

---

Volume 60  
Issue 3 *Dickinson Law Review* - Volume 60,  
1955-1956

---

3-1-1956

## Cemetery Trusts in Pennsylvania

Maxwell E. Davison

Follow this and additional works at: <https://ideas.dickinsonlaw.psu.edu/dlra>

---

### Recommended Citation

Maxwell E. Davison, *Cemetery Trusts in Pennsylvania*, 60 DICK. L. REV. 264 (1956).  
Available at: <https://ideas.dickinsonlaw.psu.edu/dlra/vol60/iss3/7>

This Article is brought to you for free and open access by the Law Reviews at Dickinson Law IDEAS. It has been accepted for inclusion in Dickinson Law Review by an authorized editor of Dickinson Law IDEAS. For more information, please contact [lja10@psu.edu](mailto:lja10@psu.edu).

It is a general rule that if one voluntarily commits an unlawful act and inflicts personal injury he is criminally liable for such injury, but in some cases a distinction is made between unlawful acts *mala in se* and merely *mala prohibita*.<sup>44</sup> There are no Pennsylvania cases discussing this point.

### *Conclusion*

The elements of the crime of battery are relatively fixed and certain, the most recent change being a certain relaxation of the formerly strict requirement of an intentional touching. However, by allowing the jury to infer intent from gross negligence, the courts respond to present social needs and continue to protect the individual from offensive contact.

SAMUEL J. SERATA

---

## CEMETERY TRUSTS IN PENNSYLVANIA

Testator leaves property the income to be used for the care and maintenance of a cemetery lot. Formerly the validity of such a provision was challenged on the grounds that there were no beneficiaries and therefore no trust, and that in any case, such provision violated the Rule against Perpetuities or the Rule against Indestructible Trusts. In the United States generally and in Pennsylvania particularly the validity of such provisions is no longer questioned. This note will explain briefly how this position has been reached and will point up problems still unresolved, especially in regard to provisions where the amount for the care of a tomb is excessively large.

It is not within the scope of this note to consider exhaustively the Rule against Perpetuities or the Rule against Indestructible Trusts. Suffice it to say that the rules are aimed at the unreasonable continuance of restraint on alienation which is accomplished by the creation of various future interests.<sup>1</sup> The purpose of the rules is to preserve freedom of alienation, and to prevent restrictions on the circulation of property.<sup>2</sup> In a number of instances, trusts of indefinite duration for the maintenance or repair of private property not devoted to charitable uses, such as trusts for the perpetual care of cemetery lots, have been held to have created perpetuities; but it seems that the term is used in its sense of continuing interest, and the real basis for invalidity is want of a beneficiary.<sup>3</sup> Gray, one of the most prominent authorities on the rule, submits that the rule is inapplicable to cemetery trusts. He argues that the Rule against

---

<sup>44</sup> 2 Burdick, Crime § 353 (1946).

<sup>1</sup> 10 AM. JUR., *Charities*, § 75 (1937).

<sup>2</sup> Ryan v. Ward, 192 Md. 342, 64 A.2d 258, 7 A.L.R. 2d 1078 (1949).

<sup>3</sup> Bliven v. Borden, 56 R.I. 283, 185 Atl. 239 (1936).

Perpetuities makes void any future interests which may vest at too remote a time, whereas in the case of cemetery trusts there is no future interest, but rather a present interest, if any at all.<sup>4</sup> He holds the cemetery trust void on the grounds aforementioned, i.e., that there is no cestui que trust.<sup>5</sup>

It has long been the rule that there must be a beneficiary in order for there to be a valid private trust for enforceability purposes. The state attorney general enforces the charitable trust. In some jurisdictions, cemetery trusts are supported on the theory of substituting the court to enforce the trustee's obligations. The courts are given supervisory powers by statute to oversee the trust by their own motion. Another possibility is that lack of a beneficiary will not destroy the trust, if the trustee is willing to perform, for he has the power, although he does not have the correlative duty.

The cy pres doctrine is of importance only if cemetery trusts are deemed to be charities. The doctrine is a rule of construction, its object being to carry out the intention of the settlor as nearly as possible when it cannot be given full effect for some reason.<sup>6</sup> Thus, it must first be determined whether the cemetery trust is private or charitable in order to decide whether the cy pres doctrine is applicable. This varies in particular jurisdictions.

Is a cemetery trust private or charitable? The fundamental distinction between private and charitable trusts is that in the case of the former, property is devoted to the use of specified persons who are designated as beneficiaries in the trust; whereas in the latter, the property is generally devoted to purposes beneficial to the community.<sup>7</sup> It is generally held that a bequest, the income of which is to be applied to the decedent's burial lot, is not a gift for any public use, its purpose being purely private and secular.<sup>8</sup> In those jurisdictions where the trust is considered charitable, Mr. Justice Gray provides a very workable definition in a leading Massachusetts case.<sup>9</sup>

In the absence of statute, the majority rule is that a bequest for the perpetual care or improvement of a tomb, monument, or burial lot of the testator, his family or relatives is invalid.<sup>10</sup> Pennsylvania<sup>11</sup> and a number of other

<sup>4</sup> GRAY, RULE AGAINST PERPETUITIES, § 899 (2d ed.).

<sup>5</sup> *Id.* 898.

<sup>6</sup> BLACK, LAW DICTIONARY (4th ed. 1951).

<sup>7</sup> RESTATEMENT, TRUSTS, Chap. 11, Introductory note.

<sup>8</sup> *Mason v. Bloomingdale Library Asso.*, 237 Ill. 442, 86 N.E. 1044, 15 Ann. Cas. 603, 37 L.R.A. 997 (1908).

<sup>9</sup> "A charity in the legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or restraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burden of government." *Jackson v. Phillips*, 14 Allen 539, 556 (Mass. 1867).

<sup>10</sup> BOGERT, TRUSTS (2d ed. 1942); *In re Voorhis' Estate*, 27 N.Y.S. 2d 818, 176 Misc. 585 (1941).

<sup>11</sup> PA. STAT. ANN. tit. 9, § 4 (Purdon 1951).

states<sup>12</sup> have enacted statutes either specifically validating cemetery trusts or considering them to be for charitable purposes.

Before turning to a consideration of decisional law on cemetery trusts it is significant to note that such dispositions, if testamentary, are either exempt or deductible in calculating both Pennsylvania<sup>13</sup> and Federal<sup>14</sup> Inheritance Taxes. It is superfluous to note that these provisions are of prime importance and should not be overlooked by counsel when it is decided whether or not a cemetery trust will be established by the testator.

As noted previously, Pennsylvania has provided that a cemetery trust is considered a charity for the purpose of circumventing the Rule against Perpetuities. But it is not to be considered a charity for the application of the cy pres doctrine.<sup>15</sup> *Essig's Estate*<sup>16</sup> distinguished a previous decision in *Neeley's Estate*,<sup>17</sup> where the cy pres doctrine was utilized in consequence of the particular circumstances in which the testatrix devised her estate, in that she manifested an intention to provide for her lot and a church as well. The earlier case, therefore, is to be limited solely to its facts, for none of the cases subsequent to *Essig's Estate*, *supra*, mentioned the possibility of applying the excess funds to the general purpose of the cemetery. The court stated in *Kreps' Estate*<sup>18</sup> that no intent could be found that the testator wished to benefit the cemetery generally. It seems that the court was not looking for any such manifestation either. Any doubt that may have existed was thereafter removed by legislation.<sup>19</sup>

Perhaps the best summary of the philosophy of the law in upholding the validity of cemetery trusts is to be found in *Smith's Estate*,<sup>20</sup> where the court said, *inter alia*:

"Testator is disposing of his own money. This is a right assured to him by the law, and restrained only by those enactments and principles of public policy, which, for the good order and welfare of society, have been established by the legislature or by the courts. Gifts for the erection of monuments and construction of vaults or tombs in cemetery lots . . . have been recognized . . ."

There is no doubt as to the validity of such a testamentary disposition today in Pennsylvania. It seems that the proposition that a man may do with his own money that which he pleases has overcome the technical distinctions of the

<sup>12</sup> N. J. REV. STAT. § 8:2-30 (1943); MINN. STAT. § 307.05 (1941); MICH. COMP. LAWS § 13512 (1929); R. I. GEN LAWS C. 133 § 4 (i); N. Y. REAL PROP. LAW § 114-A (1943); TEX. STAT. arts. 912, 915 (Vernon, 1942); S. C. CODE §§ 9052, 9053 (1942).

<sup>13</sup> PA. STAT. ANN. tit. 72, § 2302; *Ashbridge's Estate*, 47 Pa. D.&C. 343 (1943).

<sup>14</sup> *Cardeza Estate*, 5 T.C. No. 24.

<sup>15</sup> *Devereux's Estate*, 48 Pa. D.&C. 49 (1943); *Stephan's Estate*, 129 Pa. Super. 396, 195 Atl. 653 (1937); 93 U. PA. L. REV. 226 (1944); 4 U. PITT. L. REV. 157 (1938).

<sup>16</sup> 167 Pa. Super. 66, 74 A.2d 787 (1950).

<sup>17</sup> 252 Pa. 394, 97 Atl. 502 (1916).

<sup>18</sup> 1 Fid. Rep. 99 (1950).

<sup>19</sup> PA. STAT. ANN. tit. 20, § 301.4 (Purdon 1947).

<sup>20</sup> 181 Pa. 109, 37 Atl. 114 (1897).

common law, i.e., lack of a beneficiary and the Rule against Perpetuities, in order to effect the intentions of the testator.

A much more serious problem arises where the principal of a cemetery trust is a large monetary sum. On this point there has been considerably less agreement even within the courts of Pennsylvania. The most celebrated case is *Palethorpe's Estate*,<sup>21</sup> where the court said:

"From its inception this has been an extraordinary case. In many respects it must be regarded as *sui generis*. The first and perhaps most extraordinary feature of the case was testator's attempt to create a trust in the sum of \$150,000 for the care and maintenance of the Palethorpe family lot . . . . The fund which the testator set aside was excessive . . . . The cemetery now holds a fund of \$1,000 for the care of this lot . . . . Any excess must fall into residue and be distributed among the testator's next of kin. . . ."

This case has been cited as authority for the proposition that the court may reduce the principal of a cemetery trust if it finds the res to be unreasonably large, and that even in those cases where a large sum is involved, the yardstick of reasonableness must still be applied to determine the suitable amount to carry out the testamentary purpose.

The Pennsylvania courts have not readily accepted the holding in regard to excessive principal. In *Close's Estate*,<sup>22</sup> the court said that there would be no authority for the court to reduce the principal in the absence of statute. Similarly in *Brogan's Estate*,<sup>23</sup> the court suggested that it would be a novel rule of law to place restrictions on the amount of the res, and they refused to declare a partial trust or partial intestacy. It has been stated that as a general proposition, the size of such a disposition would not impeach the trust. This is reasonable, but does not consider the advisability of diminishing the size of the principal. The most recent Pennsylvania case is *Kreps Estate*, *supra*. The decedent provided for a monument on her grave, markings on the graves of her grandparents, and the residue to be placed in trust for the perpetual care and upkeep of her cemetery lot. The residue of the estate exceeded \$46,000. In sustaining the contention of the next of kin that an intestacy existed as to part of the disposition the court held that it was obvious that the sum provided far exceeded the requirements and that the problem should be averted from the beginning.

The New York courts have taken it upon themselves to diminish the principal. In one case the court refused to enforce a clear and unambiguous testamentary provision.<sup>24</sup> There is a tendency to seize upon indefiniteness, or slight evidence of doubt, whether direct or circumstantial, and read against extrava-

---

<sup>21</sup> 69 Pa. D.&C. 500 (1950); 249 Pa. 389, 94 Atl. 1060 (1914).

<sup>22</sup> 260 Pa. 269, 103 Atl. 822 (1918).

<sup>23</sup> 290 Pa. 319, 138 Atl. 837 (1927).

<sup>24</sup> *In re Turk's Will*, 221 N.Y.S. 225 (1927).

gance in order to avoid unreasonable expenditures.<sup>25</sup> The New York case cited *Palethorpe's Estate*, *supra*, with approval and applied the "reasonable amount" test. An Ohio decision also reduced the principal on the grounds of public policy.<sup>26</sup>

In a Delaware decision the court held that a fund which had appreciated \$10,000 in 29 years from the original \$5,000 res, with an annual income of \$600, could be diminished.<sup>27</sup> The actual amount required for the lot was left to the discretion of the trustee and a resulting trust impressed in favor of the testator's next of kin as to the residue. The theory of finding a resulting trust is offered in the Restatement of Trusts<sup>28</sup> and has been cited favorably in at least one Pennsylvania case.<sup>29</sup> An Arkansas appellate court took a rational approach to the problem.<sup>30</sup> It held that the better rule was that the courts will not interfere with the testator's right to create a trust for the care of a cemetery lot so long as the amount is commensurate with the purpose and not offensive to public policy. It attached the proviso that it would not interfere when it could not be said that as a matter of law a smaller sum would be sufficient for the purpose. It is submitted that there is a relative dearth of appellate decisions on this point.

There is one fundamental argument against diminishing the principal of a trust established for the perpetual care and maintenance of a cemetery lot which has been previously alluded to, namely, that a man has the right to do with his own money as he sees fit. Should a man be permitted to deal with his own money as he chooses? The answer to this should be in the affirmative. However, the law has asserted itself in other instances to prevent injustice or on the intangible grounds of public policy by establishing certain rules regarding infants and incapacitated persons. There appears to be ample reason for the law stepping in when the res is too large to serve its purpose. When a testator bequeaths a sizable amount to be used for the care of his lot, for all practical purposes he is creating two funds, one for the care of his lot and the other to lie in a state of desuetude. The mere suggestion of the latter is repugnant. In essence this is the situation. If the purposes of the trust can be complied with, then why should the res not be diminished and a resulting trust be established in favor of the testator's estate for the unused amount? It is the reasonable conclusion to be reached.

There are two approaches that have been taken to the excessive cemetery trust: (1) the reduction prospectively of the principal, and (2) the award of excess income after a period of trial and error. *Leber's Estate*<sup>31</sup> presents the

---

<sup>25</sup> 55 A.L.R. 1303.

<sup>26</sup> *Heinlein v. Elyria Savings & Trust Co.*, 75 Ohio App. 353, 62 N.E. 2d 284 (1945).

<sup>27</sup> *Security Trust Co. v. Willett*, 97 A.2d 112 (1953).

<sup>28</sup> RESTATEMENT, TRUSTS § 430.

<sup>29</sup> *Zeller's Estate*, 2 Woodw. 191 (Pa. 1885).

<sup>30</sup> *Hammond v. Stringer*, 222 Ark. 193, 258 S.W. 2d 46 (1953).

<sup>31</sup> 123 Pa. Super. 1, 186 Atl. 225 (1936).

second possibility. That case held that the excess income will be awarded to the estate, if, after a period of years, it appears that it will not be used for the care of the lot. *Devereux's Estate, supra*, while noting that the trust therein created was dangerously close to being incommensurate with its purposes, also considered this solution. The Restatement of Trusts recognizes that when a trust is performed without exhausting the principal a resulting trust arises,<sup>32</sup> and has been cited with approval in Pennsylvania.<sup>33</sup> However, this system of trial and error is undesirable, for public policy would seem to require that such accumulations be prevented ab initio, thereby relieving the heirs of the necessity of continually policing the trust fund and periodically petitioning the courts for a determination of their rights. This seems like a more practical solution.

It would be desirable for the courts or the legislature to consider this question of excessive income and principal. It was thought that the Estates Act of 1947<sup>34</sup> might shed some light on the subject. However, it appears that this statute was not intended to cover the situation.<sup>35</sup> There is a definite need for clarification and general guiding rules. At the present time a case similar to *Palethorpe's Estate, supra*, is before the Supreme Court of Pennsylvania.<sup>36</sup> Perhaps the Court will take this opportunity to make the law more certain and predictable, so that there will be some standard to follow in the future.

There had been a different sort of problem with regard to small monetary trusts for the perpetual care of cemetery lots. For example, the testator provided that the income from \$100 be used for the care of his grave, naming either a cemetery association or trust company as trustee. Then others followed suit until the point was reached where there was a number of such dispositions, each to be invested individually. The trust companies often discovered that it cost considerably more to administer the fund than the remuneration they received for performing their endeavors. It was found in many instances that the trust companies were unable to perform their duties effectively. This condition persisted for some time, until it was brought to the attention of the Pennsylvania legislature. Statutes were passed which enabled these small funds to be transferred to non-profit corporations, such as cemetery associations and united in omnibus funds.<sup>37</sup> The reason for these aforementioned funds was to encourage greater efficiency in management of the smaller trusts by pooling and combination.<sup>38</sup> This welcome legislation has been upheld by a Pennsylvania lower court which permitted such a transfer.<sup>39</sup>

---

<sup>32</sup> RESTATEMENT, TRUSTS *op. cit. supra* at 28.

<sup>33</sup> Zeller's Estate, 2 Woodw. 191 (Pa. 1885).

<sup>34</sup> PA. STAT. ANN. tit. 20, § 301.2 (Purdon 1947).

<sup>35</sup> 96 U. PA. L. REV. 305 (1948).

<sup>36</sup> Dreisbach's Estate, 87 Pa. D.&C. 392 (1954).

<sup>37</sup> PA. STAT. ANN. tit. 15 §§ 1101, 1102 (Purdon 1951).

<sup>38</sup> Grace Lutheran Church Petition, 2 Fid. Rep. 64 (1951).

<sup>39</sup> Sixty Cemetery Trusts, 5 Fid. Rep. 505 (1955).

### Conclusion

It has been the purpose of this note to assimilate the law on trusts for the perpetual care of cemetery lots in Pennsylvania and point up certain unanswered questions. The chief problem which remains unanswered is, what shall be done with eccentric testators who continue to create trusts of considerable monetary size for the care of their lots. The cases on this point have increased throughout the years, but to date no workable solution has been attempted by the courts or the legislature. It is suggested that this would be a legitimate exercise of the legislative or judicial power and it is hoped that the proper responsible people will take note of this possibility. It has been previously mentioned that the law-makers have handled the problem of smaller trusts adequately and there appears to be no reason why they should not take it upon themselves to clarify the larger trust situation.

MAXWELL E. DAVISON

---

## MALICIOUS PROSECUTION

The interest protected by the tort of malicious prosecution is freedom from unjustifiable litigation. Originally this tort was limited in its scope so that it could be maintained by the plaintiff only where; first, the defendant had instituted or continued a criminal prosecution against the plaintiff; second, the criminal action had terminated in favor of the accused; third, the defendant in the malicious prosecution action had no probable cause for instituting or continuing the proceeding; and finally, the defendant acted maliciously in bringing the proceeding or had a primary purpose other than that of seeing that an offender be brought to justice.<sup>1</sup> These elements were essential to the maintenance of the action and the absence of any one of them inevitably resulted in a verdict for the defendant.

The inadequacies of not allowing redress by an action of malicious prosecution for suits that could not be termed criminal, but which could lead to the arrest of the accused, the seizure of his property, and even to his incarceration soon asserted themselves. Professor Harper has pointed out that even under the narrow English rule the action may be maintained for insolvency or bankruptcy proceedings, since they result in direct pecuniary loss to plaintiff, as well as for civil proceedings that are accompanied by arrest, attachment or injunction.<sup>2</sup>

The courts in this country have also broadened the scope of malicious prosecution to include proceedings that could perhaps best be termed "quasi-criminal." In the case of *Lueptow v. Schreuder*<sup>3</sup> the defendant, a school board member, filed a petition informing the juvenile authorities that, in effect, the plaintiff

---

<sup>1</sup> PROSSER, TORTS § 96 (1941 Edition).

<sup>2</sup> HARPER, A TREATISE ON THE LAW OF TORTS § 268 (1933 Edition).

<sup>3</sup> 226 Wis. 437, 277 N. W. 124 (1938).