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Effect of Power of Revocation Vesting Subsequent to Execution of Deed of Trust on Measuring Period of Perpetuities

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Comments and Casenotes

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Fitzpatrick v. Mercantile Safe Deposit and Trust Co.[1]

In 1876, H and W executed a deed of trust covering certain real and personal property to T in trust for W for life, with full power to appoint by will to or for the benefit of her children or her descendants, in such a manner as she should see fit. She also had the power to appoint any of the property she should wish to her present or any future husband, or if she should have no children or descendants living at her death, to appoint the property to whomever she desired. In default of appointment, it was provided that the property was to pass in trust for the benefit of her children, if any, per capita and the issue of any deceased child, per stirpes. Furthermore, in the event that the trustee, T, should die during the life of W, she was to have the power to appoint a new trustee or to revoke the trust and stand seized of all the property.

On July 24, 1895, T, died and thereafter, in accordance with her power, W appointed a new trustee, R, by a deed dated August 6, 1895. W died in 1924, leaving a will in which she, by reference to her power, in her residuary clause, appointed the trust property to R in trust to divide the income into four parts, one of which was to be paid to each of her four childhen respectively for life. Upon the death of her children, the trust, in respect to each child's portion, was to continue for twenty years at which time the corpus was to be distributed among her grandchildren. One of her children was *en ventre sa mere* at the time the original deed of trust was perfected; the remaining three were born after the execution of that deed but prior to the appointment of the second trustee in 1895. After the death of one of W's children, the appellee, as trustee under W's will, instituted suit for construction of the deed of trust.

[1] 220 Md. 534, 155 A. 2d 702 (1959).

The lower court determined that the secondary limitations were valid under the rule against perpetuities, the chancellor concluding that the period of perpetuities was measurable from the date of execution of the second deed. In affirming, the Court of Appeals reasoned that, since W had originally possessed a contingent right of revocation which became vested for a period of time, and the rule against perpetuities has no application to a trust which is subject to a power of revocation, the period of perpetuities had to be measured from the date of the second deed. Therefore, the conclusion was reached that, since the secondary limitations had to vest within a life in being (the children of W constituting measuring lives) and twenty-one years, they did not violate the rule against perpetuities.[2]

The instant case raises for the first time in Maryland or any other jurisdiction, so far as this writer has been able to find, the issue as to whether the period of perpetuities, with respect to the provisions of an inter vivos trust and an appointment made in accordance with a testamentary power granted by the deed of trust, should be measured from the date of expiration of a power, given to the initial life tenant, to either appoint a new trustee or to revoke the trust on the happening of a contingency, which occurred. In order to resolve this issue, it is necessary to discuss certain collateral questions: (1) what is the nature and purpose of the rule against perpetuities; (2) what is the legal effect of the rule upon powers of appointment; (3) from what point of time does the law require that an appointment made under a testamentary power of appointment be measured; and (4) is the rule with respect to ascertaining the point of commencement of the period of perpetuities any different when the power of appointment is granted by a revocable deed of trust?

The rule against perpetuities, as stated by Professor Gray, is that: "*No interest is good unless the condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest.*"[3] To this period

[2] Judge Henderson filed a dissent in which he agreed with the findings of Court except on the primary issue as to whether the fact that W possessed a power of revocation for a short period of time caused the date from which the period of perpetuities was to be measured to be the date of the second deed. See *infra*, *circa*, n. 39.

[3] GRAY, THE RULE AGAINST PERPETUITIES (4th ed. 1942) § 201. (Italics added.) This general definition of the rule was cited by the Maryland Court of Appeals in Vickery v. Maryland Trust Co., 188 Md. 178, 52 A. 2d 100 (1947); Fitzpatrick v. Mercantile-Safe Deposit and Trust Co., *supra*, n. 1.

the courts have added actual periods of gestation.[4] Thus, the permissible period of perpetuities may extend to an outside limit of twenty-one years plus actual periods of gestation beyond some life in being at the creation of the interest.

The rule is one of law and not one of construction, and applies equally to contingent legal and equitable future interests in both real and personal property.[5] Thus the rule is directed solely at interests which might vest too remotely, if at all, as distinguished from interests which have a long duration.[6] This point was stressed by the Court in *Safe Dep. & Tr. Co. v. Sheehan*,[7] wherein it said:

> "The object of the rule is to prevent the limitation of estates for future vesting upon contingencies which are not certain to happen within the period [of perpetuities]. * * * It relates to the commencement of future interests, and not to their duration, and it is therefore immaterial whether the estate limited is in fee, for life or for years, provided the event upon which the limitation depends is certain to occur within the period which the rule defines."[8]

The rule was developed for the purpose of preserving free alienation of property; basically it prevents property from being held *extra commercium* for lengthy periods of time.[9] In view of the purpose of the rule, it was held in

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[4] Perkins v. Iglehart, 183 Md. 520, 39 A. 2d 672 (1944); Ryan v. Ward, 192 Md. 342, 348, 64 A. 2d 258 (1949); Thellusson v. Woodford, 32 Eng. Rep. 1030 (1805). It is noted that the Court of Appeals has also referred to the additional period covering periods of gestation as "a fraction of a year", Barnum v. Barnum, 26 Md. 119, 169-172 (1867); Safe Dep. & Tr. Co. v. Sheehan, 169 Md. 93, 179 A. 536 (1935); and as "ten months", Ortman v. Dugan, 130 Md. 121, 100 A. 82 (1917); Hawkins v. Ghent, 154 Md. 261, 140 A. 212 (1928). Nonetheless, it is believed that the rule, as properly stated in Maryland includes only actual periods of gestation.

[5] Graham v. Whitridge, 99 Md. 248, 275, 57 A. 609 (1904); Hawkins v. Ghent, 154 Md. 264, 265, 140 A. 212 (1928); Safe Dep. & Tr. Co. v. Sheehan, 169 Md. 93, 179 A. 536 (1935); Fitzpatrick v. Merchantile-Safe Deposit and Trust Co., *supra*, n. 1. See also: Mercer v. Mercer, 230 N.C. 101, 52 S.E. 2d 229 (1949); McEwen v. Enoch, 167 Kan. 119, 204 P. 2d 736 (1949); St. Louis Union Trust Co. v. Kelley, 355 Mo. 924, 199 S.W. 2d 344 (1947).

[6] Curtis v. Maryland Baptist Ass'n., 176 Md. 430, 5 A. 2d 836, 121 A.L.R. 1516 (1915); Salisbury v. Salisbury, 92 Kan. 644, 141 P. 173 (1914); Camden Safe Deposit & Trust Co. v. Scott, 121 N.J. Eq. 366, 189 A. 653 (1937). See also discussion in Bowerman v. Taylor, 126 Md. 203, 94 A. 652 (1915); Ortman v. Dugan, *supra*, n. 4.

[7] 169 Md. 93, 179 A. 536 (1935).

[8] *Ibid.*, 106.

[9] Hollander v. Central Metal Co., 109 Md. 131, 71 A. 442 (1908); Ryan v. Ward, 192 Md. 342, 64 A. 2d 258 (1949); Safe Dep. & Tr. Co. v.

Hollander v. Central Metal Co.[10] that a covenant by the lessor, his heirs or assigns for the redemption of a ground rent under a 99 year lease was not open to any of the objections against perpetuities, even though it might not be exercised within the period set out by the rule. In so holding, the Court said:

> "Property is not thereby placed *extra commercium*. On the contrary, these leasehold interests devolve upon the personal representatives of the owner, are in terms made assignable, and they, as well as the ownerships in fee under the denomination of 'ground rents', are subjects of daily transfer, and are constantly sought for a safe investment of capital."[11]

In applying the rule against perpetuities to powers of appointment, two basic problems arise: first, it must be ascertained whether the power itself is valid; and second, whether the exercise of the power is valid. In order to properly analyze these problems it is necessary to distinguish between general and special powers. A power is said to be general when there are no restrictions placed upon its exercise, nor as to the persons in whose favor the power is to be exercised.[12] Under the view taken by most courts, the donee of a general power is entitled to appoint the property to anyone including himself and his creditors. In Maryland, however, a general power is restricted in that the donee is not permitted to appoint to himself or his creditors, unless expressly given such power by the donor.[13] On the other hand, a special power is a power which is restricted as to the person or persons to whom an appointment can be made.[14] Thus, if the donee is

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Sheehan, *supra*, n. 7; GRAY, *op. cit. supra*, n. 2, §§ 2, 2.1; SIMES AND SMITH, FUTURE INTERESTS (2d ed. 1956) § 1222; Jones, *The Rule Against Perpetuities As Applied To Powers Of Appointments In Maryland*, 18 Md. L. Rev. 93, 108 (1958).

[10] 109 Md. 131, 71 A. 442 (1908).

[11] *Ibid.*, 159, quoting from Banks v. Haskie, 45 Md. 207 (1876).

[12] Lamkin v. Safe Deposit & Trust Co., 192 Md. 472, 479, 64 A. 2d 704 (1949); Henderson v. Rogan, 159 F. 2d 855 (9th Cir. 1947); In re Rowland's Estate, 241 P. 2d 781, 73 Ariz. 337 (1952); Clauson v. Vaughn, 147 F. 2d 84 (1st Cir. 1945); O'Hara v. O'Hara, 185 Md. 321, 44 A. 2d 813, 163 A.L.R. 1444 (1946); SIMES AND SMITH, *op. cit. supra*, n. 9, § 875; 3 RESTATEMENT, PROPERTY (1940) § 320; Jones, *op. cit. supra*, n. 9, 94.

[13] Balls v. Dampman, 69 Md. 390, 16 A. 16 (1888); Connor v. O'Hara, 188 Md. 527, 53 A. 2d 33 (1947); Lamkin v. Safe Deposit & Trust Co., *ibid.*, Jones, *op. cit. supra*, n. 9, 94-95; Note, *Rights of Creditors Under a Testamentary General Power of Appointment*, 4 Md. L. Rev. 297 (1940).

[14] See discussion in O'Hara v. O'Hara, 184 Md. 321, 44 A. 2d 813, 163 A.L.R. 1444 (1946); Fitzpatrick v. Mercantile-Safe Deposit and Trust

restricted in making his appointment to a limited group of persons, not including himself, the power is special. Therefore, in the principal case, W had both a special and a general power, since she had the power to appoint only to her children and her present or any future husband, and in addition, in the event that she had no children or descendants to anyone whomever. The first power was clearly special, but the latter, although contingent upon a failure of issue, was general. It is also important, at this point, to make a distinction between testamentary powers and powers presently exercisable. A power is testamentary if it can be exercised only by will.[15] On the other hand, if it can be exercised by deed it is a power presently exercisable.[16] Both general and special powers may be either testamentary or presently exercisable. In the present case both of W's powers of appointment were testamentary.

Regardless of whether the power be general or special it must vest in the donee within the period of perpetuities. If it does not, it is void.[17] As long as a general power presently exercisable vests in the donee within the period, it is valid.[18] However, a special power or a testamentary power (whether general or special) must not only vest but must also be exercised within the period.[19] Thus, a testa-

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Co., 220 Md. 532, 155 A. 2d 702, 706 (1959); it is arguable in Maryland that a general power is actually a special power. For some purposes it is so treated while for others it is treated as an actual general power. *Cf.* Balls v. Dampman, *ibid*, denying the donee of a general testamentary power the right to devise the subject matter for payment of her debts, with Lamkin v. Safe Deposit & Trust Co., *ibid*, where the normal rules were applied to a creation of a new power by the exercise of a general testamentary power.

[15] SIMES AND SMITH, *op. cit. supra*, n. 9, § 874; 3 RESTATEMENT, PROPERTY (1940) § 321; Jones, *op. cit. supra*, n. 9, 95.

[16] *Ibid.*

[17] Levenson v. Manly, 119 Md. 517, 87 A. 261 (1913); SIMES AND SMITH, *op. cit. supra*, n. 9, § 1272; 4 RESTATEMENT, PROPERTY (1944) § 390; Leach, *Perpetuities in a Nutshell*, 51 Harv. L. Rev. 638, 651-653 (1938); Jones, *op. cit. supra*, n. 9, 96; Fitzpatrick v. Mercantile-Safe Deposit and Trust Co., *supra*, n. 14, 706, ". . . if a power can be exercised at a time beyond the limit of the rule it is bad. . . ."; Burlington County Trust Co. v. Di Castelcicala, 2 N.J. 214, 66 A. 2d 164 (1949).

[18] Mifflin's Appeal, 121 Pa. St. 205, 15 A. 525 (1888); *cf.* Ortman v. Dugan 130 Md. 121, 100 A. 82 (1917); SIMES AND SMITH, *op. cit. supra*, n. 9, § 1273; 4 RESTATEMENT, PROPERTY (1944) § 390(1); Jones, *The Rule Against Perpetuities As Applied To Powers Of Appointment in Maryland*, 18 Md. L. Rev. 93, 97 (1958); Leach, *op. cit. supra*, n. 17, 653.

[19] Lamkin v. Safe Deposit & Trust Co., *supra*, n. 12; SIMES AND SMITH, *op. cit. supra*, n. 9, § 1273; 4 RESTATEMENT, PROPERTY (1944) § 390 (2); Jones, *loc. cit. supra*, n. 18; Leach, *op. cit. supra*, n. 17, 652. It is noted that there can be no objection to a power granted to a donee who is *in esse* at the creation of the power. See: Collins and Bernard v. Foley, 63 Md. 158 (1884).

mentary power granted to a person not *in esse* when the power was created is necessarily void. In the principal case the testamentary power given to W was valid, since she was *in esse* when the deed granting her the power was executed and it could only be exercised in her lifetime.

The second question, whether the exercise of the power was valid, is more difficult to answer. At the outset, one must understand the underlying legal theories with relation to the exercise of a power. Under the law the property, over which one has been given a power of appointment, is considered to be that of the donor, or of his estate, until the power is exercised; and the exercise of the power is held to pass the property directly from the donor to the appointee.[20] Conversely, the appointment is considered to relate back to the donor, and as a result is to be read into the instrument creating the power.[21] What might be considered an exception relates to general powers presently exercisable. The courts have expressed the view that, since a donee of such a power has virtually as much control over the property as he has over his own and can appoint to himself or his creditors, for the purpose of the rule against perpetuities, the exercise of the power is not to be read back into the instrument creating the power.[22] Essentially the concept is that the property is readily transferable by the donee at all times either by making a direct appointment or by appointing to himself and thereafter alienating it for his own benefit. Therefore, it is not held *extra commercium,* and is not subject to the rule against perpetuities. On the other hand, property subject to special power or a testamentary power (whether general or special) is held *extra commercium.* The limitations placed on a special

[20] Connor v. O'Hara, 188 Md. 527, 53 A. 2d 33 (1947); Lamkin v. Safe Deposit & Trust Co., 192 Md. 472, 64 A. 2d 704 (1949); Pearce, et al. v. Van Lear, 5 Md. 85 (1853); Ray v. Pung, 106 Eng. Rep. 1296 (1822); 3 RESTATEMENT, PROPERTY (1940) § 318 (1), comment b.

[21] Graham v. Whitridge, 99 Md. 248, 275, 57 A. 609 (1904); Pearce et al. v. Van Lear, *ibid.*, 89; Commonwealth v. William's Ex'rs., 13 Pa. St. 29 (1850); Connor v. O'Hara, *ibid;* GRAY, THE RULE AGAINST PERPETUITIES (4th ed. 1942) §§ 514, 515, 525, 526; SIMES AND SMITH, FUTURE INTERESTS (2d ed. 1956) §§ 1274, 1275; 4 RESTATEMENT, PROPERTY (1944) § 392; Jones, *op. cit. supra,* n. 18, 101.

[22] SIMES AND SMITH, *ibid.*, § 1274; 4 RESTATEMENT, PROPERTY (1944) § 391; GRAY, *op. cit. supra,* n. 21, § 524; Jones, *loc. cit. supra,* n. 18. It is noted that in Maryland the donee of a general power is incapable of appointing to himself, see *supra,* n. 13. Therefore, it is less arguable that he has power akin to ownership. However, the Maryland Court by its holding in Ortman v. Dugan, *supra,* n. 18 has implied acceptance of the view that the limitations created under a general power presently exercisable are to be measured from the termination of the power. See also discussion in Collins and Bernard v. Foley, *supra,* n. 19, 162-3.

power prevent the property from being freely alienable, while property subject to a testamentary power is completely withdrawn from commerce during the life of the donee, since the law forbids an inter vivos execution or contract for later execution of such a power.[23] Therefore, the rule that an appointment is to be read back into the instrument creating the power is applicable to special or testamentary powers. Following this concept, the courts have universally held that the period of perpetuities with relation to a special or testamentary power is to be measured from the date of execution of the instrument creating the power. Thus, if there were no additional factors in the present case, the appointment made by W in her will would have been void with respect to the secondary limitations. Her provisions, for the property to be held in trust for the benefit of her children for life and thereafter for the trust to continue for twenty years after which time the corpus was to be distributed among her grandchildren or their descendants, would have to be added to the life estate given to her under the deed of trust. Since her children, with the exception of one which was *en ventre sa mere,* were not in being when the original deed of trust was executed, her life would be taken as the measuring life, and the secondary limitations would not necessarily vest within twenty-one years after her death.[24] Therefore, those limitations would be void.

The question then arises whether the fact that W, for a period of time, had an absolute power to revoke the trust, affects the validity of the secondary limitations. The rule against perpetuities applies to contingent beneficial interests in a trust as well as to contingent legal interests.[25] Therefore, the beneficial interests or gift over following

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[23] Wilks v. Burns, 60 Md. 64, 73 (1883); O'Hara v. O'Hara, 185 Md. 321, 324, 44 A. 2d 813 (1945); Palmer v. Loche, L.R. 15 Ch. D. 294 (Eng. 1880); Farmer's Loan & Trust Co. v. Mortimer, 219 N.Y. 290, 114 N.E. 389, 390 (1916); 4 RESTATEMENT, PROPERTY (1944) § 339, 340. See Lamkin v. Safe Deposit & Trust Co., 192 Md. 472, 479, 64 A. 2d 704 (1949) ". . . the power must be exercised in the manner directed, that is, if the grantor says it shall be exercised by will, it cannot be exercised by deed."

[24] Since the donee split the trust into four parts for the separate benefit of each of her children, the gift over following the life estate in the child that was *en ventre sa mere* at the creation of the deed of trust of 1876, in any case might have been valid — his life being usable as the measuring life. See Turner v. Safe Dep. & Trust Co., 148 Md. 371; 129 A. 294 (1925). For the purposes of this comment consideration will only be given to the law in relation to the limitations following the life estates in the children born after that deed.

[25] Gambrill v. Gambrill, 122 Md. 563, 89 A. 1094 (1914); Safe Dep. & Tr. Co. v. Sheehan, 169 Md. 93, 179 A. 536 (1935).

a trust must vest within the period of perpetuities.[26] Generally this period is measured by looking forward from the date of the instrument creating the trust.[27] Thus, under a trust created by deed the measuring period, for the purposes of the rule, runs from the date of execution of the deed, while under a trust created by the settlor's will, the measuring period is limited from the date of his death. Similarly, where one has a testamentary power to appoint the corpus of the trust or beneficial interests thereunder, such appointment is to be read back into the instrument creating the trust.[28]

Where the settlor of a trust retains the power to revoke it, or gives such power to the person who, for the time being, is entitled to the property, the courts have generally held that the measuring period for purposes of the rule against perpetuities is to be determined from the date when such power expires, which is usually the death of the person having such power.[29] It is simply a question of whether the trust is destructible; if so, the property is not actually *extra commercium*. In other words, so long as the trust under which the property is held is revocable at will, it is not within the purview of the rule. The Court in *Graham v. Whitridge*[30] recognized this when they defined a perpetuity as being:

> "A future limitation whether executory or by way of remainder and of either real or personal property, which is not to vest until after the expiration of, or will not necessarily vest within, the period fixed and prescribed by law for the creation of future estates and interests, and *which is not destructible by the person for the time being entitled to the property*

[26] Gambrill v. Gambrill, *ibid.*, Turner v. Safe Dep. & Trust Co., *supra*, n. 24.

[27] Ryan v. Ward, 192 Md. 342, 348, 64 A. 2d 258 (1949); Bowerman v. Taylor, 126 Md. 203, 212, 94 A. 652 (1915); Goldberg v. Erich, 142 Md. 544, 548, 121 A. 365 (1923), Hawkins v. Ghent, 154 Md. 261, 265, 140 A. 212 (1928).

[28] Ryan v. Ward, *ibid.;* Gambrill v. Gambrill, *supra*, n. 25; Hawkins v. Ghent, *ibid.;* Thomas v. Gregg, 76 Md. 169, 24 A. 418 (1892).

[29] Ryan v. Ward, *supra*, n. 27, 353; Graham v. Whitridge, 99 Md. 248, 274, 57 A. 609 (1904); Safe Dep. & Tr. Co. v. Sheehan, 169 Md. 93, 179 A. 536 (1935); GRAY, *op. cit. supra*, n. 21, §§ 203, 524.1; Leach, *Perpetuities in a Nutshell*, 51 Harv. L. Rev. 638, 662-3 (1938); Jones, *The Rule Aagainst Perpetuities As Applied to Powers of Appointment in Maryland*, 18 Md. L. Rev. 93, 108-109 (1958); SIMES & SMITH, FUTURE INTERESTS (2d ed. 1956), § 1250.

[30] 99 Md. 248, 57 A. 609 (1904).

> subject to future limitations except with the concurrence of the individual interested under that limitation."[31]

In *Ryan v. Ward*[32] the court, measuring from the date of an inter vivos deed of trust, struck down certain end limitations which gave the corpus of the trust to the children of the settlor's son or their descendants following successive life estates in the settlor and his son, although the settlor had retained the right to withdraw portions of the corpus so long as such withdrawals did not surpass a certain figure each year. In so holding the Court cited the Restatement of Property which provides:

> "The period of time during which an interest is destructible pursuant to the uncontrolled volition and for the exclusive personal benefit of the person having such a power of destruction is not included in determining whether the limitation is invalid under the rule against perpetuities."[33]

Recognition was given to the fact that "it was the indestructibility . . . of future interests which forced upon the judges the rule against perpetuities . . . ," but the court could not find that the trust in the *Ryan* case was destructible. It was reasoned that at the creation of the trust it was foreseeable that the settlor could over the course of years withdraw the entire corpus of the trust, but at no one particular time could he exercise an uncontrolled volition and revoke the entire trust. Therefore, it was concluded that the trust was not destructible and its provisions would have to be tested with respect to the rule against perpetuities by measuring from the date the deed became operative.

The Court in the *Ryan* case, as in the principal case, relied in part upon two analogies. First, that the situation presented by limitations created under a destructible trust, or a power of appointment given under such a trust, is analogous to limitations following an estate tail, in which case the period of perpetuities is computed from the termination of the estate tail.[34] Second, that the situation is similar to that of gifts in default of general powers exercisable by either deed or will, in which case the period

[31] *Ibid.*, 274 (emphasis added.)
[32] 192 Md. 342, 64 A. 2d 258 (1949).
[33] 4 RESTATEMENT, PROPERTY (1944) § 373.
[34] *Ibid.*, comment b. See also, Leach, *op. cit. supra*, n. 29, 663.

is measured from the date of expiration of the power.[35] In each of these cases the analogy exists because the limitations may themselves be destroyed by the exercise of some power which prevents them from taking effect. If an estate tail is disentailed, the limitations following it are ineffective; and if the donee of a power exercises his power, the takers in default are cut off, unless the appointment is to them. Likewise, if a power of revocation over a trust is exercised and the donee thereby stands seized of the property in his own right, he holds the property absolutely and may freely alienate it. The analogy is especially strong with relation to limitations following estates tail, since such estates by statute were made freely alienable and the act of alienation in and of itself acted to disentail the estate.[36] Alienation of property held under a revocable trust only requires one additional step, and hence, it can be said that such property is freely alienable. In neither of these cases can the property be considered as being held *extra commercium,* and therefore, the rule against perpetuities does not apply.

An analogy also exists between a general power presently exercisable and a power to revoke a trust. Under the former the donee can appoint to anyone including himself (except in Maryland). He has, in fact, as much control over the property as an actual owner would have. It only takes one act to make the property his own so as to be able to alienate it for his own benefit, and even if he does not take that measure he can appoint it at will and readily transfer it to whomever he pleases. For this reason limitations created under such powers are not considered by the law to be invalid as long as they must vest within the period set by the rule measuring from the death of the donee.[37] There is no logical reason why the same result should not be reached with respect to revocable trusts, since the donee can as easily perfect title in himself and thereafter alienate the property at will. In fact, there is more reason for holding the rule against perpetuities to be inapplicable to recovable trusts in Maryland than to general powers presently exercisable, since by revocation of the

[35] Leach, *loc. cit. supra,* n. 29; see discussion in Jones, *op. cit. supra,* n. 29, 106.

[36] See 2 MD. CODE (1957) Art. 21, § 22. This analogy is weakened somewhat due to the fact that it is merely historical, since under the cited statute a fee tail has been held to constitute a fee simple absolute. See Thomas v. Higgins, 47 Md. 439 (1878).

[37] SIMES & SMITH, *op. cit. supra,* n. 29, § 1274; 4 RESTATEMENT, PROPERTY (1944) § 391; GRAY, THE RULE AGAINST PERPETUITIES (4th ed. 1942), n. 29, 101.

trust the donee of the power of revocation can become absolutely seized of the property, whereas the donee of a general power can only transfer to another and can never appoint to himself or to someone in a manner that the benefit would actually be cast on himself, unless the donor explicitly gave him such power.

Thus, it is clear under the law that if a power to revoke a trust and thereby become the sole owner of the trust property is certain to be exercised, if at all, within a life in being and twenty-one years, as in the present case, then the power to revoke is itself not too remote, and limitations created by the exercise of a testamentary power are to be measured for purposes of the rule from the date of termination of the power to revoke. However, should the result be any different, if the power to revoke is itself contingent? In regard to situations of this nature it has been stated that:

> "The destructibility prerequisite for an application of the rule . . . exists only when some person possesses a complete power of disposition over the subject matter of the future interests which have been limited and can exercise this power of disposition for his own exclusive benefit. * * * The destructibility prerequisite for an application of the rule . . . can exist when the power of disposition (or of revocation) is *not presently exercisable* at the time of its creation, provided that the period, during which the exercise of such power is postponed, does not invalidate all interests created by the exercise of such power, and thus, in effect invalidate the power itself."[38]

Thus, the contingent power of revocation given to W by the deed of trust was subject to the rule. However, there is no question but that it was valid. Viewing it from its creation it is clear that it not only had to vest, but had to be exercised within her lifetime; and since she was one of the settlors of the trust, she was clearly a life in being

[38] 4 RESTATEMENT, PROPERTY (1944) § 373 comment d (emphasis added.) See also SIMES & SMITH, *op. cit. supra*, n. 29, § 1272. Judge Henderson, in dissenting, could not agree that this section of the Restatement supported the position taken by the Court and advocated herein. He laid emphasis upon the second clause of the omitted sentence which states:

> "Similarly it [the destructibility prerequisite] does not exist when the power of revocation is exercisable only with the concurrence of one or more persons other than the settlor, *or is otherwise subject to any conditions precedent.*" (Emphasis added.)

It cannot logically be said that the latter clause supports the position taken by the dissent, when read in context with the whole sentence and comment.

at the creation of the power. It, therefore, becomes clear that the destructibility prerequisite was present, at last during the period of time which elapsed between the death of the original trustee, on July 24, 1895, and the appointment of a new trustee by the second deed which was executed by W on August 6, 1895. At any time during that period W, acting on her sole volition, could have revoked the trust and stood seized of the property. Since the trust was destructible, the property was not held *extra commercium* and hence was not subject to the rule against perpetuities. Therefore, the rule could not logically be held to be operative with regard to this trust and the limitations created under the testamentary power, until W's power to revoke was extinguished in August of 1895.

In measuring the end limitations in the instant case, some reference must be made to the so-called "second look" doctrine. Although the general rule provides that, if, in viewing the circumstances as they might occur from the ascertained date for commencing the period of perpetuities, it is possible that a limitation will not vest within the period, it is void, the courts, for the purpose of testing limitations created under powers of appointment, have adopted a slightly different rule. The "second look" doctrine takes cognizance of the facts which were known to the donee of a power when such power was exercised, but which were not certain when the original instrument was executed.[39] The result has been stated to be that:

> ". . . in determining the validity of the interests created by the donee in the exercise of the power, the facts existing at the time he exercises the power may be considered although the time period is computed from the date the donor created the power."[40]

In the instant case, if the limitations made by W in her will were strictly read back into the trust deed, they would have been invalid, since that deed gave her power to appoint to her "children", which she did, but without the knowledge that all of the children she would have were *in esse* when the 1895 deed of trust was executed, it would have to be recognized that one, if not all, of her children could have been born after the execution of the original deed, and hence, the limitations over to their children 20 years after

[39] GRAY, *op. cit. supra*, n. 37, § 523.5; SIMES & SMITH, *op. cit. supra*, n. 29, § 1274; 4 RESTATEMENT, PROPERTY (1944) § 392; Jones, *op. cit. supra*, n. 29, 102.

[40] Jones, *loc. cit. supra*, n. 39.

their death would be too remote. However, by applying the "second look" doctrine, although the Court did not refer to it specifically, recognition was taken of the fact that W knew that her "children" were *in esse* when the deed of trust was executed. Therefore, their lives could be used as lives in being, and the limitations over to her grandchildren, twenty years following the deaths of her children, were not too remote.

In conclusion, it is clear that the Court reached the proper result in the instant case. Under the original deed of trust, W was given a contingent power to revoke the trust or appoint a new trustee, if the trustee died during her lifetime. This power was not void for remoteness, and in 1895 the specified event happened causing an absolute power of revocation to become vested in W. Since the law provides that the rule against perpetuities is not applicable to the provisions of a revocable trust, and that limitations created under a testamentary power of appointment are to be read back into the instrument creating the trust, thereby becoming provisions of such instrument, the provisions of the trust in the instant case, including the limitations created under W's power of appointment, were not subject to the rule during the period in which she possessed her right of revocation. Furthermore, since the law specifies that the rule is to be applied from the date of termination of the power to revoke, logically it could only be applied from the date of execution of the second deed of trust.

Criticism cannot be leveled at the Court for looking at the facts as W had known them to be when she exercised her testamentary power of appointment, and recognizing that she knew that her children were all *in esse* when she executed the second deed of trust. In so doing, the Court clearly applied the so-called "second look" doctrine, although not specifically referring to it. It would have been desirable if the Court had made specific reference to that doctrine, and thus, cleared up what little doubt remains as to whether it has been recognized in Maryland.