The Rule Against Indestructibility of Trusts in Pennsylvania

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"Trusts are destructible if the cestuis, who being of age and of sound mind, call for a conveyance of the legal estate, possession of the res, and a termination of the trust."¹

Trusts are indestructible when there is a provision that the trust may not terminate for a definite period of time or until the happening of a certain event, even though the cestuis are not under any disabilities and ordinarily could terminate the trust, and such a provision is held to be valid. Pennsylvania has recognized the validity of such provisions.² This being true, the problem then arises as to how long the trust may last or whether there is a limitation upon their duration.

It has been said that a rule setting the period for which trusts may remain indestructible seems only in the process of formulation.³ However, since this statement was made, it appears that this rule has gone beyond the formative stage.

While the existence of the rule seems no longer to be in doubt,⁴ there are conflicting views as to whether the rule is a separate one, or a part of the rule against perpetuities which fixes the limit beyond which future interests cannot be created.⁵

Professor Gray states the rule against perpetuities as follows:

"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."⁶

The same authority and others⁷ contend that since this rule deals with the time within which an interest must vest, it does not have anything to do with the duration of a trust, and therefore, if a rule exists as to the duration of a trust it is separate from the rule against perpetuities.

In Pennsylvania the courts have not recognized the existence of a separate rule and have not referred to or discussed a separate one, but have treated it as a part of the rule against perpetuities.⁸ The Pennsylvania cases when dealing with the duration of trusts confound the problem with that of vesting of interests. Notwithstanding this, it is to be remembered that the rule against perpetuities deals only with the remoteness of the vesting of interests, while the rule of indestructibility places a limitation upon the duration of trusts.

¹ 11 BOGERT, TRUSTS AND TRUSTEES (1935), Sec. 218.
⁵ Gray, The Rule Against Perpetuities (4th ed. 1942), Sec. 1.
⁶ Ibid., Sec. 201.
⁷ Ibid., Sec. 3; 1 Scott, Trusts (1939), Sec. 6210; Foulke, Rule Against Perpetuities (1909), Sec. 375; 2 Simes, Future Interests, (1939), sec. 523 says a separate rule probably exists.
The rule of indestructibility of trusts provides that no trust of a private nature may be created to endure for a time longer than lives in being and twenty-one years, plus a gestation period, or for a period of twenty-one years only where the measure of lives is not availed of.9

The United States Supreme Court has recognized the existence of the rule in stating, "it is conceded by all that the utmost extent of a trust at common law is limited by lives in being at its creation and for twenty-one years thereafter."10

The adoption of this period as the period of the permissible duration of these trusts may be due to the fact that the same policy,11 the avoidance of undue restraints on alienation, lies back of both the rule against perpetuities and the rule against the indestructibility of trusts. While a trust may be created to endure for a long period of time and its primary object may not be to restrain the alienability of property, the practical, indirect effect accomplishes the same result. A trust is thus just as surely an indirect restraint on alienation as is a contingent future interest.12

The effect of the rule against perpetuities as applied in Pennsylvania to the duration of trusts may be considered under the following classifications: charitable trusts, trusts for specific non-personal objects, and ordinary private trusts.

Charitable Trusts

The rule does not apply to the duration of charitable trusts. Therefore they may be created to last for a period longer than that prescribed by the rule, or forever.13

The rule against perpetuities considered as a rule against remoteness of vesting is applicable to charitable trusts, except where a gift in trust for one charity is to take effect after a gift in trust for another charity.14 The fact that in one instance a charitable trust is affected by the rule against perpetuities, and in another, when treated as a rule applicable to the duration of a trust, it is not affected, is an indication of the existence of a distinct rule as to the indestructibility of trusts, whether or not it be treated as a separate one or as a part of the rule against the remoteness of vesting of interests.

The policy of the law in allowing charitable trusts to be created to last forever is that the social advantages gained from such a trust outweigh the disadvantages of permitting a donor to put restraints on the alienation of his property which may last far into the future.15

9Seidler v. Sims, 56 N. J. Eq. 275, 38 A. 424 (1897).
13Steven's Estate, 164 Pa. 209, 30 A. 243 (1894); Estate of Smith, 181 Pa. 109, 37 A. 14 (1897); Hunter's Estate, 279 Pa. 349, 123 A. 865 (1924).
14GRAY, op. cit., Secs. 591, 597.
15BOGERT, TRUSTS AND TRUSTEES (1935), Sec. 352.
Specific Non-Personal Objects Trusts

In the case of *Hillyard v. Miller*, where the trust was created to maintain perpetually a loan office and loan fund where and from which farmers and mechanics could borrow money at the usual rate of interest, it thus being a trust for a specific non-personal object the court held it was void as violating the rule against perpetuities. The court in its opinion stated that the trust is "but a naked and invalid trust of indefinite continuance. No trust of this class can be allowed to last beyond the period for the vesting of an executory limitation..." The court therefore clearly applied the rule against perpetuities not as to the vesting of an interest but as to the duration of the trust.

In a later case the court upheld the application of the residue of an estate to the erection of a monument at the grave of the testator even though this was for a specific non-personal object of indefinite duration.

In view of these decisions the Pennsylvania legislature early realized that the desirable trusts of this class might often be invalidated because they violate the rule against indestructibility of trusts. A statute was enacted in 1891 which provides:

"No disposition of property hereafter made for the maintenance or care of any cemetery, churchyard, or other place for burial of the dead, or of any portion thereof, or grave therein, or monuments or other erections on or about the same, shall fail by reason of such disposition having been made in perpetuity, but said disposition shall be held to be made for a charitable use." This statute clearly permits certain kinds of trusts for specific non-personal objects to be made perpetual, though other trusts in the same class not within its provisions are invalid as being in violation of the rule against indestructibility.

In *Palethorp's Estate*, a trust was created for the care of a cemetery lot, and the support and maintenance of a person to care for the lot, who was also to show people where the grave was, and to perform such other duties as the trustees might designate. The Supreme Court held that the bequest in trust to maintain a family burial lot and to support a person to care for it was void as a perpetuity, except, in so far as the reasonable care of the lot and structure thereon is concerned and that the testator by providing for the maintenance of a person to perform other specified duties had clearly made a gift for purposes not contemplated in the Act of 1891.

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1610 Pa. 326 (1849).
17Ibid., at 334 and 338.
18Bainbridge's Appeal, 97 Pa. 483 (1881).
20Act of May 26, 1891, P.L. 119 Sec. 1, 9 PS 4.
21249 Pa. 389, 94 A. 1060 (1915).
A later case, *Estate of Deaner*, like the *Palethorp* case, involved a trust created after the Act of 1891 was enacted. This was a trust for the perpetual upkeep of graves. The Superior Court also held that the trust being perpetual was valid only because it fell within the exceptions made by the Act of 1891.

*Stephan's Estate* is a recent decision of the Superior Court where a gift was made to an unincorporated association of individuals, as trustee, for the perpetual care and upkeep of a memorial. The court said that there is no indication that the trust has any religious or charitable purpose whatever. The trust was one within the category of trusts for specific non-personal objects and since it did not fall within the exceptions made by the Act of 1891 it was void in that it might endure perpetually. This case therefore holds that not only are trusts invalid that are for specific non-personal objects not within the provisions of the Act of 1891, but also that the rule against indestructibility also applies to trusts for unincorporated associations.

As a general proposition the rule against perpetuities, as applied to the duration of trusts, does apply to trusts for specific non-personal objects, with such exceptions being made as are provided for in the Act of 1891.

**Ordinary Private Trusts**

The Pennsylvania courts have held ordinary private trusts, as distinguished from trusts for specific non-personal objects, valid, although it is obvious that they might endure for a period longer than that applied by the rule against perpetuities. In other instances similar trusts have been declared invalid.

First, as to the line of cases which indicate that the rule against indestructibility does not apply to ordinary trusts:

In *Rhodes Estate*, the testator gave his whole estate to trustees to pay one-half the net income to his wife for life, one-fourth to his daughter for life. After the death of the wife, the daughter was to receive one-half of the net income from the estate during her life. If the daughter died, leaving a child or children surviving her under the age of twenty-five years, the trustees were directed to pay such child or children the sum of $350 a year, each, until they respectively arrived at the age of twenty-five years; the estate was to remain in the hands of the trustee without division until all the said children should attain the age of twenty-five. At that time, the principal was to be distributed equally among the children of the testator's brothers and sisters that were alive at the time of his daughter's death. The daughter of the testator claimed the entire estate on the ground that the remainders were void as violations of the rule against perpetuities and that she had a life estate under the will, and that the estate thus ineffectually disposed of passed to her under the intestate laws. The court in denying this claim held that the remainders to the testator's nieces and nephews vested at the time of the

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24147 Pa. 227, 23 A. 553 (1892).
daughter's death and that the rule against perpetuities was not violated, and that the right of possession of the remainders was postponed in order to secure payment of the annuities.

Nowhere did the court discuss the duration of the trust as being too long. It is conceivable that the trust might continue for a period longer than a life or lives in being and twenty-one years, for as stated in the opinion: "Some of the daughter's children might not be born at the death of the testator, and may not reach the age of twenty-five until more than twenty-one years after their mother's death..." It is to be remembered also that the trust was created to continue until the last child of the daughter had attained the age of twenty-five.

In a later case, the Supreme Court held that the rule against perpetuities applies only to the vesting of interests. The court failed to recognize the existence of a distinct rule against the indestructibility of trusts but used language which indicated that a trust need not be limited in duration. Here the testator, by his will and codicil thereto, devised six farms to trustees to be held in trust for seventy-five years after his death. After directing that certain debts and legacies be paid out of the rents and profits thereof, the balance was to be divided annually and distributed among his children share and share alike. The children of such of his children as might die during the said period were to take such portion as their deceased parents would have taken, the said mode of distribution to obtain also to descendants of more remote degree than his children's children. After the expiration of the seventy-five year period, the trustee was to sell the farms and divide the proceeds among all the testator's children then in being, share and share alike, and to the legal descendants of deceased children who take the proportion their parents would have taken had they been living. The court held that the remainder interests after the expiration of the seventy-five year term were contingent and therefore violated the rule against perpetuities. It further held that the testator died intestate as to the six farms, for while a prior estate is generally not affected when an ultimate estate is declared void for remoteness, in this case the failure of the ulterior estate defeats the main and dominant purpose of the testator the prior estate having been adopted as a means for the accomplishment of that which the law forbids.

While it is obvious that the seventy-five year term, as provided for in the will, might be longer than the lives in being named in the will and twenty-one years, the court said that the estate "began within the prescribed limits, and it is of no consequence, so far as concerns the rule (against perpetuities) that it extends beyond it."

In Endsley v. Hagey, the testator willed his whole estate to trustees to pay the income of it to his wife and daughter and the survivor of them for life. He

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25 ibid., at 230.
26 Johnston's Estate, 183 Pa. 179, 39 A. 879 (1898).
27 ibid., at 185.
28 301 Pa. 158, 151 A. 799 (1930).
also gave a power to them to sell such part of his real estate as might be needed for their support. At the death of both the wife and daughter, the testator directed that the residue of the estate be held in trust for his grandchildren until the youngest reached the age of twenty-five, the corpus then to be distributed. The wife and daughter agreed to sell some real estate. A grandchild objected and denied their right to convey a fee simple, contending that he had a vested interest in the realty which could not thus be destroyed. The court in upholding the right of the life tenant to dispose of the real estate, as directed in the will, held that the remainders to the grandchildren did not violate the rule against perpetuities.

Here the testator created the trust to continue until the youngest grandchild reached the age of twenty-five. While the court held the trust valid it is possible that a grandchild might not be born until after the testator's death and might not reach the age of twenty-five years until more than twenty-one years after the death of the life tenants named in the will. The court did not discuss the duration of the trust as being too long or as affecting the validity of it but merely stated that, "The estate became fixed in the grandchildren immediately on the termination of the tenancy of the two granted life interest... This disposition did not violate the rule against perpetuities. The right to take the remainder did not depend upon the happening of some contingent event, but passed to persons definitely determined as of the date of the death of the testator. The mere fact that the time of distribution was deferred, or that unborn grandchildren might share, does not alter the conclusion." 29

Secondly as to the line of cases which indicate that the rule against indeducibility does apply to ordinary private trusts:

In a lower court case, 30 the settlor deeded property in trust for his eight children, their heirs and assigns forever. He directed that the trustee should distribute the corpus of the estate among his children that have attained the age of twenty-one years, if the trustee thought it safe and prudent to do so; if he did not think it safe and prudent to do so, then to pay them only the rents and profits. A committee in lunacy of one of the children filed a bill to compel the trustee to pay them the sum of the corpus belonging to this child, on the ground that the active duties of the trust had been performed, and that the trust violated the rule against perpetuities. The court in allowing the claim said that there was no limitation that the trust should end within a life or lives and twenty-one years. Thus the trust could continue indefinitely merely by the trustee deciding that it is not "safe and prudent" to distribute the corpus to the children. In deciding that the trust violated the rule against perpetuities the court said, "all this is in direct conflict with the policy of the law, which abhors a perpetuity, which favors the alienation

29 Ibid., at 161.
of estates, and which will not allow, out of consideration of public interest, that property shall be in perpetuity fettered with restrictions which prevent its being alienated or transferred."

In *Shallcross's Estate* the testator gave property to a trustee in trust for the minor children of a son, naming them, "until they respectively arrive at a lawful age, or the survivor of them, or the heirs of such survivor, share and share alike." By a codicil the testator postponed the bequest until they reached the age of twenty-five years. All the grandchildren survived the testator. The court in its opinion said that the trust which was created for the grandchildren during their minority was good, but the subsequent provision of the codicil, postponing the payment until they severally attained the age of twenty-five years, was void, as contrary to the rule against perpetuities. While it was the wish of the testator to postpone payment, "this desire cannot be upheld, as it is against the rule of public policy, forbidding restraint in the use or disposition of property, in which no one but the beneficiary has any interest."

In *Bender v. Bender,* testatrix gave her estate to trustees for the benefit of two nephews and a niece. It was further provided that if either of the beneficiaries should die, then the deceased's child or children should receive the parent's share of the income. Upon the death of the nephews and niece, the trust was to continue and the income to be paid to the named grand-nephews and grand-nieces for life and when the last one of these had died the trust was to terminate and the property was to be sold and proceeds distributed among the heirs of all the children of the nephews and niece. A bill in equity was filed to declare the testamentary trust invalid as in violation of the rule against perpetuities. The court dismissed the bill and held that the trust was a good one under the law. It was stated, that since the testatrix designated the grand-nephews and grand-nieces, she removed the possibility of a person becoming a beneficiary who might have been born subsequent to twenty-one years after the testatrix's death. Had she not so designated them, the trust would have been void as a perpetuity. The court held that since the grand-nephews and grand-nieces were all lives in being at the time of testatrix's death, and since the trust was to last only until the death of the survivor of them, the remainders over at the end of the trust would vest within the period permitted by the rule against perpetuities.

In a recent case, one of testator's ten children filed a petition to terminate a testamentary trust claiming that the testator created an unlawful perpetual trust. The testator created the trust for his children but did not say anything as to how long the trust should last. The court held that the omission of a provision expressly setting forth the intended duration of a trust will not in itself support an implication that a perpetual trust was created. The court in construing the will

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32 200 Pa. 122, 49 A. 936 (1901).
33 225 Pa. 434, 64 A. 246 (1909).
creating the trust said it showed a primary intent to benefit the testator's children and held that his purpose would be accomplished upon the death of the last child and that the trust was not void as a perpetual trust, but was a valid and active trust.

From the language of the court it could be inferred that, had the testator set forth the duration of the trust and had it been longer than the period allowed by the rule against perpetuities, the court might have declared the trust void.

Two other cases of similar import are Goehring's Appeal and Briggs v. Davis. This latter group of cases is directly in conflict with those that indicate the rule against indestructibility does not apply to ordinary private trusts. It has been said that the decisions of this latter group of cases are fallacious. If this is true the ultimate conclusion is that the rule does not apply and thereby limit the duration of ordinary private trusts.

If we continue to accept the rule that ordinary private trusts may be created to last for any period of time, we obviously are casting aside and rendering of no effect the policy of the common law which seeks to prevent restraints on alienation of property.

It is to be desired that some clear and express statement of the rule against indestructibility be made in Pennsylvania as well as a definite application of it to the ordinary private trusts.

Since the Pennsylvania Supreme Court by some of its decisions refuses to restrict the duration of these ordinary private trusts, and since other decisions cast doubt upon those cases which allow unlimited duration of trusts, it appears that the only solution is by legislation. By this latter method not only could a limitation be enacted into our law, but as in the case of trusts for specific non-personal objects, any present or future confusion as to the application of the rule against indestructibility would be set at rest.

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381 Pa. 283 (1875).
381 1/2 Pa. 470 (1875).
374 U. of Pitt. L. Rev. 169.
Note 9, supra.
Note 18, supra.