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THE RULE AGAINST PERPETUITIES AS IT RELATES TO POWERS OF APPOINTMENT

Lawrence Berger*

Over the past twenty-five years, much has been written about the *raison d'être* of the Rule Against Perpetuities.¹ During this period, the theories underlying and the justifications posited for the Rule have changed considerably, while some of the older notions concerning it have been partially discredited. The purpose of this article is to utilize some of these newly arrived at basics and apply them specifically to the problem of the Rule as it relates to powers of appointment. In the course of the discussion, a cursory review of the history of the Rule and its policy progenitors is undertaken for background purposes; and in addition, the newer thinking about the Rule is broadly outlined. Finally, an evaluation of the legal principles in light of these newer policy justifications for the Rule is attempted.

I. THE BASIC STRUGGLE AND ITS RELATION TO THE RULE

The history of English real property law is marked by a struggle between the landowner, who was constantly seeking to perpetuate control over his property far beyond his own death, and the courts who in opposition tried to keep these activities within reasonable bounds.² It is thought that originally a conveyance "to A and his heirs" created an interest in A's heirs which could not be barred by A without the consent of his heir apparent. In 1225, the court changed this rule in *D' Arundel's Case*³ so that the heirs could no longer prevent an alienation.

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¹ See, e.g., RESTATEMENT, PROPERTY, Introductory Note 2129-33 (1944); 3 POWELL, REAL PROPERTY § 762 (1952); MORRIS & LEACH, THE RULE AGAINST PERPETUITIES 13-18 (1956); Fraser, *The Rationale of the Rule Against Perpetuities*, 6 MINN. L. REV. 560 (1922); Simes, *The Policy Against Perpetuities*, 103 U. PA. L. REV. 707 (1955); Schuyler, *Should the Rule Against Perpetuities Discard Its Vest*, 56 MICH. L. REV. 683, 688 (1958).

² 7 HOLDSWORTH, HISTORY OF ENGLISH LAW 193 (1926); RESTATEMENT, PROPERTY, Introductory Note 2123-29 (1944).

³ BRACTON'S NOTE BOOK 1054.

This was probably the first judicial strike at the fettering of property. The conveyancers then started using the device of a gift "to A and the heirs of his body" to assure that A's heirs took. The eventual reply of the courts was that such a limitation created a fee simple conditional and that after A had issue born, he could convey a fee simple absolute.⁴ It was then that Parliament interjected itself into the conflict on the side of the landowner and the fettering of property, doubtless because the landowning barons controlled Parliament. In 1285, it enacted the Statute De Donis⁵ which provided that in such a conveyance the heirs could recover the property from the ancestor's grantee after the ancestor's death; if there were no heirs of the body or there were an indefinite failure of issue, the estate reverted to the grantor in fee. This, of course, was the beginning of the estate fee tail.

Around 200 years later, the courts again showed their penchant for freedom from fettered alienability in *Taltarum's Case*,⁶ in which it was held that a tenant in tail could bar the entail by common recovery and thus effectively convey an estate in fee simple absolute.⁷

The history of the Rule Against Perpetuities is marked by a similar struggle. The holdings in two early seventeenth century cases, *Mannings Case*⁸ and *Pells v. Brown*,⁹ precipitated the invention and evolution of the Rule. These cases held that the executory interest, the new type of future interest permitted at law by the Statute of Uses, was indestructible. This ran counter to the court's long standing policy fostering alienability and was in substantial opposition to the rule of destructibility of contingent remainders.¹⁰ It should be noted that had it been decided

⁴ 3 HOLDSWORTH, HISTORY OF ENGLISH LAW 112, 113 (1923).

⁵ 13 Edw. 1, c. 1.

⁶ Y.B. 12 Edw. IV, 19 (1472).

⁷ Other areas of similar conflict could be mentioned, e.g., the Rule in Shelley's Case and the Doctrine of Worthier Title. See RESTATEMENT, PROPERTY, Introductory Note 2123-29 (1944).

⁸ 8 Co. Rep. 94b, 77 Eng. Rep. 618 (K.B. 1609).

⁹ Cro. Jac. 590, 79 Eng. Rep. 504 (K.B. 1620).

¹⁰ This is the rule that says that a contingent remainder is destroyed unless it vests at or before the termination of the particular freehold estate preceding it. Thus in the gift from A to B for life, remainder to C if he survives D, C's remainder is destroyed if D is still alive when B dies. Contingent remainders could also be artificially destroyed by forfeiture of the preceding life estate or merger of the life estate in the next vested estate of freehold. See SIMES & SMITH, FUTURE INTERESTS §§ 193-209 (1956).

that executory interests were similarly destructible, the Rule Against Perpetuities probably would never have evolved. It was the presence of these judicially created and potentially infinite fetterings that pushed the courts toward the reasonable limitation of future interests. In 1685, this process began with the *Duke of Norfolk's Case*,¹¹ the first decision in which the courts started groping toward the Rule Against Perpetuities. The basic outlines of the Rule were perhaps not complete for almost 200 years, and the evolution continues to this day with many suggestions being currently advanced for improvement.¹²

II. THE RATIONALE OF THE RULE

Of more immediate concern in this article is the change in the way the Rule has been justified through the years. Historically, the Rule has been rationalized by courts and text writers as an effectuation of the broad social policy in favor of the productive use of property.¹³ It was thought that property could be kept productive if it were freely alienable, and that inalienable property was likely to be unproductive. Professor Simes in his recent writings¹⁴ traces this development, admitting the validity of these theories for the period when they were formulated but rejecting them for modern application. He states three basic reasons why alienability for productivity is no longer applicable as a rationale in the United States.

[F]irst . . . future interests are nearly always equitable interests in trusts and the trustees, in most cases, will have, either by the terms of the trust or by law, a power to sell and reinvest; second, if the future interests are in corporate stock or in corporate or government bonds, the corporation will make the property productive, or the governmental authority will use the borrowed capital for social benefit . . . [third], by the weight of authority, in America,

¹¹ 3 Ch. Cas. 1, 22 Eng. Rep. 931 (Ch. 1682).

¹² For an excellent summary of most of the criticisms and suggestions for improvement see Schuyler, *Should The Rule Against Perpetuities Discard Its Vest*, 56 MICH. L. REV. 683, 693-726 (1958). For more detailed criticisms the following materials are indispensable: MORRIS & LEACH, *THE RULE AGAINST PERPETUITIES* (1956); SIMES, *PUBLIC POLICY AND THE DEAD HAND* (1955); Leach, *Perpetuities: Staying the Slaughter of the Innocents*, 68 L.Q. REV. 35 (1952); Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721 (1952); Simes, *Is the Rule Against Perpetuities Doomed*, 52 MICH. L. REV. 179 (1953).

¹³ See GRAY, *THE RULE AGAINST PERPETUITIES* § 4 (4th ed. 1942); SIMES, *PUBLIC POLICY AND THE DEAD HAND* 33-36 (1955).

¹⁴ SIMES, *PUBLIC POLICY AND THE DEAD HAND* (1955); Simes, *The Policy Against Perpetuities*, 103 U. PA. L. REV. 707 (1955).

if there are legal future interests in land affected with a future interest and an emergency has arisen whereby the property is likely to be lost because it is unproductive, the court can order a sale of the land and a productive investment of the proceeds by a trustee¹⁵

If alienability to secure productivity is its sole purpose, "then we have reached a point when the Rule should be completely abolished."¹⁶ But this is not the sole purpose of the Rule at all. First it "strikes a fair balance between the desires of members of the present generation, and similar desires of succeeding generations, to do what they wish with the property which they enjoy;"¹⁷ and second, it serves the socially desirable end "that the wealth of the world be controlled by its living members and not by the dead."¹⁸

Both of these arguments, it would seem, go to the same basic idea; that is, the avoidance of excessive control of property by the dead. It might well be asked what policy or policies underlie that principle. This is a question which is not so easily disposed of other than by the intuitive and most unsatisfactory circular answer that it just is not sound policy to allow the dead an unlimited right to control the property of the living. Simes might pose other answers as well: (1) that properties subject to future interests are mostly in trust funds and that a trustee is not generally allowed to invest in risk capital, the backbone of our economic expansion; (2) that trust funds cannot be used for consumption but only for capital investment, and (3) that a condition attached to a gift can unreasonably control human conduct into the indefinite future.¹⁹ Perhaps I might pose a fourth: that the dead hand cannot possibly predict far into the future, especially in this era of rapidly advancing technology, and to allow property to be bound to certain people indefinitely might result in the inefficient utilization of the wealth of society in ways that we cannot even foretell as yet.

Whatever formal justifications can be posed, it is clear that there is a consensus among most writers that the dead hand

¹⁵ SIMES, PUBLIC POLICY AND THE DEAD HAND 53 (1955). Simes states that two additional factors are present in England: (1) The Law of Property Act of 1925 which gives some persons the power to sell a legal fee even though there are contingent interests outstanding and (2) the English Town and Country Planning Act of 1947, which provides that private unproductive land can be taken by compulsory process for more productive use.

¹⁶ *Ibid.*

¹⁷ SIMES, *op. cit. supra* note 15, at 58.

¹⁸ SIMES, *op. cit. supra* note 15, at 59.

¹⁹ SIMES, *op. cit. supra* note 15, at 60-62.

should not rule forever over the disposition of property.²⁰ It is submitted then, that the legal rules relating to perpetuities problems should be in consonance with this basic policy consideration.²¹ An attempt to see whether this is true in the powers of appointment area follows.

III. THE LEGAL RULES IN GENERAL

There are at least three different areas in which the Rule Against Perpetuities is said to apply to the power of appointment: first and most important, where the interest created by the exercise of the power may not vest within the period of the Rule; second, where the power itself may be exercised outside the period of the Rule, and third, where the exercise of the power is subject to a condition precedent which may occur outside the period of the Rule. The second and third areas involve the application of the Rule Against Perpetuities to the power itself, and the first involves the application of the Rule to the interest created by the exercise of the power. The above areas will be considered seriatim.

²⁰ RESTATEMENT, PROPERTY, Introductory Note 2129-33 (1944); 5 POWELL, REAL PROPERTY § 762 (1956); MORRIS & LEACH, THE RULE AGAINST PERPETUITIES 16 (1956).

Professors Morris and Leach in their work opine that the Rule can best be justified on the theory that it strikes a balance between the desires of present and future generations to control property.

The Restatement, *supra*, suggests another justification for the Rule in that it aids the competitive struggle by preventing persons less fit from retaining property disproportionate to their skills.

Of course there is a vast literature written by economists of the early twentieth century and earlier philosophers on whether there should be testation at all. See, *e.g.*, READ, THE ABOLITION OF INHERITANCE (1919); CARVER, *The Question of Inheritance*, in ESSAYS IN SOCIAL JUSTICE 304-23 (1915); SEDGWICK, FREEDOM OF BEQUEST, quoted in WIGMORE & KOCOUREK, RATIONAL BASIS OF LEGAL INSTITUTIONS 445 (1923); McMurray, *Liberty of Testation and Some Modern Limitations Thereon*, 14 ILL. L. REV. 96 (1920). The last article cited contains an excellent summary of the views of such assorted thinkers as Maine, Grotius, Pufendorf, Blackstone, Mirabeau and Plato.

²¹ It is clear that dead hand control is almost eliminated by making property fully alienable in the hands of one living person and the law is equally clear that if property is so alienable there is no violation of the Rule. RESTATEMENT, PROPERTY § 363 (1944); 5 POWELL, REAL PROPERTY § 767 nn.32-41 (1956); SIMES & SMITH, FUTURE INTERESTS §§ 1249-55 (1956). See also Fraser, *The Rationale of the Rule Against Perpetuities*, 6 MINN. L. REV. 560 (1922).

A. REMOTENESS OF THE APPOINTED INTEREST—SPECIAL AND GENERAL TESTAMENTARY POWERS

Generally, no interest created by the exercise of a valid²² special or general testamentary power is good unless it must vest, if at all, not later than twenty-one years after some life in being at the time of the creation of the power.²³ Circumstances may be viewed as of the time of the exercise of the power, however, to determine whether an appointment is void under the Rule.²⁴ Thus, if A devises property to B for life, remainder to such relatives of B as B by deed or will appoints, and B appoints by deed to his child C (unborn at A's death) for life, remainder to C's first son (who is as yet unborn), the remainder to C's first son is void. It is void because C was not alive at A's death and the interest in C's first son, therefore, may not vest within twenty-one years after the death of B, who is the life in being. However, if C's first son were already born at the time of the appointment, his remainder would be good, because even though the period of the Rule is counted from the creation of the power (at A's death), the actual circumstances at the time of the appointment are looked to, and, in this case, the interest of C's first son vested at the time of the appointment.

The rule that circumstances are viewed as of the time of the appointment is, perhaps, in opposition to the basic doctrine of the Rule Against Perpetuities, of looking not to what has happened *after* the creation of the interest, but only to what may happen viewed *at the time* of the creation of the interest. If the latter were the rule, then all general, and most special, powers would be void because a remote appointment might possibly be made within the terms of the power granted. It makes eminently good sense to "wait and see" what appointment is made and consider the actual circumstances that exist at that time. This was the rule long before Professor Leach proposed that the "wait and

²² The word "valid" as used here means valid under the Rule as applied to the power itself. See discussion at note 44 *infra*.

²³ Special Powers: *In re Boyd's Estate*, 199 Pa. 487, 49 Atl. 297 (1901); *Graham v. Whitridge*, 99 Md. 248, 57 Atl. 609, 58 Atl. 36 (1904). GRAY, *RULE AGAINST PERPETUITIES* §§ 514-22 (4th ed. 1942).

General testamentary powers: *Minot v. Paine*, 230 Mass. 514, 120 N.E. 167, 1 A.L.R. 365 (1918); *Gambrill v. Gambrill*, 122 Md. 563, 89 Atl. 1094 (1914); SIMES & SMITH, *FUTURE INTERESTS* § 1275 n.89 (1956) and cases therein cited.

²⁴ *Marx v. Rice*, 3 N.J. Super. 581, 67 A.2d 918 (App. Div. 1949); 6 *AMERICA LAW OF PROPERTY* § 24.35 (Casner ed. 1952); SIMES & SMITH, *FUTURE INTERESTS* § 1274 n.85 (1956) and cases therein cited.

see" concept be extended to Rule Against Perpetuities problems generally.²⁵

B. REMOTENESS OF THE APPOINTED INTEREST—GENERAL POWER PRESENTLY EXERCISABLE

No interest created by the exercise of a valid general power presently exercisable is good unless it must vest, if at all, not later than twenty-one years after some life in being *at the time of the appointment*.²⁶ Thus if A devises property to B for life, remainder to whom B appoints by deed or will, and B appoints by deed to his son C (unborn at A's death) for life, remainder to C's first son, the remainder to C's first son is valid. It is valid because in determining the validity of an interest created by the exercise of a general power presently exercisable, the period of the Rule Against Perpetuities is counted from the time of the exercise of the power, and at the time of the exercise C was a life in being. This, of course, is in contrast to the Rule in relation to special and general testamentary powers where the period is computed from the time of the creation of the power.²⁷

The significant distinction is between general powers presently exercisable and all other powers, of which much has been written. The basic lines of the argument were laid down about fifty years ago in a well known debate between Professors John Chipman Gray of Harvard and Albert M. Kales of Northwestern.²⁸ Gray's position basically was that the key question in all cases is whether the donee of the power is "practically the owner" of the property. If he is, then the period of the Rule should be computed from the time of the exercise of the power. Gray went on to say that the donee of a general power presently exercisable is "practically the owner," but the donee of a general testamentary power is not.

[W]hen he [the donor] gives a testamentary power, he distinctly means that the donee shall have only a delegated authority; he does not mean at any time, or on the performance of any condition, to make a gift to the donee himself. When there is a power by deed given, the creator of the power means that at some time or on some condition the donee shall have in substance the fee.

²⁵ See note 12 *supra*.

²⁶ *Mifflins' Appeal*, 121 Pa. 205, 15 Atl. 525, 1 L.R.A. 453 (1888); RESTATEMENT, PROPERTY § 391 (1944); SIMES & SMITH, FUTURE INTERESTS § 1274 (1956).

²⁷ See text accompanying note 23 *supra*.

²⁸ Kales, *General Powers and the Rule Against Perpetuities*, 26 HARV. L. REV. 64 (1912); Gray, *General Testamentary Powers and the Rule Against Perpetuities*, 26 HARV. L. REV. 720 (1913).

When a testamentary power is given, the creator as distinctly means that the donee shall never have the fee.²⁹

Professor Kales agreed that the test of "practically the owner" was the true one but disagreed on its application.

Mr. Gray insists that the donee is not "practically the owner; he cannot appoint to himself; he is, indeed, the only person to whom he cannot possibly appoint, for he must die before the transfer of the property can take place." When Mr. Gray says the donee cannot appoint to himself so as to enjoy the property during his life, we must agree with him. It follows inevitably that during the life of the donee he is not practically the owner. If this is what Mr. Gray means when he says that the donee is not "practically the owner," all must agree. But is that the important inquiry? Is it not essential to determine whether *at the moment of exercising* the general power the donee is practically the owner? For instance, if a donee were given a general power to appoint by deed or will when he reached thirty or married, it would be stupid to say that he was not practically the owner before he reached thirty or married, and, therefore, could not be practically the owner when he reached that age or married. . . . In short, our real inquiry must be, is the donee with a general power to appoint by will only practically the owner at the moment of his death.³⁰

Kales, in effect, went on to say that at the very instant of death there is only one incident of ownership, namely the power to dispose of the property. This incident the donee of a general testamentary power has. He is practically the owner of the property, therefore, and all general powers should be treated alike for the purpose of computing the period of the Rule.³¹

Since Gray and Kales explored the problem others have joined in, some on Gray's side,³² others following Professor Kales' position.³³ As a result, however, of Gray's writings and his tremendous influence in this area, most American courts classified the general testamentary power with the special power for the

²⁹ Gray, *supra* note 28, at 722.

³⁰ Kales, *supra* note 28, at 66-67.

³¹ *Ibid.*

³² Foulke, *Powers and the Rule Against Perpetuities*, 16 COLUM. L. REV. 537, 642 (1916); SIMES & SMITH, *FUTURE INTERESTS* § 1275 (1956); MORRIS & LEACH, *THE RULE AGAINST PERPETUITIES* 138-40 (1956).

³³ Gold, *General Testamentary Powers and the Rule Against Perpetuities*, 58 L.Q. REV. 400, 416 (1942); Thorndike, *General Powers and Perpetuities*, 27 HARV. L. REV. 705, 714 (1914); Bettner, *The Rule Against Perpetuities as Applied to Powers of Appointment*, 27 VA. L. REV. 149, 176-77 (1940); Droop, *Powers in Relation to the Rule Against Perpetuities*, 71 L.Q. REV. 242, 250 (1955).

purpose of computing the period of the Rule³⁴ though the English rule is the other way.³⁵

Professors Simes and Smith in their treatise justify Gray's position in a slightly different manner:

[F]rom a practical standpoint the position of the donee of a general power to appoint by will is very different from that of the donee of a power to appoint by deed. Wills are not, as a rule, commercial transactions. And the fact that a man has an unrestricted power to appoint property by will does not mean that he is likely to put the property on the market and sell it. The very fact that he is limited to a disposition by will means that he will probably dispose of it to members of his family or to charities by way of gift. The property, during the existence of this power, is, from a practical standpoint, removed from commerce. And it is proper, in determining remoteness, to count the period from the creation and not from the exercise of the power.³⁶

There are some criticisms that might be leveled at the Simes-Smith position. It would seem that the basic test proposed here—whether property is removed from commerce—smacks of the traditional rationale of the Rule Against Perpetuities, alienability for productivity, which Professor Simes himself so ably and convincingly refuted as a current *raison d'être* of the Rule.³⁷ It would, perhaps, have been more appropriate to analyze the problem from the point of view of the modern justification of the Rule, the freeing of property from the control of the dead hand.³⁸ An attempt to do so is made here through consideration of the following closely related fact situations.

(1) *The Fee Simple*. A devises Blackacre to (or bequeaths a fund in trust for) his son B and his heirs. B by will leaves the property to his son X for life, remainder to X's oldest surviving son.

³⁴ *Cleveland Trust Co. v. McQuade*, 106 Ohio App. 237, 142 N.E.2d 249 (1957); SIMES & SMITH, *FUTURE INTERESTS* § 1275 n.89 (1956) and cases therein cited. *Contra*, *Miller v. Douglas*, 192 Wis. 486, 213 N.W. 320 (1927).

³⁵ *Rous v. Jackson*, 29 Ch. D. 521, 52 L.T.R. (n.s.) 733 (1885).

³⁶ SIMES & SMITH, *FUTURE INTERESTS* § 1275, at 214 (1956).

³⁷ See text accompanying notes 14-16 *supra*.

³⁸ There is another but unimportant criticism that might be leveled as well. When a man has a testamentary power, it is not just "unlikely" that he will put the property on the market and sell it. Under American law it is well nigh impossible, for the cases say that contracts to exercise a testamentary power are unenforceable either by way of a suit for damages or for specific performance. *Northern Trust Co. v. Porter*, 368 Ill. 256, 13 N.E.2d 487 (1938); *RESTATEMENT, PROPERTY* § 340 (1940).

(2) *The General Power Presently Exercisable.* A devises Blackacre to (or bequeaths a fund in trust for) his son B for life, remainder as B appoints by deed or will and in default of appointment to Y and his heirs. B appoints to his son X (who was not alive at A's death) for life, remainder to X's oldest surviving son.

(3) *The General Testamentary Power.* A devises Blackacre to (or bequeaths a fund in trust for) his son B for life, remainder as B appoints by will and in default of appointment to Y and his heirs. B by will appoints to his son X (who was not alive at A's death) for life, remainder to X's oldest surviving son.

(4) *The Special Power.* A devises Blackacre to (or bequeaths a fund in trust for) his son B for life, remainder to such of B's relatives as B by deed or will (or by will) appoints and in default of appointment to Y and his heirs. B appoints to his son X (who was not alive at A's death) for life, remainder to X's oldest surviving son.

(5) *Immediate Creation of Remote Future Interest.* A devises Blackacre to (or bequeaths a fund in trust for) his son B for life, remainder to B's oldest surviving son for life, remainder to said son's oldest surviving son.

It is, of course, readily apparent that in each example A's grandson, and A's unascertained great grandson get the same interest—in the first four examples, by means of a two step process in which B plays a most crucial and indeed indispensable role, and in the last example, by means of a one step process in which A is the only effective agent. These examples run the gamut from the least possible to the most complete in attempted control by A of the future disposition of the property; and as a result, the law holds the gifts to the unascertained great grandson void in some and valid in other cases.

In example (1), A has given B the fee and B independently has tied the property up to his son and grandson, a process, needless to say, universally conceded to be unobjectionable from the point of view of the Rule Against Perpetuities.³⁹ In example (5), on the other hand, A has attempted independently to tie the property up so that neither his son nor grandson can effectively control it, and the fee goes to the unborn great grandson. The last interest purportedly given is void because B's oldest surviving son may not be a life in being at A's death.⁴⁰ In both cases A's great grandson gets the same interest and the property is in

³⁹ See MORRIS & LEACH, *THE RULE AGAINST PERPETUITIES* 2 (1956).

⁴⁰ GRAY, *RULE AGAINST PERPETUITIES* ch. VI (4th ed. 1942).

the family the same length of time. The objectionable feature in (5) is not that property is actually kept in the family for too long a time, but that the property is so limited that no living person can control it free of the dead hand within the period of the Rule.

In like manner, let us examine cases (2), (3) and (4). In (2), B has a life estate and a general power presently exercisable; he can appoint to himself at any time and thus become the owner in fee. Is it therefore correct to say that all elements of dead hand control have been eliminated? Not really, because if B chooses not to exercise the power at all, the property will pass to the taker in default, in accordance with A's original gift. Nevertheless, it is universally accepted that the validity of the gift is measured by counting from the time of exercise of the power on the theory that at any time B can make the property freely alienable, just by exercising the power.⁴¹ But it should be noted that if and until B does exercise the power, there is a measure of dead hand control over the disposition of the property which the courts say is irrelevant because of B's absolute power of disposition in the meantime.

In case (4), in which B has a life estate with a special power, the element of dead hand control is more evident. B cannot make the property his own and is confined to an appointment among a certain named class. From this, it can most convincingly be argued, and the law clearly is, that in such a situation the period of the Rule should be computed from A's death, that instant in time when the property is first fettered.⁴² The gift to X's unascertained son is therefore void.

The problem, as already noted, comes in case (3) where B has a life estate and a general testamentary power. To what extent has A released his after death hold upon the property? It is, of course, clear that he has released it to a lesser extent than in (2) and to a greater extent than in (4). The problem in (3) lies clearly in the difficult middle area. It has already been shown that there are times when some measure of dead hand control is deemed not to involve the running of the Rule Against Perpetuities; that is, in a case where one person has the power to make the property fully alienable. Here A has given B as much as he possibly could without actually giving B the means of obtaining the entire ownership. He has given B beneficial ownership for life and a power at death to dispose of the property completely

⁴¹ See note 26 *supra*.

⁴² See note 23 *supra*.

free of A's control of who gets the property and what interest can be given. At B's death, A's last restraining fetter is broken. For that reason, it would seem that Professor Kales' position is correct. Since the control of the dead hand has been effectively destroyed within the period of the Rule, there is no reason to count the period preceding that destruction as an objectionable fetter upon the property. The period of the Rule should be computed from the time of the exercise of the power, the time when the fetter is reapplied.

It might be asked whether the result would be different if B does not have a life estate but merely has a collateral testamentary power.⁴³ It would seem the result should be the same. In such a case the property would also be completely free of the dead hand at the time the power is exercised.

C. POSSIBLE EXERCISE OUTSIDE THE PERIOD OF THE RULE

Where a special or general testamentary power of appointment may be exercised outside the period of the Rule, the power is said to be void or incapable of effective exercise.⁴⁴ Thus, if A devises Blackacre to his son B (who has no children) for life, then to B's oldest surviving son for life, remainder as B's oldest surviving son should appoint by will, the power is bad because B's oldest surviving son may not be a life in being at A's death and B's son may exercise his testamentary power more than twenty-one years after B's death.

On the other hand, if the power is general and presently exercisable, it is good if it may be exercised within the period of

⁴³ "Where the donee of a power of appointment has no other interest in the thing with respect to which the power exists the power is said to be collateral." 5 AMERICAN LAW OF PROPERTY § 23.12, at 493 (Casner ed. 1952).

⁴⁴ *Webb v. Sadler*, L.R. 14 Eq. 533 (1872), L.R. 8 Ch. App. 419 (1873); RESTATEMENT, PROPERTY § 390(2) (1944); SIMES & SMITH, FUTURE INTERESTS § 1273 (1956).

Historically there has been some conflict as to whether a power that violates this rule is itself void or merely incapable of being effectively exercised. Professor Gray took the position that only the estate created by the exercise of the power was voided by the operation of the Rule. GRAY, RULE AGAINST PERPETUITIES § 474.1 (4th ed. 1942). But Gray's son disagreed. *Id.* § 479.2. The Restatement follows the argument of the elder Gray on the theory that the Rule operates only against future interests and a power is not a future interest. RESTATEMENT, PROPERTY § 390, comment b (1944). Professor Powell agrees. 5 POWELL, REAL PROPERTY § 786 (1956). On the other hand, many authorities take the position that the power itself is void. SIMES & SMITH, FUTURE INTERESTS §§ 1272-73 (1956); 6 AMERICAN LAW OF PROPERTY §§ 24.31-32 (Casner ed. 1952).

the Rule.⁴⁵ In the above example, then, the power, if changed to one presently exercisable would be good because it is possible for B's oldest son to exercise it within twenty-one years of B's death. It is clear also that when a power is given to a living natural person, the power may not violate the Rule because it cannot possibly be exercised outside the perpetuities period.⁴⁶

In this area, less has been written about the problem of the distinction between general powers presently exercisable and general testamentary powers than in the area of the remoteness of the appointment itself. But the principles are the same. If the questions in this area are one of degree, then the inquiry must be to the extent that dead hand control has been relaxed in the particular disposition involved. In the above example, is there any justification for saying, on the one hand that the general testamentary power is bad if it may be exercised outside the period of the Rule, but the general power presently exercisable is good if it may be exercised within the period? The justification often given is that in the case of the power presently exercisable the donee has the authority to make the property his own, and if he can do this within the period of the Rule, there is no fetter upon alienability or dead hand control and the policy of the Rule Against Perpetuities is not violated.⁴⁷ But this is not true, the argument runs, in the case of the general testamentary power because there the donee of the power cannot make the property his own and so terminate dead hand control. He cannot eliminate the dead hand until he dies exercising the testamentary power, and he may die outside the period of the Rule. And even if he happens to die within the period, this fact is not within his control. There is then no one person who can terminate all fetters upon alienability within the period of the Rule just by the exercise of his volition. Of course, it might be argued that it is within the donee's volition. At any time before the expiration of the period of the Rule he may opt to commit suicide and leave a will exercising the power. Realistically and practically viewed, this argument falls. Rare is the donee who would exercise this "option." During the period of the donee's life, then, it would seem that there is an objectionable fetter upon the property and the rule as generally enunciated is sound.

⁴⁵ *Bray v. Bree*, 2 Cl. & F. 453, 6 Eng. Rep. 1225 (1834); RESTATEMENT, PROPERTY § 390(1) (1944).

⁴⁶ See SIMES & SMITH, FUTURE INTERESTS § 1272 n.77 (1956) and cases therein cited.

⁴⁷ Gray, THE RULE AGAINST PERPETUITIES § 477 (4th ed. 1942).

D. POWER SUBJECT TO A CONDITION PRECEDENT

The text authorities almost universally accept the doctrine that if the exercise of a power is subject to a condition precedent which may not occur within the period of the Rule as counted from the creation of the power, the power is invalid or incapable of effective exercise.⁴⁸ This is true whether the power is general or special, testamentary or presently exercisable. For example, suppose A devises property in trust for B for life, remainder to B's first daughter (unborn at the time of A's death) for life, subject to a general power by deed or will in B's first daughter to be exercised only after her marriage. Such a power would be invalid because the marriage of B's first daughter might take place more than twenty-one years after the death of B, the life in being. As noted, this rule applies even to the general power presently exercisable. The reason for this is clear. Until the contingency occurs, there is no one person who can by the exercise of his volition terminate all fetters upon the property. In the case above, for example, B's daughter cannot free the property from the bonds created by A unless and until she marries. Her marriage is subject not only to the exercise of her own volition but also the acquiescing volition of a male. The power, therefore, would be void. The few cases on this subject seem to follow this view.⁴⁹

One limitation of this rule should be noted. If the power on condition precedent is given solely to a living natural person, the power would be valid because it must of necessity be exercised during the life of the donee of the power, the life in being.

IV. CONCLUSION

The Rule Against Perpetuities has as its basic purpose the elimination of dead hand control beyond a precisely measurable period. Perpetuities problems should, therefore, be approached from the point of view of determining whether there is an unbreakable dead hand control. The key to whether a power of appointment "tolls" the running of the Rule should be found by answering this question: Can that control be broken during the

⁴⁸ GRAY, *THE RULE AGAINST PERPETUITIES* § 474.3 (4th ed. 1942); SIMES & SMITH, *FUTURE INTERESTS* § 1272 (1956); 5 POWELL, *REAL PROPERTY* § 786 (1956); *RESTATEMENT, PROPERTY* § 390(1) (1944).

⁴⁹ See, e.g., *Morgan v. Gronow*, L.R. 16 Eq. 1, 28 L.T.R. (n.s.) 434 (1873).

period of the Rule? If it can, such control is not offensive to the Rule Against Perpetuities.⁵⁰

⁵⁰ The acceptance of this view would also change the Rule from one against remoteness of vesting in interest to a rule against remoteness of possession. For example take the gift from A to B for life, then to B's oldest surviving son for life, remainder to C in fee. Under present rules the gift to C is valid because it is vested though C (or his heirs) never may enjoy it within lives in being and twenty-one years. (In such a case, of course, it is probably C's heirs or devisees who will finally take).

But if the Rule is viewed as one proscribing dead hand control outside the period of the Rule then the gift to C would be void. The Rule then would require a certainty of possession within the period. Others have suggested the possibility of such an approach. See SIMES, *PUBLIC POLICY AND THE DEAD HAND* 80 (1955); Schuyler, *Should the Rule Against Perpetuities Discard Its Vest*, 56 *MICH. L. REV.* 683 (1958).