearly in the words in which the rule and its consequence will be found to be stated by the most approved text writers on this abstruse branch of the law, Fearne, Sugden, and Cruise. As I construe the section, therefore, it refers only to the nature of the estate granted, and not at all to any personal incapacity of the grantee, other than that which the rule, declared in § 128, necessarily creates, although it cannot be denied that the words of the section are quite susceptible of the interpretation that my brother Bosworth has given to them." 311

310 3 Duer (10 N.Y. Super.) 73 (1854).
311 3 Duer (10 N.Y. Super.) 73 at 101-102. See Part Two, note 303 supra.
To return to the example given in the first paragraph of this section: If Andrew Baker devises property to John Stiles, who has neither children nor grandchildren, for life, remainder to such persons as John may by deed or will appoint, it is clear that John has an absolute power of disposition of the entire fee under Sections 9 and 13. Accordingly, under the New York view, which Michigan is likely to follow, Sections 55 and 56 have no application, from which it follows that the period of the Rule Against Perpetuities does not commence until John exercises the power. Hence, if he appoints by will to "my children for life, remainder to my grandchildren," the appointment is valid, as at common law. If, on the other hand, Andrew Baker devises property to James Thorpe upon trust to pay the income to John Stiles, who has no children or grandchildren, for life, remainder to such persons as John may by deed or will appoint, John does not have an absolute power of disposition of the entire fee under Sections 9 and 13. Under the New York view, Sections 55 and 56 apply. Section 55 no longer has meaning in Michigan, but, if our courts should follow the majority view in Dempsey v. Tylee that Section 56 has independent and literal significance, it would seem that John could not appoint to "my children, remainder to my grandchildren," because Andrew Baker could not have made a devise directly to John’s grandchildren. In this situation, then, our law would differ from the common law as to the application of the Rule Against Perpetuities to appointments made under unlimited powers to ap-

312 In the text immediately following Part Two, note 301 supra.
313 Part Two, note 305 supra.
314 Part Two, note 307 supra.
315 Part Two, note 310 supra.
point by deed or will. If our courts should accept the Duer view in *Dempsey v. Tylee* 316 that Section 56 has no independent significance and relates only to the statutes prohibiting suspension of the absolute power of alienation, now repealed in Michigan, then that section no longer has meaning here and the common law applies. In view of the doubt which exists, Sections 55 and 56 should be repealed or modified so as to make clear this phase of the law.

The New York and Michigan statutes governing powers of appointment purport to apply only to interests in land. The courts of both states have tended to extend them, by analogy, to powers of appointment of chattels personal. 317 If Section 56 should be deemed to have independent and literal significance, the distinction would, of course, become important because, if it does not apply to dispositions of chattels personal, they are governed by the common law.

The older English cases and the great weight of American authority hold that, when a power of appointment is restricted to exercise by will, the period of the Rule Against Perpetuities is computed, as to interests appointed, from the creation of the power rather than the time of its exercise, even though the objects of the power are unlimited, so that the donee could appoint to his own estate. 318 The more recent English decisions and

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316 Part Two, note 311 supra.
one in Wisconsin hold that, even though a power is restricted to exercise by will, if it is unlimited as to objects, the period of the Rule does not commence until the power is exercised.\textsuperscript{319} Section 12 of Chapter 64 of the Revised Statutes of 1846 \textsuperscript{320} provides that, if a tenant for life has unlimited power to devise the fee, he shall be deemed to possess an absolute power of disposition. It would seem that the effect of this statutory provision is that, in Michigan, even though the power as to the remainder is limited to exercise by will, if the donee is enabled to dispose of the entire fee, including his own life estate, for his own benefit, the period of the Rule Against Perpetuities does not commence until the power is exercised, that is, from the death of the life tenant.\textsuperscript{321} If a testamentary power is unlimited as to objects but the donee cannot dispose of the entire fee, the same doubtful situation described in the preceding paragraph exists.

\textsuperscript{319} Rous v. Jackson, 29 Ch. D. 521 (1885); Miller v. Douglass, 192 Wis. 486, 213 N.W. 520 (1927).
\textsuperscript{320} Part Two, note 304 supra. But there must be power to dispose of the entire fee. A life cestui of a trust with unlimited power to appoint the remainder cannot dispose of the entire fee if, because of spendthrift provisions as to personalty or the statutory restraint on alienation as to land, he cannot transfer his own life interest. Hunt v. Hunt, 124 Mich. 502, 83 N.W. 371 (1900); In re Peck Estates, 320 Mich. 692, 32 N.W. (2d) 14 (1948); Dana v. Murray, 122 N.Y. 604, 26 N.E. 21 (1890).
\textsuperscript{321} Farmers' Loan & Trust Co. v. Kip, 192 N.Y. 266, 85 N.E. 59 (1908); Property Restatement, §391, Comment h., App. Ch. A. par. 36 (1944); Leach and Tudor, "The Common Law Rule Against Perpetuities," 6 American Law of Property, §24.34 (1952). In re Kilpatrick's Estate, 318 Mich. 445, 28 N.W. (2d) 286 (1947) involved a bequest to a trustee to pay the income to testator's wife for life and to transfer to her any part of the principal which she might request, remainder as the wife might appoint by will. No perpetuities problem was involved. As the wife had an immediate right to demand the whole principal, it would seem that the period of the Rule Against Perpetuities should be computed from the time she made an appointment rather than from her husband's death under both the common-law and statutory rules.
It is well settled everywhere that when a power of appointment is limited as to objects, so that the donee cannot appoint to himself or his estate, the period of the Rule Against Perpetuities is computed from the effective date of the instrument creating the power. If Andrew Baker bequeaths property to John Stiles for life, remainder to such issue of John as John may appoint, the period of the Rule commences at the death of Andrew. It will be recalled that events which occur after the commencement of the period ordinarily cannot be considered in determining whether interests are certain to vest within the period. When the period commences at the creation of a power of appointment, however, facts which occur between the creation and exercise of the power may be so considered. If Andrew Baker bequeaths property to John Stiles, who has no issue, for life, remainder to such of John’s issue as John may by will appoint and John appoints by will to “my son Henry for life, remainder to his children,” the appointment to the children of Henry is invalid if Henry is


alive when John dies, because the class may include children born more than twenty-one years after the death of John, the only measuring life designated in Andrew’s will. If, however, Henry predeceased John, the appointment to his children is valid. The fact of Henry’s death may be considered, and it makes it certain that all of Henry’s children came into being during the life of John.325

The repeal in 1949 of the statutes prohibiting suspension of the absolute power of alienation for more than two lives326 creates a difficult question as to powers of appointment created by instruments which became effective before the repeal but exercised after the repeal. Is the validity of an appointment made after the repeal under a power created before governed by the repealed statutes? Such authority as there is indicates that it is if the power is limited as to objects.327 Probably it is not if the power is an absolute power of disposition of the entire fee within the meaning of Sections 9-13.328

325 Rev. Stat. 1846, c.64, §56, Part Two, note 302 supra, should not affect the result in such a situation. Andrew could have bequeathed directly to “the children of any son of John Stiles who may predecease John” because such children would necessarily come into being during the life of John.
326 Part Two, notes 46, 61, supra.
328 Part Two, note 304 supra.