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Perpetuities - Powers of Appointment

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PERPETUITIES—Powers of Appointment—The Supreme Court of Rhode Island has held that, in determining the validity of an appointment under a general testamentary power of appointment under the Rule against Perpetuities, the period for vesting shall be calculated from the time of the exercise of the power.

Industrial Nat'l Bank v. Barrett, — R.I. —, 220 A.2d 517 (1966).

The donor died in 1959 and, under his will, conferred upon his wife a general testamentary power of appointment over the corpus of a trust[1] in which the wife had a life estate. In 1963 the wife died and under her will exercised the general testamentary power to the Industrial National Bank, in trust "to pay over the net income thereof to and for the use and benefit of my granddaughters, Alice C. Lathan and Evelyn M. Barrett . . . equally for and during the term of their natural lives, and upon the death of either of them, to pay over said net income to her issue, *per stirpes* and not *per capita*."[2] The trust was to terminate "twenty one (21) years after the death of the last survivor of the younger grandchild or issue of either grandchild of mine living at my death. . . ."[3] At the donor's death the two granddaughters and one great-grandchild were living. At donee's death six additional great-grandchildren were in being. The major question presented was the validity of the appointment made under the Common Law Rule against Perpetuities, the determination of which was dependent upon whether, for the purpose of the Rule, the period of vesting would be calculated from the time of the exercise of the power or from the time of its creation.[4] If the vesting of the appointment is measured from the creation it is invalid because the six additional great-grandchildren were not "in being" at the creation of the power. Under a certification to the court of a bill in equity for the construction of a will[5] the Supreme Court of Rhode Island took the other view and held the period for vesting shall be calculated from the time of the exercise of the general testamentary power in determining its validity under the Rule against Perpetuities.[6]

In taking this view the court is the first American court to do so by case

1. It was initially argued that the power conferred was in effect a general power of appointment exercisable during the lifetime of the donee. This was based on the provisions found in the eighth clause of donor's will directing trustee's to pay donee, who was also beneficiary for life, such principal as she should request *for her own comfort and support.* However, this argument was rejected. Industrial Nat'l Bank v. Barrett, — R.I. —, 220 A.2d 517, 520-22 (1966).

2. — R.I. at —, 220 A.2d at 520.

3. — R.I. at —, 220 A.2d at 520.

4. For the appointment to be valid the period had to be calculated from the power's exercise. In some situations the validity might be sustained even if the period were calculated from the creation of the power under the 'second look' doctrine. See 6 AMERICAN LAW OF PROPERTY § 24.35 (Casner ed. 1952). However, under the facts here the doctrine would not apply.

5. R.I. GEN. LAWS § 9-24-28 (1956).

6. — R.I. at —, 220 A.2d at 524.

law, at least with regard to the Common Law rule.[7] Generally the weight of authority is that the period of perpetuities begins to run at the creation of a general testamentary power.[8] This view is based upon the general rule that, as to powers of appointment generally, the validity is determined by calculating the period of perpetuities from the creation of the power.[9] The reason for this rule is that the exercise of the power relates back to the instrument creating the power and is considered the act of the donor.[10] However, where there is a general power to appoint by *deed or will* an exception is made and the period is measured from the exercise of the power.[11] The reason for such exception is that under a general power presently exercisable the donee is considered to hold the *equivalent* of ownership for the purposes of the Rule against Perpetuities and, therefore, when the power is exercised it is not considered to relate back to the instrument creating the power.[12] In American jurisdictions,[13] except those noted, such exception has not been extended to general testamentary powers.

But here the court takes the view that, when the general testamentary power is exercised, the donee is *at that time* the practical owner for the *purposes of the rule*, as he can appoint to anyone of his choice as well as to his own estate. There is no restraint on alienation because the donee's power is absolute.[14] Moreover, the court arrived at its conclusion because "it is in line with the trend to obviate the technical harshness of the rule against perpetuities and decide cases on the substance of things."[15]

7. Wisconsin has also adopted this rule by case law. See Miller v. Douglas, 192 Wis. 486, 213 N.W. 320 (1927). However, this applied not to the common law rule but to Wisconsin's statutory modification. See WIS. STAT. §§ 230.14-.15 (1965). For a discussion of the Wisconsin rule see 6 AMERICAN LAW OF PROPERTY, *op. cit. supra* note 4, §§ 25.54-.57.

Delaware has established by statute that the period begins to run at the time of the exercise as to *all* powers. DEL. CODE ANN. tit. 25, § 501 (1953).

8. See SIMES & SMITH, FUTURE INTERESTS § 1275, n.89 (1956, Supp. 1965) for citations.

9. See GRAY, THE RULE AGAINST PERPETUITIES, pt. 3 at 498 and § 514 (4th ed. 1942).

10. See 5 AMERICAN LAW OF PROPERTY § 23.3 (Casner ed. 1952).

11. See GRAY, *op. cit. supra* note 9, § 524.

12. See 6 AMERICAN LAW OF PROPERTY, *op. cit. supra* note 4, § 24.33. See also GRAY, *op. cit. supra* note 9, § 962 where it is stated that a general power presently exercisable is *"not really a power at all, but is a direct limitation in fee."* But see Gold, *General Testamentary Powers and the Rule against Perpetuities*, 58 LAW QUAR. REV. 400, 413 (1942) where the author states that the rationale of the special application of the rule to general powers is not based upon the similarity to property but rather to the freedom of disposition which they permit.

13. See SIMES & SMITH, *op. cit. supra* note 8, § 1275, n.89 for citations to English cases. The English view is the same as that reached by the Rhode Island Supreme Court, although for a short period it was the same as that of the majority of the American jurisdictions.

14. — R.I. at —, 220 A.2d at 524; see Kales, *General Powers and the Rule Against Perpetuities*, 26 HARV. L. REV. 64 (1912); Thorndike, *General Powers and Perpetuities*, 27 HARV. L. REV. 705 (1914).

15. — R.I. at —, 220 A.2d at 524 citing 6 AMERICAN LAW OF PROPERTY, *op. cit. supra* note 4, § 24.45 and RESTATEMENT, PROPERTY § 343 (1940).

The question which was considered is one which has presented a great deal of difficulty. It is argued that for the purposes of perpetuities the donee of a general testamentary power is not practically the owner. It is also argued that the "exception," *i.e.*, calculating the period for perpetuities from the time of exercise of the power, can be made only where there is a person who has the immediate right to become the absolute owner.[16] On the other hand, the view is taken that the issue of whether the donee is practically the owner is only important *at the moment of exercise* and that, in determining the validity of appointments made under a power *in respect to perpetuities*, the proper question is whether "he can do everything with reference to the property subject to the power that he could do if he were the owner."[17] The fact that the donee of a general testamentary power may never technically become the absolute owner because his death prevents it is irrelevant.

It may be true that a general power presently exercisable more closely approximates absolute ownership in that the donee may appoint more freely in *respect* of time.[18] However, "it is immaterial that the property is tied up during the donee's life—the Rule itself allows that much of a restraint upon alienation."[19] Therefore, the latter interpretation, *i.e.*, the "exception" extended to general testamentary powers, would seem to be the better view and this is the view taken by the court in *Industrial National Bank v. Barrett*.[20]

There is another consideration which makes the court's holding the more desirable result. Assume that A, the donor, gave B's first son, who was not in being at the creation of the power, a general power of appointment by deed or will which could not be exercised until 21 years after B's death. B has a son C who, when the necessary period elapsed, exercised the power and made appointments similar to those made in *Industrial Nat'l Bank*. The power is valid when created,[21] for the power "vests" within the period of perpetuities[22] and the validity of the appointments

16. GRAY, *op. cit. supra* note 9, § 526.2. See also § 952 where it is stated "When a testamentary power is given, the creator as distinctly means the donee shall never have the fee." The same arguments presented in §§ 948-69 of GRAY, *op. cit. supra* note 9 may also be found in Gray, *General Testamentary Powers and the Rule against Perpetuities*, 26 HARV. L. REV. 720 (1913).

17. Kales, *supra* note 14, at 67. See also Thorndike, *supra* note 14, at 717.

18. See 5 AMERICAN LAW OF PROPERTY, *op. cit. supra* note 10, § 23.4; RESTATEMENT, PROPERTY, pp. 1813-14 (1940).

19. Bettner, *The Rule against Perpetuities as applied to Powers of Appointment*, 27 VA. L. REV. 127, 149 (1940).

20. — R.I. at —, 220 A.2d at 524.

21. "If an instrument causes a general power presently exercisable to vest in the donee of the power within the period of perpetuities, the power is valid." 6 AMERICAN LAW OF PROPERTY, *op. cit. supra* note 4, § 24.31.

22. If the power created in the example were a general testamentary power and the appointments made under the power were the same, they would be invalid because the power

thereunder is determined from the date of exercise. But, under the majority rule, if B were the donee of a general testamentary power and he made the appointments in the same manner, the appointments thereunder are invalid if measured from the creation. But if one analyses the examples in a "restraint of alienation" context, it can be seen that where C is the donee the property is "tied up" for a longer period. This is so because the power *cannot* be *exercised* until 21 years after B's death. Where B is the donee, the power *must* be *exercised,* if at all, under B's will when he dies. Yet, the former is valid and the latter invalid under the majority rule although in the former the property cannot be "brought into the market" until a later period.[23] To so state is inconsistent and permits a scheme to be carried out by some words which cannot be done by others. "[T]here is serious objection to a rule, purporting to express a policy, which declares that this scheme can be carried out by some words and cannot be carried out by others."[24] Such objections can be made to the "majority view" here and it must be concluded that the holding of the court in *Industrial Nat'l Bank v. Barrett* answers such objections and is consistent with obviating the technical harshness of the rule.[25]

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TORTS—Governmental Immunity—The Pennsylvania Supreme Court refuses to abolish the doctrine of sovereign immunity.

Dillon v. York City School Dist., 422 Pa. 103, 220 A.2d 896 (1966).

Plaintiff, a minor, and her guardian brought suit against the defendant for injuries sustained in a fall on the school's icy steps. The trial court sustained a demurrer based on sovereign immunity from tort liability. On appeal the Pennsylvania Supreme Court, in affirming the lower court's order, held that it could not undertake piecemeal judicial reform of a

was invalid *when created.* C was not in being at the creation of the power and it is possible that C would live more than 21 years after the death of A and B and might not be able to exercise the power (he cannot until he dies) until such time. But this problem goes to the validity of a *power when created* and not appointments made under a valid power. See Kales, *supra* note 14, at 64-65.

23. See Thorndike, *supra* note 14, at 715.

24. 6 AMERICAN LAW OF PROPERTY, *op. cit. supra* note 4, § 24.9.

25. "The Rule persists in personifying itself to me as an elderly female clothed in the dress of a bygone period who obtrudes her personality into current affairs with burst of indecorous energy." Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror* 65 HARV. L. REV. 721, 725 (1952). By its decision, the Supreme Court of Rhode Island has taken a step in clothing the lady in more "modern garb."

See the above cited article generally for some proposed solutions to the problems created by the Rule against Perpetuities. However, it should be noted that although this article is cited in *Barrett*, — R.I. at —, 220 A.2d at 524, one of the problems *not* discussed in the article is that which was before the court.