CHAPTER 17

Consequences of Violation of the Rule

A. EXCISION OF THE LIMITATION WHICH VIOLATES THE RULE

WHEN an interest in property is limited subject to an illegal provision for defeasance by way of condition subsequent or executory limitation, the provision for defeasance is void but the interest itself is usually valid and indefeasible.\(^{512}\) If Andrew Baker conveys land to John Stiles and his heirs, “but if the grantee or his heirs shall attempt to alienate, the grantor or his heirs may re-enter and terminate the estate hereby conveyed,” the condition subsequent is void as an illegal direct restraint on alienation of an estate in fee simple, and John takes an indefeasible fee.\(^{513}\) When, on the other hand, an interest in property is limited subject to a condition precedent which is illegal because it may be fulfilled at a time beyond the period of the common-law Rule Against Perpetuities, the interest itself as well as the condition is void.\(^{514}\) In some cases it would be possible for the courts to treat the condition as void but the interest as valid. Thus if Andrew Baker conveys land to John Stiles, who has no children, for life, remainder to the children of John who reach

\(^{512}\) Property Restatement, §228, Comment d., §229 (1936); Browder, "Illegal Conditions and Limitations," 6 American Law of Property, §27.22 (1952).


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twenty-five, it would be possible to delete the words "who reach twenty-five" and give the children an interest which would vest on the death of John. Although conditions precedent which are illegal for some other reason than the Rule Against Perpetuities are sometimes handled in this manner,\(^{515}\) conditions which violate the Rule are not. If a condition precedent is void under the Rule, the interest subject to it is also void.

English law recognized an exception to the rule of complete nullity of interests limited in violation of the Rule Against Perpetuities in two related situations. When land was devised to an unborn person for life with remainder in tail to his children or to an unborn person for life with successive remainders for life to each generation of his descendants forever, the first unborn person took an estate tail under what was known as the *cy pres* doctrine.\(^{516}\) *St. Amour v. Rivard*\(^{517}\) involved a will devising land to a son for life, remainder to his children for life, with successive remainders for life to each generation of his descendants. There were similar devises to others, with cross-remainders on extinction of issue of any initial devisee. The Court discussed the *cy pres* doctrine at some length and refused to apply it. Of course the *cy pres* doctrine cannot be applied in its

\(^{515}\) *Property Restatement*, §424, *Comment d.* (1944); Browder, "Illegal Conditions and Limitations," *6 American Law of Property*, §27.22 (1952).

\(^{516}\) Nicholl v. Nicholl, 2 Black. W. 1159, 96 Eng. Rep. 683 (1777); Humberston v. Humberston, 1 P. Wms. 332, 24 Eng. Rep. 412 (1716); Gray, *Rule Against Perpetuities*, 3rd ed., §§643, 652 (1915); 2 Simes, *Law of Future Interests*, §§552 (1936). This is not the same as the doctrine of the same name which is applied when the specific purpose of a charitable trust fails or does not require the whole trust property.

\(^{517}\) 2 Mich. 294 (1852). The testator died in 1841, so the common-law Rule Against Perpetuities applied to the devises of land.
original form to wills of testators who died after March 2, 1821, when estates tail were abolished.\textsuperscript{518}

Generally speaking, when a limitation is void under the Rule Against Perpetuities, it is stricken out of the instrument and, unless they are inseparably connected with it, the other limitations of the instrument take effect as if it had not contained the void limitation.\textsuperscript{519}

If the void limitation is the only one made by the instrument or is a limitation of an ultimate remainder, the interest invalidly limited never passes out of the transferor by virtue of the limitation. In such a case, if the void limitation is contained in a deed, the interest ineffectively limited simply remains in the grantor.\textsuperscript{520} If it is contained in the residuary clause of a will, the interest passes to the heirs or next of kin of the testator as intestate property.\textsuperscript{521}

\textsuperscript{518} Part One, note 82 supra.


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of a will, the interest falls into the residue and passes under the residuary clause. If Andrew Baker conveys land to John Stiles "if and when the Penobscot Building falls," the deed conveys nothing, and Andrew retains a fee simple absolute. If Andrew Baker devises the residue of his estate to John Stiles, who has no children, for life, remainder to those children of John who reach twenty-five, John takes a life estate and the heirs of Andrew inherit the reversion. If Andrew Baker devises land to John Stiles, who has no children, for life, remainder to those children of John who reach twenty-five, and devises the residue of his estate to James Thorpe and his heirs, John takes a life estate and James the remainder in fee.


Where an interest which violates the Rule Against Perpetuities is limited to follow a prior interest, its invalidity does not enlarge the prior interest. If Andrew Baker conveys land to John Stiles and his heirs so long as the Penobscot Building stands and then to James Thorpe and his heirs, the shifting executory limitation to James is void, but its invalidity does not make John’s estate endure after the Penobscot Building falls. Andrew Baker retains a possibility of reverter which will become possessory in that event.\textsuperscript{523} On the other hand, if the void interest is limited to cut off a prior interest, the prior interest is indefeasible. If Andrew Baker conveys land to John Stiles and his heirs, “but if the Penobscot Building should fall, then to James Thorpe and his heirs,” the interest of James is void, and John takes an indefeasible estate in fee simple absolute.\textsuperscript{524}

If an appointment under a power of appointment which is limited as to objects violates the Rule, the property passes to the persons to whom it is limited in default of appointment.\textsuperscript{525} If an appointment under a power of appointment which is not limited as to objects violates the Rule, the effect is the same under some cir-


\textsuperscript{525} Property Restatement, §365 (1940), §403 (b) (1944); Leach & Tudor, “The Common Law Rule Against Perpetuities,” 6 American Law of Property, §24.47 (1952).
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Cumstances as if the donee of the power had made an effective appointment to himself or his estate.\textsuperscript{526}

The problems which involve the most difficulty in the field covered by this chapter are those involving the validity of limitations which, if considered by themselves, do not violate the Rule Against Perpetuities, but which are contained in instruments limiting other interests that do violate the Rule. The otherwise valid limitations do not fail unless they are inseparably connected with the void limitations. The following sections of the chapter are devoted largely to consideration of various situations where such connection may exist. The statutes prohibiting suspension of the absolute power of alienation of land for more than two lives, which were in force in Michigan from 1847 to 1949,\textsuperscript{527} were a statutory substitute for the common-law Rule Against Perpetuities, and the problems relating to the consequences of violation of the statutes were, for most purposes, the same as those which relate to the consequences of violation of the common-law Rule. Hence it will be convenient to consider, in the sections which follow, Michigan cases determining the consequences of violation of the statutes as well as those determining the consequences of violation of the common-law Rule. Such precedents must be used with caution, however, because the theory and operation of the statutes differed from those of the common-law Rule. The common-law Rule Against Per-

\textsuperscript{526} Property Restatement, §365 (1940), §403 (c) (1944); Leach & Tudor, "The Common Law Rule Against Perpetuities," 6 American Law of Property, §24.47 (1952). The property passes to the donee's estate rather than to the taker in default of appointment if it is found that the donee intended to exclude the donor from further control of it. Such a finding is usually made when the appointment is to a trustee on a trust which fails and when the appointment is made in a residuary clause which disposes of owned and appointive assets by the same words.

\textsuperscript{527} Part Two, note 47 supra; Part Three, note 1 infra.
petuities invalidates only *future* interests which may vest at a time beyond the period of the Rule; it does not limit the duration of trusts as such, only the vesting of future interests under or following them. The statutes, on the other hand, invalidated provisions, whether for *present* or future interests, which might suspend the absolute power of alienation for longer than two lives in being; hence they invalidated present trusts for receipt of the rents and profits of land which might last longer than two lives although the interests under and following the trusts were vested and, apart from the trusts, did not violate either the statutes or the common-law Rule.\(^{528}\)

### B. EFFECT ON PRIOR LIMITATIONS

When a limitation of a future interest violates the Rule Against Perpetuities, limitations of interests prior thereto, whether present or future, which do not themselves violate the Rule, take effect in accordance with their terms, unless the void limitation is so essential to the dispositive scheme of the transferor that it is inferable that he would not wish the prior limitations to stand alone.\(^{529}\) If Andrew Baker devises land to John Stiles, who has no children, for life, remainder to those children of John who reach twenty-five, the limitation of the life estate to John will ordinarily be effective even though the remainder violates the Rule.

\(^{528}\) Part One, note 593 *supra*; Chapter 20, Section C, *infra*.

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In *Wilson v. Odell*, land was devised to trustees to pay annuities to the testator's wife and children for their lives and to the children's children until the youngest grandchild came of age, and to distribute the principal to the children's children after the death of all the children and on the majority of the youngest grandchild. It was held that the limitations subsequent to the interests of the testator's children violated the statutes prohibiting suspension of the absolute power of alienation for more than two lives in being and so were void, but that the provisions for the annuities to the children were effective. In *Trufant v. Nunnelly*, land was devised to three children for their lives, remainder to their "body heirs." It was held that the limitation of the remainder violated the suspension statutes, but that the life estates could take effect. In *State v. Holmes*, land was devised to the testator's wife for life with alternative contingent remainders conditioned on events which might not occur for five years after her death to the State of Michigan and a grandson. It was held that the limitations in remainder violated the suspension statutes but that the life estate was valid. In *Rozell v. Rozell*, one farm was devised to testatrix's son Cass for life, remainder to his children for their lives, remainder to the heirs of such children in fee. Another farm was devised to testatrix's daughter Sarah for life, remainder to Cass for life, remainder to his children for life, remainder to the heirs of such children in fee. It was held that the remainders

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530 58 Mich. 533, 25 N.W. 506 (1885). The widow renounced her interest under the will. In *Palms v. Palms*, 68 Mich. 555, 36 N.W. 419 (1888), Part Two, note 561 infra, prior life interests were held valid although a subsequent trust violated the suspension statutes.

531 106 Mich. 554, 64 N.W. 469 (1895).


to the children of Cass were void because they violated a statute then in force prohibiting the limitation of life estates to unborn persons\textsuperscript{534} and that the remainders to their heirs violated the suspension statutes, but that the life estates of Cass and Sarah could take effect.

\textit{Gettins v. Grand Rapids Trust Co.}\textsuperscript{535} is an excellent illustration of the effect on prior limitations of a subsequent limitation which is void under the common-law Rule Against Perpetuities. There, half the residue of an estate was devised to a trustee, with direction to convert land to personalty, to pay the income to testatrix's daughter Belle for life, and on her death to divide the corpus into as many shares as Belle should have children then surviving or with issue her surviving. The trustee was to pay one share to each child of Belle who had reached twenty-five and to the issue of each child who had predeceased Belle. The other shares were to be held on trust for each child until it reached twenty-five and then paid to it, but if any child died under twenty-five, its share was to go to its issue, or if none, the other children or their issue, and if all the issue of Belle were then dead, to a sister of Belle. The provisions for defeasance of the interests of children of Belle who survived their mother but died under twenty-five violated the Rule Against Perpetuities. It was held that the life interest of

\textsuperscript{534} Rev. Stat. 1846, c. 62, §17, Comp. Laws (1857) §2601; Comp. Laws (1871) §4084; Comp. Laws (1897) §8799; How. Stat. §5533; Comp. Laws (1915) §11535; Comp. Laws (1929) §12937; Mich. Stat. Ann., §26.17; Comp. Laws (1948) §554.17. Repealed by Act 38, P.A. 1949, Mich. Stat. Ann., §26.49 (2), Comp. Laws (1948) §554.52; Chapter 19 infra. The section read: "Successive estates for life shall not be limited unless to persons in being at the creation thereof; and when a remainder shall be limited on more than two successive estates for life, all the life estates subsequent to those of the two persons first entitled thereto, shall be void, . . . ." The disposition of the second farm violated both clauses of this section.

\textsuperscript{535} 249 Mich. 238, 228 N.W. 708 (1930).
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Belle was valid and that her surviving issue would take shares which would be indefeasible from the time of her death.

If a limitation of a future interest violates the Rule Against Perpetuities and the void interest is so essential to the dispositive scheme of the transferor that it is inferable that he would not wish prior limitations to stand alone, such prior limitations are also invalid. *St. Amour v. Rivard* 536 involved a will which devised life estates in land to nine persons, with remainders for life to the children of the first tenants, remainders for life to the children's children, and so on forever, with cross remainders in the event of extinction of the descendants of any original taker. The will prohibited alienation forever of interests devised by it. Although the initial life estates and the remainders for life to the children of the first life tenants did not themselves violate the Rule, the Court decided that the testator's scheme was to create an indestructible perpetuity, and that since most of it must fail he probably would not wish any part to stand. Hence it held the whole will void, so that the land passed to the heirs of the testator as intestate property.

*Dean v. Mumford* 537 involved a will which, as construed by the Court, devised land to trustees to pay income to the testator's wife for life, then to divide into five shares, transfer two to the testator's two daughters or their children, and hold the other three on separate trusts for testator's three sons and their wives, and on the death of each son and his wife, to transfer the principal of that son's trust to his children. The Court held that the trust provision for each son suspended the abso-

536 2 Mich. 294 (1852), Part Two, note 39 supra. The testator died in 1841, before the enactment of the suspension statutes.
lute power of alienation for the lives of (1) testator's wife, (2) the son's life, (3) the son's wife's life, and so the trusts were void under the statutes. The widow having renounced her interest under the will, the property was ordered distributed at once to the five children free of trust. The Court declined to decide whether the children took as devisees or as heirs at law of the testator. In *Niles v. Mason*, land was devised to trustees to pay an annuity to testator's sister Sarah for life and to pay the balance of the income to testator's children Charles and Lottie for their lives. On the death of either Charles or Lottie, half the principal was to be transferred to the children of the deceased child, or if none, held in trust for the other child and transferred on its death to its children. If both Charles and Lottie died without issue, the principal was to be transferred to testator's brother. It was held that these provisions suspended the absolute power of alienation for three lives, those of Sarah, Charles, and Lottie, and that they were all void except the annuity of Sarah, which the Court deemed sufficiently disconnected to be enforcible apart from the other provisions.

*Grand Rapids Trust Co. v. Herbst* involved a will which, after a $1000 bequest to a business associate, devised an estate consisting of land and personalty on trust to pay life annuities to two nephews and a niece, and to pay the balance of the income to testator's son, a brother, and two sisters until the son reached twenty-five or died. When the son reached twenty-five or died, half the estate was charged with the annuities and payment of the balance of the income to the brother and sisters for

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538 126 Mich. 482, 85 N.W. 1100 (1901).
life. Subject thereto, the son was to take the entire estate on reaching twenty-five; if he died under twenty-five, it was to be held on trust for his issue and transferred to them on reaching twenty-one. If the son died without issue or his issue died under twenty-one, the estate was to pass to four charities, subject to the provisions for the annuities and the brother and sisters. It was held that the bequest to the business associate was valid but that the other dispositions were so interconnected that the violation of the suspension statute by some of them caused all to fail.

In Gardner v. City National Bank & Trust Co., the residue of an estate, consisting of land and personalty, was devised to trustees upon two trusts. Each trust was to pay the income to a daughter of the testator for life, then to her children. Each child was to receive half a share in principal at twenty-five and the other half at thirty. If any child died under thirty, its issue was to receive the income from its share until twenty-one and then the principal. If a child died under thirty without issue, its interest passed to the other children of the daughter or their issue on the same trusts, and if the daughter and all her issue died before the termination of the trusts, the principal of her trust was to be added to the principal of the similar trust for the other daughter and her issue. If both daughters and their issue died before termination, the property was to pass to testatrix’s brother. The Court held that the trusts violated both the suspension statutes and the common-law Rule Against Perpetuities and that no part of them could be given effect without making a wholly new scheme for the testator, which the court declined to do.

The Michigan cases just discussed indicate that, under both the common-law Rule Against Perpetuities and the suspension statutes, the invalidity of a future interest does not ordinarily affect the validity of prior interests. The last four cases considered appear to hold, on the other hand, that when a trust for receipt of the rents and profits of land was set up to last for longer than two lives in being, the entire trust was void; it would not be split and held valid for two lives but void as to the balance.541

Professor Whiteside has remarked that under the Michigan decisions it is difficult, if not impossible, to point out any definite test for determining when invalid provisions will be eliminated from a testamentary disposition and the valid provisions sustained.542 Most of the confusion has arisen, however, because the suspension statutes prohibit not only certain contingent future interests but also present trusts which might last longer than two lives in being. The repeal of the suspension statutes leaves only the common-law Rule Against Perpetuities, which is violated only by a future interest which may vest more remotely than the period of the Rule. Moreover, the period of the common-law Rule includes any number of lives in being plus twenty-one years in gross. Under the common-law Rule, there should seldom be occasion for striking down innocent prior interests merely because some subsequent interest is too remote.


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C. EFFECT ON ALTERNATIVE AND CONCURRENT LIMITATIONS

When a limitation of a future interest violates the Rule Against Perpetuities, limitations of alternative and concurrent interests, which do not themselves violate the Rule, generally take effect in accordance with their terms unless the void limitation is inseparably connected with them, as it is when it is so essential to the dispositive scheme of the transferor that it is inferable he would not wish the otherwise valid limitations to stand alone.\(^{543}\)

Completely disconnected limitations are almost always valid. Thus if a testator directs payment of his debts and of small legacies to servants and friends and devises the residue of his estate to a trustee to accumulate the income for a thousand years and pay the accumulated fund to his descendants then in being, the invalidity of the residuary clause does not prevent the provisions for payment of debts and legacies taking effect. Moreover, concurrent limitations may be separable although related to some extent to the void provision. *Bateson v. Bateson* \(^{544}\) was a suit by a settlor to set aside a deed of

\(^{543}\) 2 Simes, Law of Future Interests, §§529, 531 (1936); Property Restatement, §402, (1944); Leach & Tudor, "The Common Law Rule Against Perpetuities," 6 American Law of Property, §§24.49, 24.50 (1952). It should be recalled, however, that if the interest of any member of the class may vest at a time beyond the period of the Rule, a class gift is wholly void, although the interests of some members are presently vested or will certainly vest within the period. Part Two, note 280 supra.

\(^{544}\) 294 Mich. 426, 293 N.W. 705 (1940). Three justices dissented on the ground the absolute power of alienation of the two tenths was not suspended beyond the life of James. Cf. Lewis v. Nelson, 4 Mich. 630 (1857). In Wheelock v. American Tract Society, 109 Mich. 141, 66 N.W. 955 (1896), the residue of an estate was devised to the executors to pay to four named charitable societies, with discretion to pay some to worthy poor girls to aid in their education. It was held that the provision for worthy poor girls was void for indefiniteness and that the provisions for the charitable societies were inseparable and so failed also. This was unsound; if the discretionary power to benefit poor girls was invalid, the four societies should have been held to take indefeasible interests. Trusts Restatement, §398 (2). There
trust. The plaintiff conveyed his land to his son George upon trust to pay the income to the settlor for life and at his death (1) to convey four tenths to George, if then alive, or to his named wife and son, (2) to hold four tenths upon trust to pay the income to the settlor's son Samuel for life and on his death to convey to his named wife and daughters, (3) to hold two tenths upon trust to pay the income to the settlor's grandson James for fifteen years and then to convey to James, but if James should die within the fifteen years, to convey to the wife and children of James, if any, otherwise one tenth to George and one tenth to the trust for Samuel. It was held that the disposition was void under the suspension statutes as to the two tenths, but that the other eight tenths were separable and valid.

If alternative limitations are made on verbally separate contingencies, the fact that one is invalid does not ordinarily prevent the other from taking effect.\(^{545}\) If Andrew Baker devises property to James Thorpe, who has no children, for life, remainder to his children, but if all his children die under twenty-five without surviving is-

are numerous cases holding wholly unrelated legacies valid although the principal dispositive provisions of the will were void. E.g. Farrand v. Petit, 84 Mich. 671, 48 N.W. 156 (1891) (devises of land to sons and daughter good although trust of residue wholly void under suspension statutes); State v. Holmes, 115 Mich. 456, 73 N.W. 548 (1898) ($2000 legacy to grandson valid although contingent remainders in residue violated the suspension statutes); Otis v. Arntz, 198 Mich. 196, 164 N.W. 498 (1917) (bequest to church valid although trust of residue violated suspension statutes); Michigan Trust Co. v. Baker, 226 Mich. 72, 196 N.W. 976 (1924) (bequest of tea set good although devise of land bad). There are numerous cases of this type in which the validity of the separate gifts was not questioned. See: Property Restatement, §376, Comment c., §402, Comment e. (1944).

sue or if James dies without surviving issue, to John Stiles and his heirs, the contingency of James's children dying under twenty-five is too remote so John cannot take if James has surviving children, but the contingency of James's dying without surviving issue is not too remote so John will take if James dies without surviving issue. A verbally single contingency will not be split, however. If Andrew Baker devises property to James Thorpe, who has no children, for life, remainder to his children who reach twenty-five, but if there are no such children, to John Stiles and his heirs, John cannot take even though James dies without having had a child.

In *Michigan Trust Co. v. Baker*, testatrix devised land to her husband for life, remainder to a trustee to convert into money and hold for the benefit of her son Stuart for life. The will provided:

"If my said son shall have lawful child or children of his body who shall survive him, his share of my estate shall go to such child or children, girls at age of twenty-five years and boys at thirty years and not before.

"If my son Stuart shall die without lawful issue, his share of my estate shall go five thousand dollars ($5,000) to my son Looe Baker in fee, and the remainder for his life and at his death to his lawful children, - - -.""

Stuart died after the testatrix, without having had issue. It was held that the first quoted paragraph suspended the vesting of the interests of the children of Stuart for longer than lives in being and twenty-one

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547 226 Mich. 72, 196 N.W. 976 (1924).
years and so violated the common-law Rule Against Perpetuities. The Court also held that the remainder limited to Looe and his children in the event of Stuart’s death without issue failed because of the invalidity of the interest of the children of Stuart. The latter holding was clearly wrong. The contingencies were separately stated and that of Stuart’s death without issue did not violate the Rule. As Stuart did die without issue, the remainder to Looe and his children should have been given effect.

In Gettins v. Grand Rapids Trust Co.,548 half of the residue of an estate was devised to a trustee to pay the income to testatrix’s daughter Belle for life, and if Belle had issue then surviving, to divide into as many shares as Belle should have children then surviving or with issue her surviving. The trustee was to pay one share to each child of Belle who had reached twenty-five and to the issue of each child who had predeceased Belle. The other shares were to be held on trust for each child until it reached twenty-five and then paid to it. The will provided:

"- - - and in the event of the death of such child before the same shall reach the age of 25 years, my trustee shall pay, deliver and convey his or her special fund to my said daughter’s children surviving, except this, that if any child has died with issue then surviving, said issue shall take the share the deceased child would receive if living and if at the death of any child my daughter has no issue then surviving, it shall pay, deliver and convey the special fund to my daughter, Shirley S. Thurston, if surviving, and to her issue, if she is deceased.

"If [upon the death of Belle] she has no issue then surviving I direct my trustee to pay, deliver and convey

548 249 Mich. 238, 228 N.W. 703 (1930).
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this trust fund to my said daughter, Shirley S. Thurston, if then surviving, and to her issue, if she is deceased."

It was held that the provisions of the first quoted paragraph for gifts over on the contingency of Belle's children dying under twenty-five were void under the Rule Against Perpetuities. The Court held, however, that the remainder to Shirley or her issue on the contingency of Belle's death without surviving issue could take effect in that event. As the contingencies were separately stated, this result was correct. When the problem arises again it is to be hoped that the Court will follow the sound rule of the Gettins case rather than the unsound one of the Baker case.

It will be recalled that under English law a remainder on an estate tail, which, of course, could not take effect unless the descendants of the first tenant in tail became extinct, was valid.\textsuperscript{549} As chattels real and personal could not be entailed, however, a limitation over on extinction of issue of a legatee of such interests violated the Rule Against Perpetuities.\textsuperscript{550} When freehold land and other property were devised by the same limitation, the dispositions of the freehold land and those of the other property were treated as separable.\textsuperscript{551} If Andrew Baker, owning Blackacre in fee simple and an estate for a thousand years in Whiteacre, devised all his interests in land to James Thorpe and the heirs of his body and upon extinction of such heirs to John Stiles and his heirs, the limitation to John was valid as to Blackacre although void as to Whiteacre. A very similar problem arose in

\textsuperscript{549} Gray, Rule Against Perpetuities, 3rd ed., §111 (1915); Part Two, note 155 \textit{supra}.
\textsuperscript{550} Burges v. Burges, 1 Ch. Cas. 229, 22 Eng. Rep. 775 (1674); Gray, Rule Against Perpetuities, 3rd ed., §212 (1915); Part Two, note 175 \textit{supra}.
\textsuperscript{551} Forth v. Chapman, 1 P. Wms. 663, 24 Eng. Rep. 559 (1720).
Michigan because the stringent provisions of the statutes prohibiting suspension of the absolute power of alienation, which were in force from 1847 to 1949, applied only to land, whereas limitations of personalty were restricted only by the more liberal provisions of the common-law Rule Against Perpetuities. If Andrew Baker devised his entire estate, consisting of land and personalty, to James Thorpe upon trust to pay the income to Lucy Baker for life, then to John Stiles for life, then to the issue of John Stiles for twenty years and to transfer the principal to the descendants of John in being at the end of the twenty years, the dispositions did not offend the common-law Rule but did violate the suspension statutes. Should the fact that the limitation was void as to land make it void as to personalty also? The early Michigan decisions indicated that it should not, but later cases laid down an arbitrary rule that such limitations were not separable; if they failed as to land, they failed as to personalty also. The most extreme case of this type was In re Richards’ Estate, where the fact that land worth $800 was included in a limitation with


554 283 Mich. 485, 278 N.W. 657 (1938). The desirability of this harsh and arbitrary rule was questioned by Butzel, J. in Dodge v. Detroit Trust Co., 300 Mich. 575 at 598, 2 N.W. (2d) 509 (1942), where the land involved was worth some $40,000 and the personalty about $38,000,000.
personalty worth $56,000 caused the entire limitation to fail.

The donee of a power of appointment sometimes exercises the power and disposes of his own property by the same limitation. If the limitation is invalid under the Rule Against Perpetuities insofar as it is an appointment, it would seem that it is nevertheless valid insofar as it disposes of the donee's own property. Suppose Andrew Baker devises Blackacre to John Stiles, who has no children, for life, remainder to such issue of John as John may by will appoint. John Stiles, owning Whiteacre, devises "all land over which I have power of disposition to my children for life, remainder to my grandchildren." As the period of the Rule Against Perpetuities is computed, in determining the validity of an appointment under such a limited testamentary power, from the death of Andrew, the limitation to the grandchildren of John violates the Rule so far as Blackacre is concerned. It would seem that it is valid as to Whiteacre.

If a limitation of a future interest violates the Rule Against Perpetuities and the void interest is so essential to the dispositive scheme of the transferor that it is inferable that he would not wish otherwise valid alternative or concurrent limitations to stand alone, such alternative or concurrent limitations also fail. This proposition is well illustrated by In re Richards' Estate. There a testator bequeathed $1,000 to Willard G. Stone and devised one third of his estate to his daughter and two thirds to trustees to pay the income to his two sons for twenty years and then to transfer the principal to issue

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556 Part Two, note 322 supra.

of the sons to be ascertained at that time. As the suspension statutes permitted no period in gross, the disposition of the two thirds was void. It was held that the legacy of Willard G. Stone could stand, but that the devise to the daughter of one third of the estate failed. As the Court observed, the testator probably intended to treat his children with approximate equality. If the disposition of the two thirds alone failed, it would pass as intestate property, so the daughter would receive one third plus two-ninths, or five-ninths of the estate, and each son would receive only two ninths. By eliminating the devise of one third to the daughter, the Court caused the entire estate, less the $1,000 legacy, to pass as on intestacy to the three children equally.

D. EFFECT ON SUBSEQUENT LIMITATIONS

If a future interest is so limited that it may vest at a time beyond the period of the Rule Against Perpetuities, a subsequent interest limited to follow it or cut it off is usually such that it, too, may vest too remotely. In such a case both fail by reason of the direct operation of the Rule. In a few situations, however, it is possible to have a future interest which violates the Rule followed by an interest which is vested or will certainly vest within the period of the Rule. If Andrew Baker devises property to James Thorpe, who has no children, for life, remainder to the children of James who reach twenty-five for their lives, remainder to John Stiles and his heirs, the life estate of the children of James violates the Rule Against Perpetuities, but the remainder in fee of John Stiles is indefeasibly vested. If Andrew Baker bequeaths property to John Stiles, who has no children, for life, remainder to such issue of John as John may by will appoint, and John appoints by will "to my
daughters for their lives, remainder to their children for their lives, remainder to my son Henry and his heirs," the appointment to the children of the daughters violates the Rule, but the appointment to Henry vests upon the death of John, who was a life in being when Andrew died. Should such subsequent interests, themselves vested or certain to vest within the period of the Rule, fail merely because prior interests violate the Rule? The English cases suggest that they do, and Professor Gray accepted this view. The Restatement of Property and Professors Simes and Leach do not agree. They think that subsequent interests should be treated in the same way as prior, alternative and concurrent interests, that is, as valid unless the void intermediate limitation is so essential to the dispositive scheme of the transferor that it is inferable that he would not wish the subsequent limitations to stand if the intermediate interest fails.

There are no American decisions on this problem. Michigan has, however, a number of decisions as to the closely related problem of the validity of interests which did not themselves violate the statutes prohibiting suspension of the absolute power of alienation for more than two lives but were limited to follow trusts which did violate the statutes.


559 RULE AGAINST PERPETUITIES, 3rd ed., §251 (1915). He had expressed a contrary view in previous editions. Moreover he thought that the rule of nullity extended only to subsequent interests in fee, that, despite the English cases to the contrary, a life estate limited to a living person should be valid although preceded by a void interest. Id., §§252-257.

PERPETUITIES AND OTHER RESTRAINTS

In *Palms v. Palms*,\(^{561}\) land and personalty were devised to trustees to pay the income to the testator's two children for their lives and then to transfer the principal to their children. The will provided that if any child was a minor at its parent's death, its share should be held on trust during minority. It was held that this provision for trusts to last beyond lives in being probably violated the suspension statutes but that both the prior and subsequent interests were valid, that is, the grandchildren would take on the deaths of their parents, free of the void trusts.

In *Dean v. Mumford*,\(^{562}\) land was to be held on trust during the lives of the testator's widow, three sons, and the sons' wives, remainder to the children of the sons. The Court held that the trust for each son, his wife, and children, was separate from the others but that the whole disposition failed and the property involved passed as on intestacy. As the interest of the children of each son would vest in interest on the death of their father, a life in being at the death of the testator, it would seem that their interests were valid, apart from the trusts. It would have been possible to delete the trusts and hold the limitations to the children valid.

In *Niles v. Mason*,\(^{563}\) an estate was devised to trustees to pay a life annuity to the testator's sister Sarah and to divide the remaining income between the testator's two children, Charles and Lottie, for their lives. On the death of either child, half the principal was to be transferred to his children, if any, and if none, held on trust for the other child and transferred to his children at his death. If both died without issue, the principal was to

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\(^{561}\) 68 Mich. 355, 36 N.W. 419 (1888).  
\(^{562}\) 102 Mich. 510, 61 N.W. 7 (1894).  
\(^{563}\) 126 Mich. 482, 85 N.W. 1100 (1901).
be transferred to testator's brother. It was held that the disposition created a trust for three lives and so violated the suspension statutes and that the estate passed to the heirs subject to the annuity to Sarah. It might have been possible to hold that the trusts for Charles and Lottie were separate, that each could last for the life of Sarah and the life beneficiary, with remainder to the children of the life beneficiary, and that nothing failed except the cross remainder to the other trust on the death of Charles or Lottie without issue. The decision rendered indicates unwillingness to find separate trusts when there are cross-remainders.\(^{564}\)

In *Casgrain v. Hammond*,\(^{565}\) Ellen Hammond conveyed land to her son Charles, who executed an instrument of trust declaring that he would pay the net income to Ellen for life, and if she died before the expiration of fourteen years, he would pay it to five of her children, including himself. The instrument provided that the trust should last for fourteen years and until the death of Ellen if she lived longer. Upon its expiration Charles was to convey the land to the five children or the survivor or survivors of them. The trust was void because it suspended the absolute power of alienation for a period not based on lives. It was held that the land passed to the heirs of Ellen, who had died before the suit was commenced. The Court said that it did not pass to the five children who were *cestuis* of and remaindermen after the void trust because there was no intention to convey to them. This seems unsound. The trust instrument gave the five children an unconditional estate which vested in them immediately, subject only


\(^{565}\) 134 Mich. 419, 96 N.W. 510 (1903).
to the void trust and to defeasance upon failure to survive. It would seem that the provision for the trust lasting beyond the life of Ellen could have been deleted and the balance of the disposition allowed to stand, so that the five children would take a remainder, indefeasible after the death of Ellen.\textsuperscript{566}

In \textit{Van Driele v. Kotvis},\textsuperscript{567} a testator bequeathed $500 to a church, to be paid out of the rents, issues, and profits of his estate at the rate of $25 a year for twenty years and devised the residue to his wife for life, remainder to his daughter for life, remainder to the heirs of his wife and himself. It was held that the provision for the church was void but that this did not invalidate the disposition of the residue which was, of course, partly concurrent with and partly subsequent to the void interest.

\textit{James E. Scripps Corporation v. Parkinson},\textsuperscript{568} involved the will of a testator who died in 1851, devising land to his wife upon trust until 1864, then one-third to the wife for life, and the balance, being a present estate as to two-thirds and a remainder after the widow's life estate as to the other third, in equal shares, one to each of testator's sons in fee and one to his daughter Jane for life, remainder to her heirs. It was held that because the trust, not being limited in duration by lives, was invalid, the whole will was void and the land passed

\textsuperscript{566} See: \textit{Property Restatement, App., Ch. A, ¶64} (1944). But see Part Two, note 541 \textit{supra}.

\textsuperscript{567} 135 Mich. 181, 97 N.W. 700 (1903).

\textsuperscript{568} 186 Mich. 663, 153 N.W. 29 (1915). There was earlier litigation over this will. Parkinson v. Parkinson, 139 Mich. 530, 102 N.W. 1002 (1900). It was held in the later case that the heirs of Jane did acquire an interest by purchase, not under the will but by virtue of her consent to a probate decree of partition in accordance with the terms of the void will. Thus the Court reached by indirect means the same result it should have reached by simply deleting the void trust and enforcing the subsequent provisions. A similar result was reached by the same indirect means in Snyder \textit{v. Potter, 328 Mich. 236, 43 N.W. (2d) 922} (1950).
to the testator’s heirs at his death, so that the heirs of Jane took nothing by purchase. This holding seems unsound. If the void trust, which suspended the absolute power of alienation for thirteen years in gross in violation of the statutes, were deleted, the other provisions of the will would be valid, since the limitation to the heirs of Jane would vest at her death, and these provisions should have been enforceable.

In *Otis v. Arntz*, a will directed that the income from the residue of an estate, consisting of a farm and personalty, be paid to the two children of the testator, Grace and Clark, “and in case of their decease to their heirs” for twenty-five years. The next paragraph devised the residue, subject to the preceding provision as to income, to the children’s children in equal shares, “The share of any deceased grandchild shall go to his children if living, otherwise to revert to the surviving grandchildren.” The following paragraph directed that the farm be kept intact, unsold and unmortgaged, until the expiration of twenty-five years, when it should be partitioned among the grandchildren or sold and the proceeds divided as directed in the preceding paragraph. A codicil provided that if Grace died within twenty-five years, her interest in the income should go to the children of Clark. It was held that these dispositions of the residue were wholly void under the suspension statutes and that the residue passed to the heirs at law of the testator. If, as the Court thought, a trust to last twenty-five years was intended, this result was probably sound, either on the ground that the will suspended the vesting of the grandchildren’s interests for twenty-five years or on the ground that the testator would not want

their interests to stand alone and be accelerated as to possession, because this would deprive his children of all benefit under the will. It would have been possible, however, to construe the will as devising a legal estate for twenty-five years to the children with a remainder to the grandchildren which would vest completely on the death of their parents. Such a twenty-five year term would be valid because the provision of the Michigan Constitution making void leases of agricultural land for agricultural purposes for terms of more than twelve years only applies to leases which reserve rent or services.570

Scheibner v. Scheibner571 involved a will which, after provision for several legacies, devised the residue to trustees to pay the income to the testator's wife for life and after her death to pay $75 a month to each of his two sons, Charles and William, until the expiration of twenty years after the testator's death, then to convert the estate into cash and pay it to the sons. Charles, during

570 Const. 1908, Art. XVI, §10, Part One, notes 806, 350, supra. However, even on this construction, the interest of the grandchildren would be void if its vesting was suspended for twenty-five years, because the statutes then provided, "A contingent remainder shall not be created on a term for years, unless the nature of the contingency upon which it is limited be such that the remainder must vest in interest, during the continuance of not more than two lives in being at the creation of such remainder, or upon the termination thereof." Rev. Stat. 1846, c. 62, §20, Comp. Laws (1857) §2604; Comp. Laws (1871) §4087; Comp. Laws (1897) §8802; How. Stat., §5536; Comp. Laws (1915) §11538; Comp. Laws (1929) §12940; Mich. Stat. Ann., §26.20; Comp. Laws (1948) §554.20; repealed by Act 38, P.A. 1949, §2, Mich. Stat. Ann., §26.49 (2); Comp. Laws (1948) §554.52.

571 199 Mich. 630, 165 N.W. 660 (1917). See Part Two, note 541 supra. Subsequently the widow conveyed her interest, which had been enlarged as to a third from a life estate to a fee as a result of Charles's suit, to William. After her death, Charles sued unsuccessfully to set aside the conveyances on the ground of undue influence. Scheibner v. Scheibner, 220 Mich. 115, 189 N.W. 913 (1922). If he had never brought the first suit, Charles would have taken half the estate instead of only a third.
the widow's life, sought a decree that the provisions for a trust were invalid and that the residue should pass at once, free of trust, to the widow and sons as heirs at law. A motion to dismiss the bill on the ground there was an adequate remedy at law was overruled, and the order overruling it was affirmed in an opinion which intimated that the disposition of the residue was wholly void and that the residue passed to the widow and sons as heirs at law. This result seems unsound. The trust could have been sustained for the life of the widow, with immediate remainder to the sons, or the trust could have been deleted entirely and the widow given a legal life estate, with remainder to the sons.

*Loomis v. Laramie* 572 illustrates the type of result which could have been reached in *Scheibner v. Scheibner* and several other cases discussed above. There the residue of an estate was devised to trustees to accumulate the income for twenty years and transfer the accumulated fund to five named persons, "and the heirs of their body forever." The trust for accumulation violated both the suspension statutes and the accumulation statutes then in force. It was held, however, that the interests of the five named persons were vested and took effect at once. As these persons were not the heirs of the testator, they would have taken nothing if the void trust had been held to invalidate the limitations subsequent to it, as was the case in *Scheibner v. Scheibner*.

572 286 Mich. 707, 282 N.W. 876 (1938). In DuBuck v. Bousson, 295 Mich. 164, 294 N.W. 135 (1940), a will disposed of an estate to the testator's wife and children in fourteen paragraphs. The fifteenth provided that these devises and bequests should not be effective for a year after the testator's death. It was held that the fifteenth paragraph was void under the suspension statutes but that this did not affect the validity of the other provisions because its deletion would not materially alter the testator's plan. *Cf. Snyder v. Potter*, 328 Mich. 296, 43 N.W. (2d) 922 (1950).
It is thus apparent that our Supreme Court was willing, in some cases, to enforce limitations subsequent to trusts which were void under the suspension statutes if the deletion of the void trust did not unduly distort the transferor's dispositive scheme. It would seem that it should also be willing to enforce limitations subsequent to interests which violate the common-law Rule Against Perpetuities, under similar conditions. The purpose of the Rule is to prevent property being tied up for undesirably long periods, not to punish innocent transferees of interests which do not so fetter it.