



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 27 | Number 1

Article 23

12-1-1948

Trusts -- Duration -- Rule against Perpetuities

Robert L. Hines

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

Recommended Citation

Robert L. Hines, *Trusts -- Duration -- Rule against Perpetuities*, 27 N.C. L. REV. 158 (1948).

Available at: <http://scholarship.law.unc.edu/nclr/vol27/iss1/23>

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

small hill, and collided with an unlighted truck just below the crest of the hill. In its decision, the court pointed out that, by statute, curves and hills are conditions a motorist is required to consider in regulating his speed "as may be necessary to avoid colliding with any person, vehicle, or other conveyance."²⁵ That requirement, considered in conjunction with the rule of the *Weston* case was held to be one of the two circumstances which prevented the plaintiff from getting to the jury. The other was evidence of the inattentiveness of the driver. The court did not indicate whether the first circumstance alone would have been sufficient to support its decision. If so, and if the case is later interpreted to mean that it is negligence as a matter of law to drive around a curve and over the crest of a hill on a clear night at a speed of 40 to 45 miles per hour, then it would seem that the court has taken a step toward the adoption of a mathematical formula for the solving of these rear-end collision cases.

LEMUEL H. GIBBONS.

Trusts—Duration—Rule against Perpetuities

A died in 1923 leaving property by will in trust for his son *B*, with a power of appointment in *B* by will, the property to go to *B*'s children if he died intestate. *B*, a widower, died, in 1945, leaving one-half the property to his two infant children upon their reaching age 25 and the other half in trust for them for life with power to appoint by will to a class or a charity. Upon the trustee's request for instructions, held, the children take the property free of the trust and the power; the equitable life estates would probably last longer than 21 years after the death of *B* and thus violate the Rule against Perpetuities.¹

There is a difference of opinion as to the point in time when the period of the rule against remoteness of vesting begins to run, where there is a general power of testamentary disposition. Some authorities maintain that the period starts when the power is exercised, because the donee could appoint to his estate, which is practically like appointing to himself.² Others claim that it is just like any other special power because of the inability to appoint to oneself and that it should start when the power was created, either by deed or will.³ The weight of

²⁵ *Tyson v. Ford*, 228 N. C. 778, 781, 47 S. E. 2d 251, 252 (1948).

¹ *American Trust Co. v. Williamson*, 228 N. C. 458, 46 S. E. 2d 104 (1948).

² *Miller v. Douglass*, 192 Wis. 486, 213 N. W. 320 (1927); *Rous v. Jackson*, 29 Ch. D. 521 (1885); *KALES, ESTATES, FUTURE INTERESTS AND ILLEGAL CONDITIONS AND RESTRAINTS IN ILLINOIS* §695 (2d ed. 1920).

³ *De Charette v. De Charette*, 264 Ky. 525, 94 S. W. 2d 1018 (1936); *Hawkins v. Ghent*, 154 Md. 261, 140 Atl. 212 (1928); *Minot v. Paine*, 230 Mass. 514, 120 N. E. 167 (1918); *In re Lewis' Estate*, 349 Pa. 571, 37 A. 2d 482 (1944); *In re Warren's Estate*, 320 Pa. 112, 182 Atl. 396 (1936); *In re Powell's Trusts*, 39 L. J. Ch. 188 (1869); *GRAY, THE RULE AGAINST PERPETUITIES* §526 (4th ed. 1942); *ROOD, A TREATISE ON THE LAW OF WILLS* 779 (2d ed. 1926); 2 *SIMES*,

authority, aided or led by Professor Gray,⁴ holds that the time is measured from the creation of the power.⁵ In the principal case, the court, following earlier North Carolina cases, adhered to the majority rule.⁶ And it was conceded that the rule against remoteness of vesting rendered void the power to vest the fee beyond the lives of the children.

Most courts⁷ and text writers⁸ are in accord with the view that the Rule against Perpetuities, as such, does not render a trust invalid merely because it may extend beyond the time limit if the interests thereunder vest within the specified time. However, a new rule of American origin,⁹ which is adhered to in the majority of states which have considered it, that an indestructible private trust may not continue for a period longer than that of the Rule against Perpetuities, renders the trust void. This rule, unknown in England because indestructible trusts are not there favored,¹⁰ has been introduced in America to increase alienability and to prevent circumvention of the Rule against Perpetuities by the use of the trust device,¹¹ though not without oppo-

THE LAW OF FUTURE INTERESTS §538 (1936); 3 TIFFANY, THE LAW OF REAL PROPERTY §713 (3d ed. 1939); 3 WALSH, COMMENTARIES ON THE LAW OF REAL PROPERTY §340 (1947); see Notes, 33 GEO. L. J. 234 (1945), 1 A. L. R. 374 (1919).

⁴ GRAY, *op. cit. supra* note 3, §526.

⁵ See note 3 *supra*. It is otherwise where the power is exercisable by deed or will, the theory being that the donee is practically the owner since he can appoint to himself. *Genet v. Hunt*, 113 N. Y. 158, 21 N. E. 91 (1889).

⁶ *Hardee v. Rivers*, 228 N. C. 66, 44 S. E. 2d 476 (1947); *Roane v. Robinson*, 189 N. C. 628, 127 S. E. 626 (1925); *White v. White*, 189 N. C. 236, 126 S. E. 612 (1925); *Chewning v. Mason*, 158 N. C. 578, 74 S. E. 357 (1912); FARWELL, A CONCISE TREATISE ON POWERS 325 (3d ed. 1916).

⁷ *Wilbur v. Portland Trust Co.*, 121 Conn. 535, 186 Atl. 499 (1936) (where *cestui que trust* was also entitled to legal estate upon termination of the trust); *Loomer v. Loomer*, 76 Conn. 522, 57 Atl. 167 (1904); *Story v. First Nat'l Bank & Trust Co.*, 155 Fla. 436, 156 So. 101 (1934); *Ligget v. Fidelity & Columbia Trust Co.*, 274 Ky. 387, 118 S. W. 2d 720 (1938); *Minot v. Paine*, 230 Mass. 514, 120 N. E. 167 (1918) (again appointment in trust for life to child unborn at death of donor upheld); *Pulitzer v. Livingston*, 89 Me. 359, 36 Atl. 635 (1896); *Pennsylvania Co. v. Robb*, 118 N. J. Eq. 529, 180 Atl. 410 (1935); *In re Wanamaker's Estate*, 335 Pa. 241, 6 A. 2d 852 (1939); *In re Boyd's Estate*, 199 Pa. 487, 49 Atl. 297 (1901) (here *A* left property in trust to minor daughter for life with power of appointment by will, which she validly exercised by setting up a trust for her son's life, though her attempt to give him a power of appointment was invalid); *Tramell v. Tramell*, 162 Tenn. 1, 32 S. W. 2d 1025 (1930); see *In re Lawrence's Estate*, 136 Pa. 354, 367, 20 Atl. 521, 523 (1890). *Contra*: *Colonial Trust Co. v. Brown*, 105 Conn. 261, 135 Atl. 555 (1926).

⁸ GRAY, *op. cit. supra* note 3, §232; 1 PERRY, A TREATISE ON THE LAW OF TRUSTS AND TRUSTEES §383 n. 2(a) (6th ed. 1911); RESTATEMENT, TRUSTS §62(k) (1935); 1 SCOTT, THE LAW OF TRUSTS §62.10 (1939); 2 TIFFANY, THE LAW OF REAL PROPERTY §408 (3d ed. 1939). *Contra*: 2 SIMES, *op. cit. supra* note 3, §§500, 553.

⁹ 1 BOGERT, THE LAW OF TRUSTS AND TRUSTEES §218 (1935); SCOTT, *Control of Property by the Dead II*, 65 U. OF PA. L. REV. 632 (1917).

¹⁰ *Saunders v. Vautier*, 4 Beav. 115 (1841).

¹¹ *In re Howard's Estate*, 54 Pa. D. & C. 312 (1945); *In re Stephen's Estate*, 129 Pa. Super. 396, 195 Atl. 653 (1937); REMSEN, THE PREPARATION OF WILLS AND TRUSTS §10 (2d ed. 1930); 1 SCOTT, THE LAW OF TRUSTS §62.10 (1939) (it is against public policy to permit continuance of such a trust though interests are all vested).

sition.¹² The principal case is the first direct decision in North Carolina that this rule against excess duration of an indestructible private trust operates to make a vested trust estate void. Heretofore, North Carolina has declared that the Rule against Perpetuities as applied in this state is the rule against remoteness of vesting,¹³ and that it is concerned only with the vesting of estates, not with their enjoyment or possession.¹⁴

The North Carolina court has frequently stated that the Rule against Perpetuities does not apply to charitable trusts, and this is repeated in the principal case. What is meant, however, is that a charitable trust will not fail for excessive duration,¹⁵ because of the countervailing public gain. For the rule against remoteness of vesting does apply to charitable trusts, except where the property vests in one charity after another charity.¹⁶ Indeed, in the principal case, the power of appointment that was concededly stricken by the rule against remoteness was a power to leave the property to charity in the alternative.

ROBERT L. HINES.

Wrongful Death—Amendment of the Pleadings after the Limitation Period Has Run

In a recent case¹ the plaintiff sued to recover for the wrongful death of her husband, alleging that as he was driving along the highway in a careful manner the defendant "negligently and carelessly" ran into him from the rear and killed him. The defendant entered a demurrer *ore tenus* at the trial, which was sustained on the ground that the complaint did not state any fact constituting negligence. The plaintiff was granted permission to amend. She then enumerated items of negligence, and was awarded a judgment of \$6550 on a jury verdict of negligence. On appeal the North Carolina Supreme Court stated the rule that an amendment which introduces a new cause of action will not relate back to the

¹² *Pulitzer v. Livingston*, 89 Me. 359, 36 Atl. 635 (1896); *RESTATEMENT, PROPERTY* §378 (1944); *RESTATEMENT, TRUSTS* §62(k) (1935).

¹³ *Vinson v. Gardner*, 185 N. C. 193, 116 S. E. 412 (1923); *Springs v. Hopkins*, 171 N. C. 486, 88 S. E. 774 (1916); *O'Neal v. Borders*, 170 N. C. 483, 87 S. E. 340 (1915).

¹⁴ *Springs v. Hopkins*, 171 N. C. 486, 88 S. E. 774 (1916); *accord*, *Story v. First Nat'l Bank & Trust Co.*, 155 Fla. 436, 156 So. 101 (1934); *Hawkins v. Ghent*, 154 Md. 261, 140 Atl. 212 (1928) (where the four appointees, given life estates in trust, were unborn at creation of power of appointment and estates were held valid); *Loring v. Blake*, 98 Mass. 253 (1867). *GRAY, op. cit. supra* note 3, §121.5; 1 *PERRY, op. cit. supra* note 8, §383.

¹⁵ *Penick v. Bank of Wadesboro*, 218 N. C. 686, 12 S. E. 2d 253 (1940); *State ex. rel. Wardens v. Gerard*, 37 N. C. 210 (1842); N. C. GEN. STAT. §36-21 (1943); 2 *BOGERT, op. cit. supra* note 9, §352; 1 *PERRY, op. cit. supra* note 8, §384; 3 *SCOTT, op. cit. supra* note 11, §365.

¹⁶ *Williams v. Williams*, 215 N. C. 739, 3 S. E. 2d 334 (1939); 2 *BOGERT, op. cit. supra* note 9, §§ 342-349; *GRAY, op. cit. supra* note 3, §594; 3 *WALSH, op. cit. supra* note 3, §341; *see Reynolds Foundation v. Trustees of Wake Forest College*, 227 N. C. 500, 513, 42 S. E. 2d 910, 918 (1947).

¹ *Webb v. Eggleston*, 228 N. C. 574, 46 S. E. 2d 700 (1948).