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UNENFORCEABLE TRUSTS AND THE RULE AGAINST PERPETUITIES.

BEQUESTS upon trust to erect a monument to the memory of either the testator or another have generally been held valid;¹ so also have bequests upon trust to say masses for the repose of the soul of the testator or another,² or to free the testator's slaves,³ where such provisions were not positively in violation of the local law. In all these cases, the trust, though valid, is an unenforceable one. If the trustee wishes to carry it out he may do so and no one can prevent him; if he does not wish to do so, he can not be held liable for a breach of trust for thus refusing, because there is no cestui que trust to bring the suit.⁴ In *Trimmer v. Danby*,⁵ the testator had bequeathed £1,000 for the erection of a monument to his memory in St. Paul's Cathedral. In holding the provision valid the court said: "I do not suppose that there would be any one who could compel the executors to carry out this bequest and raise the monument; but if the residuary legatees or the trustees insist upon the trust being executed, my opinion is that this court is bound to see it carried out. I think, therefore, that as the trustees insist upon the trust being executed according to the directions in the will, that sum must be set apart for the purpose." In *Cleland v. Waters*,⁶ the testator had directed the executors to free his slaves. The court held the direction valid, saying: "And though the slave may have no legal right in the premises by reason of his legal incapacity and no remedy for such rights as he may have, still, if by the law of the testator's will, the executor has the right to send him out of the country, he may, in this way, of course, be legally emancipated. At all events, if the executor in such a case does send him out of the country, no one can gainsay him. The executor's right and duty in the premises are prescribed by the law of the testator's will. Where there is no municipal law forbidding it, the testator can certainly

¹ *Masters v. Masters*, 1 P. Wms. 423 (bequest of £200 for a monument to the testator's mother); *Detwiller v. Hartman*, 37 N. J. Eq. 347 (bequest of \$40,000 for a monument to the testator).

² *Reichenbach v. Quin*, 21 L. R. Irish, 138 (bequest of £100 for masses for the repose of the souls of the testator, and of her father, mother, brother, sisters and servant).

³ *Ross v. Duncan*, Freem., Ch. 587; *Cleland v. Waters*, 19 Ga. 35, 61.

⁴ In jurisdictions which hold that a gift upon trust to say masses is a charity, the trust is, of course, enforceable like all other charitable trusts, by the State acting through the Attorney General. *Schouler*, petitioner, 134 Mass. 426.

⁵ 25 L. J. Ch. 424.

⁶ 19 Ga. 35, 61.

make such a law for himself in his will, and the same reason exists why the executor should carry it into effect, as why he should erect a monument or tombstone of specified character and cost, if so directed by the testator's will. It will not be disputed, I suppose, that if such directions were given by a testator, it would be the duty of his executor to carry them into effect (especially if they were reasonable), and that he would be sustained by a Court of justice in so doing, or instructed so to do by a Court of Equity if he asked instructions on this head. Yet, it could not be said that the tombstones had any right in the premises, or perhaps, that any remedy lay against the executors, by which the erection of the stone could be enforced."

Bequests upon trust to use the income thereof each year in keeping a monument or grave in repair,⁷ or in saying masses,⁸ or in having a brass band to play at the testator's grave each year on the anniversary of the testator's death⁹ have been held invalid, and the reason given is that the gift is a "perpetuity"¹⁰ or is in "violation of the rule against perpetuities."¹¹ What do the courts mean by calling such a gift a "perpetuity?" And in what way, if at all, could the bequest be so changed as to avoid the "rule against perpetuities" and thus make the gift valid?

It is the policy of the law that property shall, in general, be freely alienable. Based upon this policy is the rule that direct attempts to restrain the alienation of specific property are void. Thus, if A conveys certain property to B and imposes a condition that B shall not alien it, the condition is held bad, and B may hold the property free from the condition. Equity has followed the common law in this respect except that in some jurisdictions the alienation of an equitable life estate may thus be restrained; a clause taking away the power of a married woman to alienate her separate equitable estate is generally held valid, but this is not an exception to the above rule because the married woman's power to alien was given by courts of equity and therefore they might very properly hold valid a provision taking it away.

Is it an attempted restraint upon alienation to give property upon trust to devote the income therefrom indefinitely to the care and repair of a monument or grave or to the saying of masses? It is not

⁷ *Johnson v. Holifield*, 79 Ala. 423 (bequest of \$1,000 to county commissioners, to be held in perpetuity in trust, to expend the income upon a monument to be erected to the testator).

⁸ *Dillon v. Reilly*, 10 R. 152.

⁹ *Detwiller v. Hartman*, 37 N. J. Eq. 347.

¹⁰ *Rickard v. Robson*, 31 Beav. 244; *Fowler v. Fowler*, 33 Beav. 616.

¹¹ *Hoare v. Osborne*, L. R. 1 Eq. 585.

an attempt to restrain the alienation of any particular piece of tangible property, since the trustee would usually have the power to sell the specific property bequeathed and invest the proceeds even if such power were not expressly given by the will. But that is also true of attempts by direct provisions to restrain the alienation of equitable interests generally; if property be conveyed to T in fee upon trust for C in fee with a proviso that C shall not alien his interest, such proviso is within the rule prohibiting restraints upon alienation, though T may have the power to sell the specific property conveyed to him and thus change the investment. In a gift upon trust to devote the income therefrom indefinitely to the care of a monument or grave or to say masses or to have a brass band play each year at the testator's grave there is obviously no one who can alienate the beneficial interest in the property; hence such a gift is properly held bad as an attempted restraint upon alienation. In fact, it is an extreme instance of attempted restraint since the restraint is to last forever. Now when the courts speak of such a gift as a "perpetuity" or an "attempt to create a perpetuity," they are using the term as meaning an attempt to restrain perpetually—i. e., for an indefinite time—the alienation of the beneficial interest in the property; and when they speak of this as being in "violation of the rule against perpetuities," they have in mind a rule which is a part of the more general rule against restraints upon, or suspension of, alienation.

Unfortunately, the terms "perpetuity" and "rule against perpetuities" are also used to mean a very different thing; and worse still, the terms are frequently so used that it is difficult to tell which kind of a "perpetuity" or which "rule against perpetuities" the court had in mind. To take a common illustration, if an estate be given to A, a bachelor, for life, with remainder to his eldest son for life, with remainder in fee to the eldest son of such son, the estate thus attempted to be provided for the grandson is called a "perpetuity" and is invalid as within the "rule against perpetuities." This rule against perpetuities has been formulated by Professor Gray as follows:¹² "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." In the example put the grandson's estate was contingent upon the birth not only of a son but of the grandson; and the grandson might not be born until more than twenty-one years after A's death; therefore the grandson's estate is invalid because prohibited by the rule.

A perpetuity here means a gift which by its terms is to vest upon

¹² Gray, *Rule Against Perpetuities*, Ed. 2, § 201.

a contingency which may happen too far in the future, and the rule holding such interests invalid should have been called—for the sake of clearness,—the rule against remoteness¹³ rather than the rule against perpetuities. Two main points of dissimilarity will bring out the contrast between the two rules. The first rule applies no matter whether the gift upon trust to use the income is an immediate, vested gift, or a contingent one. For example, if a gift be made upon trust for A in fee, but if A should die without issue, then upon trust to devote the income each year to keeping A's grave in repair, the contingent provision as to the care of the monument would be bad because it is a perpetuity in the first sense—i. e., an attempt to make a perpetual restraint upon alienation. The gift would have been invalid if it had been vested and of course the fact that it is contingent does not cure the invalidity.

On the other hand, the second rule applies only to contingent interests; if the interest vests at once, the rule does not apply, even though it might not come into possession until after the period. For example, if a conveyance be made to A for life, remainder to his children as tenants in common for life, remainder in fee to B, B's estate is good because it is vested in interest at once though it may not come into possession until more than twenty-one years after the death of both A and B.

The other main point of difference is this: while the first rule is a part of the general rule against restraints upon alienation, the second rule applies even though the "perpetuity"—i. e., the remote contingent interest—would be freely alienable, if it were valid. Thus in *Winsor v. Mills*,¹⁴ an agreement between A and B giving to B, his heirs and assigns an option to purchase at any time for a certain price a piece of land owned by A was held invalid because the option might not be exercised until more than twenty-one years after the death of both A and B; yet this contingent equitable interest in the land could have been released by B or his successors at any time.¹⁵

Though the two rules are aimed at quite dissimilar objects, they do sometimes operate to bring about a similar result. Though the second rule, as we have just seen, is not aimed directly at restraints upon alienation, yet the operation of the rule in holding remote contingent interests void may eliminate a flaw in the value of the preceding interest and in that sense and to that degree render it

¹³ Gray, *Rule Against Perpetuities*, Ed. 2, § 1.

¹⁴ 137 Mass. 362.

¹⁵ See also *Starcher Bros. v. Duty*, 61 W. Va. 371 and 373.

more freely alienable. Thus, if property be conveyed to A for life, remainder to his children as tenants in common in fee, but if the children all die under twenty-five, then to B in fee, B's interest is too remote and bad. The effect of holding it bad is to give the children of A an absolute estate which is much more marketable than if the contingent estate to B were valid.

The answer, then, to the first question asked at the beginning of this article is this: in cases of gifts upon trust to devote the income each year indefinitely to the care of a grave or monument or to say masses for the repose of the testator's soul, the courts in calling such gifts "perpetuities" must have in mind the first rule discussed above and not the second, because the gifts in such cases are vested and not contingent, the second rule applying only to contingent interests. Such gifts are held bad because the donor contemplated and attempted to provide that the beneficial interest in the fund would be forever inalienable; and the only way to hold the restraint upon alienation void is to hold such a disposition of the beneficial interest itself void; there will then be a constructive trust for the donor or his representatives.

There still remains to be considered the second question: "In what way, if at all, could such a bequest be changed so as to avoid the 'rule against perpetuities' and thus make the gift valid?" Can the time be so limited that the gift will not be a "perpetuity?" And if so, what is that limit of time?

Professor Gray seems to take the position¹⁸ that trusts for the saying of masses and for the freeing of slaves where no indefinite period of time was involved should have been classed as charities and upheld on that ground; that there are no valid unenforceable trusts except those for funeral expenses, including the building of monuments, this exception being based upon necessity; and that the real objection to trusts to apply the income for the perpetual care of monuments or graves or the saying of masses or the playing of a brass band at the testator's grave each year is not that they are to endure indefinitely but because there is no cestui que trust to enforce them. If such a contention should now be adopted judicially, the consideration of the first question raised in the article—what the courts have meant by calling such gifts perpetuities—would become a question of psychology rather than of law; while the second question would be wholly eliminated because it could not possibly arise.

¹⁸ See 15 Harv. L. Rev. 509-530 (Gifts for a Non-Charitable Purpose); Gray, Rule Against Perpetuities, Ed. 2, § 904-§909.

There is much to be said for Professor Gray's contention; it would make the law on this point much more easily understood and no great harm would be done by holding such bequests void no matter how short their duration, since the legislature may easily interfere, if desirable, and fix a limit by statute. There seem, however, to be few, if any, decisions which hold such gifts bad on the ground of there being no cestui que trust; and practically, if not entirely all of them do say that the reason why such gifts are bad is because they are "perpetuities." This being true, it seems at least questionable whether Professor Gray's contention will soon be adopted by the courts; and in the meantime it may not be amiss to inquire whether—if the courts do not see fit to take such a position—there is any period of time which they are likely to fix as being a valid duration for such trusts.

In 1828 the New York legislature passed a statute regulating the subject of perpetuities. The main provisions of this statute are as follows: "Every future estate shall be void in its creation, which shall suspend the absolute power of alienation for a longer period than is prescribed in this article. Such power of alienation is suspended, when there are no persons in being, by whom an absolute fee in possession can be conveyed. The absolute power of alienation shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate." This statute was apparently framed upon the theory that the direct object of the rule against perpetuities was to limit restraints upon alienation; whether the framers had in mind that there were really two rules, at common law, one aimed at certain kinds of restraints upon alienation and the other at the remoteness of vesting of contingent interests, seems at least doubtful.¹⁷

What is the answer to our question under a statute similar in terms to the New York statute? The question does not seem to have arisen squarely, but the inference to be drawn from the reading of the statute itself and two cases thereunder is that a bequest upon trust to devote the income to the care of a monument or grave or for any other non-charitable purpose which is not positively illegal, would be valid if the trust is limited in its duration to

¹⁷ Until quite recently it was supposed that there was no other rule against perpetuities in New York except this statutory one. But the case of *In re Wilcox*, 194 N. Y. 238, decided that the common law rule against remoteness was in force in New York—with the modification of the period to two lives—and hence the fact that a contingent interest was alienable did not make it good unless it must vest, if at all, within two lives in being. See 9 Col. L. Rev. for a discussion of this case.

two lives in being. In *Read v. Williams*,¹⁸ the court said: "It is not contended that the provision setting apart a trust fund to be perpetually kept by the executors and trustees and their successors, and directing the application of the income for cemetery purposes, can be upheld. These provisions are manifestly void as involving an unlawful suspension of the power of alienation." In *Driscoll v. Hewlett*,¹⁹ the testator left the residue of his estate to a church corporation, "to invest and keep invested the same, and to collect the income derived therefrom and devote it in caring for my burial plot in the cemetery connected with said church." The testator's next of kin contested the validity of this bequest, the argument of their attorneys being that it was invalid "because it suspends the power of alienation beyond the statutory period of two lives in being," apparently conceding that if the trust had been thus limited in duration it would be valid. The court seemed to agree that this contention was sound unless the case came within the Statute of 1895; in their opinion the court said: "The donees of the residuary estate are a religious corporation and the gift constitutes a trust for its administration, which, for involving perpetuity, would be void, unless saved by some statute." The court then decided that the bequest was valid because it came within the Statute of 1895 which authorized gifts to religious corporations for cemetery purposes.

If the inference drawn above should prove, by later decisions, to be sound, the result would be that in New York and other states having similar legislation, the period beyond which a contingent estate will be too remote is the same period during which an unenforceable trust for definite lawful purposes may be validly created. Hence a bequest to trustees upon trust to devote the income thereof to the care of the testator's tomb during the continuance of the lives of Adam Brown, Charles Dawson and Edward Fell and then upon trust to divide the fund equally between the children then living of Geoffrey Hall, bachelor, both gifts would be invalid; while if the name of Edward Fell be stricken out above, leaving only the two lives of Adam Brown and Charles Dawson, both gifts would be valid.

In jurisdictions which do not have legislation on the subject, there are two periods, either of which might be adopted by the courts with some degree of reasonableness. One is the period of lives in being, in analogy to the law of spendthrift trusts; the other is twenty-one years after lives in being which is the period within which

¹⁸ 125 N. Y. 560, at 567.

¹⁹ 198 N. Y. 297.

contingent remainders must vest in order to be valid. It might be argued for the second suggestion that this period is one to which the legal mind is already accustomed; and that while there is, as we have seen, no logical connection between the two rules against "perpetuities," yet they have been confused so long that it would be comparatively easy to establish such a period judicially; furthermore, this would be in analogy to the situation which seems to prevail in States, like New York, which have a statutory rule against perpetuities; and it might also be urged that this suggestion is better than the first in that it allows to the testator a fixed number of years, not subject to the uncertainties of life, during which he may feel fairly sure that his wishes will be carried out. In favor of the first suggestion—if the second should not be adopted,—it may be argued that, in those jurisdictions which allow spendthrift trusts, there ought to be no greater objection, from the standpoint of public policy, in holding valid a direction to apply the income of a trust fund to a definite lawful purpose during the existence of lives in being, than in holding valid a direction to hold property upon trust during the lifetime and for the benefit of individuals who are not allowed to alien their interests but who may enjoy their property free from their creditors; if a restraint upon alienation is valid during a life or lives in the one case, why should it not be in the other just as well?

Although there are several cases both in England and the United States holding that such bequests with no time limit are void as being "perpetuities," there seem to be a very few from which any inference can be drawn as to what the courts would probably consider a lawful period of duration. In *Lloyd v. Lloyd*,²⁰ the testator's will provided as follows: "And further I desire that my wife, Lucy Lloyd and Mary Martha Lockley shall, out of the annuity they receive, keep in good, sound repair the tomb and vault in Chatham church yard, that belongs to me, and cause to be painted the said tomb and vault every four years, or, if required, more frequently, and in default or failure they shall lose and forfeit their claim to the annuity, and any person thereafter that shall receive the annuity shall be bound to perform the same conditions." In respect to this provision the court said: "I am satisfied that a direction simply for keeping a tomb in repair is not a charitable use and is not of itself illegal. It may be illegal to vest property in trustees in perpetuity for such a purpose. But the direction that the widow and M. M. Lockley shall, out of their life interest, keep

²⁰ 2 Sim, N. S. 255.

the tomb in repair, etc., is quite lawful, and they are under an obligation out of their annuities to do so according to the direction of the will."

Another case which seems to intimate that the period of lives in being would be a satisfactory limit is *Leonard v. Haworth*,²¹ in which the court said: "While a testamentary provision for the preservation, adornment and repair of a private monument may be void as creating a perpetuity for a use not charitable, this provision [to pay the funeral expenses of the widow and to erect a suitable tablet at the head of her grave] is open to no such objection, as it would be completely performed upon the decease of the testator's wife." The case of *Angus v. Dalton*,²² seems to make a similar suggestion. In that case one of the provisions of the will of the testatrix was "our graves to be kept clean, and flowers once in a while, to show that you have not forgotten us." The court said: "She established a trust which was to endure, at least, during a number of lives. It was her wish that throughout this period her estate should be kept as it was. The reference to adorning the graves with 'flowers once in a while, to show that you have not forgotten us,' indicates something to be done by those who, like the executors she named, had been personally acquainted with her, and so that she did not look forward to a perpetual trust to be administered by and for those to whom she would be unknown except by name."

There are two more cases which deserve attention, one suggesting and the other holding a fixed number of years to be a valid period for a non-charitable bequest. In *In re Dean*,²³ the testator made the following bequests: "I give to my trustees my eight horses and ponies (excluding cart horses) at Littledown, and also my hounds in the kennels there. And I charge my said freehold estates hereinbefore demised and devised, in priority of all other charges created by this my will, with the payment to my trustees for the term of fifty years, commencing from my death, if any of the said horses and hounds shall so long live, of an annual sum of £750. And I declare that my trustees shall apply the said annual sum payable to them under this clause in the maintenance of the said horses and hounds for the time being living, and in maintaining the stables, kennels, and buildings now inhabited by the said animals in such condition of repair as my trustees may deem fit, etc." In discussing the validity of the bequest the court said: "It is obviously

²¹ 171 Mass. 496.

²² 73 Conn. 56, 63.

²³ 41 Ch. Div. 552.

not a charity, because it is intended for the benefit of the particular animals mentioned, and not for the benefit of animals generally. * * * Then it is said, that there is no *cestui que trust* who can enforce the trust, and that the court will not recognize a trust unless it is capable of being enforced by some one. I do not assent to that view. There is not the least doubt that a man may, if he pleases, give a legacy to trustees, upon trust to apply it in erecting a monument to himself, either in a church or in a churchyard, or even in unconsecrated ground, and I am not aware that such a trust is in any way invalid, although it is difficult to say who would be the *cestui que trust* of the monument. In the same way, I know of nothing to prevent the gift of a sum of money to trustees upon trust to apply it for the repair of such a monument. In my opinion such a trust would be good, although the testator must be careful to limit the time for which it is to last, because, as it is not a charitable trust, unless it is to come to an end within the limits fixed by the rule against perpetuities, it would be illegal. But a trust to lay out a certain sum in building a monument, and the gift of another sum in trust to apply the same to keeping that monument in repair, say for ten years, is, in my opinion, a perfectly good trust, although I do not see who could ask the Court to enforce it."

Besides the express suggestion that a trust for ten years would be valid, the court also impliedly suggests that it would be valid "if it came to an end within the limits fixed by the rule against perpetuities," apparently meaning the period of twenty-one years after lives in being, within which period contingent future estates must vest in order to be valid. While it was extremely unlikely—considering the average age of horses and dogs,—that these particular individuals, being probably old favorites of the testator, would live longer than twenty-one years after the death of his trustees, the bequest is not so drawn as to conform to this period. Conceivably some of the horses or dogs *might* live longer than this; but this point was not raised. Nowhere in the case does the court attempt to lay down a rule that such a trust would always be good if limited in duration to the lives of horses and dogs, and can hardly be considered an authority for such a proposition, taking into consideration the extracts from their decision quoted *supra*.²⁴

²⁴ In criticising this case, Professor Gray, (Rule Against Perpetuities, § 906), after pointing out that the trust might last conceivably for more than twenty-one years after the extinction of all human lives, continues: "It is a novel idea that the validity of a limitation over (or of a trust) may depend upon whether the limitation must happen (or the trust determine) within the lifetime of an animal. Can a gift over be made to take effect upon the death of any animal however longevous,—an elephant, a crow, a carp, a crocodile, or a toad?" The facts of the case did not involve any question about the

In *Pirbright v. Salwey*,²⁵ "a testator, after expressing a wish to be buried in the inclosure in which his child lay in the churchyard of E, bequeathed to the rector of and churchwardens for the time being of the parish church £800 Consols to be invested in their joint names, the interest and dividends to be derived therefrom to be applied, so long as the law for the time being permitted, in keeping up the inclosure, and decorating the same with flowers. *Held*, that the gift was valid for at least a period of twenty-one years from the testator's death, and *semble* that it was not charitable."

In conclusion, if a case should arise of an unenforcible trust for a purpose not unlawful in itself, it would seem a fair prediction that such a trust would be held valid if it should be limited in duration to a period not longer than twenty-one years after lives in being at the creation of the trust.

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vesting of contingent interests; but it is to be noted that although Professor Gray contends that the trust should have been held bad upon the simple ground that there was no cestui que trust to enforce it, he seems to assume that if such trusts are held valid at all, the same period within which contingent interests must vest in order to be valid would apply to the duration of such trusts, and vice versa.

²⁵ Weekly notes for 1896, p. 86. Not having access to the original report, the above statement of the case has been copied verbatim from Gray, *Rule Against Perpetuities*, Ed. 2, § 907.