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Ronald C. Link

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THE RULE AGAINST PERPETUITIES IN NORTH CAROLINA

RONALD C. LINK†

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The world of estates and future interests in North Carolina is a fascinating one (at least to collectors of incunabula). Here is found almost the full panoply of common law freehold estates: the fee simple absolute; the defeasible fees including the fee simple determinable, the fee simple subject to condition subsequent, and the fee simple subject to executory limitation;1 and the life estate. Although our statutes convert the fee tail into a fee simple,2 one must understand the feudal niceties of the fee tail in order to know when the statutes will operate. Fortunately, North Carolina has never recognized the fee simple conditional,3 a medieval estate eliminated in England in 1285;4 the distinc-

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1. See McCall, Estates on Condition and on Special Limitation in North Carolina, 19 N.C.L. Rev. 334 (1941).
2. N.C. Gen. Stat. § 41-1 (1976): “Every person seized of an estate in tail shall be deemed to be seized of the same in fee simple.”
3. Prior to 1285 a conveyance “to A and the heirs of his body” created in A a fee simple conditional upon the birth of issue. If, after the birth of issue, A failed to convey the estate, it passed on his death to his issue in fee simple conditional, with the same consequences. J. Cribbet, Principles of the Law of Property 46 (2d ed. 1975).
tion of sanctioning that estate is reserved for our sister state to the south.⁵

The feudal conveyancer would also find his full armamentarium of future interests: reversions, possibilities of reverter and powers of termination (rights of entry) for the grantor; remainders (indefeasibly vested, vested subject to total divestiture, vested subject to partial divestiture and contingent); and executory interests (springing and shifting) for the grantee. Were Lord Coke to emerge, H.G. Wells-like, from a time machine into a twentieth-century Tar Heel deeds vault, he would not be unfamiliar with many of the doctrines and issues associated with our future interests. Worthier Title may have been abolished,⁶ but Destructibility of Contingent Remainders lurks in the cases.⁷ The Rule in Shelley's Case is alive and well and living in Raleigh,⁸ and the Rule in Wild's Case, dating from 1599, is still with us.⁹ Various restrictive common law rules have led to meliorating North Carolina statutes furthering the transferability of future inter-

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⁶ See N.C. GEN. STAT. § 28A-1-2 (1976). Compare id. with Link, The Rule in Wild's Case in North Carolina, 55 N.C.L. REV. 751, 824 n.369 (1977). One question not addressed in this article is whether the abolition applies to instruments other than wills (chapter 28A deals with decedents' estates) and, if so, whether it applies retroactively.


⁸ On Worthier Title generally, see 41 N.C.L. REV. 317 (1963); 14 N.C.L. REV. 90 (1935).

⁹ There is a kind of statutory destructibility in North Carolina. The grantor of a deed or settlor of a trust creating a contingent future interest in some person not in esse or not determined until the happening of some future event may revoke the grant of the interest at any time prior to the happening of the contingency vesting the future interest. N.C. GEN. STAT. §§ 39-6, -6.1 (1976); cf. id. §§ 41-11, -11.1, -12 (generally allowing sale or mortgage of property subject to contingent remainders, with proceeds of sale to be held for ascertainment of ultimate remaindermen).

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⁸ E.g., Starnes v. Hill, 112 N.C. 1, 16 S.E. 1011 (1893); N.C. GEN. STAT. § 39-1.1 (1976). The statute provides that in construing conveyances the court shall give effect to the intention of the parties, but has an express proviso that the section shall not prevent the application of the Rule in Shelley's Case. The Rule in Shelley's Case has even been extended to personal property. Riegel v. Lyerly, 265 N.C. 204, 143 S.E.2d 65 (1965), noted in 68 W. Va. L. REV. 104 (1965). On Shelley's Case generally, see Block, The Rule in Shelley's Case in North Carolina, 20 N.C.L. REV. 49 (1941); Webster, A Relic North Carolina Can Do Without—The Rule in Shelley's Case, 45 N.C.L. REV. 3 (1966).

⁹ Link, supra note 6, at 819-21.
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ests,10 sanctioning the creation of future interests in personalty by inter vivos instrument,11 and establishing a constructional preference for definite failure of issue.12 The Statute of Uses, in a form recognizable by Henry VIII, lies entombed in the General Statutes.13

Many of the rules, doctrines and issues just listed are of somewhat limited current significance. Destructibility of Contingent Remainders, for example, customarily is restricted to legal (not equitable) remainders (not executory interests) in real property (not personalty); its potential scope is therefore limited. Even those old rules, such as the Rules in Shelley's Case14 and Wild's Case,15 which are now applied to equitable interests as well as legal ones and to personalty as well as realty, apply only if the creator uses certain fatal language not ordinarily found in modern instruments. (At least one hopes that lawyers avoid such pregnant language as “to A and his children” (invoking the Rule in Wild's Case) or such notorious phrases as “to A for life, remainder to his heirs” (invoking the Rule in Shelley's Case). Laymen may blunder into such usages, but there are limits to the preventive scope of the law.16)

On the other hand, the Rule Against Perpetuities, while derived from centuries-old principles, remains a vital concept. It applies to legal and equitable interests, to real property and personal property, to family dispositions and, perhaps unexpectedly, to some commercial transactions (for example, options, leases and condominiums). Further, the kinds of gratuitous dispositions to which the Rule Against Perpetuities applies include two of the most common dispositive tools in modern estate planning: class gifts and powers of appointment. For various reasons, it is often advisable for the draftsman of a will or trust disposing of a modest or large estate to create class gifts17 and powers

11. Id. § 39-6.2 (overturning rule of Speight v. Speight, 208 N.C. 132, 179 S.E. 461 (1935), noted in 14 N.C.L. REV. 196 (1935), which held that future interests in personal property, which may be created by will, could not also be created by deed).
12. Id. § 41-4.
13. Id. § 41-7.
14. For the Rule in Shelley's Case to apply to equitable interests, both the preceding freehold estate to the ancestor (e.g., the life estate to A) and the remainder to the ancestor's heirs or bodily heirs must be equitable. If one is legal and the other equitable, the Rule does not apply. If both are legal, of course, the Rule applies. See Webster, supra note 8, at 14-15.
15. See Link, supra note 6, at 783-85.
16. Because laymen persist in drawing their own wills, it has been suggested that, rather than ignore the problem, the bar promulgate an official will form and instructions for using it. JUSTICE (SOCIETY) HOME-MADE WILLS (1971).
17. Except for very simple estates, the testator or settlor almost inevitably will want to create interests in unborn or unascertained beneficiaries, requiring the use of a general class designation.
of appointment. The Rule applies to both, sometimes in a surprising or unexpected fashion. The Rule Against Perpetuities, then, is not a cubbyhole for antiquarians; it is a strong, wide-ranging creature based on enduring policies. Some general knowledge of the Rule is important to almost every lawyer, to enable him to recognize perpetuities problems, and a working knowledge of the intricacies of the Rule is essential to the probate lawyer.

In view of the range and depth of available analyses of North Carolina estates and future interests issues, it is surprising that the Rule Against Perpetuities has not been the subject of comprehensive scrutiny. Perhaps the reputation of the Rule as "a technicality-ridden legal nightmare" or as a "trap and snare for the unwary" has discouraged inquiry. Despite this daunting prospect, the time seems right for a look at the North Carolina Rule. While the last few decades have witnessed widespread debate and occasional reform of "the Rule" in other states, the flow of North Carolina cases on perpetu-

18. Special powers preserve flexibility over the shares of the second generation of takers under a will or trust: "To regulate events in 1980 the judgment of a mediocre mind on the spot is incomparably preferable to the guess in 1960 of the greatest man who ever lived." W.B. LEACH & J. LOGAN, CASES AND TEXT ON FUTURE INTERESTS AND ESTATE PLANNING 241-42 (1961).

19. For example, the "all-or-nothing rule" of Leake v. Robinson, 35 Eng. Rep. 979 (Ch. 1817), that a class gift is totally bad if the gift to any potential class member can vest too remotely. See section III. infra.

20. For example, the validity of interests created by exercise of a general testamentary power is determined by reading the appointment back into the instrument creating the power, and the period of perpetuities runs from the date the power is created, not the date the appointment is made. See section IV. infra.

21. As examples, consider the articles cited in notes 1, 6, 7 & 8 supra.

22. The Rule is treated in 1 S. MORDECAI, LAW LECTURES 588-89, 595-96 (2d ed. 1916); 2 id. 1158, 1162, 1281-82; 7 STRONG'S NORTH CAROLINA INDEX 3D Wills § 41 (1978); and 2 N. WIGGINS, WILLS AND ADMINISTRATION OF ESTATES IN NORTH CAROLINA § 287 (1964).

Rule Against Perpetuities questions continues unabated. The purpose of this article is to examine the Rule Against Perpetuities as it is applied in North Carolina, with particular emphasis on those aspects of the Rule of greatest importance to the modern estate planner and draftsman. For the estate planner, the Rule's application to class gifts, to powers of appointment, and to the duration of trusts is of primary concern. For the draftsman, the single most important problem is one of prevision—anticipating when the Rule may be involved—so the article will stress some of the unexpected applications of the Rule, particularly those involving commercial transactions. Developing case law suggests that an attorney may be negligent in drafting an instrument containing perpetuities errors, so these matters are not purely of academic interest.

In delineating the North Carolina Rule, this article will compare its application to that in other states, will ask whether our courts have applied the Rule correctly, and will inquire whether reform is advisable, and, if so, which form it should take.

I. Evolution of the Rule

The classic statement of the Rule Against Perpetuities is by Gray:

No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.28

Leach remarks that "Gray's formulation would be more realistic if it were preceded by the words Generally speaking and if the word vest were put in quotation marks."29

Of course, the Rule did not spring forth in this form from the brow of the first judge to decide a perpetuities case. Rather, the Rule evolved in a classic common law fashion—on a case-by-case basis over the course of nearly two centuries—until it was reduced to the Holy Writ of Gray's codification. Because the evolution of the Rule in North Carolina followed roughly the same path as the English cases, the development of the Rule in England will be described briefly.

A. Evolution of the Rule in England

It has been postulated that developments in real property law have

27. See section VI. infra.
28. J.C. Gray, supra note 22, § 201.
followed a Hegelian path of thesis, antithesis, and synthesis. Conventional analyses of the Rule Against Perpetuities treat it as the product of a struggle between the attempts of past generations to tie up land and the desires of present generations freely to dispose of it. Most major developments of English land law can be analyzed in terms of a struggle over free alienability of real property. The progression may be represented schematically as follows:

<table>
<thead>
<tr>
<th>Thesis (to restrain alienability)</th>
<th>Antithesis (to further alienability)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Conveyance “to A and his heirs.” Result: This created an interest in A's heirs that could not be defeated by A's conveyance.</td>
<td>1a. <em>D'Arundel's Case</em>, 1225. Result: The words “and his heirs” were interpreted as words of limitation, limiting or describing A's estate. A took in fee simple absolute, free from any obligation to his heirs.</td>
</tr>
<tr>
<td>2. Conveyance “to A and his bodily heirs.” Result: This created an interest in A's descendants that was certain to pass to them at his death.</td>
<td>2a. Thirteenth Century Cases. Result: Fee simple conditional. The conveyance was interpreted as creating a fee simple conditional in A; if the condition of birth of issue were met, A had the power to convey absolute ownership.</td>
</tr>
<tr>
<td>3. Statute De Donis Conditionalibus, 1285. Result: Fee tail. This statute gave effect to the fee tail. A could not bar his descendants.</td>
<td>3a. <em>Taltarum's Case</em>, 1472. Result: Common recovery. By going through a largely fictional lawsuit, the common recovery, A, the tenant in tail in possession, could “dock the entail” and convert his estate into a fee simple absolute.</td>
</tr>
</tbody>
</table>

At this point, circa the sixteenth century, the number of alternative moves and countermoves multiplied and the story became more complex. On the side of restraining alienation were variations on the ba-

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30. E. RABIN, *FUNDAMENTALS OF MODERN REAL PROPERTY LAW* 223 (1974): Hegel . . . developed a theory of thesis, antithesis, and synthesis. Each development (thesis) in human affairs developed opposition (antithesis), and from the clash of these opposing forces came a new development (synthesis). Whether this is true at all times in all places and in all contexts I do not know, but it certainly has been true of the development of property law institutions.


32. *E.g.*, E. RABIN, supra note 30.


34. Bracton's Notebook, Case 1054 (1225).

35. 13 Edw. 1, c. 1 (1285).

36. Y.B. Mich. 12 Edw. 4, 19, pl. 25 (1472).

37. Perpetuities aspects aside, the next move by those who would entail land was the strict settlement, an ingenious device for tying up family estates. *See* W.B. LEACH & J. LOGAN, *supra* note 18, at 102-03. The ultimate fate of the legal fee tail in England was abolition by the reform legislation of 1925.
sic fee tail. One device to restrain alienation was by conveyance of land in fee tail with the added condition that any attempt to dock the entail (as by common recovery) would terminate the estate of the person attempting disentailment. These conditions were struck down as repugnant to the fee tail and were often described as "perpetuities," since, if given effect, the fee tail might last forever. Thus, the loathed "perpetuity" first arose in the context of a present, inalienable estate in land.\(^{38}\)

At about the same time, English conveyancers began to tie up land by using future interests instead of the present estate in fee tail. Contingent remainders were used first, and the armamentarium was expanded by the Statute of Uses in 1535\(^ {39} \) to include executory interests. Contingent interests in unborn or unascertained remaindermen restrained alienability since, obviously, the property could not be sold if the owners of some outstanding interests were unborn or unascertained.\(^ {40} \) The reaction to this technique was, for remainders, the doctrine of Destructibility of Contingent Remainders, which furthered alienability by allowing for destruction of contingent remainders by natural or artificial means.\(^ {41} \) It was supposed that executory interests were also subject to destructibility, but in 1620 the case of \textit{Pells v. Brown}\(^ {42} \) held that they could not be destroyed, despite a dissenting view that the holding would lead to a "mischievous kind of perpetuity."\(^ {43} \) Gray\(^ {44} \) and others\(^ {45} \) believe that \textit{Pells v. Brown} made the

\(^{38}\) Another attempt to avoid docking of the entail involved the creation of an equivalent of the fee tail in a long term of years. The courts struck down this device by holding that a term of years could not be entailed and that the attempt to do so gave the grantee the entire term. On these fee tail variations, see generally 5 R. Powell, \textit{supra} note 22, \S 759[2]; \textit{Restatement of Property, supra} note 31, at 2126-27; 3 L. Simes \& A. Smith, \textit{supra} note 5, \S 1212.


\(^{40}\) Even if the remaindermen were ascertained, it is argued that the existence of a remainder contingent upon an event (for example, "to A for life, and if UNC wins the NCAA basketball championship, to B and his heirs, and if UNC does not win the NCAA basketball championship, to C and his heirs") restrains alienability because it is unlikely that B and C will get together and agree on the terms of a sale. Because the event is uncertain, B and C are not likely to agree on the valuation of their respective interests. L. Simes, \textit{Public Policy and the Dead Hand} 36-38 (1955).

\(^{41}\) \textit{See generally} 1 L. Simes \& A. Smith, \textit{supra} note 5, \S\S 193-209.


\(^{44}\) J.C. Gray, \textit{supra} note 22, \S 121.7.

\(^{45}\) \textit{E.g.}, Schuyler, \textit{supra} note 38, at 5.
Rule Against Perpetuities inevitable: something had to be invented to control indestructible executory interests.

That invention took place in six landmark cases, beginning with the *Duke of Norfolk's Case* in 1682, ranging through *Thellusson v. Woodford* in 1805, and ending with *Cadell v. Palmer* in 1833. The *Duke of Norfolk's Case* is the most important and will be summarized here. Simply stated, an estate for 200 years was given to Henry and his issue, but if Thomas should die without issue during the life of Henry, to Charles. At the time of the decision, it was not clear what a perpetuity was or what period, if any, was permissible for a perpetuity. The only prior cases on the notion were those holding an unbarrable present estate tail invalid as tending to a perpetuity. When future interests were concerned, the law was unclear.

The issue that divided the judges in this case was not whether perpetuities should be allowed, but what perpetuities were, or more exactly, whether this case presented a perpetuity. On one side it could be argued that the contingency upon which the disposition of the property turned was certain to happen within a short period of time, so it was foolish to refer to the gift as a perpetuity. On the other side, it might be argued that the type of interest created should be found destructible; otherwise the all important preference for free alienability would be compromised. This second argument was the traditional approach to perpetuities and convinced the common law

46. The cases are discussed in 5 R. Powell, *supra* note 22, ¶ 760[2].
47. 22 Eng. Rep. 931 (Ch. 1682).
48. 32 Eng. Rep. 1030 (Ch. 1805).
51. See text accompanying note 39 *supra*.
52. To Lord Nottingham in the *Duke of Norfolk's Case*, a perpetuity was an unbarrable entail:

A Perpetuity is the Settlement of an Estate or an Interest in Tail, with such Remainders expectant upon it, as are in no Sort in the Power of the Tenant in Tail in Possession, to dock by any Recovery or Assignment, but such Remainders must continue as perpetual Clogs upon the Estate; such do fight against God, for they pretend to such a Stability in human Affairs, as the Nature of them admits not of, and they are against the Reason and the Policy of the Law, and therefore not to be endured.

But on the other Side, future Interests, springing Trusts, or Trusts executory, Remainders that are to emerge and arise upon Contingencies, are quite out of the Rules and Reasons of Perpetuities, nay, out of the Reason upon which the Policy of the Law is founded in those Cases, especially, if they be not of remote or long Consideration: but such as by a natural and easy Interpretation will speedily wear out, and so Things come to their right Channel again.

judges Lord Nottingham consulted. The first argument, however, convinced the Chancellor, and was the one that has become the basis for the modern Rule Against Perpetuities. The argument between the two perceptions of what constituted a perpetuity runs through the entire case.\textsuperscript{53}

So, the case sustained an interest certain to vest or fail within one life in being at the creation of the interest. Lord Nottingham's memorable opinion stated a principle for testing the validity of executory interests, but left the exact limits of the rule open to further development:

*Object.* They will perhaps say, where will you stop, if not at *Child and Bayly's Case*?

*Answ.* Where? why everywhere, where there is not any Inconvenience, any Danger of a Perpetuity; and whenever you stop at the Limitation of a Fee upon a Fee, there we will stop in the Limitation of a Term of Years. No Man ever yet said, a Devise to a Man and his Heirs, and if he die without Issue, living $B$. then to $B$. is a naughty Remainder, that is *Pell's* and *Brown's Case*.

Now the *Ultimum Quod Sit*, or the utmost limitation of a fee upon a fee, is not yet plainly determined; but it will be soon found out, if Men shall set their Wits on Work to contrive by Contingencies to do that, which the Law has so long laboured against the Thing will make it self evident, where it is inconvenient, and, God forbid, but that Mischief should be obviated and prevented.

\[\ldots\]

But what Time? And where are the Bounds of that Contingency? You may limit, it seems, upon a Contingency to happen in a Life: What if it be limited, if such a one die without Issue within twenty-one Years, or 100 Years, or while *Westminster-Hall* stands? Where will you stop, if you do not stop here? I will tell you where I will stop: I will stop where-ever any visible Inconvenience doth appear; for the just Bounds of a Fee-simple upon a Fee-simple are not yet determined, but the first Inconvenience that ariseth upon it will regulate it.\textsuperscript{54}

The case thus laid the foundation for the notions that (a) a perpetuity is a future interest not certain to vest within a specified period and (b) the permissible period is tied to lives in being at the creation of the interest.\textsuperscript{55} Although the Rule grew out of the struggle over free alienability, its final form was not cast precisely in the mold of alienability.\textsuperscript{56}

\textsuperscript{53} Haskins, *supra* note 50, at 37.
\textsuperscript{54} 22 Eng. Rep. at 953, 960.
\textsuperscript{55} It is not usually noticed that there were successive limitations to other younger brothers, which Lord Nottingham held invalid without discussion. 22 Eng. Rep. at 931, 963. Under the modern rule these interests would all appear to be good because the brothers would have taken, if at all, within their own lives.
\textsuperscript{56} J. C. Gray, *supra* note 22, §§ 2-2.1. There was no suspension of the power of alienation...
B. Evolution of the Rule in North Carolina: Gifts Over on "Death Without Issue"

There have been two generations of North Carolina perpetuities cases, reflecting inevitably the problems associated with common drafting devices of the times. The first generation includes roughly two score cases from the first half of the nineteenth century, almost all of which involved attempted estates in fee tail and gifts over on death without issue. These cases gave some shape to the emerging North Carolina Rule Against Perpetuities and illustrate some fundamental concepts of the Rule; they will therefore be discussed as a group.

Following the first generation was a gap of more than half a century, broken by only a few perpetuities cases; one may surmise that the perpetuities law relating to gifts over on death without issue had been pretty well settled by the first generation cases, so few appeals were taken during the late nineteenth and early twentieth century. Following the first World War, however, a steady stream of perpetuities cases, numbering nearly fifty, has flowed through our courts. Most likely this second generation of cases reflects the attempts of draftsmen to facilitate the transfer of increased wealth of the state’s citizens and to keep that wealth out of the hands of the federal tax collector. In this group of cases are found, for example, perpetuities problems associated with trusts, class gifts and powers of appointment, three common tools of the modern estate planner. The second generation cases will be incorporated into the discussion of the elements of the Rule in section II.

As background for the first generation cases, the reader may be helped by a review of two common-law concepts, the estate in fee tail and the indefinite failure of issue construction. The estate in fee tail was created by a conveyance or devise "to A and his bodily heirs," or some similar phrase such as "heirs of the body" or "issue." The estate in fee tail was created by a conveyance or devise "to A and his bodily heirs," or some similar phrase such as "heirs of the body" or "issue." The estate in fee tail was created by a conveyance or devise "to A and his bodily heirs," or some similar phrase such as "heirs of the body" or "issue." The estate in fee tail was created by a conveyance or devise "to A and his bodily heirs," or some similar phrase such as "heirs of the body" or "issue." The estate in fee tail was created by a conveyance or devise "to A and his bodily heirs," or some similar phrase such as "heirs of the body" or "issue." The estate in fee tail was created by a conveyance or devise "to A and his bodily heirs," or some similar phrase such as "heirs of the body" or "issue." The estate in fee tail was created by a conveyance or devise "to A and his bodily heirs," or some similar phrase such as "heirs of the body" or "issue."
tate would last as long as there were lineal descendants ("bodily heirs") of A. In effect, A took a life estate (he could convey the land to a third person, but the grantee acquired only an estate for A's life), followed by a life estate in his bodily heirs, followed by a life estate in the bodily heirs of A's bodily heirs, and so on.

If the grantor of the estate tail said nothing about what happened when A's line of bodily heirs ran out, there was left, by implication, a reversion in the grantor. On the other hand, the grantor could provide for a gift over upon termination of the fee tail—for example, "to A and his bodily heirs, then to B and his heirs." In this case A would take a fee tail and B a vested remainder.61

Actually, the practice of draftsmen was to introduce the remainder following the estate tail by the language "but if A die without issue," so that the conveyance customarily read "to A and his bodily heirs, but if A die without issue, to B and his heirs." The remainder to B did not necessarily take effect or fail at A's death; it took effect whenever A's fee tail terminated, that is when A's line of lineal descendants ran out, whenever that might occur. This is known as an indefinite failure of issue (as opposed to a definite failure of issue, which would cause the fee tail to terminate at A's death or some other fixed time).

Now suppose a conveyance "to A and his heirs, but if A die without issue, to B and his heirs." For various reasons,62 one of them being that the practice of English conveyancers was to use the phrase "but if he die without issue" in limiting remainders after estates tail,63 the indefinite failure of issue construction was put on the grantor's language. It was read as if he had said, "to A, but if A's line of lineal descendants runs out, whenever that may occur, to B." The result, via the back door, was an estate that lasted as long as A had lineal descendants, viz. a fee tail in A, followed by a remainder in B.

Finally, two North Carolina statutes are important to the perpetuities analysis of the first generation cases. The first is the Act of 1784,64 converting estates tail into estates in fee simple; the Act is currently codified at G.S. 41-1:65

61. L. Simes & A. Smith, supra note 5, § 142.
62. The possible reasons for the English common law preference for the indefinite failure of issue construction are discussed in id. § 522.
63. Id.
Fee tail converted into fee simple. Every person seized of an estate in tail shall be deemed to be seized of the same in fee simple.

The second is the Act of 1827, reversing the common law presumption of indefinite failure of issue in favor of a presumption of definite failure of issue at the devisee's death. The second Act is currently codified at G.S. 41-4.

Limitations on failure of Issue. - Every contingent limitation in any deed or will, made to depend upon the dying of any person without heir or heirs of the body, or without issue or issues of the body, or without children, or offspring, or descendant, or other relative, shall be held and interpreted a limitation to take effect when such person dies not having such heir, or issue, or child, or offspring, or descendant, or other relative (as the case may be) living at the time of his death, or born to him within ten lunar months thereafter, unless the intention of such limitation be otherwise, and expressly and plainly declared in the face of the deed or will creating it: Provided, that the rule of construction contained in this section shall not extend to any deed or will made and executed before the fifteenth of January, one thousand eight hundred and twenty-eight.

Now for some cases.

A good place to begin is, logically, the beginning: Volume 1 of the North Carolina Reports. In that compilation appears the following case:

*Case I.* T died in 1790 survived by three sons, A, B, and C. T's will devised a plantation to A, and "if either of my two sons, A or B, should die without lawful issue begotten of their bodies," T's son C "shall have the lands of the one so first dying." A died in 1792 without ever having had issue; A's will gave the residue of his estate to his wife. Held, the wife took the plantation. The gift over to C was too remote, since it was on an indefinite failure of issue.

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68. The paradigm for Case I is Sutton v. Wood, 1 N.C. (Cam. & Nor.) 399 (1801). Other cases finding remote gifts over on an indefinite failure of issue include Sanders v. Hyatt, 8 N.C. (1 Hawks) 247 (1821) (rationale not too clear); Brown v. Brown, 25 N.C. (3 Ired.) 134 (1842); Hollowell v. Kornegay, 29 N.C. (7 Ired.) 261 (1847); and Weatherly v. Armfield, 30 N.C. (8 Ired.) 25 (1847).
69. Actually, the opinion is not clear on when T died; his will was made in 1790, and the case was decided in 1801. See Sutton v. Wood, 1 N.C. (Cam. & Nor.) 399 (1801).
70. Again, the opinion is not clear on when A died; his will was made in 1792. Id. at 400.
Initially the gift over to C appears good. Applying the presumption of indefinite failure of issue, the devise to A would be a fee tail, followed by a remainder over to C. Although this remainder might first appear to be too remote because A's line of issue (lineal descendants) could last for several centuries before dying out, the ordinary remainder following a fee tail does not violate the Rule Against Perpetuities. Two reasons customarily support the validity of the remainder. First, Gray explains validity on the theory that "[a] future estate [the remainder] which, at all times until it vests, is in the control of the owner of the preceding estate [the fee tail] is, for every purpose of conveyancing, a present estate, and is therefore not obnoxious to the Rule Against Perpetuities." In other words, because the owner of the fee tail could at any time "dock the entail," that is execute a disentailing conveyance by a fictional lawsuit such as the fine or the common recovery, and thereby convert his fee tail into a fee simple absolute, eliminating the remainder, the property had not been tied up by the grantor. A second explanation for the validity of the remainder following the fee tail is that the remainder is presently vested in interest (although not in possession). "A remainder is vested if, at every moment during its continuance, it becomes a present estate, whenever and however the preceeding freehold estates determine." In other words, its enjoyment is subject to no condition precedent except termination of the prior particular estate. According to the common law notion of vestedness, it was not required that the prior estate be certain to terminate: that was not a part of the definition. So the remainder following a fee tail was presently vested and violated no rule against remoteness of vesting.  

71. It was argued, unsuccessfully, that T had meant a definite failure of issue and intended the gift over to take effect only if A died without issue in the lifetime of B. Id. at 404.
72. J.C. Gray, supra note 22, § 443. On the validity of limitations after estates tail, see generally id. §§ 211-212, 443-472.
73. On methods of barring estates tail, see 1 L. Simes & A. Smith, supra note 5, § 14.
74. The theory here is akin to the rationale for beginning the perpetuities period at the death of the creator of a revocable inter vivos trust. See section II.B.8. infra.
75. J.C. Gray, supra note 22, § 9.
76. Id. § 970.
77. As stated in 1 L. Simes & A. Smith, supra note 5, § 142:
[A] remainder after an estate tail is vested if limited to an ascertained person without words of condition. It is true, the tenant in tail may always have heirs of his body, and thus the remainder may never take effect in possession. Moreover, if the tenant in tail can bar his estate and pass a fee simple, the remainder will be extinguished. Nevertheless such conditions arise purely by implication and are not considered in determining the vested character of the remainder.

See also J.C. Gray, supra note 22, §§ 111(2), 970.
Nevertheless, this fee tail-vested remainder analysis was not available in North Carolina, due to the Act of 1784, which converted estates in tail into estates in fee simple. Thus the fee tail in $A$ resulting from an indefinite failure of issue construction was converted by the Act of 1784 into a fee simple.\textsuperscript{78} Note, however, that the statute did not necessarily convert $A$'s fee tail into a fee simple \textit{absolute}. The statute was silent on the question of the nature of $A$'s fee simple, leaving open the possibility of $A$'s taking a defeasible fee simple; indeed, the court in Case 1 found that $A$ took a fee simple subject to an executory devise\textsuperscript{79} over to $C$ on indefinite failure of issue. For purposes of the Rule Against Perpetuities, executory interests are not "vested" until they become possessory,\textsuperscript{80} so $C$'s gift over on an indefinite failure of issue clearly violated the Rule. Case 1 verifies that in North Carolina the Rule at least is one against remoteness of vesting, and that the meaning of vesting for re-

\textsuperscript{78} The court might well have rejected the indefinite failure of issue construction on the ground that the act abolishing fees tail destroyed the underlying rationale for the indefinite construction. The court did not take this approach. \textit{See} Sutton v. Wood, 1 N.C. (Cam. & Nor.) 399, 403 (1801).

\textsuperscript{79} On the other hand, there is a separate line of cases straining to sustain the validity of the gift over. These cases reasoned that the abolition of fees tail removed the reason for the strained indefinite failure of issue construction; that the language "if he die without issue" ought therefore to be received in its natural sense, as it was for personalty; and that therefore slight evidence of contrary intention was sufficient to rebut the presumption of indefinite failure of issue. Such words as "leaving" or "survivor" were regarded as sufficient to tie up the failure of issue to the life of one in being. Jones v. Spaight, 4 N.C. (Car. L. Rep.) 157 (1814); Zollicoffer v. Zollicoffer, 20 N.C. (3 & 4 Dev. & Bat.) 574 (1839); Threadgill v. Ingram, 23 N.C. (1 Ired.) 577 (1841); and Gregory v. Beasley, 36 N.C. (1 Ired. Eq.) 25 (1840). Compare Cases 2 and 3 \textit{infra}. Thus there appear to be several conflicting lines of decisions. Some of the cases suggest that realty and personalty were to be treated differently, others that they were to be treated alike. And if they were to be treated alike, some cases said the real property rules controlled both, while other cases said the personal property rules governed both.

\textsuperscript{80} Since the prior estate in $A$ was a fee simple, not a life estate or a fee tail, the interest in $C$ was an executory interest, not a remainder. In the common-law system, remainders followed only "prior particular estates," which did not include defeasible fees. The only remaining category for $C$'s interest, if not a remainder, was an executory interest, here a shifting executory devise. \textit{See} J. Ritchie, N. Alford & R. Effland, \textit{Decedents' Estates and Trusts} 765-71 (5th ed. 1977).

\textit{For an excellent discussion of the proposition that the Act of 1784 did not necessarily convert the fee tail into a fee simple absolute, see Smith v. Brisson, 90 N.C. 284 (1884). Smith states clearly that the reason $A$ takes a fee simple absolute is not by operation of the Act of 1784 but rather because of the remoteness of the gift over to $C$. Id. at 287. Smith also confirms that $C$'s interest is an executory devise, taking effect under the Statute of Uses. Id. at 290; accord, Sessoms v. Sessoms, 144 N.C. 121, 56 S.E. 687 (1907).

\textit{For a true case of repugnancy, see Roane v. Robinson, 189 N.C. 628, 127 S.E. 626 (1925), in which the devisee was given, in effect, an unrestricted power of disposition, and the gift over on failure of issue was found to be repugnant to the fee.}

\textit{80. Leach, \textit{supra} note 29, at 648.}
mainders is vesting in interest and for executory interests is vesting in possession.

Case 1 illustrates two other fundamentals of the Rule. One is what Leach has termed the “might-have-been rule.” In Case 1, A in fact died without ever having had issue, only a few years after T and within the life of C. If the gift over had been given effect, it would have taken place well within the period of the Rule. Nevertheless, the court did not find it necessary to address this fact; it judged the validity of C’s interest by viewing the possibilities from the creation of the interest (T’s death) rather than in light of events as they actually occurred.

The other instructive aspect of Case 1 is its handling (or ignoring) of the effect of invalidity of the gift over. The court struck C’s remote executory interest from the devise, leaving A with a fee simple absolute that was devisable to his wife. The testator had indicated, however, that if A died without issue, the plantation was to stay within the family and go over to C. This intention could have been accomplished rather roughly in one of two ways: (1) The court might have limited A to the original quantum of his estate, a defeasible fee, leaving a power of termination (right of entry) in T’s estate if A died without issue. This interest would not violate the Rule, and would have passed by descent to T’s heirs, presumably his three children. C would thus have gotten a third of the plantation, and only a third would have gone to A’s wife. (2) The court might have applied “infectious invalidity” on the theory that T’s intentions would better be accomplished by striking the entire devise of the plantation rather than excising only the cancerous part. Thus the plantation would have passed by descent to the three children.

Of course, the court discussed neither of these alternatives. Its mechanical approach to the effect of the invalid divesting gift is typical of many perpetuities cases.

Case 2. T died in 1800 leaving a will that gave a female slave and all her children, together with all T’s lands and half

81. See section VI. infra.
82. This assumes that there was no clause in T’s will broad enough to have carried the interest.
83. See section II.B.2.b. infra.
84. The paradigm for case 2 is Davidson v. Davidson’s Ex’rs, 8 N.C. (1 Hawks) 163 (1820); Accord, Bailey v. Davis, 9 N.C. (2 Hawks) 108 (1822); Rice v. Satterwhite, 21 N.C. (1 Dev. & Bat. Eq.) 69 (1835); Lister v. Skinner, 26 N.C. (4 Ired.) 57 (1843); Cox v. Marks, 27 N.C. (5 Ired.) 361 (1845); Ferrand v. Howard, 38 N.C. (3 Ired. Eq.) 381 (1844); Porter v. Ross, 55 N.C. (2 Jones Eq.) 196 (1855).
of his household furniture and personal estate, to his daughter \( A \), and if \( A \) "dies without having heirs,\(^{86}\) then\(^{87}\) ... the property bequeathed to her shall be divided into four equal parts, between" \( T \)'s brothers, \( B, C \) and \( D \), and the children of \( E \). \( A \) survived \( T \) but died an infant without ever having had issue. \textit{Held}, \( A \)'s estate took the property. The gift over was on a remote indefinite failure of issue.

The principal question raised by this case is whether the presumption of indefinite failure of issue applied in Case 1 to real property will be extended in Case 2 to personal property.\(^{88}\) The indefinite construction, which "outrages grammar, and what is worse, outrages common sense,"\(^{89}\) had some justification for real property when fees tail were commonly sought as a means of keeping estates within the family,\(^{90}\) but

85. It was argued that the word "having" would cause the limitation over to take effect at the death of \( A \), and that therefore the devise involved a definite failure of issue not violating the Rule. The court did not find this inference strong enough to overcome the usual construction. Davidson v. Davidson's Ex'rs, 8 N.C. (1 Hawks) 163, 182 (1820).

86. Note that the gift over was on death without \textit{heirs}, not death without \textit{issue}. It was conceded by counsel that "heirs" as used by \( T \) meant "issue," because the limitation over was to collaterals capable of taking as heirs of \( A \), showing that the word "heirs" must have been confined to "issue." \textit{Id.} at 165. For similar cases, see Sanders v. Hyatt, 8 N.C. (1 Hawks) 247 (1821); Rice v. Satterwhite, 21 N.C. (1 Dev. & Bat. Eq.) 69 (1835).

87. It was also argued that the word "then" confined the failure of issue to \( A \)'s death. The court did not find that "then" was used as an adverb of time; rather it was merely a grammatical connective. Davidson v. Davidson's Ex'rs, 8 N.C. (1 Hawks) 163, 184 (1820).

88. The court treated the case as if it involved personal property only, notwithstanding that the gift included Realty as well as personalty. \( T \) did use the word "bequeathed," and the gift included a female slave and "household furniture and personal estate." \textit{Id.} at 180-81. Slaves may have been regarded as personal property in North Carolina. This view is reflected in the underlying assumptions of the cases involving slaves as property. \textit{E.g.}, Cutlar v. Cutlar, 3 N.C. (2 Hayw.) 154 (1801); Matthews v. Daniel, 3 N.C. (2 Hayw.) 346 (1801). The assumption is explicit in some early opinions applying the Rule in Shelley's Case, in which the distinction between lands, as real property, and slaves, as personal property, was significant. \textit{See} Nichols v. Cartwright, 6 N.C. (2 Mur.) 137 (1812); Ham v. Ham, 21 N.C. (1 Dev. & Bat. Eq.) 598, 599-600 (1837); Floyd v. Thompson, 20 N.C. (3 & 4 Dev. & Bat.) 616, 618 (1839). See also Riegel v. Lyerly, 265 N.C. 204, 143 S.E.2d 65 (1965), for a review of these early cases. Some jurisdictions applied real property rules to slaves, though they were always treated as having at least some characteristics of personalty. The majority of slave states regarded slaves as personalty, and some enacted legislation establishing this rule. \textit{See generally} W. Goodell, \textit{The American Slave Code} 23-25 (Negro Universities Press ed. 1968) (1st ed. n.p. 1853); 1 L. Simes & A. Smith, \textit{supra} note 5, § 357; J.D. Wheeler, \textit{A Practical Treatise on the Law of Slavery} 36-41 (Negro Universities Press ed. 1968) (1st ed. n.p. 1837). North Carolina had no determining statute, but went along with the majority rule. \textit{See} B. Holt, \textit{The Supreme Court of North Carolina and Slavery} 11 (1970).

If \( T \)'s gift indeed carried both Realty and personalty, the case involves a further point: Does the strength of the indefinite failure of issue construction vary according to the subject matter of the gift? May the same words in a single will mean one thing as applied to Realty and another thing as applied to personalty? \textit{See} note 94 \textit{infra}, for the proposition that they may.

89. Davidson v. Davidson's Ex'rs, 8 N.C. (1 Hawks) 163, 187 (1820).

90. \textit{See} text accompanying notes 33-39 \textit{supra}. 
made no sense for personal property—in which fees tail do not exist.91 The indefinite construction was especially inappropriate for chattels at common law because, the fee tail not being available, the gift over inevitably would be remote. The court might therefore have rejected the indefinite failure of issue construction for personal property,92 but it did not do so. Rather, it felt bound to follow the indefinite construction, so that A took an "absolute interest" subject to defeasance on a remote (indefinite failure of issue) event. The divesting clause was bad, giving A an indefeasible absolute interest in the personal property.

Case 3.93 T died in 1820. His will bequeathed personal property to his son A, and if A "dies, leaving no heir lawfully begotten of his body," T gave the property to his wife, W, for life, remainder to B and C. A survived T but died in his

91. The Statute De Donis Conditionalibus, which sanctioned the fee tail, did not apply to personal property. 1 L. SIMES & A. SMITH, supra note 5, §§ 354, 359. The result of an attempt to create a fee tail in personal property was to create what is commonly called an "absolute interest" in the personality. Id.

92. Some of the Case 2 decisions appear to be based on rationales other than remoteness (perpetuities); but it is believed that remoteness is the true ground of decision.

One alternative reading is that the attempt to create a fee tail in the legatee of personal property gives the legatee an indefeasible interest in the property, without regard to the limitation over. Id. § 359. In other words, the cases appear to be saying that there can be no future interests in personally analogous to executory interests or remainders. While now it is commonly accepted that generally one can have the same present estates and future interests in personality as in realty, for several centuries only limited future interests were recognized in personality. See generally id. §§ 351-371. It was accepted, however, that future interests could be created in trusts of personal property. Id. § 351. (Case 2, however, did not involve a trust.) Nevertheless, the possible nonexistence of gifts over in personality does not seem to be the real basis of the Case 2 decisions because cases only a few decades later recognized the validity of gifts over in chattels on definite failure of issue. See notes 93-96 infra. If executory interests did not exist in chattels, they could not have been sanctioned in the definite failure of issue cases.

It might also be noted that some of the landmark English perpetuities cases involve gifts over on failure of issue in chattels. Both the Duke of Norfolk's Case, 21 Eng. Rep. 665 (Ch. 1682), and Jee v. Audley, 29 Eng. Rep. 1186 (Ch. 1787), involve attempted fees tail in chattels real. Both of those cases rest on the proposition that fees tail do not exist in estates for years, so that the gift over cannot automatically be sustained as a remainder. Norfolk's Case sustained a gift over that was certain to invest within one life in being, impliedly recognizing the existence of the executory interest. Note, however, that the future interest was (a) equitable, not legal, and (b) in a chattel real, not a chattel personal. Jee v. Audley struck down a remote executory interest in a chattel personal on the ground of perpetuities rather than some other ground such as "repugnancy." The subject of the gift was £1,000, apparently free of trust.

Another reason sometimes given in the Case 2 opinions is that the limitation over is "repugnant" to the first taker's interest. This reason is really no reason at all; it merely announces a conclusion. The fundamental question is why the gift over is repugnant; the reason must be perpetuities because the gifts over are otherwise sustained when the failure of issue is definite.

Finally it might be noted that there is language in the Case 2 paradigm, Davidson v. Davidson's Ex'trs, 8 N.C. (1 Hawks) 163 (1820), suggestive of the Rule Against Perpetuities: the words "remote" and "it tended to a perpetuity" are used, and the Duke of Norfolk's Case is cited. Id. at 181, 186, 187.

mother's lifetime without ever having had children. *Held,* the
gift over to the wife and B and C was good; the word "leav-
ing" confined the time of the vesting to the death of A.

This is one of several cases finding sufficient language to rebut the pre-
sumption of indefinite failure of issue. The holding that the word
"leaving" indicates a definite failure of issue for gifts of personalty
follows the well-known English case of *Forth v. Chapman.* Other
words and phrases have had similar effect.

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94. The same word is not enough to rebut the indefinite construction when the subject of the gift is realty, even when the phrase appears in the same will. *Forth v. Chapman,* 24 Eng. Rep. 559 (Ch. 1720). So the strength of the presumption appears to vary according to the nature of the property given, with the indefinite presumption being more easily overcome in the case of personalty.

95. 24 Eng. Rep. 559 (Ch. 1720) (estate for years). As one of several reasons for the construc-
tion, the court said:

[T]he reason why a devise of a freehold to one for life, and if he die without issue, then to
another, is determined to be an estate-tail, is in favour of the issue, that such may have it,
and the intent take place (vide ante, the case of *Target v. Gaunt*); but that there is the
plainest difference betwixt a devise of a freehold, and a devise of a term for years; for in
the devise of the latter to one, and if he die without issue, then to another, the words [if
he die without issue] cannot be supposed to have been inserted in favour of such issue,
since they cannot by any construction have it.

Id. at 560. Compare *Forth v. Chapman,* 24 Eng. Rep. 559 (Ch. 1720), with *Vinson v. Gardner,* 185 N.C. 193, 116 S.E. 412 (1923) (real property). Dictum in *Bailey v. Davis,* 9 N.C. (2 Hawks) 108, 110 (1822), says that the distinction in *Forth v. Chapman* between realty and personalty was no longer followed, but subsequent cases seem to reject that conclusion.

96. Other cases finding sufficient language to rebut the presumption of indefinite failure of issue for personalty include *Watson v. Ogburn,* 22 N.C. (2 Dev. & Bat. Eq.) 353 (1839) ("at her death") (semblé); *Baker v. Pender,* 50 N.C. (5 Jones) 351 (1858) ("at her decease"); *Newkirk v. Hawes,* 58 N.C. (5 Jones Eq.) 265 (1859) ("at her decease"); *Blake v. Page,* 60 N.C. (Win.) 252 (1864) ("after her decease"—note that this is weaker than "at her decease"). *Porter v. Ross,* 55 N.C. (2 Jones Eq.) 196 (1855), while finding a remote gift over, classifies the cases as follows:

A work written by Mr. Wade Keyes, of Alabama, on chattels, has recently made its
appearance at our bar, where all the doctrine upon this subject is stated and the various
cases are lucidly arranged and commented on. At page 138 he arranges, into four
classes, the cases in which the general rule is controlled by the intention of the testator.
The first is, where the failure of issue is combined with an event personal to the donee;
as dying without issue and unmarried. The second, where words or phrases are used in the
context, which, of themselves, restrict the failure within the prescribed limit. The third
class is, where the subject of the gift, necessarily precludes the idea, that any other but a
restricted failure, was intended by the donor. The fourth is, where a restriction is raised
from the nature of the estate given over by the limitation.

Under these various classes, are arranged the different cases cited by him. This
writer, under the second class, observes, that a bequest over to the survivor of two per-
sons, after the death of one of them without issue, furnishes the presumption that the
testator used the words in their limited sense, and the limitation is not too remote, for it
will be intended that the survivor was meant, individually and personally, to enjoy the
legacy.

*Id.* at 197-98. The work cited by the court is *W. Keyes, An Essay on the Learning of Par-
tial, and of Future Interests in Chattels Personal* (Montgomery, Ala. 1853).
Case 4.\textsuperscript{97} T died in 1810,\textsuperscript{98} survived by three children, James, Nancy and Sally. T's will gave certain property\textsuperscript{99} to his daughter Nancy and her heirs,\textsuperscript{100} and "in case [Nancy] should die without heir properly begotten, . . . the property should be equally divided between the children then living, whether James . . . or Sally." All three children survived T; of the children, James died first, then Nancy died without ever having had issue. \textit{Held}, Sally took the property. "The words 'then living' tied up the limitation during the lives of the three children."\textsuperscript{101}

This case illustrates the impact of three little words in Gray's statement of the Rule: "No interest is good unless it must vest, \textit{if at all} . . . ." The measuring life here is Sally, not Nancy. Even if one presumes an indefinite failure of issue in the gift to Nancy, the gift over to Sally will take effect, \textit{if at all}, within Sally's lifetime. This is because the words "then living" make Sally's interest contingent upon her being alive when the failure of issue takes place. That is, upon the failure of issue, Sally will either be alive and therefore will take, or will be dead and therefore will not take. Thus, Sally will take, if at all, within her own life. The Rule does not require that the devisee in fact take, only that the decision on taking be made within the period of the Rule;\textsuperscript{102} the gift must only be certain to vest or fail within the period. If Sally dies before the expiration of Nancy's line of descendants, Sally's interest terminates, so she will take, if at all, within her own life. This theory was not available in Cases 1 through 3, because there the gifts over were not subject to a condition precedent that the remainderman be alive in order to take; even if he were not alive, his estate would have taken.\textsuperscript{103}

The preceding explanation of Case 4 squares with standard perpetuities doctrine; however, it is not altogether clear that the "if at all" rationale was in the mind of all the judges in the Case 4 decisions. Some of the opinions seem to be saying that the significance of the

\textsuperscript{97} The paradigm for Case 4 is Fortescue v. Satterthwaite, 23 N.C. (1 Ired.) 566 (1841). \textit{Accord}, Threadgill v. Ingram, 23 N.C. (1 Ired.) 577 (1841) (gift over to testator's "surviving children"); Gregory v. Beasley, 36 N.C. (1 Ired. Eq.) 25 (1840) (similar).

\textsuperscript{98} Actually, T's will was made in 1810, Fortescue v. Satterthwaite, 23 N.C. (1 Ired.) 566, 568 (1841); the opinion does not indicate when T died, but it must have been sometime before 1827.

\textsuperscript{99} The property consisted of a female slave, a bed and furniture. \textit{Id} at 566. As to the possible effect of the subject-matter of the gift, see Case 5 infra.

\textsuperscript{100} The words "and her heirs" of course were words of limitation, not words of purchase, and indicated that Nancy took the property in fee. \textit{E.g.}, J. CriBBET, \textit{supra} note 3, at 41-42.

\textsuperscript{101} Fortescue v. Satterthwaite, 23 N.C. (1 Ired.) 566, 570 (1841).

\textsuperscript{102} Baker v. Pender, 50 N.C. (5 Jones) 351 (1858).

\textsuperscript{103} \textit{See}, e.g., Hollowell v. Kornegay, 29 N.C. (7 Ired.) 261, 262 (1847).
"then living" condition is that it indicates the testator meant a definite failure of issue. This latter theory has not found currency elsewhere, and indeed is based on the tenuous ground of rebutting a strong presumption. The first theory, which is not dependent on any slippery finding of intention, seems more reliable.

Case 5. T died sometime before 1805 bequeathing a male slave, a female slave and a horse to her daughter A, and if A “should depart this life without heir lawfully begotten of her body,” the slaves and the horse should belong to B. A survived T but died without having had issue, and her administrator claimed the property. Held, the limitation over was too remote and the property vested absolutely in A.

Case 5 may be wrong, at least in part. The wrinkle in this case is the property given by T: May its nature be examined in determining the certainty of vesting? As to the male slave, if he had been treated as a human being then he would have become the life in being and the gift over would have taken effect, if at all, within his life. As to the female slave, even if she had been treated as a life in being, the gift would not have been saved. A bequest of a female slave included her increase

104. The trial judge “was of the opinion that the limitation in the will was not too remote, but that the words, then living, whether James, Nancy, or Sally, tied up the contingency to the death of the first taker without issue.” Fortescue v. Satterthwaite, 23 N.C. (I Ired.) 566, 567 (1841). The opinion of the supreme court is not altogether clear:

We agree with the judge that, in this case, the limitation over to Sally, the survivor, of the legacy given to Nancy, on her dying without issue, was not too remote; but that it was a good executory devise. The meaning of the testator is plain, that on any one or two of the children dying without issue, the survivor or survivors, then living; whether James, Nancy, or Sally, should have the legacy which had been before given to the one so dying. The contingent interest, if it ever could vest, must necessarily vest during the period of a life or lives that were in being at the death of the testator. The words "then living" tie up the limitation during the lives of the three children.

Id. at 570. Compare Fortescue v. Satterthwaite, 23 N.C. (1 Ired.) 566 (1841), with Zollicoffer v. Zollicoffer, 20 N.C. (3 & 4 Dev. & Bat.) 574 (1839); Threadgill v. Ingram, 23 N.C. (1 Ired.) 571 (1841), and Williams v. McComb, 38 N.C. (3 Ired. Eq.) 450 (1844). See also W. Keyes, supra note 96, at 139-41.

Porter v. Ross, 55 N.C. (2 Jones Eq.) 196 (1855), a personal property case, appears incorrectly decided. There the gift over on death without issue was to the testator’s six sons, “or the survivors of them.” The court, approaching the matter from the standpoint of construction, found no intention by the testator to limit the failure of issue to the first taker’s death and held the gift over remote. Nevertheless, the gifts should have been good on an “if at all” theory even if the failure of issue was general, because the sons would take only if they survived the failure of issue. That the court did not sustain the gift over may indicate that the “if at all” theory was not clearly perceived in the first generation cases and that they were instead based on a tenuous construction of the testator’s intention.

105. The paradigm for Case 5 is Matthews’ Adm’r v. Daniel, 5 N.C. (1 Mur.) 42 (1805).

106. Actually, the case involved only a male slave and a horse. Id. at 42. The female slave is postulated because the result may turn on the sex of the slave. See note 107 and accompanying text infra.
(but a gift of a male slave did not). So the gift of the female slave could not be tied to her life. As to the horse, it is settled that "lives in being" means human, not animal lives.

Gray liked the male slave argument: "[I]t was easier to sneer at the argument than to refute it. It seems unanswerable." There appears to have been no way of saving the gift over of the female slave, but the gift of the horse should have been good; there is no policy reason not to base the period of the Rule on lives of animals known to have a shorter life span than human beings. Of course, even under the most favorable view, one of the three gifts (that of the female slave) may have been bad. But that does not mean all gifts should have been held bad. The effect of invalidity of one gift on others is properly a question of construction, not an automatic "infectious invalidity."

An alternative way of saving the gift over would be via construction. An extraordinary and lengthy Reporter's Note in 1 Murphey contends that the court should have looked to the subject matter of the bequest as a circumstance from which the intention of the testator might have been inferred: since neither the horse nor the male slave could have lived longer than the period of lives in being plus twenty-

107. One aspect of the practice of slavery gives a partial explanation for the assumption that a slave, like any property, would last indefinitely. The settled rule, apparently, was that a female slave's increase were part of her. Therefore, it could be assumed that a gift of a female slave would last indefinitely, unless her increase were specifically excluded from the gift. See Williamson v. Daniel, 25 U.S. (12 Wheat.) 568 (1827). Furthermore, because the question of ownership of the increase became the subject of occasional litigation, the practice of including the expression "and her future increase" became standard. See generally J.D. Wheeler, supra note 88, at 23-36.

These assumptions did not necessarily extend to male slaves, however. In Biscoe v. Biscoe, 6 G. & J. 232 (Md. 1837), the court distinguished gifts of male and female slaves, on the ground that a male slave's issue were not presumed to follow him. It was found that the testator could not have intended a gift over on indefinite failure of issue because the gift of a male slave would have to vest, if at all, by the end of the slave's life. The distinction between gifts of male and female slaves became the rule in Maryland. See, e.g., Hatton v. Weems, 12 G. & J. 83 (Md. 1841). The North Carolina courts never adopted this theory.

108. 3 L. Simes & A. Smith, supra note 5, § 1223.
109. J.C. Gray, supra note 22, § 228.

In their casebook, Leach and Logan put the following related case:

$L$ leased Blackacre to $T$ for 50 years in 1900 for a lump sum consideration paid in advance. $T$ died in 1930 bequeathing the term to $A$, but if liquor should ever be sold on the premises, to $B$. Is $B$'s interest valid?

W.B. Leach & J. Logan, supra note 18, at 685, Problem (1). $B$'s interest is good. Since only 20 years remain on the term, all interests must vest in it within less than 21 years.

110. 3 L. Simes & A. Smith, supra note 5, § 1262. Gray cites a case that held a gift of male and female slaves remote on the ground that the same rule of construction had to apply to both. J.C. Gray, supra note 22, § 228. But why, if the same construction had to be applied to both slaves, was the invalid construction chosen in lieu of the valid one?
one years, the testator must have meant a definite failure of issue. Since the court did not find a definite failure of issue, the Reporter concluded that the subject matter of the gift will not be looked to as a circumstance from which the testator's intention may be inferred. Perhaps the Reporter was too pessimistic; the intention-oriented argument may not have been made to the court. Other authorities suggest that the subject of the gift does bear on intention.

Case 6. T made his will in 1834, devising a tract of land to his sons William and Rufus, and "if any of my children die without issue, leaving a wife or husband, it is my will that such wife or husband shall be entitled to one half of the property; the other half to be equally divided between my other children or their heirs." T had two sons and two daughters. Held, the limitation over was not too remote, because the Act of 1827 interpreted the limitation as one to take effect when the sons died, not having issue at the time of their deaths.

This case simply illustrates the effect of the Act of 1827, which established a presumption of definite failure of issue in order to avoid remoteness of the gift over on indefinite failure of issue at common

112. J. C. GRAY, supra note 22, §§ 225-229.

**Cabarrus Bank & Trust Co. v. Finlayson, 286 F.2d 251 (4th Cir. 1961), contains an excellent discussion of the history and purpose of the Act of 1827:**

This statute was enacted in 1827 to meet the rule then generally prevailing in this country that a gift over on "death without issue" in a deed or will meant an indefinite failure of issue and hence was void for remoteness. To remedy this situation statutes similar to that of North Carolina were passed in a number of states whereby the defect was cured by directing that such a phrase in a deed or will should be interpreted as a limitation to take effect when such person dies not having such heir, issue, or child living at the time of his death.

*Id. at 253. See also Tillman v. Sinclair, 23 N.C. (1 Ired.) 183 (1840).*
law. Occasionally, the 1827 Act has been overlooked or even extended to gifts over "if he die." 

114. Some language in Case 6 suggests another approach to validity. The language "leaving a wife or husband" arguably indicates a definite failure of issue because the death is tied to the life of a spouse of William or Rufus. The leading English case on this score is Pells v. Brown, 79 Eng. Rep. 504 (K.B. 1820), which involved a devise in the form "to Thomas and his heirs, but if Thomas shall die without issue, living William, then to William and his heirs." Id. at 505 (emphasis added). The court held that the reference "living William" rebutted the presumption of indefinite failure of issue. Id. In Case 6, however, the reference was not to a named spouse, and William or Rufus, under the traditional view of Jee v. Audley, 29 Eng. Rep. 1186 (Ch. 1787), might have married someone not in being at T's death. Case 6 does cite Pells v. Brown and Garland v. Watt, 26 N.C. (4 Ired.) 287, 290 (1844), but perhaps only on the nature of the gift over (an executory devise). Other cases clearly have been based on the Act of 1827. E.g., Smith v. Brisson, 90 N.C. 284 (1884) (deed) (excellent explanation); Sessoms v. Sessoms, 144 N.C. 121, 56 S.E. 687 (1907) (will of land and slaves; opinion does not distinguish between the two); Harrell v. Hagan, 147 N.C. 111, 60 S.E. 909 (1908) (semble); O'Neal v. Borders, 170 N.C. 483, 87 S.E. 340 (1915); Vinson v. Gardner, 185 N.C. 193, 116 S.E. 412 (1923); Turpin v. Jarrett, 226 N.C. 135, 37 S.E.2d 124 (1946) (deed). Occasionally, it is found that the testator used "issue" in the sense of "children," obviating any perpetuities problem. White v. Alexander, 290 N.C. 75, 224 S.E.2d 617 (1976) (will); good discussion of the Act of 1827, now N.C. GEN. STAT. § 41-4 (1976)).

115. E.g., Ex parte McBee, 63 N.C. 332 (1869); Elledge v. Parrish, 224 N.C. 397, 30 S.E.2d 314 (1944). 

116. The question upon a testamentary limitation "to A and his heirs, but if A dies then to B and his heirs" is not the same as one involving a gift over "if A dies without issue." The two cases, nevertheless, are sometimes confused. It is not certain whether A will die without issue, but it is certain that A will die, so how can one make any sense out of a gift in fee simple absolute to A coupled with a clause divesting A's fee on an event certain to occur? Several approaches have been taken, the most sensible one usually being that what T meant was "to A and his heirs, but if A dies before I die, to B and his heirs." In other words, the gift over was a built-in antilapse provision. This is known as a substitutional construction. See generally L. SIMES & A. SMITH, supra note 5, § 534.

The usual case on the Act of 1827 deals with the question whether the time of determining failure of issue is at the devisee's death or at some indefinite future time. There are a number of cases, however, involving the question whether the failure of issue is to be determined at the devisee's death or at some earlier time: litigants seek to rebut the Act's presumption and apply an earlier time for determining death without issue. In effect, many of them try to substitute "death" for "death without issue" in order to reach a substitutional construction. One of the leading cases in this line is Hilliard v. Kearney, 45 N.C. (Busb. Eq.) 221 (1853). Hilliard involved a will executed in or before 1775, and therefore decisions under the Act, which applies only to instruments executed after January 15, 1828, did not provide the standard for construction. Richard White bequeathed slaves to his wife for life, remainder to his five daughters, "and if either of them die without an heir, her part to be equally divided among her other sisters." Id. at 222. All of the daughters survived the life tenant. One (Mary) died without children, apparently soon after the life tenant, and her share was divided among the four survivors. Subsequently, two sisters (Sarah and Nancy) died leaving children, then one (Elizabeth) died leaving her husband but no children. The survivor, Drucilla, claimed all of Elizabeth's share; Elizabeth's husband claimed it as her administrator; and the representatives of Nancy and Sarah claimed portions of it. The court decided that in the context of the will the term "heirs" must mean "children," so the question of indefinite failure of issue did not arise.

The opinion discusses in detail three of six constructions that were suggested. The first construction would have caused Elizabeth's share to pass to Drucilla; the second would have caused the share to pass to Nancy's and Sarah's representatives. The other four constructions necessarily resulted in Elizabeth's having an absolute interest before her death.

Judge Pearson disposed of the first two constructions as being contrary both to the preferred rules of construction and to the apparent intent of the testator. Under the first construction, the will created successive survivorships, so that the shares of all those who died without leaving children ultimately would pass to the last surviving sister. This result was rejected for several reasons. It would require the use of the plural—the shares of the sisters who died without heir—but the testator used the singular. No estate would vest absolutely until the taker's death, and this
The first generation cases approached the Rule in typical fashion. It was treated as a rule against remoteness of vesting, with vesting defined as vesting in interest for remainders and as vesting in possession for executory interests. The Rule did not insist that the interests actually vest within the period of the Rule, only that they be certain to vest or fail in time. The validity of interests was measured from the creation would be contrary to the judicial preference for early vesting, as well as being a possible economic inconvenience when the gift was of slaves and their increase. It was also argued that this construction would prevent the property from passing to the sons. The language of the bequest, however, does not indicate that this was the testator's intent, especially since there was no gift over provided in case of the death without heir of all the daughters. Generally, this construction was found to be contrary to the presumption that the daughters themselves were the primary objects of the testator's bounty.

The second construction argued that the ultimate takers would be the representatives of those who died leaving children: the survivors would divide the shares of those who died without heir in the meantime, but their interest would not be absolute, if at all, until their deaths. The testator's intent was said to be to create a preference for those who died leaving children. This argument was also rejected as being contrary to the preference for early vesting; furthermore, no intent to prefer those who died leaving children appeared in the will.

The other constructions resulted in: (3) absolute vesting at testator’s death; (4) absolute vesting at life tenant’s death; (5) absolute vesting when the first daughter dies without leaving a child; and (6) absolute vesting in the last two survivors. The court does not discuss what would have happened if one daughter had predeceased the testator, leaving children, but there is language to indicate that there would be no gift over to children by implication and that one had to survive the testator in order to take. The court also apparently failed to note that one sister had died without children, having survived the testator and the life tenant. Her share in any case had long ago been distributed to the other daughters, and none of her other heirs appeared to be interested in making a claim on her share.

The holding states that Elizabeth's share vested in her absolutely “at the division.” Id. at 234. Since this apparently occurred after Mary's death, it is arguably the fifth construction that Judge Pearson was applying. Language in the opinion indicates, however, that Judge Pearson was applying the third construction: absolute vesting in takers living at the death of the testator. See id. at 232. This interpretation of the opinion was approved in Davis v. Parker, 69 N.C. 271 (1873), and Murchison v. Whitted, 87 N.C. 465 (1882).

The fourth construction, absolute vesting on survival of the life tenant, would have been equally applicable in Hilliard, and would appear to be the preferred construction under the rule stated by Judge Pearson. He apparently overlooked this possibility. See Murchison v. Whitted, 87 N.C. at 470. The sixth construction is dismissed as being both inconvenient and unlikely. Thus, the rule appears to be that the interest should vest in those who survive the testator at his death, whether or not they die leaving heirs. A provision such as this one in Richard White's will is thus regarded as an antilapse provision, rather than as a true survivorship condition. See id.

This discussion was rendered largely academic by the adoption of § 41-4 because this rule of construction does not apply to wills under that section. See Kirkman v. Smith, 175 N.C. 579, 94 S.E. 423 (1918). It is now provided by statute that a reference to a gift on the death of a taker without children, etc., fixes the time of vesting at the death of that taker. The construction applied in Hilliard was argued in Cabarrus Bank & Trust Co. v. Finlayson, 286 F.2d 251 (4th Cir. 1961), and was firmly rejected. In abolishing the indefinite failure of issue construction, § 41-4 also established a new rule for determining the time when the absolute interest will vest.

Cases preferring the Act of 1827 over a substitutional construction include Buchanan v. Buchanan, 99 N.C. 308, 5 S.E. 430 (1888); Kornegay v. Morris, 122 N.C. 199, 29 S.E. 875 (1898) (following Buchanan v. Buchanan); Rees v. Williams, 165 N.C. 201, 81 S.E. 286 (1914); Patterson v. McCormick, 177 N.C. 448, 99 S.E. 401 (1919) (devise in question followed life estate, and it was argued, unsuccessfully, that death of life tenant was time for determining substitution); House v. House, 231 N.C. 218, 56 S.E.2d 695 (1949) (in accord with Patterson v. McCormick).
tion of the interests, with courts refusing to take into account the events that actually took place. The constructional question of the effect of invalidity of one interest on other valid interests was ignored. The courts were willing to look to constructional questions before reaching perpetuities, but the subject matter of the gift, and its bearing on perpetuities, was ignored. 117

II. ELEMENTS OF THE RULE

A. Statement of the Rule in North Carolina

Article I, section 34 of the Constitution of North Carolina states: Perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed. 118

The same provision was found in the constitutions of 1868 and 1776, 119 and similar provisions are included in the constitutions of several other states. 120

The North Carolina constitutional ban on "perpetuities and monopolies" does not appear to have given any different meaning to the Rule in this state, as compared with traditional formulations; 121 nor do similar constitutional provisions in other states appear to have affected the development of the Rule. 122 The constitution is cited in an occa-

117. Dukeminier and Johanson state:

Although the indefinite failure of issue construction has been abolished in almost all states and is of very little modern importance, the principles involved ... are still fundamental. "Indefinite failure of issue" is the equivalent of any remote event that may happen more than 21 years after the death of all living persons.


118. N.C. CONST. art. I, § 32.

119. N.C. CONST. of 1868, art. I, § 31; N.C. CONST. of 1776, Declaration of Rights § 23. Those constitutions also included a provision that "[t]he General Assembly shall regulate entailso in such manner as to prevent perpetuities." N.C. CONST. of 1868, art. II, § 15; N.C. CONST. of 1776, § 43.

120. ARK. CONST. of 1874, art. 2, § 19; FLA. CONST. of 1838, art. 1, § 24; FLA. CONST. of 1865, art. 1, § 23 (current constitution of Florida omits any perpetuities provision); NEV. CONST. of 1864, art. 15, § 4; PA. CONST. of 1776, § 37; TENN. CONST. of 1870, art. 1, § 22; TEX. CONST. of 1876, art. 1, § 26; VT. CONST. of 1793, ch. 2, § 36; WYO. CONST. of 1890, art. 1, § 30.

121. One might have expected the association of "perpetuities" with "monopolies" to have colored the meaning of perpetuities. Nevertheless, the early cases regarded perpetuities as unbarable estates tail, e.g., Griffin v. Graham, 8 N.C. (1 Hawks) 96 (1820), and a similarity between perpetuities and monopolies was found in that each resulted in a tying up of property so that no one had the power to alienate it. See Yadkin Navigation Co. v. Benton, 9 N.C. (2 Hawks) 10 (1822). This section was said to protect the vested right of jus disponendi and was followed by the Act, passed in the same spirit, converting estates tail into fees simple. Hughes v. Hodges, 102 N.C. 236, 9 S.E. 437 (1889). See also Lane v. Davis, 2 N.C. (1 Hayw.) 277 (1796); Minge v. Gilmour, 2 N.C. (1 Hayw.) 279 (1796). Most of the cases arising under article I, § 34 deal with alleged monopolies, such as exclusive franchises and licenses. See annotations to N.C. CONST. art. I, § 34.

122. For example, the annotations to the Tennessee constitutional proscription of perpetuities
sional perpetuities case, but generally it has not been an influencing factor.

The verbal formulation of the Rule in North Carolina has followed much the same path as in other jurisdictions. The first generation cases conceived of perpetuities as unbarrable estates tail, à la the Duke of Norfolk's Case, and seemed to be applying the "inconvenience" concept of that case. By the mid-nineteenth century, the cases had moved toward Gray's formulation. From time to time, Mordecai was quoted, and there was an occasional wistful look at Powell's different formulation of the Rule, but the second generation cases generally stuck to Gray.

As typically stated, the Rule in North Carolina is:

No devise or grant of a future interest in property is valid unless the title thereto must vest, if at all, not later than twenty-one years, plus the period of gestation, after some life or lives in being at the time of

indicate that common law perpetuities are comprehended by that provision and also cite cases using Gray's formula. E.g., Chattanooga v. Tennessee Elec. Power Co., 172 Tenn. 524, 112 S.W.2d 385 (1938). The annotations to the Texas Constitution also apply the traditional Gray formulation. Giddings v. Smith, 15 Vt. 344 (1843), is unusual in that it regards entails as not necessarily perpetuities.


124. The North Carolina reception statute adopting the common law of England as of the date of the signing of the Declaration of Independence, N.C. GEN. STAT. § 4-1 (1969), does not appear to have affected the Rule or prevented the adoption of Gray's formulation (which first appeared in 1886). This is not unusual. See Link, supra note 6, 822-23. For the story of a creative use of a Colorado reception statute to avoid Gray's "if at all" aspect of the Rule, see W.B. Leach & J. Logan, supra note 18, at 711.

125. See section I.B. supra.

126. E.g., Fuller v. Hedgpeth, 239 N.C. 370, 377, 80 S.E.2d 18, 23 (1954). Mordecai's formulation ignores the "if at all" aspect of Gray's rule. 1 S. Mordecai, supra note 22, at 588-89: "Every estate must vest during a life or lives in being and twenty-one years—plus the usual period of gestation—thereafter."

127. One court noted:

Professor Richard R. Powell in his work, Powell on Real Property, ... has a very good discussion of the rule. He points out that the rule against perpetuities is a product of the struggle to preserve the alienability of property.

Professor Powell quotes the rule as stated by John Chipman Gray and criticizes it as not being accurate. He contends for a different statement of the rule and his contention has been adopted in the Restatement of Property as follows:

"Thus the rule against perpetuities promotes alienability by destroying future interests which interfere therewith either by eliminating the power of alienation for too long a time or by lessening the probability of alienation for too long a time. ..."

Applying the rule as articulated in this State or as contended for by the Restatement, we believe the result would be the same in this instance.

Wing v. Wachovia Bank & Trust Co., 35 N.C. App. 346, 350, 241 S.E.2d 397, 400 (1978) (quoting RESTATEMENT OF PROPERTY § 370, Comment i (1944)).

128. E.g., id. ("We believe that the courts of this State have adopted the rule as stated by John Chipman Gray.").
the creation of the interest. If there is a possibility such future interest may not vest within the time prescribed, the gift or grant is void. The rule refers solely to the vesting of estates and does not concern itself with their possession or enjoyment.¹²⁹

For a time, the formulation was misstated as “not less than” rather than “not later than,” but the mistake did not affect the outcome of any cases.¹³⁰ The second sentence of the formulation is somewhat inconsistent with the “if at all” concept of the first sentence; the matter is discussed below in connection with the elements of the Rule.¹³¹

B. Elements of the Rule in North Carolina

1. “No devise or grant of a future interest in property”

a. In General

Apparently the Rule originally developed as a check on executory interests in real property, because they were held to be free from the doctrine of destructibility of contingent reminders.¹³² The rule now applies to remainders, as well as executory interests, even if the remainder is subject to destructibility by the common law doctrine or by statute.¹³³ The Rule applies to interests in personal property as well as realty.¹³⁴ Equitable interests as well as legal ones are subject to the Rule,¹³⁵ even


Indicative of the elusive quality of the Rule is the very difficulty encountered in stating it accurately and comprehensively. . . . And of purely passing interest is the fact that the North Carolina Supreme Court has in a series of cases, beginning apparently with McQueen v. Trust Co. . . . inadvertently misstated Gray’s formulation by 180 degrees, stating it “not less than” rather than “not later than.” This quite understandable reversal in form of a formulation already replete with negatives was carried over into Fuller v. Hedgepath, McPherson v. Bank, Finch v. Honeycutt, . . . thence into the advance sheet report of Parker v. Parker, . . . being corrected in the bound volume report of this case, and later correctly stated in Clarke v. Clarke . . . . No substantive result was affected by this inadvertence.

¹³¹. See section II.B.A. infra.
¹³². See text accompanying notes 43-45 supra.
¹³³. North Carolina may still recognize the doctrine of destructibility of contingent remainders. See McCall, supra note 7. Dictum in the fairly recent case of Blanchard v. Ward, 244 N.C. 142, 148, 92 S.E.2d 776, 781 (1956), suggests the possibility of destructibility by merger. By statute, the grantor may revoke deeds of future interests made to persons not in esse, N.C. GEN. STAT. § 39-6 (1976), or may sell property subject to contingent remainders and reinvest the proceeds, id. § 41-11. Nevertheless, this state continues to apply the Rule Against Perpetuities to contingent remainders. See also 3 L. Simes & A. Smith, supra note 5, § 1255.
¹³⁵. E.g., cases collected in section V. infra.
if the trustee has a power of sale.\textsuperscript{136} Class gifts,\textsuperscript{137} powers of appointment,\textsuperscript{138} and interests created by exercise of powers of appointment\textsuperscript{139} are within the Rule. Fiduciary powers run some risk of being subjected to the Rule.\textsuperscript{140}

Future interests left in the creator of the interest, including reversions, possibilities of reverter and powers of termination (rights of entry), usually are regarded as presently vested and therefore not subject to the Rule.\textsuperscript{141} Commercial interests such as rights to repurchase, options to repurchase, leases to commence at an uncertain time in the future, and options in gross have been struck down under the Rule, but covenants for perpetual renewal of leases, options to purchase in lessees, easements, profits \textit{à prendre}, expandable easements and pension trusts for employees have escaped the guillotine.\textsuperscript{142} In sum, the Rule may apply to interests other than the conventional "future interests" suggested by the typical definition. And the "property" referred to in the definition includes personalty as well as realty and may even extend to some contractual arrangements.\textsuperscript{143}

The definition refers to "devises and grants." Clearly the rule may apply to gifts by will of realty (historically called "devises") or of personalty (historically called "bequests" or "legacies").\textsuperscript{144} It applies to interests created by deed (grant), as well as to inter vivos trusts and testamentary trusts.\textsuperscript{145}

\textbf{b. Charitable Gifts}

The blackletter is unequivocal: "[T]he rule against perpetuity does not apply to charitable trusts."\textsuperscript{146} This view is codified in G.S. 36A-49:\textsuperscript{147}

\begin{small}
\textsuperscript{136} See McQueen v. Branch Banking & Trust Co., 234 N.C. 737, 68 S.E.2d 831 (1951). Only Wisconsin frees from the Rule those trusts in which the trustee has the power to sell. \textit{E.g.}, \textit{In re Walker's Will}, 258 Wis. 65, 45 N.W.2d 94 (1950), \textit{noted in 49 MICH. L. REV. 1239 (1951); 35 MINN. L. REV. 617 (1951)}.

\textsuperscript{137} See section III. infra.

\textsuperscript{138} See section IV. infra.

\textsuperscript{139} Id.

\textsuperscript{140} See notes 321-22 infra.

\textsuperscript{141} See Case 32 infra.

\textsuperscript{142} See section VI. infra.

\textsuperscript{143} Id.

\textsuperscript{144} \textit{E.g.}, Stellings v. Autry, 257 N.C. 303, 126 S.E.2d 140 (1962).

\textsuperscript{145} Id. \textit{; See section V. infra.}


\textsuperscript{147} N.C. GEN. STAT. § 36A-49 (Supp. 1977). This statute is merely declarative of the com-
Not void for indefiniteness; title in trustee; vacancies. - No gift, grant, bequest or devise, whether in trust or otherwise, to religious, educational, charitable or benevolent uses or for the purpose of providing for the care or maintenance of any part of any cemetery, public or private, shall be invalid by reason of any indefiniteness or uncertainty of the objects or beneficiaries of such trust, or because said instrument confers upon the trustee or trustees discretionary powers in the selection and designation of the objects or beneficiaries of such trust or in carrying out the purpose thereof, or by reason of the same in contravening any statute or rule against perpetuities.

Other authorities would suggest that this blanket exemption is stated too broadly, but no North Carolina case has invalidated a gift to charity on the ground of perpetuities. The statute may mean literally what it says.

There are almost as many North Carolina perpetuities cases on charitable gifts as on any other aspect of the Rule, and those cases pretty well run the gamut of possible issues. For starters, a perpetual trust for a charity is valid. If the Rule Against Perpetuities does not apply to the duration of a private express trust, seemingly it should not apply to the duration of a charitable trust. There is a difference, however: in the private express trust, all the equitable interests of the beneficiaries must vest within the period of the Rule, but in the case of the charitable trust the interests do not vest in any particular beneficiaries. A better explanation of the exemption is that outright gifts to charitable corporations are exempt from the Rule, and the charitable trust is not fundamentally different from the charitable corporation—in each form one entity (corporation or trust) holds title for the benefit of the public (charity). Even if the charitable trust is somehow different, the public benefit of the charitable trust outweighs any perpetuities detriment.

In other jurisdictions, when there is a gift to one charity subject to a remote gift over to another charity, both gifts are good, at least when


148. See 5 R. Powell, supra note 22, ¶ 770[1]; 4A id. ¶ 584 (1979).


150. See section V. infra.

151. Although in a sense the equitable interest does vest in the charitable purpose.

152. E.g., 3 L. Simes & A. Smith, supra note 5, § 1279.
the contingency on which the gift shifts is related to charity. The reason is that a perpetual tying up of property for two charities should be good if a perpetual tying up for one charity is good (and it is). Although no North Carolina cases are squarely in point, undoubtedly this state would follow the usual rule.

Given the basic exemption of present gifts for charitable trusts, some variations are possible. The settlor, for example, may provide that the trustee has no power to sell the trust corpus. Here the restraint on alienation is aggravated, since the trustee cannot even sell the particular trust corpus and reinvest the proceeds of sale for the benefit of charity. Nevertheless, the recent case of Wachovia Bank & Trust Co. v. John Thomasson Construction Co. sustained the validity of the restriction on the power of sale. Aside from citing cases from other jurisdictions, the court’s only reason for reaching this result was that “since North Carolina recognizes that a donor may create a perpetual charitable trust, it would seem strange to deviate from the general rule so as to prevent the donor from restraining sale of the corpus of such trust.” This reasoning is not convincing, but it is not unusual. Significantly, the court actually did authorize the sale of the trust corpus, pursuant to the general power of courts of equity to permit sales of property settled in trust for charity, so the validation of the restraint on alienation did not have disastrous consequences.

Now, suppose that instead of allowing immediate use of the charitable gift, the settlor directs accumulation of the income for a specified period of time, say ninety-nine years. Will the accumulation for charity be good? Yes, according to Penick v. Bank of Wadesboro, although it is not clear what standard, if any, will be imposed on

153. E.g., 6 ALP, supra note 22, § 24.40.
154. 3 L. Simes & A. Smith, supra note 5, § 1280.
155. See Williams v. Williams, 215 N.C. 739, 3 S.E.2d 334 (1939); Z. Smith Reynolds Foundation v. Trustees of Wake Forest College, 227 N.C. 500, 42 S.E.2d 910 (1947) (contract for payments from one charity over to another).
156. 275 N.C. 399, 168 S.E.2d 358 (1969), modifying 3 N.C. App. 157, 164 S.E.2d 519 (1968). The court of appeals held only that the restriction on sale was invalid; the trust itself did not fall.
157. Id. at 408, 168 S.E.2d at 364.
159. In John Thomasson, the court of appeals relied on the decision in Hass v. Hass, 195 N.C. 734, 143 S.E. 541 (1928). The supreme court distinguished Hass as a case based on the proposition that the words preventing sale (“It is my will that my real estate be not sold . . .”) were merely precatory! These decisions overlooked two early cases sustaining perpetual trusts for charity in which the trustee was forbidden to sell the trust corpus. One was the fountainhead charitable case of Griffin v. Graham, 8 N.C. (1 Hawks) 96 (1820), and the other was State ex rel. Wardens of the Poor v. Gerard, 37 N.C. (2 Ired. Eq.) 210 (1842).
160. 218 N.C. 686, 12 S.E.2d 253 (1940).
accumulations for charity, because the court simply cited the statute that charitable trusts are not subject to the Rule Against Perpetuities. Elsewhere it is said that accumulations for charity are subject to a test of reasonableness, while accumulations of income for private beneficiaries may not exceed the period of perpetuities. One would expect some outer limit on accumulations for charity, although it has not yet been reached.

Some caution is advisable in drafting accumulations for charity. Penick involved a direct gift to charity, with provision for postponed enjoyment pending accumulation of income. Suppose, however, that the gift to charity was conditional upon the accumulated fund reaching a specified amount. Leach suggests that such a gift would be bad. This example is just one aspect of the broader question whether a gift to charity on a possibly remote condition precedent would be bad. In other words, the inquiry now shifts away from present gifts to charity, to gifts postponed until the happening of some condition precedent.

The North Carolina cases uniformly have sustained postponed gifts to charity, despite some fairly clear cases of remote conditions precedent. In the accumulation of income situation, gifts were upheld in the following cases: (1) Griffin v. Graham, in which the testator directed that as soon as the funds arising from the profits of his estate were deemed sufficient by his executors "a brick house shall be erected . . . for the accommodation of indigent scholars . . . . And . . . as soon as the house is finished and the funds arising from the profits of my estate will admit, a proper schoolmaster shall be employed . . . ."; and (2) State ex rel. Stanly v. McGowen, in which the tes-

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161. E.g., 6 ALP, supra note 22, § 24.42.
162. E.g., 3 L. SIMES & A. SMITH, supra note 5, §§ 1461-1468.

Actually, while there are several cases validating provisions for accumulation within the period of the Rule, there are few cases involving provisions for accumulation for periods longer than the Rule. It does not logically follow that if an accumulation for a period not longer than the Rule is good, an accumulation for a longer period is necessarily bad.

Following the celebrated case of Thellusson v. Woodford, 31 Eng. Rep. 117 (Ch. 1798), aff'd, 32 Eng. Rep. 1030 (H.L. 1805), Parliament enacted its "Thellusson Act," 39 & 40 Geo. 3, c. 98 (1800), restricting the period of valid private accumulations. Several American states, fearing dynastic trusts created by compound interest-crazed settlers, passed similar statutes. The fears proved unjustified—most Americans just were not Thellusson-minded. Since the statutes restricted certain federal tax advantages of accumulation trusts, most of the American Thellusson Acts have now been repealed. See generally 3 L. SIMES & A. SMITH, supra § 1466. Apparently North Carolina has never faced the problem.

163. 6 ALP, supra note 22, § 24.42. Whether invalidity would merely cut the accumulation provision down to size or completely defeat it is not clear. Id.
164. 8 N.C. (1 Hawks) 96 (1820).
165. Id. at 98.
166. 37 N.C. (2 Ired. Eq.) 9 (1841).
tator directed that "the net proceeds [of the estate] are then to be kept and put by my executors to the use of a free school." It is not clear whether these holdings reflect a view that the gifts were presently vested with only enjoyment postponed, or whether they represent a general exemption of contingent charitable gifts from the Rule Against Perpetuities. Given the favorable treatment of charities, the courts may be inclined to construe ambiguous language as creating a presently vested interest.

The most complete discussion in any North Carolina case of the condition precedent problem came in Farnan v. First Union National Bank. The court saved the gift by finding that the only condition precedent (acceptance in writing by the trustee) had to be performed within the period of the Rule and that other apparent conditions precedent merely affected the time of enjoyment. The court's consideration of the issue is some suggestion that the gift would have been bad if the conditions had been remote, although Leach opines that the charitable trust statute would save the gift.

About the only charitable trust issue not found in the North Carolina cases is the one that arises when an immediate gift to charity is followed by a remote gift over to a noncharity. In cases of this type, the remote gift over typically fails, leaving the charity with a valid indefeasible estate.

To summarize, perpetual trusts for charity are valid, even if they forbid alienation of the trust corpus or direct accumulation of the income for a fairly long period. A gift to one charity followed by a gift over to another charity on a remote condition apparently is good, provided the contingency is related to charity. The status of gifts to charity subject to remote conditions precedent is somewhat unclear. North Carolina has never invalidated a charitable gift on perpetuities grounds, and G.S. 36A-49, which exempts charities from the Rule, may be a strong factor. Given the favorable treatment of charities, interests that otherwise might fall afoul of the Rule may be construed as vested, or cy pres may be applied. Charitable gifts are not invalidated merely

167. Id. at 11.
168. See 3 L. SIMES & A. SMITH, supra note 5, §§ 1282-1285.
169. 263 N.C. 106, 139 S.E.2d 14 (1964). For a full statement of the case, see Case 30 infra.
171. E.g., 3 L. SIMES & A. SMITH, supra note 5, § 1287.
because the beneficiaries may be remotely ascertained; the focus is on the legal interest in the trustee.

2. "Is valid"

If an interest is not valid it is, logically enough, invalid. That is, the interest is invalid from the time of creation, and it is not cut down to size. There is no cy pres to reform the interest, and to make it approximate as nearly as possible the creator’s intention.172

There is little consideration of the effect of invalidity of one interest on other valid interests in the North Carolina cases.173 Generally, the invalid interest is stricken, leaving the other interest to take effect as if the invalid interest had never been written.174 The case of the dynastic-minded testator is an instructive example:

Case 7.175 T, whose spelling was rather idiosyncratic, devised his farm
to my Grand Sound John W. Clayton . . . to have and to hold
his life time, thence to his Body ars if he has Eney and if not
then if my Grand Sound Silas . . . if he a living but if J.W.
Clayton Shold hav a body hir it Shall go to them down to the
Tenth Jenerration . . . ."176

John W. Clayton survived T and later died, leaving as heirs nine children. Held, the provision in the will restricting the land “down to the Tenth Jenerration” was void, but the prior estate to which it was annexed was valid, giving the nine children a fee simple.

Apparently, the court mechanically excised the invalid limitation, leaving the gift to John W. Clayton’s “Body ars if he has Eney,” which vested on John’s death. A related case seems disposed to sever only the remote part of a single phrase.177

172. See, e.g., Case 8 infra.
173. The standard cases are discussed in Leach, supra note 29, at 656-57. Perhaps the most important case is that of alternative contingencies: if two alternative contingencies are stated, one of which is remote and the other is not, and the contingency occurs on which the valid limitation is to take effect, the gift will be good. Id. at 657.
174. E.g., 3 L. SIMAS & A. SMITH, supra note 5, § 1262.
176. Id. at 387-88, 80 S.E.2d at 30.
177. In Jackson v. Powell, 225 N.C. 599, 35 S.E.2d 892 (1942), the testator modestly attempted to entail his estate for a mere three generations: “The grantors hereof make this conveyance to the grantees named above during their natural lifetime then to their bodily heirs to the third generation.” Id at 599-600, 35 S.E.2d at 892. The court held the limitation to the third generation to be a violation of the Rule, giving the grantees a fee simple under the Rule in Shelley’s Case! The court in effect struck only the words “to the third generation,” leaving a gift in the form “to the
When it is difficult to sever the remote interests from the nonremote, the entire gift will fail:

*Case 8.*178 *T'*s will provided:

Item 7. My will is that all the rest of my property of every description, and my money, be kept by my executor, whomsoever I may appoint; it shall be kept as a fund. Should any of my children or grandchildren come to suffering, in any other way, save by idleness, drunkenness, or anything of the kind, so as to become an object of charity, I want the said executor to give a part of this to such child or grandchild.

_Held,_ whether the administration of the fund by the executor was deemed a power or trust in him, the bequest was void because the fund might have been needed for grandchildren more than twenty-one years after the death of *T*'s children. Implicit in this case are gifts to: (1) testator's children, all of whom necessarily were lives in being; (2) testator's grandchildren born before his death; and (3) testator's grandchildren born after his death. The court did not separate (1) and (2) from (3), or (1) from (2) and (3), even though either of these alternatives would have saved part of the gift. This automatic result is typical but regrettable.179

A leading powers of appointment case severed a valid gift of one-half of a remainder from an invalid gift of the other half:

*Case 9.*180 By his will, *T* left property in trust for his son, William, and provided that "William, shall have the right to dispose of the entire estate ... by will . . . . Should my son die intestate . . . then such estate shall go to [William's surviving] child or children." William's will gave "[a]ll the rest and residue of my estate . . . including [the property subject to the power]" in trust for his children. Upon each child's reaching age twenty-five, one-half of the child's trust was to be distributed in fee to the child, and the remaining one-half was to be held in trust for the benefit of the child for life, with the right to dispose of the remaining one-half share by will to

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179. The usual argument against severability is that it cannot be known which plan the testator would have preferred; indeed he might have preferred a different plan (for example, distribution for a period of the lives of his children plus 21 years). Perhaps, but the question at least deserves attention. (Note that total intestacy will result in equality among family branches without regard for the testator's preferences.)
the child's spouse, descendants or charity, and in default of appointment to the child's issue, or if none, to William's surviving issue. William was survived by two children, ages thirteen and ten. Held, the gift of the remaining one-half to William's children for life with power to appoint violated the Rule, and the children took that share free of trust under the gift in default in T's will.

The court stated that the provisions were severable without indicating its reasons. This result is in startling contrast to the class gift cases, in which infectious invalidity seems to be the rule. This matter is discussed more fully in connection with class gifts in section III. Finally, during the period when North Carolina took the view that trust duration was within the Rule, a remotely long trust failed in toto; the court would not limit its duration to a valid period.

3. "Unless the title thereto must vest"

a. In General

The Rule Against Perpetuities is a rule against remoteness of vesting. It is not a rule against interests that last too long or against trusts that endure too long, although one has the lingering suspicion that a court would find some way to strike down a flagrantly long-lasting gift or trust even if all interests vested within the period of the Rule.

For perpetuities purposes, "vest" is used in its technical sense of vesting in interest—a remainder is vested in this sense when its possession and enjoyment is subject to no condition precedent other than termination of the prior particular estate. There is one important qualification: for executory interests (as contrasted with remainders),

183. Leach, supra note 29, at 639-40, 668; see section V. infra.
184. For example, (1) O conveys to A for life, remainder to A's children, to be paid at age 75, or (2) O conveys to A for life, remainder to B, to be distributed to B 100 years after A's death.
185. W.B. Leach & J. Logan, supra note 18, at 253:

To say that an interest is vested may mean that, although it is still a future interest, it has acquired that metaphysical and artificial status which under the feudal law made it an estate rather than the possibility of becoming an estate—i.e., that it is vested in interest. A remainder is vested in this sense when it is not subject to a condition precedent other than the termination of the particular estate. Executory interests, it is said, do not have the capacity for vesting in interest as remainders do; but this statement is supportable only on historical grounds having no relation to present practical considerations, nor is it really observed by the courts in situations where it counts.
vesting means vesting in possession.\textsuperscript{186} The concept of remote vesting breaks down in certain applications of the Rule to commercial interests.\textsuperscript{187}

The Rule Against Perpetuities is not a rule against suspension of the power of alienation.\textsuperscript{188} It is not the same as the rule against restraints on alienation, although both are based at least in part on a policy against withdrawal of property from commerce.\textsuperscript{189} The Rule has been used by analogy to check the duration of accumulations of income, although the issue seems not to have arisen in this state.\textsuperscript{190}

\textit{b. Absolute Certainty of Vesting}

The interest must be absolutely certain to vest (if at all), on any possibility one can imagine, from the creation of the interest. It is not enough that the interest is highly likely to vest in time, nor that it in fact vests in time. The certainty must exist at the time the interest is created.\textsuperscript{191} In other words, the test is what might have been, not what actually happened.\textsuperscript{192}

Leach has collected a set of bizarre, unanticipated English applications of the Rule, denominated the "fertile octogenarian," the "unborn widow," and the "precocious toddler," in which, by disregarding the facts of life, various interests were invalidated.\textsuperscript{193} A couple in their seventies was presumed capable of having children, a man in his sixties was considered capable of courting and marrying a woman sixty years his junior, and a child of five was deemed capable of producing offspring. None of these exact cases has been litigated in North Carolina, although there are sparse indications that the fantastical presumptions of the English cases would not be followed here. In \textit{McPherson v. First & Citizens National Bank},\textsuperscript{194} the trial court found from the evidence

\textsuperscript{186} \textit{Id;} \textit{accord,} Poindexter v. Wachovia Bank & Trust Co., 258 N.C. 371, 376, 128 S.E.2d 867, 872 (1963) (dictum); Parker v. Parker, 252 N.C. 399, 405, 113 S.E.2d 899, 904 (1960) (dictum).
\textsuperscript{187} \textit{See} section VI. \textit{infra}.
\textsuperscript{188} Leach, \textit{supra} note 29, at 640.
\textsuperscript{189} \textit{Id.} For a strong statement that a perpetuity is an estate settled so that there is no power of alienation in the owner, see the leading case of Griffin v. Graham, 8 N.C. (1 Hawks) 96, 131-32 (1820).
\textsuperscript{190} \textit{See} note 162 \textit{supra}.
\textsuperscript{191} Leach, \textit{supra} note 29, at 642-43.
\textsuperscript{192} \textit{See, e.g.,} Moore v. Moore, 59 N.C. (6 Jones Eq.) 132 (1860).
\textsuperscript{193} Leach, \textit{supra} note 29, at 643-44; Leach, \textit{Perpetuities: The Nutshell Revisited}, 78 HARV. L. REV. 973, 992 (1965). Schuyler points out the absurd assumptions implicit in these cases in Schuyler, \textit{supra} note 38, at 12-16.
\textsuperscript{194} 240 N.C. 1, 81 S.E.2d 386 (1954).
before it that a fifty-three year old man was physically incapable of having further children. The supreme court reversed this finding because the case was not "sufficiently compelling" to warrant relaxation of the common law presumption that so long as a man lives he is capable of procreation. The court's ruling did not affect the perpetuities issue, however. On the other hand, in *Hicks v. Hicks*, which was not a perpetuities case, evidence was introduced that a seventy-three year old woman had undergone surgery for removal of her ovaries, and her gynecologist testified that it was impossible for her to bear children. The supreme court sustained the trial court finding that the evidence was sufficient to rebut the presumption of procreative ability. The cases are distinguishable in the degree of proof at the trial level and the sex of the person in question. But significantly, both indicate that the common law presumption is rebuttable, in contrast to the rule of the English fertile octogenarian case that no evidence would be heard on the facts of life.

Another farfetched case of invalidity is the "administration contingency," in which the grantor foresees that some of the objects of his bounty will die during a relatively short period of administration of an estate or trust and so provides that the property will pass only to those beneficiaries who are living when administration is completed or distribution is made. Because it is mathematically possible that administration will take more than the period of perpetuities (which, in the absence of a measuring life, is twenty-one years), the gift may fail.  

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Nor have we overlooked Finding of Fact No. 17, wherein the court below found "that it is physically impossible for . . . James E. McPherson to have additional children." On the basis of this finding, without further elaboration or supporting allegation, the court decreed in effect that the living children of James E. McPherson are entitled to all the benefits of the McPherson trust. This decree may not be treated as conclusive in view of the presumption indulged by the law that so long as a man lives he is capable of procreation. . . . Indeed, by the ancient rule of the common law, to which this Court adheres (*Shuford v. Brady* . . .) it is irrebuttably presumed that any person—man or woman—may have issue so long as life lasts. . . . While in many jurisdictions, including England, the question whether the possibility of issue is ever extinct, has been re-examined in the light of exact processes of medical science by which in given cases sterility or impotency may be shown as matters of scientific certainty, nevertheless, thus far this Court has not been presented with a situation sufficiently compelling to warrant relaxation of the common law rule.

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195. The court noted:

For example, suppose the following cases:

Case 10.\textsuperscript{199} In return for $200, \(H\) conveyed to \(G\) all the timber cut on fifty acres of \(H\)'s land. \(G\) was allowed "the full term of five years within which to cut and remove the timber hereby conveyed, said term to commence from the time \(G\) begins to manufacture said timber into wood or lumber." Thirteen years had elapsed without action by \(G\). \textit{Held}, the contract created a lease for a term of years, which was void for uncertainty as to when it will commence.

Case 11.\textsuperscript{200} \(T\) bequeathed the corpus of a trust to named beneficiaries five years after the final decree of distribution of the trust corpus from his executor to the trustee. \textit{Held}, the gift was bad.

Case 12. \(T\) devised Blackacre to \(X\) to have and to hold twenty-five years from and after the date of probate of \(T\)'s will. There are no North Carolina cases in which the issues raised by this hypothetical have been noticed.\textsuperscript{201}

Case 13. \(T\) bequeathed the residue of his estate in trust to pay the debts, taxes and administration expenses of his estate, then to hold the balance for \(A\). This fact situation existed in two North Carolina cases, but the issue was not noticed.\textsuperscript{202}

The invalidation of the contract in Case 10 was consistent with the perpetuities idea that it was uncertain that cutting the timber would commence within twenty-one years (there being no human lives to which the commencement could relate), although the opinion belies that rationale.\textsuperscript{203} Case 11 is the celebrated California malpractice case of \textit{Lucas v. Hamm},\textsuperscript{204} in which the gift was assumed to be bad because there was a possibility that the decree of distribution might not be entered

\begin{itemize}
\item \textsuperscript{199} Gay Mfg. Co. v. Hobbs, 128 N.C. 46, 38 S.E. 26 (1901).
\item \textsuperscript{200} Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), cert. denied, 368 U.S. 987 (1962). Actually, the exact language of the will appears neither in the supreme court or district court of appeal opinions, see 11 Cal. Rptr. 727 (Dt. Ct. App. 1961), and it was only assumed that the postponement violated the Rule Against Perpetuities: \textit{See} 14 STAN. L. REV. 580, 581 n.1 (1962). Clearly it violated the California rule against suspension of the power of alienation.
\item \textsuperscript{201} The fact situation existed in McQueen v. Branch Banking & Trust Co., 234 N.C. 737, 68 S.E.2d 831 (1951), but the issue was not noticed.
\item \textsuperscript{203} \textit{See} text accompanying notes 348-50 infra.
\item \textsuperscript{204} 56 Cal. 2d, 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), cert. denied, 368 U.S. 987 (1962).
\end{itemize}
RULE AGAINST PERPETUITIES

until more than sixteen years after the testator's death. Note that if the gift had been to named beneficiaries if living five years after the decree of distribution, it would have been good because the beneficiaries would have taken, if at all, within their own lives. Apparently the gift was an executory interest, so it could not have been saved on a theory of being vested at the testator's death, with enjoyment merely postponed.

The gift in Case 12 should be good. Even though the will may not be probated within twenty-one years, until it is probated no estates at all are created. The cases are split. The gift in Case 13 should also be good. Even though the debts may not be paid for more than twenty-one years, the gift is simply one of the net estate, which is all the testator could give anyway.

In sum, the draftsman should avoid these administration contingency risks. Although there are various escape theories, such as that the testator contemplated a reasonable time not to exceed the period of the Rule, the North Carolina courts have not clearly indicated how they will approach these farfetched applications.

c. Construction to Avoid Invalidity

The Rule Against Perpetuities is a rule of property, not a rule of construction. Originally this was held to mean that one could not consider the testator's or grantor's intention. In other words, one construes the instrument as if there were no Rule Against Perpetuities and then, having arrived at the construction, one applies the Rule. On the other hand, it is a fair inference that the testator or grantor intended to do a legal act rather than an illegal one; if so, he must have intended not to violate the Rule. Accordingly, "[i]f under one construction a devise or bequest would become an illegal perpetuity while under another construction it would be valid and operative, the latter mode must be preferred." The strength of the two North Carolina cases stating

205. See 6 ALP, supra note 22, § 24.23.
206. Id.
208. The leading English case is Pearks v. Mosely, 5 App. Cas. 714 (H.L. 1880).
210. Poindexter v. Wachovia Bank & Trust Co., 258 N.C. 371, 377, 128 S.E.2d 867, 872 (1963) (emphasis added); accord, Clarke v. Clarke, 253 N.C. 156, 161, 116 S.E.2d 449, 453 (1960); cf. Elledge v. Parrish, 224 N.C. 397, 400, 30 S.E.2d 314, 316 (1944) ("In our opinion, the testatrix did not intend a disposition of her property which would violate the rule against perpetuities or entail the estate—not because of a conscious restraint from these prohibited practices, but because her care was for the more immediate objects of her bounty."). In two early cases "or" was construed
this view is difficult to assess. Both Clarke v. Clarke (Case 16 in section III. on class gifts)\textsuperscript{211} and Poindexter v. Wachovia Bank & Trust Co. (Case 29 in section V. on the duration of trusts)\textsuperscript{212} sustained the limitations in question, but other North Carolina cases that seemed ripe for the approach have expressly rejected it.\textsuperscript{213} Further, the cases that have acknowledged the principle do not consider how one decides whether the testator's expression is really ambiguous. Although of uncertain acceptance and scope, therefore, the principle should be useful to counsel.

One very important case takes a sympathetic approach toward validity:

\textit{Case 14.}\textsuperscript{214} T bequeathed stocks in trust for his wife and two daughters for life, with provisions for accumulation of part of the income. On the death of the wife and daughters, part of the income was to be paid to his legal descendants, per stirpes, "until such time as the Law of Perpetuity shall cause this trust to be dissolved," at which time the trustee was to pay the corpus to T's legal descendants, per stirpes. \textit{Held}, the trust was valid. To carry out T's intent, the corpus should be distributed twenty-one years after the death of the last to die of T's two daughters and three grandchildren living at T's death.

The significance of this case is that the court might easily have invalidated the gift, but did not. The court might have said that it did not know who were to be the measuring lives. Or it might have wondered whether the testator meant for the court to wait and see. Or it might have speculated on whether the testator meant only a twenty-one year period in gross beyond the specified life estates. Nevertheless, the court sustained the gift, suggesting that counsel should press the courts for sympathetic rewriting of dubious gifts.

It should be noted that various constructional preferences may support validity in individual cases: the presumption for early vest-

\textsuperscript{211} 253 N.C. 156, 116 S.E.2d 449 (1960).
\textsuperscript{212} 258 N.C. 371, 128 S.E.2d 867 (1963).
\textsuperscript{213} See, e.g., Parker v. Parker, 252 N.C. 399, 113 S.E.2d 899 (1960) (Case 15); Mercer v. Mercer, 230 N.C. 101, 52 S.E.2d 229 (1949) (Case 26).
The Rule does not require that an interest be certain to vest within the perpetuities period. It requires only that it be certain either to vest or fail within the period of the Rule. If the decision on vesting is made within lives and being plus twenty-one years, the donor's tying up of the property is kept within limits, because at the end of the period it will be known for certain who the owner is. Thus a devise "to my children who shall attain twenty-one" is good, even though it is possible that no child of the testator may ever reach age twenty-one. In a gift "to A for life, then to A's children for life, then to A's grandchildren for life, remainder to X if he is then living," the gift to X should be valid (notwithstanding the remote life estate to A's grandchildren) because X will take, if at all, within his own life.

Nevertheless, it is not clear that the significance of these three little words is recognized in North Carolina. The second sentence of the usual statement of the Rule in North Carolina ("If there is a possibility such future interest may not vest within the time prescribed, the gift or grant is void.") is inconsistent with the "if at all" concept, and few cases raise the issue. The nearest example is Case 4 in the first generation cases, and the vest or fail theory may not have been the ground of the decision. Clearly the words must be part of the Rule, because without them all contingent interests would be void.

5. "Not later than twenty-one years"

The period of twenty-one years originally was picked to allow infants to reach their majority. In Cadell v. Palmer, however, the English court allowed a period in gross of twenty-one years unconnected with any minority, and that view has persisted in the United States despite criticism. The twenty-one year period cannot precede the measuring lives. The recent general reduction in the age of majority

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217. Williams v. Williams, 215 N.C. 739, 3 S.E.2d 334 (1939); see section II.B.1.b. supra.
218. See text accompanying notes 98-104 supra.
220. E.g., J.C. Gray, supra note 22, §§ 186-188.
221. Leach, supra note 29, at 641.
from twenty-one to eighteen has not affected the Rule; indeed, there is some sentiment for extending the period to thirty or more years to keep property out of the hands of young adults. Presumably North Carolina would follow the usual period in gross approach, although there is little precedent. One case indicates that a gift does not fail merely because the interest is to vest immediately at the expiration of the period of the Rule rather than at some point within the period.

6. "Plus the period of gestation"

This part of the Rule is sometimes stated as "ten lunar months," but regardless of how stated, only actual periods of gestation are allowed (in contrast to the twenty-one year period in gross unconnected with any minority). It is possible to have children en ventre at the beginning of a period as well as the end.

7. "After some life or lives in being"

One of the most difficult aspects of the Rule is selecting the measuring lives when none are specified in the instrument. They are those lives, the termination of which may have some effect on vesting. "The measuring lives need not be mentioned in the instrument, need not be holders of previous estates, and need not be connected in any way with the property or the persons designated to take it." For example, a gift to the testator's grandchildren who shall attain the age of twenty-one is good, because all grandchildren must reach age twenty-one within twenty-one years after the death of the testator's (unmentioned) children, who must be lives in being. The lives must be human lives, although one would hope for sympathetic treatment of

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223. Schuyler, supra note 38, at 19-20.
227. See Leach, supra note 29, at 642.
229. Leach, supra note 29, at 641.
230. Id.
a gift measured by the life of an animal having a lifetime shorter than humans.

If the measuring lives are specified in the instrument, the question becomes how many and whose lives may be selected. Again one may select persons who are not takers of any interest, but the number of lives may not be so numerous that it becomes unreasonably difficult to ascertain their termination. The outside limit of validity was the "Royal Lives Clause" of In re Villar: "to my descendants who shall be living 21 years after the death of all lineal descendants of Queen Victoria now [1926] living." Some fairly large classes of measuring lives have been sustained in North Carolina: at least twenty-four persons, including brothers, a sister, nieces, nephews, great nieces and great nephews were considered measuring lives in Case 31; three nieces and one nephew were the measuring lives in Case 30; and two daughters and three grandchildren were used in Case 14. Although the measuring lives in these North Carolina cases were connected with the disposition, under Villar they need not have been. This aspect of the Rule has been criticized, because the donor may escape the purpose of the Rule (controlling unreasonable family settlements) by selecting as measuring lives a number of healthy babies unrelated to his family.

For purposes of the Rule, the possibility of adoption is disregarded. Adoption was unknown to the common law at the time of development of the Rule, and if the possibility of adopting a beneficiary not in being at the creation of the interest were cognizable, most gifts would violate the Rule. This disregard is similar to the proposition that a power of appointment is not invalid \textit{ab initio} merely because the donee might exercise the power to create remote interests.

232. Leach, \textit{supra} note 29, at 642.
233. \[1929\] 1 Ch. 243. The same clause in a 1979 English will might be bad, because Queen Victoria's line would be difficult to trace and presumably would include many lives.
234. Wing v. Wachovia Bank & Trust Co., 35 N.C. App. 346, 241 S.E.2d 397 (1978). The court treated the term "last survivor" kindly. Had it been disposed to invalidate the gift, it could have read "last survivor" as meaning the last to die of all lineal descendants of the named beneficiaries.
237. \textit{E.g.}, Schuyler, \textit{supra} note 38, at 9.
8. "At the time of creation of the interest."

For wills the clock starts at the testator’s death.\textsuperscript{238} For deeds the operative date is the delivery of the deed.\textsuperscript{239} Irrevocable trusts are measured from the date of creation of the trust,\textsuperscript{240} but the clock should not begin to run on revocable trusts until the settlor’s death: as long as the settlor is living and has the power to revoke, the trust corpus has not been tied up.\textsuperscript{241}

III. CLASS GIFTS

Along with powers of appointment, class gifts are among the most powerful tools of the modern estate planner. Save for the simplest of estates, almost every plan will create future interests in unborn or unascertained beneficiaries who cannot be named specifically but can only be described by reference to their membership in some group.\textsuperscript{242} This may facilitate generation-skipping\textsuperscript{243} or tend to keep the property in the family as long as possible. Even when the client is elderly and the immediate objects of his bounty are ascertained and therefore named individually, it is not uncommon to provide a gift over to a class to guard against intestacy in the event of an untoward sequence of deaths. The application of the Rule Against Perpetuities to class gifts is, therefore, a compelling subject for the estate planner.

The perpetuities doctrines for class gifts fall into several traditional categories, and the North Carolina perpetuities cases appear to line up with the patterns recognized elsewhere. A trio of opinions from the pen of Justice Clifton L. Moore is essential to the understanding of class gifts and perpetuities. The first case illustrates the basic class gift rule.

Case 15.\textsuperscript{244} \(T\) devised realty to his son in trust\textsuperscript{245} to pay

\textsuperscript{239} E.g., 3 L. Sims & A. Smith, supra note 5, § 1226.
\textsuperscript{240} Leach, supra note 29, at 642.
\textsuperscript{243} Generation skipping refers to the practice of conferring substantial benefits (e.g., life estates plus special powers of appointment) on successive generations without attendant taxation. If \(O\) devised property to his children for life, then to his grandchildren for life, remainder to his great-grandchildren (assuming no perpetuities violation), no transfer taxes would be imposed on the children or grandchildren. They had only life estates, which were valueless at their deaths. The Tax Reform Act of 1976 imposes a tax on generation-skipping transfers. I.R.C. §§ 2601-2622.
\textsuperscript{244} Parker v. Parker, 252 N.C. 399, 113 S.E.2d 899 (1960), noted in 40 N.C.L. Rev. 151 (1961).
\textsuperscript{245} The son could not have been used as the measuring life because the trust was not personal to him as trustee; at the time of the action a bank had been appointed as successor trustee.
the college expenses of the son's children in such amounts as the son deemed necessary. When the son's youngest child "shall arrive at the age of twenty-eight (28)," the son was to convey the land to the children, "and if any child . . . shall in the meantime have died leaving issue surviving, such issue shall stand for, and represent his [parent], and receive the share that his [parent] would have received." At T's death, the son had four children (the youngest being two years old); two children were born later (the youngest being eighteen at the time of the case), and the son was still living. Held, the gift violated the Rule Against Perpetuities. The gift did not vest until the youngest child of the son reached twenty-eight, which might be more than twenty-one years after the deaths of the son and his four children living at T's death.

This case illustrates the so-called "all-or-nothing rule" of Leake v. Robinson. That is, a class gift must stand or fall as a unit; if the interest of any member of the class is remote, the entire gift falls. Both maximum and minimum membership in the class must be determined within the period of the Rule. In Case 15, the gift to the four children of the son in being at T's death, considered separately, is good; they will reach age twenty-eight, if at all, within their own lives. But the youngest child to reach twenty-eight might be an after-born, and that possibility invalidates the entire gift.

Apparently no North Carolina case squarely states the all-or-nothing rule in so many words; nevertheless, the result of several cases points clearly in that direction. The merits (or demerits) of this rule

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247. Apparently, the gift of income was held bad, as well as the gift of the remainder. The income gift was not vested in any child.
248. 35 Eng. Rep. 979 (Ch. 1817).
249. Another case seeming to adopt the rule of Leake v. Robinson is Moore v. Moore, 59 N.C. (6 Jones Eq.) 132 (1860), in which the testator willed the residue of his estate to his executor, to keep it as a fund and with the further direction that should any of the testator's children or grandchildren "come to suffering . . . I want the said executor to give a part of this to such child or grandchild." Id. at 132. The gift was struck down because a grandchild might come to suffering more than 21 years after the deaths of the testator's children. Considered separately, the gift to the testator's children would have been good because they were, perforce, lives in being at their parent's (the testator's) death. Note, too, that had the power to make distribution been restricted to the named executor, the gift would have been good because the executor himself would have been the measuring life. See text accompanying note 276 infra.
250. E.g., Leach, supra note 29, at 648-49.
will be considered after discussion of some variations on the basic class gift rule.

Because the Rule Against Perpetuities is a rule against remoteness of vesting, the crucial question in many cases is: When does the vesting take place?

*Case 16.*252 T bequeathed fifty percent of his War Bonds "and their accumulation" to the "heirs" of his son, Norman, "to be used for college education only." Any amount left over was to be divided equally among T's named "children" (including Norman). T was survived by Norman, who had six minor children at T's death. *Held,* the bequest was good. T used the word "heirs" to mean "children." The gift to Norman's children vested at T's death, to the exclusion of after-born children.

Case 16 illustrates two important constructional techniques open to the court to avoid invalidity. First, in construing the class term "heirs" as meaning "children,"253 the court avoided the invalidity that would have resulted had it construed "heirs" as meaning an indefinite succession of takers from generation to generation.254 Second, by applying jurisdictions that have considered the question have adopted the rule of *Leake v. Robinson.* 6 ALP, *supra* note 22, § 24.26. The one celebrated exception is *Carter v. Berry,* 243 Miss. 321, 140 So. 2d 843 (1962).


253. The court relied on N.C. GEN. STAT. § 41-6 (1976), which provides that "[a] limitation by . . . will . . . to the heirs of a living person, shall be construed to be to the children of such person, unless a contrary intention appear by the . . . will." The court did not note that the testator used the term "children" elsewhere in the will, suggesting that when he meant "children" he knew how to say it. See Clarke v. Clarke, 253 N.C. 156, 157-58, 116 S.E.2d 449, 450-51 (1960). On the other hand, the gift over to the testator's children (including Norman) suggests that the testator did not mean Norman's "heirs" to be read as those who would take Norman's property upon his death.

254. In *Poindexter v. Wachovia Bank & Trust Co.,* 258 N.C. 371, 128 S.E.2d 867 (1963), the testatrix' will provided that if her son "should die leaving issue then his issue shall receive the income from my estate as he did. But if he should leave no issue then . . . [to] my brothers and sisters that is [sic] living." *Id.* at 374, 128 S.E.2d at 870. The trial court held that the word "issue" was used to mean "a perpetual succession of lineal descendants" of the son, and that therefore the will violated the Rule Against Perpetuities. *Id.* at 375, 128 S.E.2d at 870-71. Noting the absence of remote issue of the son when the will was made, and the provisions of an earlier will, the North Carolina Supreme Court reversed, holding that "issue" meant only the issue of the son living at his death. Curiously, the court did not take note of N.C. GEN. STAT. § 41-4 (1976), which presumes that a gift over on death without issue is a limitation to take effect when the person dies without issue living at the time of his death. *Cf.* O'Neal v. Borders, 170 N.C. 483, 87 S.E. 340 (1915) (relying on § 41-4 to find a definite failure of issue). See generally 2 L. SIMES & A. SMITH, *supra* note 5, § 579.

In *Palmer v. Ketner,* 29 N.C. App. 187, 223 S.E.2d 913 (1976), the testator gave life estates in trust for his wife and youngest sister,

provided that after all the heirs of my youngest sister have reached their majority, and after this trust has run at least twenty-five years (It is to stay in force more than twenty-five years if all the heirs of my youngest sister have not reached their majority) then the
class closing rules to limit the takers to those children of Norman living at the testator's death, the court avoided the possibility of invalidity created by allowing after-born children to take.\textsuperscript{255} The all-or-nothing rule requires that both maximum and minimum membership be determined within the period of the Rule. The court closed the class (maximum membership) at Norman's death, citing the usual rule that an immediate (as contrasted to a postponed) gift to a class closes at $T$'s death when there are class members in being who are entitled to take at that time.\textsuperscript{256} Minimum membership (survivorship) then was no problem because the children would take, if at all, within their own lives.\textsuperscript{257}

At this point, another case is important to constructional issues.

\textit{Case 17.}\textsuperscript{258} $T$ left the residue of his estate in trust for his wife for life, then to his two named daughters for life, "and upon their death their share is to be divided equally between their children when they reach the age of twenty-five years."\textsuperscript{259} The daughters had five minor children at $T$'s death. \textit{Held}, the residuary gift was good. The remainder to

trustees who are acting at such a time shall liquidate the trust and pay to (book) the heirs (by blood kin of) my sisters Louisa Carpenter, Rena Henry and Leah Palmer per sterpes equal shares share and share alike and not per sterpes . . .

\textit{Id.} at 189, 223 S.E.2d at 915. The court voided the remainder to the heirs of the three sisters on the ground that their interest would not vest until termination of the trust, which might be 25 years after the death of the youngest sister. \textit{Id.} at 191, 223 S.E.2d at 917 (citing Parker v. Parker, 252 N.C. 399, 113 S.E.2d 899 (1960) (Case 15)). The court found some difficulty in reconciling Case 15 with Roberts v. Northwestern Bank, 271 N.C. 292, 156 S.E.2d 229 (1967), and it is curious that a technical term such as "heirs" should be given so unusual a meaning. If "heirs" meant heirs in the technical American sense, the remainder would vest on the deaths of the three sisters (all lives in being), subject merely to postponed enjoyment.

\textsuperscript{255} Even if after-borns shared, the gift would be good if interests vested upon their birth (within the measuring life of Norman), with enjoyment postponed only until they reached college. The court did not consider this possible interpretation. \textit{See} Case 17 infra.

\textsuperscript{256} \textit{E.g.}, 2 L. SIMS & A. SMITH, supra note 5, § 636. Thus when $T$ bequeaths personality "to the children of $A$," and $A$ is living and has children at $T$'s death, the class closes at that time so that the shares of $A$'s children can be calculated.

\textsuperscript{257} Clarke v. Clarke, 253 N.C. 156, 161, 116 S.E.2d 449, 453 (1960). The court's decision seemed to overlook the corollary rule that the class will remain open until the time fixed for distribution. \textit{E.g.}, 2 L. SIMS & A. SMITH, supra note 5, §§ 640, 643. Thus when $T$ bequeaths personality "to $X$ for life, then to the children of $A$," and $X$ and $A$ are living and $A$ has children at $T$'s death, the class does not close until $X$'s death. That is, because of a presumed intent to benefit as many children as possible, the class will remain open until the first class member can demand distribution (in Case 16 when he reaches college). This raises the possibility that Norman's six minor children might die before reaching college, and he might have an afterborn child who would reach college more than 21 years after Norman's death.

Furthermore, $T$'s gift of not just the War Bonds but also "their accumulation" to Norman's heirs may suggest that the testator did not anticipate that vesting would take place at his death. If the gift vested at his death, the beneficiaries would take the accumulation automatically.

\textsuperscript{258} Wachovia Bank & Trust Co. v. Taylor, 225 N.C. 122, 120 S.E.2d 588 (1961), \textit{noted in} 64 W. VA. L. REV. 91 (1961).

\textsuperscript{259} \textit{Id.} at 124, 120 S.E.2d at 590.
the grandchildren vested at T's death, subject to open to let in other grandchildren until the death of the daughters. The provision directing division at age twenty-five did not postpone vesting but merely restrained partition.

In Case 17 the early class closing ploy was not available because the gift of the remainder was postponed to let in the life estates in T's wife and daughters; under standard presumptions the class would not close until the deaths of the life tenants, so the grandchildren living at T's death could not be used as the measuring lives. Nevertheless, the court upheld the gift, this time on the theory that it was "patent" that T intended that immediately upon the death of his daughters their children should have the right of possession, although for reasons satisfactory to him he did not want the land partitioned among his grandchildren until they reached age twenty-five. The daughters became the measuring lives, with the remainder vesting upon their deaths. Case 17 thus illustrates the use of certain presumptions to construe interests as vested rather than as contingent upon survivorship to a possibly remote date in order to avoid invalidity.

In sum, Cases 16 and 17 illustrate three constructional techniques for avoiding perpetuities problems: (1) construing class terms narrowly to exclude remote class members (Case 16); (2) applying class closing (maximum membership) rules to exclude remote after-borns (Case 16); and (3) applying the presumption in favor of early vesting to avoid implied conditions of survivorship (minimum membership) (Case 17). Techniques (2) and (3) are the two sides of the class gift coin. Careful readers no doubt may wonder why neither of these techniques was used to save the gift in Case 15. Indeed, the opinions in Cases 16 and 17

260. E.g., 2 L. Simes & A. Smith, supra note 5, § 640.
261. The court did not give reasons for its findings of intention. The standard rule of construction is that a gift "when" a beneficiary reaches a specified age (as in Case 17) is contingent upon the beneficiary reaching that age. Id. § 586. Furthermore, under the now discredited "divide and pay over rule," when the only words of gift are found in a direction "to divide" (as in Case 17) or "to pay" at a future time, the gift is contingent. Id. § 593. The court did not deal with these problems. It has been suggested that the explanation for the decision is that there was an intermediate gift of income to the children, which under standard rules imports vesting. 64 W. Va. L. Rev. 91, 93 (1961); see 2 L. Simes & A. Smith, supra note 5, § 588. This writer has been unable to find any gift of intermediate income in the report of Case 17.
262. If vesting had been postponed until the grandchildren reached 25, the gift to them would have violated the Rule because some after-born grandchildren might not have reached 25 until more than 21 years after their parent's death.

struggled with the same question, and one writer has argued for validity of the gift in Case 15. For present purposes, suffice it to say that any errors in the class gift perpetuities cases seem not to result from any misunderstanding of standard perpetuities doctrine but rather from doubtful application of class gift rules, which must be decided before one reaches the question of perpetuities. Important class gift rules to keep in mind in closing the class are the rule of convenience that a class will close whenever any member of the class can demand possession and enjoyment of his share, and the countervailing presumption that the donor intends to benefit as many class members as possible. Important rules in determining minimum membership (survivorship) are the three resolutions in Clobberie's Case: (1) that a legacy "to be paid at" twenty-one is vested with enjoyment postponed; (2) that a legacy "at" twenty-one is contingent, that is, subject to a condition precedent of reaching twenty-one; and (3) that a legacy "at" twenty-one with "interest" is vested with enjoyment postponed (the gift of interest importing vesting). Also significant on survivorship may be the presumption in favor of early vesting. The deciding factor, treated in another section of this article, may be whether in determining vesting one may incline toward that construction which avoids invalidity; Case 16 announced that view.

Given the general proposition that a class gift must stand or fall as a unit (although various rules of construction for class gifts may ame-

263. According to Case 16, the reason that the devise in Case 15 did not vest in the grandchildren living at the testator's death, closing the class at that time, is that another clause of the will indicated that the gift included after-borns. Clarke v. Clarke, 253 N.C. 156, 161-62, 116 S.E.2d 449, 453 (1960).

According to Case 17, the reason that the devise in Case 15 did not vest immediately in grandchildren upon birth, with enjoyment postponed until the youngest reached 28, is that there was no language vesting the interest upon birth. Wachovia Bank & Trust Co. v. Taylor, 255 N.C. 122, 128-29, 120 S.E.2d 588, 593-94 (1961). Yet there seems to be no such language in Case 17 either, and there was in Case 15 something of a gift of intermediate income, importing vesting.


265. 2 L. Simes & A. Smith, supra note 5, §§ 636, 640.

266. Id. § 636.


268. 2 L. Simes & A. Smith, supra note 5, §§ 586, 588.


270. See section II.B.3.c. supra.
liorate some hardships of that rule), there are two classic exceptions to
the all-or-nothing rule, one for a class composed of subclasses and one
for per capita gifts.

*Case 18.*

*T* devised property to his wife for life, then
to his three named daughters for life with cross-remainders to
the surviving daughters, then to his grandchildren for life,
"with remainder over to the lawful issue of such grandchild or
grandchildren forever" and "in default of such issue" to char-
ity. *T* was survived by his wife, the three daughters and
one grandchild. No other grandchildren were ever born, and
the one grandchild in being at *T*'s death was the last to die,
survived by his four children (*T*'s great-grandchildren).
*Held,* the remainder to the great-grandchildren violated the
Rule Against Perpetuities.

In *Case 18* it was contended that the gift was to a class of subclasses
really a number of separate gifts) so that each subclass gift should be
considered separately. The court seemed to accept the availability of
the subclass theory in general, but noted that it requires that *T* verbally
separate the gift into subclasses; here there were no devises "which take
effect at different times upon the respective deaths of the life tenants;"
but only a single gift of the remainder. The strongest indication of
intention to create subclasses is a distribution per stirpes or by right of
representation, rather than per capita.

*Case 18* involved a kind of "vertical" severability, an attempted
separation of valid remainders from other invalid remainders. Another

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estates to the daughters and grandchildren were good, the grandchildren's estates vesting at the
daughters' deaths.

272. *Id.* at 179, 203 S.E.2d at 658.

273. *Id.* at 181, 203 S.E.2d at 659. Even accepting the subclass argument, the gift to the chil-
dren of the one grandchild would seem to be remote. That grandchild's parent apparently was
one of *T*'s surviving children. Viewed from the time of *T*'s death, she could have had other
children who might have lived more than 21 years beyond her death and the death of her first
child, postponing the vesting of the ultimate remainder to a remote time. Of course, it turned out
that no other grandchildren were born, but that makes no difference except in a "wait-and-see"
jurisdiction.

274. *Id.* at 181-82, 203 S.E.2d at 659-60. The gift would have been treated as one to a class of
subclasses had it been to *T*'s wife for life, then to his daughters for life, and upon the death of any
daughter to pay the income on the share from which the daughter had been receiving income to
the daughter's children for life, and upon the death of the daughter's children to distribute the
share to the daughter's grandchildren.

275. 3 L. SIMES & A. SMITH, supra note 5, § 1267. The foundation subclass case is Cattlin v.
223 S.E.2d 913 (1976) (remainder to heirs of three of testator's sisters "per sterpes [sic] equal
shares share and share alike and not per sterpes [sic]").
case suggests a "horizontal" severability of valid life estates from invalid remainders.276

Case 19.277 Article 8 of T's will bequeathed personal property in trust to her son Benjamin for life, and after his death the income to Benjamin's children equally, "with their issue standing in the stead of deceased parents on a per stirpes basis." After the death of Benjamin, any surviving child "who shall then" have been age thirty or over was to be paid his "proportionate share" of the trust corpus.278 For Benjamin's "surviving children"279 who had not reached thirty at Benjamin's death, as each one reached the age of thirty he was to be paid his "proportionate share" of the trust. For children who died before Benjamin or who died after Benjamin but before reaching thirty, and without leaving issue surviving them,280 their "share" of the corpus was to go in equal parts to Benjamin's surviving children and, "on a per stirpes basis," to the surviving issue of any deceased child of Benjamin, this issue "to stand in the stead of the deceased parent as to said parent's equal share." The shares of the surviving issue of a deceased child were subject to retention in trust; "as each one of said issue shall reach the age of twenty-five," he was to receive his share of the remaining corpus.281 Finally, the will stated that Benjamin had three children, but that any additional children born to him "shall share equally with these three." Apparently no other children had been born to Benjamin; one of his daughters had a minor child. The trial court held that the Article 8 trust violated the Rule Against Perpetuities; on appeal it was contended that the trust was good or, alternatively, that even if the limitations to the great-grandchildren of T were remote, those limitations were sever-

278. Id. at 478, 174 S.E.2d at 569.
279. It seemed to be taken for granted that "surviving" meant surviving Benjamin, not surviving T. In line with the presumption for early vesting, and in order to benefit as many class members as possible, "surviving" is sometimes read as surviving the testator rather than surviving the life tenant. 2 L. SIMES & A. SMITH, supra note 5, § 577 (citing North Carolina cases to the contrary).
280. The testamentary trust seemed to have a gap for the situation in which a child of Benjamin died before Benjamin or died before reaching 30, leaving issue. A gift to the child's issue might be implied. Id. § 842 (citing North Carolina cases in accord).
able (horizontal severability) from the limitations to T's grandchildren. Held, affirmed. The court did not reach the severability argument because it regarded the limitation to T's unborn grandchildren, or to those grandchildren who had not attained the age of thirty by T's death, as invalid. Even if all of Benjamin's living children had attained thirty at T's death, the limitation over to children born after T's death who attained age thirty was remote.282

Thus, Case 19 leaves open the horizontal severability question in North Carolina; this article will return to that question at the end of this section. Case 19 also reinforces the conclusion that North Carolina follows the all-or-nothing rule because apparently the entire trust was voided. It seems to jeopardize, however, the Case 18 implication that North Carolina will recognize, in an appropriate case, the class of subclasses exception, because the gift to Benjamin's children seemed ripe for a severed shares approach.283 Finally, it raises a further question of the effect on class gifts of a remote divesting condition.284

In sum, while the possibility of a class of subclasses or a severed share exception is mentioned in some cases, no case has actually found the exception to apply, and one (Case 19) seemed to overlook it.285 The

282. Apparently, the court struck down the entire Article 8, including the shares of Benjamin's three children living at the death of T.

283. The class of Benjamin's children (T's grandchildren) would not be closed at T's death because there was an intervening life estate in Benjamin and T expressly provided that all his children were to share, although such provisions sometimes are twisted to mean less than they say. (The phrase "if any additional child or children shall be born to him" could be read as meaning "shall be born to him after the making of this will but before my death." See 2 L. Simes & A. Smith, supra note 5, § 636.) However, all of Benjamin's children would be ascertained at his death. The three living at T's death would take, if at all, within their own lives. The trust seems to create separate gifts for each child of Benjamin, because it constantly refers to "the share" of each child and repeatedly uses a per stirpetal plan of distribution. If the gift indeed is one to subclasses (each child of Benjamin), even the gifts to Benjamin's children unborn at T's death seemed good: the gift of aliquot shares of income to each child imports vesting. Although each unborn child's share is subject to divestiture upon death before reaching 30, that is a remote condition subsequent; the usual rule is that a vested gift subject to a remote condition subsequent ripens into an indefeasibly vested gift when the cancerous remote condition subsequent is excised. 3 id. § 1263.

284. See text accompanying notes 293 & 294 infra.

285. Both horizontal and vertical severability were implicit in McPherson v. First & Citizens Nat'l Bank, 240 N.C. 1, 81 S.E.2d 386 (1954), in which the settlor created an irrevocable inter vivos trust to pay the income to his children for life, then to his grandchildren for life, and at the death of the last living grandchild, remainder to the grandchildren's heirs per stirpes. At the creation of the trust the settlor had four children, no others were born, and the trial court found that it was physically impossible for him to have additional children.

The trial court held that the life estate to the grandchildren (apparently) and the remainder to the grandchildren's heirs were remote, but that the life estates to the children were valid and severable. On the face of it, this decision is sound: the settlor's children necessarily would be born within the settlor's lifetime (vesting their life estates), but children could have been born to the
status of the doctrine in this state is therefore uncertain.

The other classic exception to the all-or-nothing rule is for per capita gifts. This situation seems not to have arisen in North Carolina, but the following case will illustrate it.

*Case 20.* T bequeathed $1,000 “to each child of A who shall attain the age of thirty.” At T’s death A had one child, B, age one, and later another child, C, was born. Both B and C attained age thirty. *Held,* the gift to B was good and the gift to C was bad. The gifts to B and C were treated separately, and B (a life in being) would take, if at all, within his own life.

Finally, class gifts subject to remote conditions precedent should be distinguished from cases in which the class is bound to be ascertained within the period of the Rule but is subject to a divesting clause in favor of a group that may not be ascertained within the period of the Rule. For example:

*Case 21.* The settlor conveyed realty in trust to her daughter-in-law for life, then for the children of her son until the youngest child “shall arrive at” the age of twenty-one, and upon arrival of the youngest child at twenty-one, to the children in fee; and in the event of the death of any child without issue, “his share shall vest in the” surviving children; and in

settlor after creation of the irrevocable trust, remotely postponing the vesting of the life estates in the grandchildren. Thus, the remainder clearly was remote. On severability, the trust referred to the settlor’s children as the “primary beneficiaries,” and there were other indications of his intent primarily to benefit them, so severability seemed appropriate.

The supreme court affirmed on remoteness but reversed on severability. The court held that the trial court’s award of the trust to the four children of the settlor was to the detriment of possible unborn children of the settlor (even though he was incapable of further procreation!), whose interests were not represented by a guardian ad litem or through the doctrine of virtual representation (the living children being adverse). The case was remanded for consideration of the rights of the settlor’s unborn children.

Neither opinion recognized a latent class of subclasses argument, which would have saved the life estates to the grandchildren (but not the remainder over). The settlor’s entire plan was per stirpes, with references to the “aliquot part” of each child and gifts to the grandchildren only of the “aliquot part” of each child and gifts to the grandchildren only of the “aliquot part of his or her parent.” Thus each child of the settlor (and the child’s descendants) was a separate subclass, and the life estates over on the death of the four children in existence when the trust was made should have been good. (Of course, this still would leave open the question of the effect of invalidity of the remainders to the grandchildren’s heirs).


289. Id. at 487-88, 88 S.E. at 775. The trust did not expressly provide for the case of death of a child with issue.
the event of the death of all of the children without issue in the lifetime of the son, to the son for life, then to certain remaindermen. Children were born to the son after the delivery of the deed. Held, the children took vested estates upon the arrival of the youngest child at twenty-one, subject to divestiture upon death without issue.

Clearly the gift to the son’s children is good because they all must reach twenty-one within twenty-one years after the son’s death. Not so clear is the validity of the gifts over upon death of a child without issue. The court apparently regarded the gifts over as valid, but they would seem remote: an after-born child could die without issue more than twenty-one years after the son. If the gift over is remote, it should not affect the validity of the gift to the son’s children, which class was fixed within the period of the Rule. This concept was latent in Cases 15 and 19. Case 15 noted, but did not reach, the issue, because the court held the prior gift to the class remote, and Case 19 struck the gift to the class without noting the condition subsequent point. Thus, the status of class gifts subject to remote divesting conditions is uncertain in North Carolina.

The North Carolina cases on class gifts may be summarized as follows: (1) by implication they recognize the all-or-nothing rule that a class gift must stand or fall as a unit for perpetuities cases; (2) they apply class closing rules somewhat erratically in the perpetuities cases; (3) they have not applied the wait-and-see approach despite good opportunities to do so; (4) they suggest the existence of a class of subclasses exception to the all-or-nothing rule (but lack a square holding that it exists); (5) they have not addressed the per capita gift exception; and (6) they have not dealt adequately with class gifts subject to remote divesting clauses.

On the basic class gift rule and its exceptions, Leach has persuasively shown that the rule of Leake v. Robinson is unsound and incon-
consistent with its recognized exceptions.\textsuperscript{296} It is, in effect, an automatic infectious invalidity, in contrast to the application of the Rule in non-class gift contexts, wherein the effect of partial invalidity on other valid interests is treated as a matter of construction. Under usual perpetuities doctrines, in contrast to the \textit{Leake v. Robinson} rule, when a vested interest is subject to divestment upon a remote contingency, the divesting gift is held invalid and the vested gift becomes indefeasible.\textsuperscript{297} Leach contends that the \textit{Leake v. Robinson} situation presents a problem of separability—that is, a question of construction regarding the effect of partial invalidity.

Actually, two threads of argument are implicit in the usual criticisms of the rule of \textit{Leake v. Robinson}, one having to do with logical inconsistency and the other with intention. The first thread treats the all-or-nothing rule and its standard exceptions (subclasses and per capita gifts) as more or less automatic rules and argues that there is no sufficient logical difference between the standard case and its exceptions; the difference in result therefore is not justified. This argument leaves open the question of which result (automatic invalidity of the entire class gift or separation of the valid gifts from the invalid) should control in all cases; usually the assumed premise is that separation of the valid and invalid gifts is preferable.

The second thread examines the rule from the standpoint of rules of construction aiming for likely intention. Here it is contended that the \textit{Leake v. Robinson} rule leads to automatic infectious invalidity, in contrast to nonclass gift perpetuities cases in which the effect of invalidity of one interest on other valid interests is treated as a matter of construction, to be examined on a case-by-case basis to ascertain likely intention. Thus, for example, a remote condition subsequent in an individual gift usually leaves the basic gift good, but in the \textit{Leake v. Robinson} situation it invalidates the entire class gift.\textsuperscript{298}

The question therefore boils down to this: Are the class gift rules to be inflexible categories of good and bad, disregarding the creator's intention, or are they to abandon set categories in favor of a de novo

\textsuperscript{296} Leach, \textit{The Rule Against Perpetuities and Gifts to Classes}, 51 HARV. L. REV. 1329 (1938).

\textsuperscript{297} See, e.g., Parker v. Parker, 252 N.C. 399, 405, 113 S.E.2d 899, 904 (1960).

\textsuperscript{298} The horizontal severability case, Case 19, illustrates the confusion of these two theories. Usually it is assumed that an invalid remainder over leaves the otherwise valid life estate good. No label is put on the case—it is just assumed that the testator would have preferred to leave the life estate untouched by invalidity of the remainder. Thus, the matter is treated as one of intention. But if the case is argued differently, under a label of "horizontal severability," the court may incline toward invalidity of the life estate on an all-or-nothing theory unless it is convinced that the testator verbally separated the gifts of life estate and remainder.
search for the creator’s intention in each case? Certainly there is much to be said for the latter approach; even if the inflexible rule were the generally preferable one of separating the good gifts from the bad (in contrast to the harsh current rule of *Leake v. Robinson*), the creator’s intention would sometimes be frustrated. Furthermore, if the case is in court anyway, why not go ahead and try best to approximate the creator’s plan? By hypothesis, the question of effect of invalidity will not be reached until one first finds a violation of the Rule; to decide the effect of invalidity question would not create any new litigation but would only add an issue to an already disputed case, and that superadded issue is really one that was implicit (though not always recognized) from the start.

IV. POWERS OF APPOINTMENT

Powers of appointment are immensely useful devices that enable the property owner to control the general devolution of his property while granting a younger generation the power to make specific redistributions to reflect changes in the family, the property, or the economy. In addition to achieving flexibility, a special power may be

299. Leach puts the following case:

*Case 45*. T bequeaths the residue of his estate in trust to pay the income to A for life, then to pay the income to the children of A for their lives and upon the death of any child of A to pay the principal upon which such child was receiving the income to the issue of such child. A has two children: C, who was born before the death of T, and C, who was born after the death of T. Plainly the life estates to both C, and C, are valid. Equally plainly the remainder to the issue of C, is invalid. The question concerns the remainder to the issue of C,.

Cases can readily be imagined in which the testator’s intention would be more closely approximated by voiding all of the remainders after the life estates to A’s children than by validating a portion of [those] remainders. . . . Suppose, for example, that in *Case 45* A is the testator’s only child. If the remainder to the issue of C, is held valid, it seems likely that such issue will get, directly or indirectly, three-fourths of testator’s estate, whereas the issue of C, will get one-fourth. Total invalidity of the ultimate remainders would tend to cause a more even distribution among A’s grandchildren. However, the reported opinions are curiously lacking in any consideration of this possibility.

6 ALP, *supra* note 22, § 24.29 (footnotes omitted).

300. Arguably litigation of this issue would only add an uncertainty to cases in which the parties agree, without litigation, that the Rule is violated. Nevertheless, because the supposed hard and fast rule of *Leake* and its standard exceptions are shot through with ambiguities and doubtful applications, rendering them unpredictable, it does not seem that much uncertainty would be added to the brew by looking for likely intention.

301. RESTATEMENT OF PROPERTY, Introductory Note, §§ 318-369, at 1808-09 (1940).
employed to give a beneficiary substantial property benefits without accompanying tax detriments.\footnote{302} A general power of appointment, most often exercisable by will only, is often given to a surviving spouse in conjunction with a life estate to qualify the property subject to the power for the federal estate tax marital deduction, while giving the spouse minimal control over the property.\footnote{303} There are not many North Carolina cases applying the Rule Against Perpetuities to powers of appointment, probably because the use of powers is a relatively new development, spurred by the estate tax savings associated with certain plans utilizing powers. Nevertheless, the few cases are classics.

\textit{Case 22.}\footnote{304} \(T\)'s will provided,

\begin{itemize}
\item Item 7. My will is that all the rest of my property of every description, and my money, be kept by my executor, whomsoever I may appoint; it shall be kept as a fund. Should any of my children or grandchildren come to suffering, in any other way, save by idleness, drunkenness, or anything of the kind, so as to become an object of charity, I want the said executor to give a part of this to such child or grandchild.\footnote{305}
\end{itemize}

\textit{Held,} whether the administration of the fund by the exec-
utor is deemed a power or trust in him, the bequest was void because the fund might have been needed for grandchildren more than twenty-one years after the death of T's children.

Two basic questions are possible in powers cases: (1) Is the power itself good? (2) Assuming the power is good, are the interests created by any exercise of the power good? Case 22 illustrates the first question—validity of the power itself. The classic view is that special powers of appointment (that is, those exercisable in favor of some specified group not including the donee or his estate or the creditors of either306) are bad if they are capable of being exercised beyond the period of the rule. The clock starts when the donor creates the power.307 The underlying theory is that, the power being confined to a limited group specified by the donor, his tying up of the property begins the moment the power is created.308 The power is remote if it is capable of being exercised beyond the period, because exercise of a power is analogous to a shifting executory interest, and executory interests are remote if they are not certain to vest in possession within the period of the Rule.309 The executor's power in Case 22 amounted in substance to a special power of appointment—to give a part of the fund to a member of a limited group specified by T (his children or grandchildren). It was void because it was capable of being exercised for the benefit of a grandchild more than twenty-one years after the death of T's children. The court struck down the entire gift, not just the remote gift to grandchildren.310

Two handy theories are sometimes available to save the gift, or part of it, in situations like Case 22. If the power is personal to the donee, the gift is good. If, for example, the power in Case 22 was exercisable only by the executor appointed by T, and not by any successor executor, the power would perforce be exercised, if at all, within the life of the original executor: he would be the life in being.311 This question was not addressed in Case 22. A second theory, resulting in partial validity of the gift, would treat the executor's power as comprising a discrete series of powers exercisable on a periodic basis. If, for example, the powers were exercisable annually, only the annual powers ca-

306. See generally 2 L. Simes & A. Smith, supra note 5, § 875.
307. 3 id. § 1273.
308. Restatement of Property § 390, Comment a; § 392, Comment a (1944).
309. 3 L. Simes & A. Smith, supra note 5, §§ 1236, 1273.
310. As to the effect of remoteness of one interest on another nonremote interest, see section II.B.2.b. supra.
311. 3 L. Simes & A. Smith, supra note 5, § 1277; Restatement of Property § 390, Comment c (1944).
pable of being exercised more than twenty-one years after the deaths of all T's children would be remote.\textsuperscript{312}

The approach to validity of general powers (those exercisable in favor of anyone including the donee, his estate or the creditors of either)\textsuperscript{313} depends upon whether the general power is exercisable by deed (inter vivos) or by will (testamentary). The test for general powers exercisable by deed is whether the power must be \textit{acquired}, if at all, within the period of the Rule; if so, the gift is good. The reason for this rule is that a general power by deed, once acquired, is the equivalent of ownership since the donee could appoint to himself.\textsuperscript{314} Thus, the power is treated like most other interests for perpetuities purposes.

The most difficult case is the general testamentary power. In one sense, it is like a general power exercisable by deed: at the moment of death, the donee may appoint to his estate and freely dispose of the property. Often the donee also has a life estate in the property, and having a life estate plus the power to dispose of the property by will, he

\textsuperscript{312} 6 ALP, \textit{supra} note 22, § 24.8, at 32-33.

\textsuperscript{313} The Internal Revenue Code has introduced a new uncertainty into the determination of validity of powers. The common law divided powers into two classes, general and special. General powers were those exercisable in favor of anybody, including the donee or his estate or the creditors of either. Special powers were those exercisable "only in favor of persons, not including the donee, who constitute a group not unreasonably large." \textit{Restatement of Property} § 320(2)(a) (1940). The Internal Revenue Code defines a special power as any power \textit{not} exercisable in favor of the donee, his estate or the creditors of either. \textit{See} I.R.C. § 2041. Thus, for federal estate tax purposes, a power to appoint to any person except the donee, his estate, or the creditors of either would be a special power. For property law purposes, the power would not qualify as a special power, because it is not confined to a specific group not unreasonably large. The Restatement labels this kind of power a "hybrid power," \textit{Restatement of Property} § 320, Comment a (1940); it also goes by trade names such as "world-wide special power."

For perpetuities purposes, should a hybrid power be treated as a general power or a special power? There is little authority on the point. \textit{See} 5 R. Powell, \textit{supra} note 22, ¶ 787; McCoid, \textit{The Non-General Power of Appointment}, 7 \textit{Vand. L. Rev.} 53, 62-67 (1953). Powell would treat the power as a special one for perpetuities purposes, since the donee has substantially less than the full equivalent of ownership. On the other hand, the donor of a hybrid power would probably have given the donee a general power, but for adverse federal estate consequences in the donee's estate; in a sense the donor is telling the donee to make up his own mind regarding appointees, free of any group specifications imposed by the donor, so the power could well be treated as general. Further, the hybrid power may ultimately prove to be a general power for federal estate tax purposes. In State Street Trust Co. v. Kissel, 302 Mass. 328, 19 N.E.2d 25 (1939), the donee was given a general power to appoint by will, provided that no part of the fund was to be liable for the donee's debts. The donee exercised the power (invoking the usual rule that creditors of the donee of a general power may reach the appointive assets if the power is exercised), and the court held the restriction on creditors to be void, so the power was general, exercised, and subject to creditors' claims. \textit{Kissel} may some day be relied upon to hold the restriction as to creditors in a hybrid power to be ineffective, making the power a general one for federal estate tax purposes. At the least, the \textit{Kissel} risk suggests caution in the use of hybrid powers; rare is the case in which the draftsman cannot specify an adequate group of permissible appointees, not unreasonably large, making the power clearly a special one.

\textsuperscript{314} 3 L. Simes & A. Smith, \textit{supra} note 5, § 1273.
resembles an owner. On the other hand, the general testamentary power is like a special power in that the holder cannot benefit himself during his lifetime, and if he exercises the power by will, it is likely that the appointment will be in favor of his family. This latter conception has controlled; general testamentary powers are treated like special powers and are void if capable of being exercised beyond the period of the Rule.

Case 23. 'T' bequeathed property in trust for A for life, then for the children of A for their lives (A having no children at T's death) as follows:

(a) income to A's first child for life;
(b) income to A's second child for life, as the trustee determines is needed for the child's support, education, maintenance and welfare;
(c) income to A's third child for life, as the trustee may in his discretion determine.

The trustee was also given a power to sell the trust property and reinvest the proceeds of sale. There are no North Carolina cases in which the issues raised by this hypothetical have been noticed. The gift of income to A's first child and the power of sale in the trustee should be good. There is little authority on the gift of income according to a standard to the second child. The gift of discretionary income to the third child is bad.

This case involves a trust that may last beyond the period of the Rule, since A's children might outlive him by more than twenty-one years. The duration of the trust does not necessarily invalidate it, but the powers of the trustee may be too remote. The discretionary power to pay income to a child of A may amount to a special power of appointment, which is remote if it is capable of being exercised beyond the period of the Rule. Clearly the gift of income to the first child is good; it vests within A's lifetime and is not dependent on the trustee's discretion; no power is involved. Equally clearly, the gift of discretionary income to the third child is bad; it does amount to a special power and can be exercised too remotely. The gift of discretionary income

315. Id. § 1275.
316. Id.
317. Id. § 1273.
318. See section V. infra.
319. See text accompanying notes 306-09 supra. The question was latent but went unnoticed
to the second child according to an ascertainable standard is a
provocative, unresolved case. On the one hand, since the standard is
ascertainable, there appears to be no discretionary power in the trustee.
On the other hand, even if the exercise of the trustee's discretion is not
regarded as a power, the amount of the income is dependent on future
events that may be remote—the needs of the second child for support.
But these needs seem no more contingent than the amount of the in-
come to be earned in the future for the first child.

The power to sell in the trustee should be good, but sometimes
is held bad. It facilitates the free circulation of property, and to
strike down administrative powers of a trustee that might last beyond
the period of the Rule would strip the trustee of all powers save those
granted by statute or court of equity.

Case 24. By his will, T left property in trust for his
son, William, and provided that “William, shall have the right
to dispose of the entire estate . . . by will . . . . Should my
son die intestate . . . then such estate shall go to [William’s
surviving] child or children.” William’s will gave “[a]ll the
rest and residue of my estate . . . including [the property sub-
ject to the power]” in trust for his children. Upon each
child’s reaching age twenty-five, one-half of the child’s trust
was to be distributed in fee to the child, and the remaining
one-half was to be held in trust for the benefit of the child for
life, with the right to dispose of the remaining one-half share
by will to the child’s spouse, descendants or charity, and in
default of appointment to the child’s issue, or if none, to Wil-
liam’s surviving issue. William was survived by two children,
ages thirteen and ten. Held, the gift of the remaining one-half
to William’s children for life with power to appoint violated
the Rule, and the children took that share free of trust under

in Wachovia Bank & Trust Co. v. Andrews, 264 N.C. 531, 142 S.E.2d 182 (1965); Wing v. Wach-
via Bank & Trust Co., 35 N.C. App. 346, 241 S.E.2d 397, cert. denied, 295 N.C. 95, 244 S.E.2d 263
(1978).

320. See Seaver v. Fitzgerald, 141 Mass. 401, 6 N.E. 73 (1886); T. BERGIN & P. HASKELL,
supra note 22, 205 n.66. The issue was latent but unrecognized in Mercer v. Mercer, 230 N.C. 101,
52 S.E.2d 229 (1949).
321. 3 L. SIMES & A. SMITH, supra note 5, § 1277.
322. Leach, supra note 29, at 664.
323. The paradigm for Case 24 is American Trust Co. v. Williamson, 228 N.C. 458, 46 S.E.2d
104 (1948)(Case 9 in section II.B. supra).
324. Id. at 459-60, 46 S.E.2d at 105.
325. Id. at 460, 46 S.E.2d at 106.
the gift in default in T's will.\textsuperscript{326} Case 24 is a veritable teacher's garden (or weed patch, depending on one's point of view) of perpetuities and powers issues, many of which went unnoticed by the court. Perhaps most significantly, the case involves the validity of interests created by exercise of powers of appointment. The court held, with respect to the power in William, that the Rule related back to the time the power was created, not to the date of its exercise. This is the standard view for special powers—the appointment is read back into the creating instrument, and the period is computed from creation of the power.\textsuperscript{327} The rationale is that, the power being special, the donor has controlled the disposition and the donee is in effect merely his agent.\textsuperscript{328} For general powers by deed, the approach is different. The period is computed from the date of exercise of the power,\textsuperscript{329} since the donee is in substance the owner of the property subject to the power.\textsuperscript{330} Of course, William's power was neither special nor general by deed; it was a general testamentary power. The arguments over whether to measure validity of interests created by exercise of a general testamentary power by the special power rule or the general power by deed rule are similar to those discussed in connection with determining validity of the power itself. Case 24 follows the majority view in treating the general testamentary power like a special power for purposes of determining validity of appointed interests, just as most cases treat the general testamentary power like a special power for purposes of determining the validity of the power itself.\textsuperscript{331} This is one significant aspect of the case.

Now, if the interests appointed by William are read back into T's will, were they remote? The disposition of the first half of T's estate to William's children at age twenty-five was not challenged.\textsuperscript{332} Why?

\begin{itemize}
\item \textsuperscript{326} \textit{Id.} at 464, 46 S.E.2d at 108.
\item \textsuperscript{327} 3 L. Simes \& A. Smith, \textit{supra} note 5, § 1274.
\item \textsuperscript{328} \textit{Id.} 612. Why?
\item \textsuperscript{329} \textit{Id.} § 1275. The perpetuities problems involved in the exercise of a general testamentary power may arise even when the donee of the power believes he has not exercised it. Section 31-43 provides that a general gift by will operates as an execution of any powers of appointment the testator may have, unless a contrary intention appears in the will. N.C. GEN. STAT. § 31-43 (1976). The section applies only to general powers, Wachovia Bank \& Trust Co. v. Hunt, 267 N.C. 173, 148 S.E.2d 41 (1966), but apparently extends to general testamentary powers as well as inter vivos ones. Perpetuities problems would appear to be fairly likely when a testamentary power is exercised unknowingly. For general powers by deed, perpetuities problems are unlikely because the clock does not start running until the death of the donee.
\item \textsuperscript{332} American Trust Co. v. Williamson, 228 N.C. 458, 462, 46 S.E.2d 104, 107 (1948).
\end{itemize}
Apparently the bequest was contingent upon the childrens' attaining age twenty-five, and William could have had more children after T's death, who might not have reached twenty-five, if at all, within twenty-one years after William's death; thus, the contingent interest looks remote. The reason for validity must have been the "second-look doctrine," the doctrine that in determining the validity of interests created by exercise of a power of appointment, one may take into account facts existing at the time the power is exercised, even though the period runs from creation of the power. The theory behind the doctrine is that since one has to wait until the power is exercised to determine validity of the appointed interests, one ought to be allowed to take into account facts known at that time. In Case 24, a second look at the time of William's death when the power was exercised reveals that William's children were thirteen and ten years old; they would therefore attain age twenty-five, if at all, within twelve and fifteen years, respectively, of William's death, well within twenty-one years after some life in being (William). Although the second look doctrine is not discussed, Case 24 is the best and only indication that the doctrine is followed in North Carolina.

In passing it might be noted that a significant recent issue not raised by any North Carolina cases is whether the second look doctrine may be applied in determining the validity of gifts in default following special powers or general testamentary powers. The sparse authority indicates that the doctrine does apply to these gifts in default, the rationale being that the donee's refusal to exercise his power amounts, in effect, to an appointment to the takers in default, thus invoking the second look. For gifts in default following general powers to appoint

333. The will provided:

The part or parts of this estate held for the benefit of any issue, per stirpes, . . . shall upon the beneficiary of his or her trust reaching the age of 25 be divided into two parts. . . . In the event that any of my issue shall die before reaching the age of 25 or intestate after reaching such age . . . .

Id. at 460-61, 46 S.E.2d at 106. The court did not discuss why the bequest was contingent.


335. Restatement of Property § 392, Comment a (1944); 3 L. Simes & A. Smith, supra note 5, § 1274.

336. Even if William's children had been less than four years old at his death, the gift would have been good if his two children had been born before T's death (actually they were not). The children themselves would then have been lives in being at the creation of the interest and would have attained age 25, if at all, within their own lives.

337. 3 L. Simes & A. Smith, supra note 5, § 1276.

338. Id. Notwithstanding that the traditional conception of a gift in default to an unascertained person is that the gift is immediately vested subject to divestiture upon later exercise of the power by the donee. Restatement of Property § 276 (1940).
by deed, the doctrine is not necessary. The validity of the gift is measured from the date of nonexercise of the power (usually the donee's death)\textsuperscript{339} since the property was not tied up in the donee's lifetime (the donee having a general power).\textsuperscript{340} In effect, the nonexercise is an appointment to the takers in default, and the clock starts to run on general powers by deed at the date of exercise.\textsuperscript{341}

In addition to indicating that the validity of interests created by exercise of a general testamentary power is measured from the date of creation of the power, but with the help of a second look when needed, Case 24 involves the validity of a power itself. In this respect it is analogous to Case 22. The question is whether the special power of appointment over the remaining one-half of the trust fund given to William's children is remote. It is. Since the special power was created by exercise of William's general testamentary power, William's appointment has to be read back into \( T \)'s will. Thus treated, it gives a special power to William's children, persons unborn at \( T \)'s death, and is void.\textsuperscript{342} In effect it is a special power created by \( T \), capable of being exercised beyond the period of perpetuities.

The special power in Case 24 was held remote, but not for the reason just discussed. Rather, the court struck the entire gift of the remaining one-half of the fund, including the life estate, the special power, and the gift in default, on the theory that William had created a trust of the remaining one-half capable of lasting beyond the period of the Rule, regardless of when vesting must occur. The question whether the Rule relates to the duration of trusts as well as to remoteness of vesting is discussed in section V. For present purposes, suffice it to say that the court was correct in concluding that the power was bad, although for a reason not accepted by most courts.

Case 24 raises at least four other powers issues, none of them discussed by the court.\textsuperscript{343} Because these issues often accompany perpetuities cases, and because of the current importance of powers to draftsmen, they will be discussed here. These issues involve: creation of further trusts, powers, and future interests; capture; marshalling; and the reach of the gift in default. First, William exercised his power not by appointing absolute interests but by creating a further trust, a life

\textsuperscript{339} 3 L. Simes & A. Smith, supra note 5, § 1252.

\textsuperscript{340} Id. §§ 1251, 1274.

\textsuperscript{341} See text accompanying note 314 supra.

\textsuperscript{342} Leach, supra note 29, at 652.

\textsuperscript{343} One may only speculate on the reasons for inattention to these issues. It may have been a failure of advocacy by counsel.
estate and remainder, and a special power. May the donee of a power create further trusts, powers and future interests? The answer may depend on the nature of the power. In Case 24, since the power was general (although testamentary), the donee could have appointed to his own estate for all purposes, so William's execution was within the scope of the power. The conception of the power as property controls here; for special powers the scope of the donee's execution is sometimes more limited.

Second, did William make an implied appointment of the remaining one-half of the fund to his own estate, that is, did he "capture" the property for his own estate? Case 24 held that, William's appointment being a violation of the Rule, the property passed pursuant to the gift in default. It was certainly open to argument, however, that William in effect said, "I make an express appointment as here indicated, but whether that is valid or not, I appoint the property to my own estate." Certainly two of the classic capture factors, either of which usually is sufficient to show such an intention, were present. William "blended" the appointive assets with his own property; he disposed of all owned and appointed property as a unit, making no distinction between the sources. Further, the appointment was made in trust; in effect he essayed a two-step transaction: a valid appointment of the legal title in trust and an invalid appointment of the equitable title out, creating a resulting trust in favor of his own estate. Although this trust factor is sometimes criticized as irrelevant to capture, usually it is persuasive. Note, too, that William may have regarded himself as the owner of the appointive assets, since he had a life estate plus a general power of appointment over them. In sum, the court failed to

344. 2 L. Simes & A. Smith, supra note 5, §§ 976-977.
345. Id. Leach and Logan suggest the following clause:

In the exercise of any power of appointment created by this will, unless the contrary is stated, the donee of such power may appoint life estates to one or more objects of the power with remainders to others, appoint to grandchildren or more remote issue even though the parents of such appointees are living, impose lawful conditions upon any appointment provided no one other than an object of the power is benefited thereby, impose lawful spendthrift restrictions upon any appointment, make appointments outright to an object or in trust for the object, create in any object a general power of appointment or a special power to appoint among objects of the original power, appoint by a will executed before my death. These powers of the donee of a power of appointment are in addition to, and not in restriction of, power he would otherwise have.

W.B. Leach & J. Logan, supra note 18, at 976.
346. 2 L. Simes & A. Smith, supra note 5, § 974. The capture doctrine is limited to general powers. If the power were special, by definition the donee could not appoint to his estate.
347. Id. at 433.
348. Id. at 432.
349. Id. at 432-33.
notice strong indications of an intent to make an implied appointment to William’s estate.

The reader may object, however, that capture would be nonsensical, since it would bring the property into William’s estate, only to violate the Rule again. Not so. The result of capture likely would be that the appointive assets would pass as intestate property to William’s heirs (his two children) under the statute of descent. As a third choice, the court might have applied the doctrine of marshalling to save William’s entire plan. Marshalling simply refers to the allocation of owned and appointed property to the various provisions of the will so that maximum effectiveness is given to the testator’s plan (which he must have intended). In Case 24, the appointive assets could have been allocated to satisfy the first half of the gift; there would be no perpetuities violation because the gift would vest, if at all, within fifteen years of William’s death. William’s own assets could have been allocated to the remaining half of the gift; there would be no perpetuities violation (whether remote vesting or trust duration) because the clock would not start running until William’s death when his children perforce were lives in being. Of course, one cannot know the exact result of marshalling without knowing the values of the respective funds, and the opinion states no sums. Nevertheless, the court overlooked a useful device for carrying out William’s intention.

Finally, however, it might be objected that the capture-marshalling line of argument is moot, because the donor, T, provided for a gift in default in the event of an invalid appointment by William. There are two answers to this objection. First, capture is a question of the donee’s intention, not the donor’s; it is unlikely that the intention to capture would be affected by the presence or absence of a gift in default. Second, the donor’s gift in default was made upon the condition, “Should my son die intestate.” William did not die intestate. His will was properly executed and attested, notwithstanding a particular disposition in it violated the Rule Against Perpetuities. The court reasoned, however, that since William’s appointment of the remaining half violated the Rule, he died intestate with respect to the fund. This argument assumes the conclusion that there was no capture because, if there were capture, William made a testamentary appointment to his own estate. And, of course, William did die at least partially testate.

Whatever the merits of the court’s argument, the drafting moral is

350. 6 ALP, supra note 22, § 24.8, at 32.
351. 2 L. Simes & A. Smith, supra note 5, § 974, at 434.
clear: the gift in default should anticipate possible violation of the Rule by the donee and clearly bring the property under the gift in default, if the donor so desires. The result of passing the property under T's gift in default was not bad; the estate went to William's children, although free of trust. Nevertheless, by a capture-marshalling rationale, the court might have fully accomplished William's plan.

To summarize, the small amount of precedent for powers in North Carolina indicates that special powers are remote if they are capable of being exercised beyond the period of the Rule (with the clock starting at the creation of the power). Interests created by exercise of special powers are judged from the creation of the power, although the second look doctrine allows one to take into account facts existing at the time of exercise. General testamentary powers are treated like special powers.

V. THE DURATION OF TRUSTS

The gospel according to Gray ordains that the Rule Against Perpetuities is a rule against remoteness of vesting; it is not a rule against interests that last too long. Thus, according to Gray, a perpetual trust to pay the income to A and his heirs does not violate the Rule.

An occasional heresy is heard, however, which Gray ascribes to a failure to differentiate the rule against remoteness (perpetuities) from the rules disallowing restraints on alienation. Both have the "same ultimate end [forwarding the circulation of property], but they serve that end by different means." Some of the heresy is proclaimed in fairly

352. See also In re Price's Trust, 4 Misc. 2d 1026, 156 N.Y.S.2d 901 (Sup. Ct. 1956); 5 ALP, supra note 22, § 23.61; 22 S. CAL. L. REV. 270, 276 (1949). The Wachovia Will Manual uses the language "[i]f this general power of appointment shall not be effectually exercised." WACHOVIA BANK & TRUST, NORTH CAROLINA WILL MANUAL SERVICE IX-14 (N. Wiggins ed. 1977). The NCNB Will and Trust Manual uses "in default of appointment." NORTH CAROLINA NATIONAL BANK, WILL AND TRUST MANUAL F-3 (1978). Since Case 24 seems eager to give effect to the gift over, explicit language may not be necessary, and indeed, clear-cut language is not easy to find. If one said, "If this power is not validly exercised," there still is room to argue that capture is a valid exercise by implication.

353. The court's attitude is somewhat at odds with its view on construction to avoid invalidity. See section II.B.3.c. supra.


355. Id. §§ 3, 235-236. If the words "and his heirs" are words of limitation, A immediately takes an equitable fee; an equitable fee is no more objectionable because it may last forever than is a devise of a legal fee simple. If the words "and his heirs" are ones of purchase, A's heirs take a vested interest upon A's death. Id. §§ 235-236. (This assumes an American meaning of heirs rather than an English meaning of indefinite takers from generation to generation. See Webster, supra note 8, § 27.) See also RESTATEMENT OF PROPERTY § 381 (1944).

356. J.C. Gray, supra note 22, § 2.1.
recent North Carolina cases.

Case 25. See Case 24 in section IV on powers of appointment.

Case 26. T devised his real estate to his son-in-law, J.H. Thompson, to hold in trust for T’s daughter Vivian for her life and in the event of her death to rent the property and apply the rents, after the payment of taxes, for the “support, sustenance, education and benefit” of Vivian’s surviving children. Vivian had two children at T’s death and two more were born to her later. She died survived by the four children. Held, the trust was void because it might have lasted beyond lives in being plus twenty-one years.

These two cases, decided in 1948 and 1949, indicate that the Rule applies to trust duration as well as to vesting and that a trust that may last beyond the period of the Rule is void. From the standpoint of the precedent cited in support of their holdings, the two cases are not strong; from the standpoint of the rationale enunciated, the cases are


359. An earlier case, Spring v. Hopkins, 171 N.C. 486, 88 S.E. 774 (1916), was cited in both cases as authority for the proposition that the Rule Against Perpetuities limits the duration of private trusts. Spring does not support that proposition. Simplified, the case involved a deed of real property to the wife of the grantor’s son, William, for life, then in trust for William’s children until the youngest attained 21, then to the use of William’s children and their heirs forever, and in the event of death of any child without issue, his share to vest in the surviving children and their heirs. The court found that the interest in William’s children was vested subject to divestiture upon death without issue (at any time, not just before William’s death) and that there was no violation of the Rule Against Perpetuities:

It was argued that our construction of the limitation would violate the rule against perpetuities. But we do not think so, for the rule, as its very language implies, refers solely to the vesting of estates, and does not concern itself with their possession or enjoyment, nor does it require that interests should end within specified limits. Id. at 494, 88 S.E. at 778. Thus, the court uses classic remoteness of vesting language, expressly rejecting any concern with possession or enjoyment. It is, however, dictum, because the trust in Springs did not last beyond the period of the Rule; the court held that the trust became passive, and was executed by the Statute of Uses, when the youngest child attained 21. Id. at 491, 88 S.E. at 776. This was necessarily within the perpetuities period because all of William’s children would necessarily reach age 21 within 21 years after the death of William, a life in being.

The gift over upon death of a child without issue appears to be remote (although not so held), since a child of William could have died without issue more than 21 years after William’s death. The child could not be a measuring life, since more children could have been born to William after the delivery of the deed or the grantor’s death. (Normally the clock starts upon delivery of a deed, but the grantor retained a power to revoke, id. at 488-89, 88 S.E. at 775, so the clock did not start until the grantor’s death.) As to the effect of invalidity of this condition subsequent on prior interests, see section II.B.2.b. supra.

Case 25 also cited Billingsley v. Bradley, 166 Md. 412, 171 A. 351 (1934), and Gray. Americ-
not persuasive;\textsuperscript{360} and from the standpoint of the facts of the cases, the decisions are somewhat equivocal.\textsuperscript{361} This is not to suggest that the cases necessarily were incorrectly decided, but merely to note certain weaknesses in them as precedents.\textsuperscript{362}

The trust duration conception of the Rule apparently was short-lived:

\textit{Case 27.}\textsuperscript{363} T devised and bequeathed the residue of her estate to her sister Margaret for life, and "after the death of

\begin{quote}
\begin{flushright}
\texttt{Mercer v. Mercer, 230 N.C. 101, 103-04, 52 S.E.2d 229, 230 (1949).}
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\texttt{Mercer v. Mercer, 230 N.C. 101, 103-04, 52 S.E.2d 229, 230 (1949).}
\end{flushright}
\end{quote}

\textsuperscript{360} Case 25 simply announces its rule without stating a rationale. Case 26 tries to find a rationale but gets the two ideas of remote vesting and suspension of alienation hopelessly intertwined:

\begin{quote}
\begin{flushright}
\texttt{McQueen v. Branch Banking & Trust Co., 234 N.C. 737, 68 S.E.2d 831 (1952).}
\end{flushright}
\end{quote}
. . . Margaret, . . . or in the event she shall predecease me," to a bank and two individuals in trust. The trustees were directed: (1) to collect income and to pay taxes; (2) to give financial assistance to a named grandnephew and grandniece if either should decide to attend college; (3) to pay certain sums to named beneficiaries; and (4) to divide the net income quarterly and pay it to named nephews, nieces, a grandnephew and a grandniece in designated proportions. The trust "shall continue for a period of twenty-five years from the date of filing this, my last will and testament for probate in the office of the Clerk . . . or from the date of the death of my sister, Margaret . . . whichever may be the later date," and then the trust shall terminate and the trustees shall within one year thereafter fully account and deliver all of the trust property in fee to the same nephews, nieces, grandnephew and grandniece who were to receive the income, and in the same proportions. The trustees were given power to sell, lease, invest and reinvest. Held, the Rule Against Perpetuities was not violated. The interests of the nieces, nephews, grandnephew and grandniece vested immediately upon T's death, subject only to postponed enjoyment.

Case 27 expressly rejected the language in Cases 25 and 26, and adopted instead the usual Gray approach:

The plaintiffs rely on what is said in [American] Trust Co. v. Williamson . . . and Mercer v. Mercer . . . respecting the rule against perpetuities as applied to private trusts. Perhaps the language used in the Williamson case and adopted in the Mercer case is not as full and complete as it might have been. In any event, the language used must be interpreted in the light of the facts in those cases and the

364. Id. at 738-39, 68 S.E.2d at 833. Any remote powers in the trustees could not be saved by treating the powers as personal to the trustees, and thereby using the trustees as measuring lives, because one of the trustees was a bank.

365. This power is not possibly remote, because it would necessarily be exercised, if at all, within the lives of the named grandnephew and grandniece.

366. The court did not consider the possible application of the widely-criticized "divide and pay over rule," which maintains that language such as "divide and pay over" implies a condition precedent that the beneficiary be alive at the time of payment in order to take.

367. McQueen v. Branch Banking & Trust Co., 234 N.C. 737, 739, 68 S.E.2d 831, 833 (1952). As to whether the equitable interests were remote because subject to a condition precedent that T's will be filed, an event which might not occur within the period of the Rule, see section II. B.3.b. supra.

368. McQueen v. Branch Banking & Trust Co., 234 N.C. 737, 739, 68 S.E.2d 831, 833 (1952); see text accompanying notes 321 & 322 supra.

RULE AGAINST PERPETUITIES

authorities cited. In the *Williamson* case there was a power of appointment which, if exercised by the trustee, would be violative of the rule against perpetuities, and in the *Mercer* case there was a future interest which might not vest within the time prescribed by the rule.

The rule may not be evaded by the creation of a private trust. It "applies to the time when the legal interest will vest in the trustees, as well as to the time when the equitable or beneficial interest will vest in the beneficiaries." . . . The question is not the length of the trust but whether title vested within the required time. . . .

"Courts and writers sometimes state in a rather loose fashion that every express private trust must be limited in duration to a period not longer than lives in being when the trust starts and twenty-one years thereafter . . . This is incorrect, except in a very few states where trusts in general, or certain trusts, have been limited in their duration by statute." . . .

"An interest is not obnoxious to the Rule against Perpetuities if it begins within lives in being and twenty-one years, although it may end beyond them. If it were otherwise, all fee-simple estates would be bad. The law is the same with lesser estates." 370

Case 27 has been followed in three subsequent cases. 372 Its view has been held retroactive. 373 However, the following case is puzzling.

*Case 28.* 374 T died in 1956 leaving a will which provided,

Therefore it is my will that my half of my & her (wife) estate be given to my three children—Judy Greer Honeycutt, Nancy Ann Honeycutt, and William Carson Honeycutt, to share & share alike. After all taxes or other debts have been settled.

It is my will that said property be held in trust by my wife & my friend Kester Walton, Atty. for said children until & when the year 1980—then ½ of residue be paid to my children or his or

370. *Id.* at 743, 68 S.E.2d at 836 (quoting G. BOGERT, *supra* note 158, § 218)(footnote added).

371. *Id.* (quoting J.C. GRAY, *supra* note 22, § 232). The interests are vested, not contingent, apparently because of the gift of intermediate income. *Accord*, Carter v. Kempton, 233 N.C. 1, 62 S.E.2d 713 (1950). The power in the trustees to use income for other purposes (college education of the grandnephew and grandniece) did not make the income beneficiaries' interests remote; rather, the ultimate beneficiaries had interests that were vested subject to divestiture to meet the college needs. McQueen v. Branch Banking & Trust Co., 234 N.C. 737, 835-36 (1952).

Judge Barnbill wrote the opinions in Cases 26 and 27.


375. As to whether the postponement until payment of debts and taxes creates any perpetuities violation, see section II.B.3.b. *supra.*
her children if any child of mine should die before reaching the year 1980. Trustee may have two years to pay said $\frac{1}{2}$ of estate to said children or their heirs—$\frac{1}{2}$ of balance of residue estate shall be distributed in the year 1992 on the same conditions as outlined above. The balance of the estate is to be distributed in the year 2005 on the same conditions as outlined above.

. . . .

If any child becomes disabled mentally or habits causing irresponsibility—a spendthrift—without heirs of his or her own or adopted children. Then his or her part of the estate shall be withheld at any one of the periods of distribution—and given to him or her as needed.

If any of my issue have heirs or adopted children, and become disabled mentally or by habits—then such children shall take the benefits along with its father or mother.

It is my desire that my Trustees will look after my childrens educational, moral and religious interests as well as their money or material interests.\(^{376}\)

\(T\) was survived by three minor children, ages seven, three and one. \textit{Held}, the trust did not violate the Rule Against Perpetuities.

The rationale of the court was not altogether clear. The court first used the standard rationale that the equitable interests vested on the death of \(T\);\(^{377}\) subject only to postponed enjoyment, but then added,

\(^{376}\) Finch v. Honeycutt, 246 N.C. 91, 92-93, 97 S.E.2d 478, 480 (1957). In addition to the perpetuities challenge, plaintiffs argued that the trust was a passive one executed by the Statute of Uses. The court held that the trustee's duty to look after the childrens' interests made the trust active.

\(^{377}\) The court stated:

\begin{quote}
The contention [that the trust violates the Rule] is not well founded here. For "it is generally held, nothing else appearing in the will to the contrary, that where an estate is devised to a trustee in an active trust for the sole benefit of persons named as beneficiaries, with direction to divide up and deliver the estate at a stated time, this will have the effect of vesting the interest immediately on the death of the testator. The intervention of the estate of the trustee will not have the effect of postponing the gift itself, but only its enjoyment." . . .

The gift in the instant case to the children vested in interest to them immediately upon the death of the testator, although the full enjoyment was postponed to later dates. When these conditions exist, a trust does not violate the Rule against Perpetuities.
\end{quote}

\textit{Id.} at 100, 97 S.E.2d at 485 (quoting Coddington v. Stone, 217 N.C. 714, 719, 9 S.E.2d 420, 423 (1940)).

Arguably, the interest in \(T\)'s children was not vested at his death because the trust provided for payment to \(T\)'s grandchildren "if any child of mine should die before reaching the year 1980." Of course, this provision could be treated as a condition subsequent rather than a condition precedent. Even if it imposes a condition precedent, the gift to \(T\)'s children still appears to be good, because the children would take, if at all, within their own lives. The gift over to \(T\)'s grandchildren appears to be good, because it would vest at the death of \(T\)'s children, subject only to postponed enjoyment (assuming there is no implied condition precedent of survivorship to the time of distribution). Query: What disposition if a child of \(T\) died before 1980 without leaving children?
RULE AGAINST PERPETUITIES

Even though the postponements here ultimately invade the Twenty-first Century, reference to the ages of the children indicates that the postponements are within the life or lives of the beneficiaries in being and twenty-one years and ten lunar months thereafter, the limitation of the Rule against Perpetuities.\(^{378}\)

A commentator suggested that this passage might have revived the line of reasoning in *American Trust Co. v. Williamson*\(^ {379}\) (Case 25) and *Mercer v. Mercer*\(^ {380}\) (Case 26),\(^ {381}\) but the court quickly put the damper on that suggestion:

*Case 29.*\(^ {382}\) *T* died in 1952 leaving a will as follows:

First, . . . I trust all of the balance of my property which I shall own at the time of my death to Wachovia Bank and Trust Company to be held in trust for my son William Harvey Poindexter and be paid out to him in the manner herein after stated.

2nd. To pay to my said son for his use all of the net income from my estate for the purpose of giving him proper support and if he should get disable to work and if the income is not sufficient, I direct that so much of the principal be used as may be deemed wise to properly support him.

Three (3) Personal property to be owned and used by him as long as he should live and by his issue also. Then to go to my brothers and sisters the same as the other property.

Fourth, if however my son should die leaving issue then his issue shall receive the income from my estate as he did. But if he should leave no issue then I will and direct that what remains of my property . . . be divided between my brothers and sisters that is living and have led a sober and good life in every way.\(^ {383}\)

*T* was survived by William and his two minor children. *Held,* William took a life estate, not a fee, with remainder to his . . .

\(^{378}\) *Id.* at 100, 97 S.E.2d at 485 (citing *American Trust Co. v. Williamson*, 228 N.C. 458, 46 S.E.2d 104 (1948).

\(^{379}\) 228 N.C. 458, 46 S.E.2d 104 (1948).

\(^{380}\) 230 N.C. 101, 52 S.E.2d 299 (1949).

\(^{381}\) *Survey of North Carolina Case Law*, 36 N.C.L. Rev. 379, 467-68 (1958): The significance of this language is not clear. However, it would seem to imply that under a different factual situation the Court might strike down an otherwise valid trust because full enjoyment of the fee is postponed for a period which might exceed that of the Rule Against Perpetuities. The Court seems to be saying that because of the youth of the children it has concluded that the distributions will probably be made within their normal life spans and twenty-one years thereafter. Unanswered is the question of what the Court would have said and done had the beneficiaries been so much older that it appeared unlikely that the distributions would be made within their lives and twenty-one years.

The eldest child would have been 56 at the time of the last distribution.


\(^{383}\) *Id.* at 374, 128 S.E.2d at 870.
issue living at his death. The trust terminated at the death of William’s issue who were living at his death. As so construed, the trust did not violate the Rule Against Perpetuities.

The opinion in Case 29 squarely rejected the Williamson/Mercer approach and said that Finch v. Honeycutt (Case 28) was not in conflict with McQueen v. Branch Banking & Trust Co. (Case 27). The courts have continued to adhere to the Case 29 approach:

Case 30. T left the residue of his estate to a bank in trust to pay the income to named nieces and nephews for life, and upon the death of the last niece or nephew to hold the property in trust for twenty years, accumulating the income for the benefit of a church:

At the expiration of said twenty years the Trustee shall as soon as practicable after the . . . Church . . . has in writing expressed its willingness to accept and use the fund for the purpose hereinafter stated, pay and distribute, free of trust, to the . . . Church . . . upon the following stated conditions: The trust

384. The court found sufficient indications of T’s intention to use “issue” in the sense of lineal descendants living at William’s death, not in the technical English sense of an indefinite succession of lineal descendants. If used in the latter sense, the Rule would have been violated. Id. at 377, 128 S.E.2d at 872.
385. 246 N.C. 91, 97 S.E.2d 478 (1957).
386. 234 N.C. 737, 68 S.E.2d 831 (1952).
387. In Case 29 the court stated:

Plaintiff also insists that the trust itself offends the rule against perpetuities in that it will not in all events terminate within a life in being at the death of testatrix plus twenty-one years and ten lunar months. It is true that there is a possibility that the trust will extend beyond such period. It was formerly the law in this jurisdiction that a trust for private purposes must terminate within a life or lives in being and twenty-one years and ten lunar months thereafter. Mercer v. Mercer . . .; Trust Co. v. Williamson . . ., Springs v. Hopkins . . . But the principle is now established that the rule against perpetuities “does not relate to and is not concerned with the postponement of the full enjoyment of a vested estate. The time of the vesting of title is its sole subject matter. . . . The question is not the length of the trust but whether title vested within the required time.” Finch v. Honeycutt . . . is not in conflict with the McQueen decision as has been suggested [36 N.C.L. Rev. 379, 467]. In the case at bar the title vests in the beneficiaries in any event no later than ten lunar months following the death of William Harvey Poindexter, a life in being at the death of testatrix. The trust will terminate at the death of the issue of William who are living or en ventre sa mere at his death. The equitable and legal titles of said issue of William will not merge. In a passive trust the legal and equitable titles are merged in the beneficiary by virtue of the statute of uses . . . But if the trust is active they do not merge . . . The trust created by Mrs. Poindexter is an active trust and it does not violate the rule against perpetuities. It will continue until the purpose for which it was created ceases.
258 N.C. at 378-79, 128 S.E.2d at 873 (quoting McQueen v. Branch Banking & Trust Co., 234 N.C. 737, 743, 68 S.E.2d 831, 836 (1952))(citations omitted).

To quibble a bit, the holding in Finch certainly is not in conflict with McQueen. The question is, what was the rationale in Finch and what did its curious paragraph citing Williams mean? Why was Finch not in conflict with McQueen?
fund shall be matched . . . and the total amount . . . shall be used to construct . . . a Church . . . .

If, however, the . . . Church . . . at any time within one year after the expiration of the twenty year period . . . in writing declines to accept the said gift upon the said terms, or if at the end of said one year, it has not affirmatively elected to accept . . . the Trustee shall pay and distribute the said trust fund, free of trust, to certain charitable institutions . . . .

Held, the trust did not violate the Rule. "That the trustee is allowed indefinite additional time ('as soon as practicable') to pay and distribute the fund to the church after acceptance, does not prevent the vesting of title upon acceptance." 389

Case 31. 391 T left the residue of his estate in trust, to divide the annual income into twenty equal shares, paying shares to various named relatives (all of whom were lives in being) and sixteen shares to be divided among named and unnamed great nieces and great nephews:

(i) The income from the sixteen shares shall be equally divided among my great nieces and nephews, now twelve (12) in number, and those who hereafter may be born within twenty-one (21) years after my death, they to share equally with the others.

(j) The share of income allotted to each great-niece and great-nephew shall be paid to the child's guardian, if there be such, and disbursed by him or her for the benefit of the child. The object of this provision is to simplify the handling of income, which will be small. 392

The will provided that the trust was to continue in effect "for, and during the joint and several lives of" his surviving brothers and sisters, listed by name, his eleven nieces and great nephews, then in being, listed by name, with the name of the parent of each of the great nieces and great nephews. It further provided that the trust should continue in effect for and during the joint and several lives of any other nieces or nephews or great nieces or great nephews born prior to, and alive at the time of my death, and until the death of the last survivor of my

389. Id. at 108, 139 S.E.2d at 16.
390. Id. at 110, 139 S.E.2d at 18.
nieces and nephews, and the last survivor of my great nieces and nephews (alive at my death) as just above referred to, and no longer.\textsuperscript{393}

The trustee had a power to sell and reinvest. \textit{Held}, all interests must vest within the permissible period,\textsuperscript{394} and even if the trust could extend beyond the period of the rule,\textsuperscript{395} duration of the trust was not controlling.\textsuperscript{396}

In sum the recent cases both state and hold that the Rule is concerned with vesting, not trust duration. Cases 25 and 26 seem to be dead. Should one mourn their demise or dance on their grave?\textsuperscript{397}

Modest celebration appears to be in order, after one examines the question of trust duration in light of the policies behind the Rule. (The cases, alas, do not approach the question from this angle, and the early confusion of Cases 25 and 26 may reflect, in part, the difficulty of introducing the rule against remoteness of vesting into a situation in which it seems a foreigner.) The principal policies served by the Rule are furthering alienability and limiting dead hand control.\textsuperscript{398} Viewed from the perspective of alienability, perpetual trusts do not pose a real danger in North Carolina. The trustee customarily is given an express power to sell his legal interest, and when one is not expressly given, a court of equity will grant a power of sale in the event of emergency.\textsuperscript{399} In the absence of a spendthrift clause, the beneficiary’s equitable interest apparently is alienable; although there is little precedent, North

\begin{itemize}
  \item \textsuperscript{393} Wing \textit{v.} Wachovia Bank \& Trust Co., 35 N.C. App. 346, 349, 241 S.E.2d 397, 399, \textit{cert. denied}, 295 N.C. 95, 244 S.E.2d 263 (1978).
  \item \textsuperscript{394} It is not clear from the opinion that all interests vested within the period of the Rule.
  \item \textsuperscript{395} It was argued that duration could be measured by an after born niece or nephew. Wing \textit{v.} Wachovia Bank \& Trust Co., 35 N.C. App. 346, 351, 241 S.E.2d 397, 401, \textit{cert. denied}, 295 N.C. 95, 244 S.E.2d 263 (1978). Perhaps the argument (unstated in the opinion) was that “surviving” meant an indefinite line of survivors, or that the class of nieces and nephews was not confined to those living at \(T\)’s death.
  \item \textsuperscript{396} The court stated:
    We are aware that \textit{Mercer v. Mercer} \ldots held that a trust must terminate within the permissible period. In \textit{McQueen v. Trust Co.} \ldots the Court distinguished \textit{Mercer} and in \textit{Poindexter v. Trust Co.}, we believe that \textit{Mercer} was overruled. Plaintiffs contend that since \textit{Mercer} was the law at a time that the trust under Mr. Andrews’ will was being administered, we cannot now rule that the limitation under his will does not violate the rule. We do not accept this argument. Nowhere in either the \textit{McQueen} or \textit{Poindexter} cases do we read that they were to have only prospective effect. We believe they declare the common law of this State as to limitations in instruments now in effect.
  \item \textit{Id.}, at 351-52, 241 S.E.2d 401.
  \item \textsuperscript{397} \textit{See generally} T. \textit{Bergin} \& P. \textit{Haskell}, supra note 22, at 225; G. \textit{Bogert}, supra note 158, \S\ 218; S R. \textit{Powell}, supra note 22, \S\ 772; I A. \textit{Scott}, \textit{Trusts} \S\ 62.10 (3d ed. 1967); \textit{Restatement of Property} \S\ 381 (1944).
  \item \textsuperscript{398} \textit{See note} 491 \textit{infra}.
  \item \textsuperscript{399} \textit{See notes} 496-97 \textit{infra}.
\end{itemize}
Carolina probably would not follow the *Clafin* doctrine that prevents trust termination when termination would defeat a material purpose of the settlor. Spendthrift trusts are not a significant consideration, because their limited statutory validation has been reduced to triviality by the effects of inflation. In sum, the beneficiary's interest must vest within the period of the Rule and, once vested, it will be alienable. Since trustee and beneficiary may both sell, alienation is not unduly restrained. Even though the existence of the trust, or the fact of multiple beneficiaries, may make alienability less likely, that does not seem a sufficient justification to invalidate the trust. And, looked at in terms of dead hand control, the trustee's and beneficiary's power to sell within the period of the Rule, ending forever the settlor's control, justifies the exemption of trust duration from the Rule.

The law elsewhere is in a formative state. In states recognizing indestructible or *Clafin* trusts, there may be a rule limiting trust duration to the period of the Rule Against Perpetuities. The best approach would be not to regard this as a question of perpetuities, so that the issue will be joined instead at the fundamental level of restraints on alienation. If an indestructible trust is limited to the perpetuities period, the effect of creating an overlong trust is unclear; the trust may be destructible by the beneficiaries after the expiration of the period of the Rule, or it may be destructible at any time, or it may (as in Cases 25 and 26) be destroyed by the court *ab initio*, a result that is harsh but nevertheless consistent with the usual perpetuities approach.

As a matter of good drafting, it is advisable not to run the risk of

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403. 3 L. SIMES & A. SMITH, *supra* note 5, § 1391.
404. 4 A. SCOTT, *supra* note 397, at 605.
406. 3 L. SIMES & A. SMITH, *supra* note 5, § 1393.
407. *Id*.
408. *Id* at 246.
creating a trust to last beyond lives in being plus twenty-one years. Even though the trust may ultimately be sustained, the draftsman risks litigation. Also, he may find the trustee stripped of distributive powers on the ground that powers to pay principal or income amount to remotely exercisable special powers of appointment. The trustee's administrative powers should not be invalid, but there is some risk involved.

VI. COMMERCIAL INTERESTS

It is often said that contracts are not subject to the Rule, but that statement is too broad. It is often said that the Rule does not apply to present interests, but that statement, too, is overbroad. Indeed, when one attempts to sort out the applications of the Rule to interests other than the traditional future interests associated with gratuitous transfers, he quickly encounters a set of seemingly contradictory holdings. In contrast to the usual perpetuities cases on gifts, wills and trusts, in which a doctrinaire application of the Rule usually results in the "correct" answer, in the commercial interest cases a logical approach based on the face of the Rule does not always yield a predictably correct result. Rather, one must look to some ad hoc reasons behind the black letter of the rule. For example:

Case 32. B conveyed land to C for use as a park on certain conditions. The habendum clause limited the park to use by white persons only, and the deed further provided that should the park fail to be used by white persons only, the property should revert to B, his heirs or assigns; provided that as a condition precedent to the reversion, B, his heirs or assigns, should pay C or its successors the sum of $3500. Held, the deed created a fee simple determinable in C and a possi-

409. The Wachovia form book is somewhat less cautious, providing that "no trust (other than a trust of a vested interest)... shall continue [beyond the period of the Rule]." WACHOVIA BANK & TRUST, supra note 352, at XVI-32.
410. 6 ALP, supra note 22, § 24.32.
411. Id. § 24.63.
412. E.g., 5 R. POWELL, supra note 22, § 767B.
413. E.g., 6 ALP, supra note 22, § 24.55.
bility of reverter in B, which possibility of reverter did not violate the Rule Against Perpetuities.

The holding in Case 32 that the possibility of reverter in B does not violate the Rule is difficult to explain except on historical grounds. Obviously, the property may cease to be used for a park long after any lives in being plus twenty-one years; and to label the interest as presently vested seems to ignore its fundamental nature. Nevertheless, the holding in Case 32 follows the guiding (and probably misguided) precedent of First Universalist Society v. Boland, the leading American case exempting possibilities of reverter from the Rule. Powers of termination (rights of entry) are similarly exempt in the United States, although there is no direct North Carolina precedent.

In Case 32 the court treated the interest in C as a fee simple determinable, despite plausible arguments (apparently unraised by counsel) that C's interest was a fee simple absolute subject only to a covenant or a fee simple subject to a condition subsequent (because B was required to pay $3500 to C to effect a reverter). In any event, B's interest was held to be good. If, instead of preserving the reverter in himself, B had given the property, in the event of breach of the condition, over to a third person (D), the interest in D would have been an executory interest violating the Rule.

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415. E.g., 3 L. SIMES & A. SMITH, supra note 5, §§ 1238-1239; 6 ALP, supra note 22, § 24.62; 5 R. POWELL, supra note 22, ¶ 769.


417. For example, O conveys Blackacre to A and his heirs on condition that the property be used for a farm, and if the property ceases to be used for a farm, O or his heirs may reenter and repossess as of O's former estate. A would have a fee simple subject to a condition subsequent, and O would have a power of termination. The difference from the fee simple determinable is that the property does not automatically revert upon breach of the condition—O must reenter. See generally J. WEBSTER, REAL ESTATE LAW IN NORTH CAROLINA §§ 35-38 (1971).

418. Powers of termination are exempt even though the requirement of a reentry makes the interest even less vested than a possibility of reverter. E.g., 3 L. SIMES & A. SMITH, supra note 5, § 1238.

419. Any North Carolina case recognizing powers of termination unlimited in duration is, indirectly, an affirmation that the interest is exempt from the Rule. For a collection of cases recognizing fees simple subject to a condition subsequent, see J. WEBSTER, supra note 417, §§ 37-38.

420. It is said that defeasible estates are not favored, as the law abhors forfeitures. The deed did not use the classic determinable fee language of "to C so long as the property is used for a park for whites only" but merely tacked the racial provision onto the deed in the habendum clause. See 6 ALP, supra note 22, § 24.62 n.8a (Supp. 1977); 34 N.C.L. REV. 113, 115 n.8 (1955).

421. The property could not automatically revert to B (the hallmark of a fee simple determinable) if, "as a condition precedent to the reversion," B was required to pay $3500 to C. This looks like a power of termination. See 34 N.C.L. REV. 113, 115 n.18 (1955).

422. For example, B conveys to C for use as a park; provided that should the park fail to be
What result in Case 32 if, instead of creating a possibility of reverter in himself, B had retained an option to repurchase the land? For example, suppose that in Case 32 B had conveyed the land to C in fee simple absolute, and C had covenanted that if the property should cease to be used for a park for whites only, upon payment of $3500 C would reconvey the property to B. No case exactly like this has arisen in North Carolina, but cases in other jurisdictions have invalidated B's interest. Case 33 represents the closest North Carolina precedent:

Case 33. G and his wife sold a lot to E, retaining for themselves and their heirs and assigns the right to repurchase said land when sold, the said [E] conveying a title for said lands, either by deed or mortgage, to any person without first giving [G and his wife], and their heirs and assigns, the privilege of repurchasing the same, renders this deed null and

used by white persons only, upon the payment of $3500 by D or his heirs the property shall go to D and his heirs. C would have a fee simple subject to an executory interest, and D would have a shifting executory interest. See generally J. Webster, supra note 417, § 39. The executory interest in D would be remote because the event might not occur within the period of the Rule. E.g., 6 ALP, supra note 22, § 24.62. It is difficult to distinguish this remote executory interest in D from the valid possibility of reverter in B. Id.

The grantor who wishes to create a fee simple in A subject to a remote executory interest in B may, if he is cleverly advised, accomplish his desires indirectly by first creating a defeasible fee in A, leaving a possibility of reverter or power of termination in the grantor. He then conveys or devises that possibility of reverter or power of termination to B, who is regarded as owning the grantor's valid reverter interest, not a remote executory interest. This device is made possible by statutes allowing the conveyance or devise of possibilities of reverter and powers of termination, and was even effective in Brown v. Independent Baptist Church, 325 Mass. 645, 91 N.E.2d 922 (1950), in which the testatrix created the determinable fee in one will clause and devised the possibility of reverter in another, residuary clause. By statute in North Carolina, possibilities of reverter and powers of termination are alienable, N.C. Gen. Stat. § 39-6.3 (1976), devisable, id. §§ 31-40, and descendible, id. §§ 29-2(2). For some time, it was held in North Carolina that powers of termination were not alienable or devisable if the condition was unbroken. The statutes now state that powers of termination are transferable, "whether any such condition has or has not been broken" at the time of transfer. Id. §§ 31-40; see id. §§ 39-6.3. There is no such statement in the statute on descendibility, § 29-2(2), but the omission should not be a problem because rights of entry were inheritable at common law even when the condition was unbroken. See generally McCall, supra note 1; Webster, The Quest for Clear Land Titles—Whither Possibilities of Reverter and Rights of Entry?, 42 N.C.L. Rev. 807 (1964).

Because the alienability and devisability of possibilities of reverter and powers of termination allow grantors to evade the check of the Rule Against Perpetuities on remote executory interests, an occasional statute forbids the conveyance or devise of these interests. E.g., Ill. Ann. Stat. ch. 30, § 37b (Smith-Hurd 1969). These statutes seem to treat the symptoms, not the disease, and have some deleterious side effects: the grantor's reverter interest remains enforceable but it must pass by intestacy, fractionating it to the point where no one can buy a release of the possibility of reverter or power of termination. Other approaches have been more fruitful (for example, so-called reverter acts limiting the duration of possibilities of reverter and powers of termination to a fixed period, say 30 or 40 years). E.g., id. § 37e. The only current North Carolina stricture is the requirement of the Marketable Title Act that the interest be rerecorded once each 30 years to preserve its vitality. N.C. Gen. Stat. ch. 47B (1976).

423. 3 L. Simes & A. Smith, supra note 5, § 1245.
void. 425

E mortgaged the land without giving G a chance to repurchase. Held, the right to repurchase was void.

If G's right to repurchase had been cast in the form of a possibility of reverter, undoubtedly it would have been held good; but in the form of a right to repurchase it was held bad. The fault, if there be one, may lie in the exemption of the possibility of reverter rather than the invalidation of the right to repurchase. 426

From a broader perspective, it is questionable whether the right to repurchase (or any other commercial interest) ought to be measured against the Rule Against Perpetuities. The period of the Rule—lives in being plus twenty-one years—is a fairly appropriate yardstick for family settlements (wills and trusts giving away the owner's property with future interests to his remote descendants), but is not an appropriate unit of measure for most commercial interests. 427 Often no lives in being can be related to the commercial interest, leaving only the twenty-one-year period in gross for measurement of validity, an arbitrary period unrelated to any commercial property consideration.

The true objection to the option to repurchase in Case 33, if any, rests in the rule against restraints on alienation. Indeed, the language of the deed in Case 33 virtually forbade alienation to anyone save the grantor. The court's opinion in Case 33 did not clearly indicate the basis for the decision, 428 although it has been read as relying on the

425. Id. at 520, 15 S.E. at 890.
426. E.g., 6 ALP, supra note 22, § 24.56.
427. In some cases, the perpetuities period might be too short, in others it might be too long. An option to purchase exercisable, if at all, within the perpetuities period ought not to be automatically valid. Id.
428. The court stated:

Considered either as a conditional sale or a contract to reconvey, his Honor was entirely correct in holding as void for uncertainty the provision in the deed respecting the right of the grantor to repurchase the land when sold. No time is fixed for performance, nor is there any stipulation whatever as to the price to be paid.

The provision, not being a limitation, can therefore only take effect, if at all, as a condition subsequent, and viewed in this light we cannot hesitate in deciding that the restriction upon alienation attempted to be imposed after the grant of the fee, is repugnant to the nature of the estate granted, contrary to the policy of the law, and therefore inoperative. Ever since the statute of Quia Emptores, the right of alienation has been considered as an inseparable incident to an estate in fee... and, except in some cases where the restriction is only partial, the law does not recognize or enforce any condition which would directly or indirectly limit or destroy such a privilege—iniquum est ingenuis hominibus non esse rerum suarum alienationem. Accordingly, it has been held by this Court that a condition that a devisee in fee shall not sell or encumber his land before attaining the age of thirty-five is void, "because it is inconsistent with the full and free enjoyment which the ownership of such an estate implies."... To the same effect has it been ruled as to a condition that a devisee in fee shall make oath "that he will not make any change during his life" in the testator's will respecting his property... or that he
Rule Against Perpetuities. The court may have been wise in leaving open the question of options to repurchase and perpetuities, and it may be significant that the only other North Carolina case on options to repurchase does not invalidate the option in question:

Case 34. As part of the sale of an oil distributorship, P deeded a bulk station and plant to B, who gave back to P an option to purchase the property at any time within one year, with automatic renewal from year to year, subject to cancellation on 60-days' written notice. About a year later, B agreed to allow P to exercise the option but B reneged and refused to execute a deed to P, contending the option violated the Rule Against Perpetuities. Held, for P for two reasons. First, B agreed to exercise of the option. Second, the option is an integral part of the transaction, and it would be inequitable to allow [B] to claim the property under a deed from [P] and at the same time annul the essential terms of its acquisition. If the option is to go out, so must the deed which induced it. The result, therefore, would be the same whether upheld or rejected.

Under traditional doctrine, the first reason for the decision (that B agreed to the repurchase) would seem inadequate—the question is what might have happened, judged from the creation of the interest,
not what in fact happened. The other reason, that the option was an
integral part of the transaction,\(^\text{432}\) seems to confuse the secondary ques-
tion of effect of invalidity with the primary question of validity or invalidity. To contend that invalidity of the option voids the initial transfer
is to assume the conclusion; Case 33 simply stripped away the invalid
option, leaving the grantee with a fee simple absolute. Furthermore, it
would seem that in most cases the option would be an integral part of
the transaction: the grantor in Case 33 was unlikely to have conveyed if
the grantee had been unwilling to assent to the option to repurchase.

For the advocate, as well as the analyst, the significance of Cases
33 and 34 is that they leave open the question of validity of options to
repurchase under the Rule Against Perpetuities. Case 33 may have been
based on restraints on alienation, and Case 34, wherein the option in
question was validated, is not a square holding that options are subject
to the Rule. Although options to repurchase generally are subject to
the Rule in other jurisdictions,\(^\text{433}\) there is still time for critical scrutiny
of this application in North Carolina. It may well be that a more ap-
propriate check for validity would be the rule against restraints on
alienation. If, for example, the option to repurchase were exercisable at
a price stated in the option (such as the $3500 stated for exercise of the
so-called possibility of reverter in Case 32), in times of constantly in-
flating land values the option would almost certainly restrain alienation
because the option price quickly would become archaically low. Even
if the price were high enough, the owner would be discouraged from
placing improvements on the land.\(^\text{434}\) In Cases 33 and 34 no purchase
price was stated; it would seem that uncertainty about the option price
would discourage the owner from attempting to sell his property, lest
he become involved in a lengthy haggle over the option price with the
risk that the optionee ultimately would prevail. Even if the price were
assumed to be current fair market value, the option might fail because
in the difficult case of the preemptive right to repurchase, the option
sometimes is held bad.\(^\text{435}\) The preemptive right to repurchase gives the
vendor the right to repurchase the property at the same price at which
the vendee is willing to sell to any third person. Because the preemp-

\(^{432}\) The Restatement adopts this idea, with citation only of Pure Oil v. Baars, 244 N.C. 612,
31 S.E.2d 854 (1954), as supporting authority. RESTATEMENT OF PROPERTY § 394, Comment f
(Supp. 1948).

\(^{433}\) See, e.g., 6 ALP, supra note 22, § 24.56.

\(^{434}\) Strictly speaking, this is not a perpetuities or restraint on alienation factor, but it is often
used as a rationale. Compare Case 36 infra.

\(^{435}\) E.g., Atchison v. City of Englewood, 463 P.2d 297 (Colo. 1969), noted in 47 DENVER L.J.
78 (1970).
tive right discourages marketability, but not greatly so, the cases and commentators on validity of the preemptive right have yet to reach a consensus.\footnote{436}

The options in Cases 33 and 34 were options to repurchase reserved by the original vendors. If these options, very much akin to the valid possibility of reverter in Case 32, are in jeopardy, clearly options in gross granted to third parties are in greater jeopardy, although the issue has not arisen in North Carolina. The option in gross reserved by the grantor or given to a third party is conventionally distinguished from the following two cases:

\textit{Case 35.} \footnote{437} \textit{L} leased a parcel to \textit{T} for a period of ten years. Upon the expiration of the ten-year period, if the property had been kept in a good state of repair, and if \textit{T} so desired, the lease was renewable for an additional ten years, and thereafter renewable every ten years so long as \textit{T} desired. The lease inured to the benefit of and was binding on the heirs and assigns of \textit{L} and \textit{T}. \textit{Held}, the lease created a lease for a term of ten years, with a covenant for perpetual renewal.\footnote{438} The covenant for perpetual renewal was a presently vested interest and did not violate the Rule Against Perpetuities.

\textit{Case 36.} \footnote{439} \textit{L} leased a tract to \textit{T} for a period of twenty years, with an option to renew for four periods of five years. A few months later \textit{L} granted \textit{T} a preemptive right to purchase a second tract adjoining the leased tract. In another few months, \textit{L} sold the second tract without giving \textit{T} a chance to purchase and \textit{T} sued for specific performance of the option. \textit{L} invoked the Rule Against Perpetuities. \textit{Held}, the option was not objectionable (semble).\footnote{440}

\footnote{436. See 5 R. Powell, supra note 22, ¶ 771[1].}
\footnote{438. Compare Case 35 with Duff-Norton Co. v. Hall, 268 N.C. 275, 150 S.E.2d 425 (1966). The lessor argued for a tenancy at will under the doctrine that a tenancy at the will of the tenant is ipso facto at the will of the landlord. Other constructions were possible. See, e.g., McLean v. United States, 316 F. Supp. 827 (E.D. Va. 1970).}
\footnote{440. The court's opinion is cryptic:

The defendants invoke the rule against perpetuities, since the option of the plaintiff could extend for a total period of 40 years. However, at this stage of the proceedings we are of opinion that this position is premature. \textit{Mercer v. Mercer} . . . \textit{Weber v. Texas Co.} . . . , where it is said: "** * * This is not an exclusive option to the lessee to buy at a fixed price which may be exercised at some remote time beyond the limit of the rule against perpetuities, meanwhile forestalling alienation. The option simply gives the}
Under Case 35 a covenant for perpetual renewal is presently vested and therefore free from the Rule. Although this rationale is a common one, it begs the question: if an option to renew a lease (at some future time) is presently vested, why is not an option to repurchase (at some future time) (Case 33) also vested? The true explanation for Case 35 seems to be not that the option to renew is vested (else most options would seem vested), but rather that for various reasons unrelated to vesting the interest serves a desirable purpose, viz. encouraging the lessee to make full utilization of the land or (for long-term leases) furthering alienability, since it is an accepted commercial device for disposing of land. In other words, because in these commercial interest cases the concept of vesting is a difficult fit, the cases seem rather to be retreating to Lord Nottingham's view of a perpetuity: "wherever any visible inconvenience doth appear." While it is well to consider such policies, it is unfortunate that the cases must be argued in terms of vesting, because the court may be forced to sustain an interest that, measured by all relevant factors, might not be desirable. A perpetual covenant to renew by definition may last forever, which is altogether too long a time.

Case 35 is significant on the specific score of covenants for perpetual renewal and on the general score of illustrating the more or less omnipresent possibility of labeling a commercial interest good because it is presently vested.

lessee the prior right to take the lessor's royalty interest at the same price the lessor could secure from another purchaser whenever the lessor desires to sell. It amounts to no more than a continuing and preferred right to buy at the market price whenever the lessor desires to sell. This does not restrain free alienation by the lessor. He may sell at any time, but must afford the lessee the prior right to buy. The lessee cannot prevent a sale. His sole right is to accept or reject as a preferred purchaser when the lessor is ready to sell. The option is therefore not objectionable as a perpetuity." *Id.* at 277, 150 S.E.2d at 427-28 (quoting Weber v. Texas Co., 83 F.2d 807, 808 (5th Cir. 1936)). The purpose of citing *Mercer v. Mercer*, a trust duration case, is not clear.

In *Duff-Norton* it did not appear that the lessor challenged the validity of the covenant to renew (as distinguished from the option), but Case 35 appears to settle the validity of the covenant. Alternatively, the court could have simply decided that at most the covenant could only have resulted in a 40-year term, and an estate for a term is good.

441. J.C. GRAY, supra note 22, § 230.

442. RESTATEMENT OF PROPERTY § 395, Comment a (1944).

443. 3 L. SIMES & A. SMITH, supra note 5, § 1244.


445. Another plausible theory, apparently not recognized in any cases, would start from the premise that so long as a person has the power to make himself the full owner of property at will (as by revoking a revocable trust), the property is not tied up, and the perpetuity period begins to run only when the power is terminated. *E.g.*, 6 ALP, supra note 22, § 24.59. It is arguable that the optionee's power to exercise the option is analogous to the settlor's power of revocation, so the perpetuities clock does not start to run until the exercise of the option. This bizarre twisting of
Case 36 appears to sustain another interest in the lessee, an option to purchase (as distinguished from the option perpetually to renew in Case 35). On the face of it, an option to purchase in a lessee is just as likely to be exercised remotely as the option to repurchase in Case 33, yet the lessee’s option is sustained. The conventional explanations are two: (1) it would be anomalous to validate the perpetual option to renew in Case 35 but to invalidate the similar option to purchase in Case 36; and (2) the option to purchase furthers alienability because it encourages the tenant to improve the land. This second rationale is strained in Case 36 because the option in the tenant was not to purchase the leased land but rather to purchase an adjoining parcel. The court’s announced rationale was a preemptive option one—the option price was the price at which the lessor was willing to sell to any third party. So, Case 36 may shed some light on the status of preemptive rights to repurchase in North Carolina. Its result is typical.

In Case 36, the court may have overlooked a convenient rationale for finding the option valid. The facts stated that the lessor granted the option to the lessee (with no mention of the lessee’s heirs or assigns). If the option was personal to the lessee, under conventional dogma the option had to be good—it was exercisable, if at all, only by the lessee, who was the measuring life. This theory was not available in Cases 32, 33 and 35, in which the challenged interest ran to heirs and assigns, but might have been available in Case 34 (the facts were unclear). The advocate in commercial interest cases should always check his case to see whether the commercial interest is limited to the life of one of the parties.

In addition to the theories that the challenged interest is presently vested or that the interest is personal to the optionee, some other exculpatory theories may be available:

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446. E.g., 3 L. Simes & A. Smith, supra note 5, § 1244.
447. Id.
448. The facts do not detail the relationship between the parcels. It may have been that the existence of the option to purchase the adjoining tract encouraged development of the leased tract.
449. The case quoted by the court, Weber v. Texas Co., 83 F.2d 807 (5th Cir. 1936), did involve a tenant’s option to purchase the leased interest.
450. See text accompanying notes 423-26 supra.
451. 3 L. Simes & A. Smith, supra note 5, § 1244.
452. If the option runs to the optionee’s heirs but is not enforceable against the optionor’s heirs, it is good, the optionor becoming the measuring life.
Case 37. In return for $200, H conveyed to G all the timber cut on fifty acres of H's land. G was allowed "the full term of five years within which to cut and remove the timber hereby conveyed, said term to commence from the time [G] begins to manufacture said timber into wood or lumber." Thirteen years had elapsed without action by G. Held, the contract created a lease for a term of years, which was void for uncertainty as to when it would commence.

This is a classic "administration contingency" case; although the opinion nowhere mentions the Rule Against Perpetuities, the decision is consistent with usual principles invalidating interests to take effect on a condition precedent that might not occur within the period of the Rule (G's commencing to cut the timber). The case belies any contention that contracts always are exempt from the Rule. It raises anew the question whether the period of the Rule is appropriate (either too short or too long) for commercial transactions. G attempted to save the deal by arguing that he was to commence cutting within a reasonable time. This argument is a useful one to keep in mind in this kind of case, since in most cases a reasonable time would be less than twenty-one years. Nevertheless, G's argument failed here since the court said that thirteen years was beyond a reasonable time, so G's rights under the contract were lost. Apparently, then, the court was not quite applying a perpetuities yardstick to invalidate the contract, since the interest would have vested, if at all, within less than thirteen years.

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454. Id. at 47, 38 S.E. at 26.
455. The court does not state whether the contract was personal to G or whether it also ran to G's successors. Even if the contract had been limited to G the interest would not have been saved, since G was a corporation and not a human being.
456. See 3 L. Simes & A. Smith, supra note 5, § 1244.
457. Case 37 has been read as a perpetuities case. See 39 N.C.L. Rev. 93, 97 & n.31 (1960). The opinion in Case 37 may waive a perpetuities flag, but it does not expressly defend it:

We are of the opinion that there is on the face of the pleadings an insuperable obstacle to a recovery on the part of the plaintiff, and that we ought . . . to affirm the judgment of the Court below. . . . The matter to which we refer is that provision of the contract by which is granted the full term of five years within which to cut the timber, the term to commence from the time the plaintiff (party of the second part) begins to manufacture the timber into wood or lumber. We think that that feature of the contract renders the whole void. The contract may be treated as a lease, or a term for years, for a lease can be made of the right to cut trees or dig minerals. An indispensable legal requirement to the creation of a lease for a term of years is that it shall have a certain beginning and a certain end. Blackstone says that such an estate is frequently called a term, terminus, because its duration or continuance is bounded, limited and determined. If no time at which a lease is to commence has been mentioned, the law would fix that time as of the date of the contract. . . . But there is an attempt to fix the beginning of the
hoc policy basis the decision seems good: $G$ should not have been allowed to tie up $H$’s timberland indefinitely, speculating on when timber prices would rise.

From the perspective of the Rule Against Perpetuities, without looking at underlying policies, the decision in Case 37 is difficult to justify. $G$’s interest seemed vested, with only his enjoyment postponed. His power to make himself the owner of the timber seemed no less contingent than the possibility of reverter in Case 32 or the option to renew the lease in Case 35; yet it was invalidated, again illustrating the necessity of an interest-by-interest analysis of underlying policies.\footnote{458}

Easements and profits à prendre usually are excepted from the operation of the Rule:

\textit{Case 38.} C conveyed a tract of land to S, reserving to himself and his heirs and assigns the right to hunt on the tract and to protect the game on the tract from all persons except S and his successors. \textit{Held,} the reservation retained a profit à prendre in C, which interest was present, not future, and did not violate the Rule Against Perpetuities.

Case 38 thus employs the present interest rationale appropriately to

\footnote{458. Case 37 is not unlike Haggerty v. City of Oakland, 161 Cal. App. 2d 407, 326 P.2d 957 (1958), which held a lease that was to commence on the completion of a building to be void ab initio. Haggerty was roundly criticized for importing the Rule Against Perpetuities into a foreign context and for ignoring the parties’ likely intention that the building be constructed within a reasonable time less than 21 years. \textit{E.g.,} 6 A.L.P, supra note 22, § 24.21 (Supp. 1977). \textit{Contra,} 39 N.C.L. Rev. 93 (1960). Haggerty was overruled in Wong v. Di Grazia, 60 Cal. 2d 525, 386 P.2d 817, 35 Cal. Rptr. 241 (1963). In view of the short-term interest in Case 37, and the fixed price (Haggerty involved a 10-year term in a large building at a rental keyed to gross income, which would increase with inflation), Case 37 appears to be reasonably decided, while Haggerty clearly was not.}

\footnote{459. Council v. Sanderlin, 183 N.C. 253, 111 S.E. 365 (1922).}
sustain a profit. Any other decision would invalidate most easements, profits, covenants and incorporeal hereditaments. These interests have escaped the Rule even when closer to the option in gross line:

**Case 39.** F conveyed to T a “right of way and easement” to lay and maintain a gas pipe line, together with the right from time to time to lay one or more additional pipe lines approximately parallel to the original line; provided that T should pay C $1.00 per lineal rod of the additional line. **Held,** the right to lay the additional lines was presently vested and did not violate the Rule Against Perpetuities.

In this case of an expansible easement, the interest was analogous to an option to purchase: by paying an additional sum of money, T could acquire additional rights in F's property. Nevertheless, in contrast to options to purchase in gross, the expansible easement was sustained. Both interests seem equally vested or equally contingent, so the reasons for validity of one (the expansible easement) and invalidity of the other (the option in gross) must lie in subliminal policy factors. These factors have not been adequately explained, and the advocate might find a useful line of attack in questioning whether the utility of a given expansible easement outweighs its fettering.

One final example deserves mention:

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460. The profit was reserved to the grantor, as in Case 32, but even if conveyed to a third party, it would be good. See 3 L. Simes & A. Smith, supra note 5, § 1248. The profit was not restricted to C's lifetime, so C could not be used as the measuring life.

461. Simes and Smith point out that generally these interests make the land more readily salable, although that would not seem to be true in Case 38. Id. § 1248.


463. Powell places Case 38 also in the expansible easement category. 5 R. Powell, supra note 22, ¶ 771[2] n.21. In a sense, the owner of the profit had a right dependent on his future action (hunting), but it was not expansible (for example, to include fishing) and did not require any future payments.

464. The Restatement retreats into a “present interest” conceptualization, Restatement of Property § 399, Comment a (1944), as does Gray, J.C. Gray, supra note 22, ¶ 279. The treatises move to the edge of policy but do not plunge into the thicket. 5 R. Powell, supra note 22, ¶ 771[2]; 3 L. Simes & A. Smith, supra note 5, § 1248.

465. Case 39 (the valid expansible easement) is an interesting comparison to Case 37 (the invalid timber lease to commence upon cutting). Compare these cases with Restatement of Property § 399, Illustration 3 (1944). Both cases involved rights to make use of the land of another, which were to commence upon action and the payment of money by the holder of the right. Yet one was held good and the other bad, suggesting that the advocate carefully categorize his interest. Perhaps the difference between the cases lies in precedent or perhaps it lies in a kind of option appendant theory—the expansible easement in Case 39 was attached to a basic easement, something like a valid option to purchase attached to a lease, but the timber lease in Case 37 was not attached to any other, valid interest, and thus was not justifiable as encouraging full utilization of the base interest.
Case 40. A company establishes a pension, profit sharing, stock bonus or other employee trust for the purpose of distributing the income and principal thereof to some or all of its employees, or the beneficiaries of such employees. The trust may last beyond the period of the Rule, may benefit persons not in being at the creation of the trust, and may vest interests beyond the period of the Rule. *By statute* the trust would not violate the Rule Against Perpetuities (nor the rules against restraints on alienation or against accumulation of income).

Pension trusts for employees should not be subject to the Rule, and apparently no court has held them bad. Nevertheless, because they probably are not exempt from the Rule as charitable trusts (since there is no direct benefit to the public), and because they resemble the kinds of dispositions in private express trusts that would run afoul of the Rule, several states, including North Carolina, have enacted salutary statutes to protect the validity of pension trusts.

In what kinds of commercial arrangements then should counsel be wary of perpetuities violations? By way of summary, there seem to be three categories: (1) any transaction involving land or an interest in land (for example an estate for years); (2) any arrangement providing death benefits or payments often associated with estate planning; and (3) any contract involving unique chattels. The North Carolina cases illustrated in this section pretty well run the gauntlet of problem areas, but counsel should always be wary of perpetuities risks in new kinds of property arrangements.

If a court wishes to validate a commercial interest without any

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467. E.g., 3 L. Simes & A. Smith, supra note 5, § 1247.
468. Id.
469. For example, the profits and easements in Cases 38 and 39 and the timber lease in Case 37, as well as the perhaps more expectable challenges to possibilities of reverter in Case 32 and the options to purchase, repurchase and renew in Cases 33-36. Questions have also been raised for restrictive covenants, id. § 1246, and for certain condominium provisions (1) determining ownership of the airspace in the event of destruction of the building and (2) providing for the control of ownership of the condominium, see Seeber, Condominiums in North Carolina: Improving the Statutory Base, 7 Wake Forest L. Rev. 355, 359, 361-65 (1971). Anytime land is involved, look out for restrictive covenants. Similar questions have arisen for contracts (often with a life insurer) providing for future payments to unborn or unascertained beneficiaries, because of the similarity of such arrangements to trusts used in estate planning. So far such contracts have escaped the Rule (on the facile theory that the relationship is purely contractual), but Leach opines that if abused, such contracts would be in jeopardy. 6 ALP, supra note 22, § 24.58.
470. Id. § 24.56 & n.7.
penetrating analysis of policy considerations, it may simply declare that the case involves a contract or a present interest, or it may find that the Rule does not apply (outside of gratuitous dispositions) to interests in personal property. Assuming that the Rule is found generally to apply to the interest in question, the interest may nevertheless be validated in a particular case if it is personal to a person such as an optionee (who then becomes the measuring life) or if the parties contemplated performance of the agreement within a reasonable time not exceeding the period of the Rule. As discussed, the cases tend to be decided by label or precedent, without inquiry into the policies served by a holding of validity or invalidity. It would be better not to apply the Rule to commercial interests, for the reasons that the concept of vesting is not a good fit and the period of the Rule is not appropriate. Nevertheless, for the foreseeable future it appears that the debate will be limited to Rule Against Perpetuities terms. Counsel in these cases might profit by arguing the underlying policies, such as free alienability or full use, which seem to control the decisions.

VII. DRAFTING

The treatises contain several excellent prescriptions for avoiding violation of the Rule.\(^\text{472}\) The caveats will be summarized here.

1. **Examine every instrument for possible violations of the Rule.** Wills and trusts are obvious candidates for scrutiny, but the commercial interest cases show that the Rule may pop up in unexpected places.

2. **State the duration of options to purchase land.** Limit them to the life of the optionee or, if not personal, state a definite period not greater than twenty-one years.

3. **Avoid agreements or gifts on conditions unconnected with any life.** Beware of administration contingencies such as completion of a building, probate of a will, distribution of an estate, or payment of debts. If the condition cannot be avoided, add a proviso that the event must take place within the period of the Rule.

4. **Beware of gifts contingent upon the taker attaining an age over twenty-one.** Indeed, whenever one sees a number greater than twenty-one, he should be on his guard.

5. **Beware of gifts to grandchildren.** While gifts to grandchildren of the testator must perforce be good, gifts to another's grandchildren

\(^{472}\) 6 ALP, supra note 22, § 24.7; 3 L. SIMES & A. SMITH, supra note 5, § 1293; Leach, supra note 29, at 669-71; Leach, supra note 334, at 985-86; Phillips, supra note 130, at VII-17 to -19.
may be bad. Indeed gifts to grandchildren of the settlor of an irrevocable trust may be bad, because more children may be born to the settlor.

(6) When possible, describe beneficiaries by name rather than by class designation. This will eliminate many of the fertile octogenarian casualties.

(7) When possible, avoid gifts conditioned on the survival of the "widow" of a named person. This will eliminate any "unborn widow" problems. Identifying the wife by name will avoid the problem but would exclude a second spouse; several better alternatives are available.473

(8) Limit the duration of trusts to the period of the Rule. Even though the Rule may not apply to the duration of trusts, it is better not to run the risk. Furthermore, the trustee of a trust lasting beyond the perpetuities period may find his powers stripped away on the theory that they constitute remotely exercisable powers of appointment.

(9) Examine every exercise of a power of appointment for possible violations of the Rule. For special powers and general powers exercisable by will, the period is computed from the creation of the power. Beware of provisions that are in substance, but not in form, powers of appointment, such as powers to consume or revoke.

(10) Consider the insertion of a saving clause. Feelings run high on this question. Leach recommends a boilerplate saving clause to protect against errors.474 Simes and Smith eschew the practice on the theory that it may produce unanticipated results.475 If the attorney does not know whether the instrument he has drawn is valid, he probably has no business drawing it.

VIII. Reform

It is useful initially to separate questions of application of the Rule from the principle and purpose of the Rule. The nonsense applications

473. 3 L. Simes & A. Smith, supra note 5, § 1293, at 233-34.
474. Leach, supra note 334, at 985-86. The Wachovia Form is as follows:

Anything in this will to the contrary notwithstanding, no trust (other than a trust of a vested interest) created hereunder shall continue beyond 21 years after the death of the last to die of those beneficiaries who were living at the time of my death; and upon the expiration of such period all trusts shall terminate and the assets thereof shall be distributed outright to such persons as are then entitled to the income therefrom and in the same proportions; but if no person is then entitled to a specific portion of income, then to the then living income beneficiaries, per stirpes.

WACHOVIA BANK & TRUST, supra note 352, at XVI-32.
475. 3 L. Simes & A. Smith, supra note 5, § 1295.
of the Rule are well known, and the North Carolina cases embody some, but not all, of them. Here the Rule has sporadically been applied to some commercial interests (for example, rights to repurchase), although a Rule designed to regulate family settlements has no rational bearing on the commercial world. Anomalously, the land use restrictions most deserving of perpetuities measurement, possibilities of reverter and powers of termination, are free from the check of the Rule. The duration of trusts, while generally exempt from the Rule elsewhere, may or may not be regarded as a question of perpetuities in this State. Authority is too sparse on powers of appointment to draw many conclusions. For class gifts, the much-maligned all-or-nothing rule of Leake v. Robinson prevails. Often the opinions seem not to grasp antecedent constructional questions of maximum membership (class closing) and minimum membership (vesting). Apparently, the testator or grantor may choose measuring lives unrelated to the disposition, and all gifts qualify for a twenty-one year period in gross unrelated to any minority, removing the logical nexus between the Rule and family settlements.

Some applications of the Rule are not bad. There is some support for choosing that construction which avoids invalidity, although the presumption is applied randomly. While North Carolina has not embraced judicial cy pres or the wait-and-see doctrine to preserve validity, a leading case indicates that, if adopted, cy pres might be applied generously. There is no clear-cut administration contingency case, and medical evidence might be admissible to avoid a fertile octogenarian problem. No charitable gift has been invalidated for perpetuities reasons.

Perpetuities reform statutes are nearly as numerous as the several states. Most reforms tinker with the period of the Rule (for example, the California allowance of an alternative sixty year period in gross), attempt to cure some of the nonsense applications (for example the

476. See Schuyler, supra note 38.
fertile octogenarian rule), or promulgate a statutory cy pres or wait-and-see doctrine. In view of the constant problems caused by the Rule, it may be time to ask whether these statutes merely treat the symptoms and not the disease. In this era of sunset laws and deregulation, could it not be that the Rule itself ought to be abolished?

Some beneficial aspects of abolition are readily apparent. Commercial interests would be free from jeopardy, and the courts would be forced to concentrate on relevant commercial policies, such as restraints on alienation, instead of trying to apply the ill-fitting Rule Against Perpetuities. Trust duration, which supposedly is not a matter of perpetuities, would be free at last. The charitable exemption of G.S. 36A-49 would be given its literal meaning, which the cases have heretofore equivocally sanctioned. And all those delightful doctrines of infectious invalidity, administration contingencies and “if at all” would be reduced to a footnote (albeit a long one) in the legal history books.

A large benefit of abolition would be removal of a substantial malpractice risk. The leading malpractice case stating that privity is no bar to suit by a disappointed beneficiary against the draftsman of an invalid will was (you guessed it!) a perpetuities case. While the court in that case exonerated the draftsman by seizing the question of negligence from the jury and declaring, in effect, that nobody understood the Rule, it is doubtful that future cases will treat perpetuities errors so kindly. The Leach recommendation that a saving clause be inserted

482. Cf. J.C. Gray, supra note 22, at xi (“There is something in the subject which seems to facilitate error. Perhaps it is because the mode of reasoning is unlike that with which lawyers are most familiar.”).
484. The leading English property law scholar, R.E. Megarry, commented on Lucas v. Hamm as follows:

An Englishman’s comment on the decision must perform observe a proper restraint. Doubtless the Supreme Court of California is the best judge of the standard of competence which is to be expected of California lawyers of ordinary skill and capacity. Let it be accepted that it is highly unlikely that it would take longer than the perpetuity period for the estate to be distributed. The question then becomes whether an ordinary lawyer who undertakes to draft a will should be expected to know that a gift will be void for perpetuity if there is any possibility, however unlikely, that the perpetuity period will be exceeded. This part of the rule is so fundamental, and so highly stressed by all the books and teachers, that he who does not know it must be expected to know little or nothing of the rest of the rule. The standard of competence in California thus seems to be that it is not negligent for lawyers to draft wills knowing little or nothing of the rule against perpetuities, and without consulting anyone skilled in the rule (a point mentioned by the
in most wills and trusts is testimony that perpetuities mistakes are inevitable.

Also, it might be noted that at least one state, Wisconsin, in effect has no Rule Against Perpetuities, and that state seems not to have been sunk into Lake Michigan by any dynastic impulses of its citizens. Wisconsin has no rule against remote vesting, although it does have a rule against suspension of the power of alienation measured by lives in being plus thirty (not twenty-one) years. Wisconsin cases have held that there is no suspension of the power of alienation for a trust if the trustee has a power of sale. Although this view was criticized, the Wisconsin legislature even reduced it to statutory writing in 1969. This large gap in perpetuities coverage seems not to have had an adverse effect. Further, the monstrous accumulations anticipated by the Thellusson Acts never materialized; Americans seem not inclined toward entailments of one kind or another.

The benefits of repeal in eliminating the nonsense applications of the Rule are obvious. But what are the detriments? Here one must look at the underlying purposes of the Rule, and Simes has stated them admirably. Briefly, they are: (1) promoting alienability of property;
(2) preventing undue concentrations of wealth; (3) furthering the competitive struggle; and (4) limiting dead-hand control. In view of a number of North Carolina statutes and one federal statute, and weighing the nuisance aspects of the Rule, it may be that these purposes are no longer so strongly served that retention of the Rule is justified.

First, note that G.S. 39-6492 tends to reduce by one generation the period during which property transferred inter vivos is tied up. This statute generally allows the grantor of a future interest in real estate to a person not in being to revoke the interest at any time before the remainderman comes into being. It also allows the settlor of a trust creating a future interest in real or personal property to a person not in being or not determined until the happening of a future event to revoke the interest at any time before the birth of the remainderman or happening of the contingency. While there are gaps in the coverage of the statute, in general it makes every contingent future interest revocable during the creator's lifetime; in essence the creator has a power analogous to the power of revocation reserved in an ordinary inter vivos trust, for which the perpetuities clock does not start until the settlor's death. While the creator has the power to revoke, the property has not been tied up. The full import of this statute does not seem to have been recognized, nor has it been argued to postpone the starting of the period in any perpetuities case.

Second, the Rule does not substantially affect marketability. Most substantial dispositions of property are trusts of corporate stock, in which the trustee customarily is given a power to sell the trust corpus. Even in the absence of an express provision, a power of sale may be implied, at least when the trustee has an express duty to invest and reinvest or to invest and manage. Although the proceeds of sale will remain impressed with the trust, that is not a question of marketability but of other policies such as dead-hand control. Legal interests are similarly alienable. North Carolina generally takes a strict view

493. For trusts, the statute applies to real or personal property and to future interests (apparently both remainders and executory interests) contingent upon birth or the happening of an event. For nontrust interests, the statute seemingly applies only to real estate (not personality) and to future interests contingent upon birth (not the happening of an event).
496. E.g., Hall v. Wardwell, 228 N.C. 562, 46 S.E.2d 556 (1948); cf. First Union Nat'l Bank v. Broyhill, 263 N.C. 189, 139 S.E.2d 214 (1964) (power of sale will not be implied merely for greater convenience in administration).
toward restraints on alienation of legal estates. Also, G.S. 41-11 pro-
vides for sale and reinvestment of the proceeds when there is a vested
interest in real estate and a contingent remainder over to unborn or
unascertained remaindermen. Most of the gaps in the coverage of
this statute (does it apply to personalty? to executory interests?) would
seem to be filled by G.S. 41-11.1, which provides for sale and rein-
vestment of real or personal property when there is a vested interest
followed by a gift over to a class, and one or more members of the class
are in esse but the membership may be increased by persons not in esse.
Any instrument attempting to keep property in the family for a long
time would be forced to use class designations for future generations,
exposing it to G.S. 41-11.1.

Third, the policies of preventing future concentrations of wealth
and, correlatively, of furthering the competitive struggle were dismissed
by Simes as matters of tax policy, not property law. Certainly there
is no suggestion in the cases that these are the purposes of the North
Carolina Rule.

Thus, the modern justification for the Rule lies in the injunction
against dead-hand control: there should be a fair balance between the
desires of present and succeeding generations to do what they wish with
the property that they enjoy, and it is socially desirable that the wealth
of the world be controlled by its living members. This proposition
seems implicit in North Carolina judicial references to the fettering of
property. Some North Carolina doctrines, however, do cut against this
rationale. For equitable interests, it appears that beneficiaries may
convey their interests, except under spendthrift trusts. Furthermore,
spendthrift restraints are virtually unenforceable in this State, since the
statutory maximum amount of $500 annual income has been rendered
trivial by inflation. It is not clear whether North Carolina would
follow the Claflin doctrine, which refuses to terminate a trust when a
material purpose of the settlor remains, even though all beneficiaries
are ascertained and competent, and request termination.

498. Id. § 41-11.1.
499. L. SIMES, supra note 491, at 57-58.
500. Id. at 58-59.
54, 121 S.E. 24 (1924).
502. N.C. GEN. STAT. § 41-9 (1976); see Mizell v. Bazemore, 194 N.C. 324, 139 S.E. 453
(1927).
503. See Turnage v. Greene, 55 N.C. (2 Jones) 63 (1854); Fowler v. Webster, 173 N.C. 442, 92
For legal interests, the statutes make alienable all future interests in real or personal property, including executory interests and vested and contingent remainders. The doctrine of destructibility of contingent remainders, which furthers alienability, may still exist.

It may be objected that these doctrines do not eliminate the need for the Rule Against Perpetuities, since the holder of a contingent interest is unlikely to sell a speculative interest for which he will not receive full value. But is this not a matter of his free choice? And might not a market develop in such interests?

A stronger objection is that sale of one of these interests normally does not defeat any other contingent interests created by the dead hand; each generation may sell, but the next generation will take another remainder for life, impressed with the whim of the original testator or grantor. The spectre of a new millennium of entailments appears. This is the fundamental question, and the answer to it lies, mirabile dictu, in the Tax Reform Act of 1976 and its new tax on generation-skipping transfers. Under the Act, when a trust provides for income or corpus to two or more generations younger than the settlor, there is a tax substantially equivalent to the estate or gift tax that would have been imposed if the property had been transferred outright to the first generation then outright to the second generation. The tax is also imposed on generation-skipping equivalents, such as legal life estates and remainders. With limited exceptions, a person is a beneficiary if he has a "right to receive income or corpus," which includes beneficiaries of discretionary trusts and donees of general or special

S.E. 157 (1917). Since North Carolina scarcely recognizes spendthrift trusts, it might not follow Clafin.

504. N.C. GEN. STAT. § 39-6.3 (1976). See also id. § 31-40 (what property passes by will).
505. See note 7 supra.

If . . . tax-avoiding schemes are resorted to in Wisconsin for periods which are in flagrant disregard of the limits of traditional perpetuity law, it is not likely that the guardians of the Internal Revenue Code will allow the matter to pass without notice. Amendments of that Code, couched in terms of general applicability, but designed to plug gaps produced by peculiar local laws, are difficult to frame without creating traps for unwary draftsmen in other states. It would be a formidable undertaking to frame a federal estate tax so as to take into account a variety of local laws on perpetuities.

509. Id. § 2611.
510. Id. § 2611(d).
511. Id. § 2613(d)(1).
powers of appointment. There is a "grandchild's exclusion" for "transfer[s] to a grandchild of the grantor," calculated at the rate of $250,000 per "deemed transferor," that is, child of the grantor, and this grandchild's exclusion is the key to the perpetuities analysis.

Suppose for example a grantor who, freed from the Rule Against Perpetuities, contemplates a trust of $1,000,000 creating a series of life estates to his children, grandchildren, and great-grandchildren, remainder to his great-great-grandchildren. The Code would permit the arrangement, but there would be a tax disincentive: no grandchild's exclusion would be allowed because the life estate in the grandchildren would not be exposed to estate tax on the grandchildren's death. Furthermore, even if a grandchild's exclusion were allowed, the grantor would be entitled only to a one-time exclusion, (because it is limited to transfers to the grandchildren of the grantor), whereas if the property were transferred to the children for life, remainder in fee to the grandchildren, and the grandchildren then transferred the property to their children for life, remainder in fee to their grandchildren, there would be two rounds of exclusions, with the number of exclusions measured by the number of children and great-grandchildren of the original grantor. Those to whom the exclusion is important will be in fairly high tax brackets, so they can be expected to terminate the trust at the level of grandchildren to secure maximum tax benefits, roughly at the outside limit of the existing Rule Against Perpetuities. They will have no tax incentive to create dynastic trusts, as they did before 1976 when only the Rule served to check these impulses.

There are, of course, limits to this line of argument. The new tax does not apply to trusts with only one generation younger than the grantor (for example, "to my wife for life, remainder to my grandchildren"), but this arrangement seems justifiable in light of the benefits of abolition. Nor do the tax disincentives concern those persons with small estates, but given the pace of inflation, the federal estate and gift

512. Id. § 2613(d)(2).
513. Id. §§ 2613(b)(5)(6), 2612.
515. See I.R.C. § 2613.
taxes will increasingly affect the middle class. The benefits of abolition of the Rule Against Perpetuities may now be worth the price.

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516. Professor Haskins advances the provocative thesis that the Rule originally was designed not so much as a check on perpetuities as it was a means of telling the new landed class how far it could safely go in tying up property. Haskins, supra note 50.

517. It should be stressed that this is only a preliminary analysis. As recently as 1958, the master future interests scholar Daniel Schuyler wrote, "no one has yet suggested that no rule against perpetuities should be retained." Schuyler, Should the Rule Against Perpetuities Discard Its Vest?, 56 Mich. L. Rev. 683, 689 (1958). It is with no small trepidation that the author challenges 300 years of property law and generations of scholars. But the current justifications for the Rule seem hindsight rationalizations.