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FUTURE INTERESTS -VALIDITY OF A POWER OF APPOINTMENT UNDER THE RULE AGAINST PERPETUITIES

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FUTURE INTERESTS — VALIDITY OF A POWER OF APPOINTMENT UNDER THE RULE AGAINST PERPETUITIES — Testator devised the income from his residuary estate to his two daughters for life, directing the trustee, on each daughter's death, to divide her share of the trust fund among the daughter's surviving children, and to hold the shares of the granddaughters for their lives and the shares of the grandsons until they severally reached the age of thirty years. The will then provided, "And in case of the death of any one of my grandsons before attaining the age of thirty years and in case of the death of my granddaughters, I direct that my Trustee shall distribute the trust fund of the grandchild so dying in such manner as said grandchild shall by will direct. . . ." *Held*, that as such power may be exercised after lives in being and twenty-one years beyond, it is invalid under the rule against perpetuities. *Camden Safe Deposit & Trust Co. v. Scott*, (N. J. 1937) 189 A. 653.

For purposes of the rule against perpetuities, a power of appointment may be considered either as a sort of interest in property,¹ or its exercise may be viewed as an event on which property shifts from the taker in default of appointment to possible appointees.² In the application of the rule to powers, therefore, three questions may arise: (1) If the power of appointment is to arise on a contingency, will the contingency happen within the time allowed by the rule? (2) If the power will arise within the limits of the rule, can it be exercised beyond the time allowed by the rule? (3) Providing a valid power

¹ 2 SIMES, LAW OF FUTURE INTERESTS, § 535 (1936).

² 2 SIMES, LAW OF FUTURE INTERESTS, § 536 (1936).

exists, and its exercise is valid, are the limitations resulting from the exercise of the power valid under the rule? ³ In regard to the validity of the existence of the power itself, with which the principal case was concerned as distinguished from the question of the validity of the limitations resulting from its exercise, two rules are deducible from the English cases. If the power is to arise on a condition precedent, the condition precedent must happen within the time of the rule or the power is invalid; ⁴ and if, even though the power may arise within the time of the rule, it may be exercised beyond the limits of the rule, it is invalid, ⁵ provided however, it is not a general power to appoint by deed or will. ⁶ In the principal case, all the grandchildren of the testator were not ascertainable until after the death of the testator's daughters, the lives in being, and therefore the power might be exercised by an unborn child after he had reached the age of twenty-one. The power might be viewed, also, as one which might not arise until after the grandchildren, born or to be born, reached the age of twenty-one. The power was, therefore, clearly bad under the rule against perpetuities.

Peter S. Boter

³ GRAY, RULE AGAINST PERPETUITIES, 3d ed., § 473 (1915); 2 SIMES, LAW OF FUTURE INTERESTS, § 534 (1936).

⁴ *Wollaston v. King*, L. R. 8 Eq. 165 (1868); *Morgan v. Gronow*, L. R. 16 Eq. 1 (1873); *Tredennick v. Tredennick*, [1900] 1 I. R. 354; *Re Phillips*, 28 Ont. L. Rep. 94 (1913). See also *In re Hargreaves*, 43 Ch. D. 401 (1890).

⁵ *Webb v. Sadler*, L. R. 14 Eq. 533 (1872), L. R. 8 Ch. App. 419 (1873). See also *Bristow v. Boothby*, 2 Sim. & St. 465, 57 Eng. Rep. 424 (1826); *Ware v. Polhill*, 11 Ves. 257, 32 Eng. Rep. 1087 (1805); *Ferrand v. Wilson*, 4 Hare 344, 67 Eng. Rep. 680 (1845). And see also GRAY, RULE AGAINST PERPETUITIES, 3d ed., § 483 (1915), and 2 SIMES, LAW OF FUTURE INTERESTS, § 536 (1936).

⁶ A general power to appoint by deed or will is not considered as restricting alienation, as there is a person who can presently convey an absolute interest. See *Bray v. Hammersly*, 3 Sim. 513, 57 Eng. Rep. 1090 (1830); *In re Teague's Settlement*, L. R. 10 Eq. 564 (1870).