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FUTURE INTERESTS-RULE AGAINST PERPETUITIES- APPLICATION TO DURATION OF PRIVATE TRUSTS

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FUTURE INTERESTS—RULE AGAINST PERPETUITIES—APPLICATION TO DURATION OF PRIVATE TRUSTS—Testator devised the locus to his daughter, *V*, in fee. Thereafter he executed a codicil whereby the property passed to his son-in-law, in trust, to take possession of the real estate and hold it in trust for *V* during her life, and “in the event of the death of my daughter . . . rent the same . . . and the said

rents so received . . . he shall use for the support, sustenance, education, and benefit of the children of my daughter . . . surviving her." Held: the trust the testator attempted to create in his codicil was void, as in violation of the Rule against Perpetuities, where daughter survived testator and gave birth to two additional children after testator's death. *Mercer v. Mercer*, (N.C. 1949) 52 S.E. (2d) 229.

The North Carolina court has decided that a trust for private purposes must terminate within the period of the Rule against Perpetuities; the rule operates to restrict the duration of an ordinary private trust where all interests are vested or must vest within a life in being, even though there is none of the complication of an indestructible or "Claffin"¹ trust in the picture. This conclusion necessarily follows from the facts of the case, for, although the trust might have lasted longer than lives in being and twenty-one years, each child of V would have taken a vested interest at its birth, which would of course occur during the life of V, the mother. The court quotes from and cites cases and textbooks which are not authority for the court's holding.² Although there are interesting and important questions as to whether the Rule against Perpetuities applies only to remoteness of vesting,³ or whether it or some very similar rule also applies to restrict limitations which attempt to make private trusts indestructible,⁴ it is submitted that there is no rule that an ordinary private trust which may endure longer than lives in being and twenty-one years is per se void.⁵ Decisions in Maine and Maryland holding there was such a rule have been overruled.⁶ The North Carolina court seems to stand alone. Until recently, that court's position was that the rule was merely a rule against remoteness of vesting, and did not require that interests end within specified limits.⁷ In a decision handed down last year,⁸ the court for the first time by way of direct decision held that the excess duration of an indestructible private trust made vested trust estates void,⁹ a holding for which there is some au-

¹ *Claffin v. Claffin*, 149 Mass. 19, 20 N.E. 454 (1889).

² The court cites 1 BOGERT, TRUSTS AND TRUSTEES, §218 (1935); *Billingsley v. Bradley*, 166 Md. 412, 171 A. 351 (1934); *American Trust Co. v. Williamson*, 228 N.C. 458, 46 S.E. (2d) 104 (1948); *Springs v. Hopkins*, 171 N.C. 486, 88 S.E. 774 (1916). All of this authority holds contra and/or involves indestructible trusts.

³ GRAY, THE RULE AGAINST PERPETUITIES, 4th ed., §201 (1942).

⁴ SIMES, FUTURE INTERESTS, §490 (1936); 1 BOGERT, TRUSTS AND TRUSTEES, §218 (1935).

⁵ GRAY, THE RULE AGAINST PERPETUITIES, 4th ed., §232 (1942); 1 PERRY, TRUSTS AND TRUSTEES, 7th ed., §383 (1929); TRUSTS RESTATEMENT, §62(k) (1935); 1 SCOTT, TRUSTS, §62.10 (1939); 2 TIFFANY, REAL PROPERTY, 3d ed., §408 (1939); 2 SIMES, FUTURE INTERESTS, §§500, 501, 557 (1936); Leach, "Perpetuities in a Nutshell," 51 HARV. L. REV. 638 (1938); Cleary, "Indestructible Testamentary Trusts," 43 YALE L. J. 393 at 398 (1934), cases cited in n. 21. A recent case is *Chicago Title and Trust Co. v. Shellaberger*, 399 Ill. 320, 77 N.E. (2d) 675 (1948).

⁶ *Pulitzer v. Livingston*, 89 Me. 359, 36 A. 635 (1896) overrules *Slade v. Patten*, 68 Me. 380 (1878). *Gambrell v. Gambrell*, 122 Md. 563, 89 A. 1094 (1914) disapproves *Thomas v. Gregg*, 76 Md. 169, 24 A. 418 (1892). See Simes, "Fifty Years of Future Interests," 50 HARV. L. REV. 749 (1937).

⁷ *Springs v. Hopkins*, supra, note 2; *Vinson v. Gardner*, 185 N.C. 193, 116 S.E. 412 (1923).

⁸ *American Trust Co. v. Williamson*, 228 N.C. 458, 46 S.E. (2d) 104 (1948).

⁹ 27 N.C. L. REV. 158 (1948).

thority.¹⁰ Whether that case is the springboard from which North Carolina has taken its latest leap is purely conjectural. It is also speculative whether North Carolina is merely mistaken as to what the past position of its own court—and the present position of all other United States courts—has been, or whether it is knowingly and deliberately announcing its new rule.

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¹⁰ 2 SIMES, *FUTURE INTERESTS*, §557 (1936), cases cited in note 25; 1 BOGERT, *TRUSTS AND TRUSTEES*, §218 (1935), cases cited in note 70.