

1936

FUTURE INTERESTS-RULE AGAINST PERPETUITIES- APPLICATION TO ESTATE CREATED UNDER POWER OF APPOINTMENT BY WILL ONLY

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Estates and Trusts Commons](#), and the [Property Law and Real Estate Commons](#)

Recommended Citation

FUTURE INTERESTS-RULE AGAINST PERPETUITIES-APPLICATION TO ESTATE CREATED UNDER POWER OF APPOINTMENT BY WILL ONLY, 34 MICH. L. REV. 1049 (1936).

Available at: <https://repository.law.umich.edu/mlr/vol34/iss7/18>

This Regular Feature is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

FUTURE INTERESTS—RULE AGAINST PERPETUITIES—APPLICATION TO ESTATE CREATED UNDER POWER OF APPOINTMENT BY WILL ONLY—The testator died in 1872 leaving to testatrix in trust certain property over which she was given a general power of appointment by will. The testatrix died in 1928 leaving this property in a trust which was found to violate the rule against perpetuities. In discussing this, the question was raised whether in testing the validity of the estate created by the power of appointment, the period of the rule is calculated from the time of the creation of the power of appointment or from the time of its exercise. *Held*, that the permissible period is to be measured from the time of the creation of the power of appointment. *St. Louis Union Trust Co. v. Bassett*, (Missouri 1935) 85 S. W. (2d) 569.

The rule against perpetuities is applied to estates created by the exercise of a special power as of the time of the creation of the power, that is, the time of the donor's death in the case of a power created by a will or the time of execution of the deed in the case of a power created by a deed.¹ Where a general power is given to appoint either by deed or by will, the rule against perpetuities is applied as of the time of the exercise of the power.² Where, however, a general power is given to appoint by will only, there is a conflict of opinion.³ The English view reasons that so long as the power to appoint is general, it is the same as a general power of disposition by deed, for it is immaterial by what means or at what time it is made exercisable.⁴ The opposite view, held by the majority of the

¹ This is upon the theory that the donee of the power is acting merely under authority given by the donor, and if the estate could not be created by the donor himself, he cannot give it validity by delegating to another the power to create it. 1 TIFFANY, REAL PROPERTY 1113 (1920); GRAY, RULE AGAINST PERPETUITIES 434 (1915); Gray, "General Testamentary Powers and the Rule Against Perpetuities," 26 HARV. L. REV. 720 (1913).

² This is because a donee of such a power can appoint to himself and thus do everything that an owner can do; therefore, the land is under no restriction infringing the purpose of the rule against perpetuities and the rule is not applied. 1 TIFFANY, REAL PROPERTY 1113, 1114 (1920); GRAY, RULE AGAINST PERPETUITIES 435 (1915).

³ 1 TIFFANY, REAL PROPERTY 1114 (1920).

⁴ *Rous v. Jackson*, 29 Ch. D. 521, 54 L. J. (Ch.) 732 (1885). The earlier view was to the contrary. In *re Powell's Trusts*, 39 L. J. (Ch.) 188 (1869).

In support of the present view Professor Kales argues, too logically it seems, that at the moment of death the holder of a power to appoint only by will has all of the

American courts,⁵ is that a power to appoint by will alone is not "equivalent to absolute ownership"⁶ so as to retard the application of the rule until the exercise of the power, but rather it is a restricted power which must be included within the period tested by the rule.⁷ Since the power to appoint by will only does prevent alienation throughout the donee's life, and in so doing it ties up the estate for that period, it seems more consistent with the purpose of the rule against perpetuities to include this period within that permitted by the rule, as was done in the principal case, by applying the test of the rule from the time of the creation of the power.

R. E. W.

powers of disposition held under the same circumstances by the holder of a power to appoint by either will or deed, that therefore, he is to be treated the same, and that this means that the rule is applied to estates created by such exercise of the power as computed from the date of its exercise. Kales, "General Powers and the Rule Against Perpetuities," 26 HARV. L. REV. 64 (1912).

This view appears wholly to lose sight of the purpose of the rule against perpetuities, for it ignores in its computation of the period of the restriction the duration of the donee's life during which time the estate is inalienable and, in effect, it results in lengthening the period of permissible restriction by the life of the donee of the power.

⁵ GRAY, RULE AGAINST PERPETUITIES 434 (1915). See cases, *infra*, note 7.

⁶ *Genet v. Hunt*, 113 N. Y. 158, 21 N. E. 91 (1889).

⁷ *Genet v. Hunt*, 113 N. Y. 158, 21 N. E. 91 (1889); *Minot v. Paine*, 230 Mass. 514, 120 N. E. 167 (1918); *Hawkins v. Ghent*, 154 Md. 261, 140 A. 212 (1928); *Equitable Trust Co. v. Snader*, 17 Del. Ch. 203, 151 A. 712 (1930); *In re Cassidy's Estate*, 144 Misc. 588, 259 N. Y. S. 67 (1932); *Eager v. McCoy*, 143 Tenn. 693, 228 S. W. 709 (1921); *In re Palmer's Estate*, 154 Misc. 705, 277 N. Y. S. 816 (1935). *Contra*: *Miller v. Douglass*, 192 Wis. 486, 213 N. W. 320 (1927).

In support of the majority view Professor Gray points out that in the one case the donor intends the donee to have in substance the fee, while in the other case, he specifically intends that the donee shall never have it; such intent is more similar to the intent in the cases of special powers where the alienation of the estate, being admittedly restricted, comes within the scope of the rule against perpetuities. Professor Gray notes also that, "The idea of a practically absolute ownership which does not arise until the owner's death involves a contradiction of terms." Gray, "General Testamentary Powers and the Rule against Perpetuities," 26 HARV. L. REV. 720 (1913); GRAY, RULE AGAINST PERPETUITIES 434 (1915).