THE MODERN RULE AGAINST PERPETUITIES

WALTER H. ANDERSON

Possibly there is no rule of law that is so simple in its statement and yet so difficult of application as the rule against perpetuities. Well did Professor Gray say:

> "A long list might be formed of the demonstrable blunders with regard to its questions made by eminent men, blunders which they themselves have been sometimes the first to acknowledge; and there are few lawyers of any practice in drawing wills and settlements who have not at some time either fallen into the net which the Rule spreads for the unwary, or have not at least shuddered to think how narrowly they have escaped it." [1]

It may be remarked here that the rule against perpetuities is purely and simply judge-made law, whose inception occurred at an early day in the history of English jurisprudence.[2] It finds application in one form or another in the law of every civilized nation. The rule inexorably opposes all efforts tending to clog or impede the devolution and free circulation of property after a certain time.[3] These observations apply with equal, if not greater, force to the rules cognate to the true rule against perpetuities; that is, the rules against accumulations, against restraints on alienation, and against indestructibility of trusts. Much confusion has been fostered by the frequent failure to distinguish these cognate rules from the rule against perpetuities proper, hereafter referred to as the rule against remoteness. The distinct character of the four rules is sometimes overlooked, and they are spoken of collectively as the rule against perpetuities. But we shall endeavor to keep them distinct.

---

[1] GRAY, THE RULE AGAINST PERPETUITIES (1st ed. 1886) VI.

[2] KALES, ESTATES, FUTURE INTERESTS AND ILLEGAL CONDITIONS AND RESTRAINTS IN ILLINOIS (2d ed. 1920) § 662.

[3] Shepperd v. Fisher, 206 Mo. 208, 103 S. W. 989 (1907).

Writers generally initiate any dissertation on the rules by discussing the public policy in favor of the alienability of property, but as that is a matter of such common knowledge, its discussion is hardly warranted in an article of this length.

THE RULE AGAINST REMOTENESS

The rule as stated by Professor Gray is that:

> "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." [4]

To this definition must be added two qualifications. The first is that the twenty-one year period must be extended for the period of gestation in favor of posthumous children. Professor Gray argues with no little force that a child *in ventre sa mere* is a life in being.[5] The second is that an interest must vest within twenty-one years after its creation when the measure of lives is not availed of by the creator of the interest. The latter seems to have been the law since the English case of *Cadell v. Palmer*,[6] and has never been questioned in this country.[7] It seems that the survivor of any number of contemporary lives may be used as a measure provided the group is reasonably ascertainable, such as nine lives,[8] forty-one,[9] twenty-eight,[10] or about fifty.[11] And while the measuring lives must be selected by the testator or settlor in the instrument creating the interest, they need not be those of the beneficiaries.[12] Professor Gray queries whether the life of an animal may

---

[4] GRAY, THE RULE AGAINST PERPETUITIES (3d ed. 1915) § 201.

[5] *Ibid.* § 222.

[6] 10 Bing. 140, 142, 144 (1833).

[7] Edgerly v. Barker, 66 N. H. 434, 31 Atl. 900 (1891). See GRAY, *op. cit. supra* note 4, § 223. However, it seems that when a testator uses the period of twenty-one years, and no life or lives in being as the measure, he is confined strictly to that period, and he cannot claim the right to use the fraction of a year allowed for gestation in addition to the twenty-one years.

[8] Thelluson v. Woodford, 4 Ves. 227 (1799), 11 Ves. 112 (1805).

[9] Fitchie v. Brown, 211 U. S. 321, 29 Sup. Ct. 106 (1908).

[10] Cadell v. Palmer, *supra* note 6.

[11] Humberston v. Humberston, 1 P. Wms. 332 (1716).

[12] Fitchie v. Brown, *supra* note 9.

be used as a measure,[13] but such a thing should not be permitted because of the danger that an animal of great longevity might be chosen. Certainly the duration of a corporation could not be used as a "life" within the meaning of the rule.[14]

Mr. Foulke criticizes Professor Gray's definition of the rule, but he offers nothing constructive, for he only suggests:

> ". . . that a perpetuity is a future interest which is destroyed by the rule." [15]

This definition would apply equally well to the cognate rules previously mentioned, for they similarly destroy future interests. Moreover, Mr. Foulke's definition hardly improves on that of Professsor Gray in the matter of conciseness, nor does it convey any idea as to the meaning of the rule or the sort of interests upon which it operates, in spite of Mr. Foulke's contention that:

> "Although this definition is not in accordance with the natural sense of the word, it is at least intelligible and easy of application." [16]

It has been said by a learned court that:

> "A perpetuity is defined to be a limitation taking the subject thereof out of commerce for a longer period of time than a life or lives in being and twenty-one years thereafter, and, in the case of a posthumous child, a few months more, allowing for the period of gestation." [17]

This is not an accurate definition, for it fails to consider the vesting of the interest, and is misleading in that the rule against remoteness applies to a contingent interest even though it be alienable.[18] It would seem that the court, while attempting to define a perpetuity, really defined the rule against restraints on alienation.

---

[13] GRAY, *op. cit. supra* note 4, § 228A.

[14] Fitchie v. Brown, *supra* note 9.

[15] FOULKE, PERPETUITIES, RESTRAINTS ON ALIENATION AND RESTRAINTS ON ENJOYMENT IN PENNSYLVANIA (1909) § 330.

[16] *Ibid.*

[17] Johnson v. Preston, 226 Ill. 447, 455, 80 N. E. 1001, 1003 (1907).

[18] GRAY, *op. cit. supra* note 4, §§ 268, 269.

The best, as well as a simple and concise, definition of an interest void for remoteness to be found states that it is

> "a grant of property in which the vesting of future interests may be postponed beyond the period of time allowed by law for the creation of future estates." [19]

It is generallly conceded that the rule against remoteness applies only to contingent, not vested, interests.[20] However, we find Professor Gray saying that the rule applies to certain vested interests:

> "Sometimes a remainder is given to a class of persons, *e. g.*, to children, the number of members in which may be increased between the time of creating the remainder and the termination of the particular estate; for instance, on a devise to A for life, remainder to the children of A and their heirs as tenants in common. Here, although it is certain that each child born, or its heirs, will have a share in the estate, that share will be diminished by the birth of every other child of A. Each child, nevertheless, on its birth is said to have a vested remainder. The remainder is said to 'open' and let in the afterborn children." [21]

In the very next section Professor Gray attempts to show that the rule against remoteness operates against this supposedly vested remainder.[22] It is our view that the interest above discussed is not vested at all, for there is uncertainty as to who will take and as to the amount. Surely this type of interest would be included under the definition of a contingent interest, or rather, excluded from that of a vested interest. But if this is vested, and nevertheless operated on by the rule, then Professor Gray's definition of the rule is faulty.

The rule applies alike to real and personal property, to legal and equitable interests.[23] A perpetuity will no more be tolerated when it is produced through a trust than when it appears undis-

---

[19] 21 R. C. L. 287.
[20] GRAY, *op. cit. supra* note 4, § 205.
[21] GRAY, *op. cit. supra* note 4, § 110. See also §§ 110a, 205a, 972, n. 6.
[22] GRAY, *op. cit. supra* note 4, § 111.
[23] GRAY, *op. cit. supra* note 4, § 202.

guised in a legal estate.[24] Springing and shifting future interests by way of use or by way of executory devise may be destroyed by the rule.[25] But it seems that neither possibilities of reverter nor rights of entry for condition broken are within the rule,[26] although in England the rule operates to destroy rights of entry for condition broken.[27] The rule is applicable to options to purchase,[28] and to powers which may be exercised after the period allowed by the rule.[29] Easements are free from its operation because the rule is concerned with the vesting and not the termination of an interest.[30]

When we concede that the rule against remoteness applies only to contingent interests, the logical inquiry becomes: what is a contingent interest, or what is its antithesis, a vested interest. Professor Gray states that a remainder is vested "if at every moment during its continuance it is ready to become a present estate, whenever and however the preceding freehold estates determine"; and that:

> "A remainder is contingent if in order for it to become a present estate the fulfillment of some condition precedent other than the determination of the preceding freehold estate is necessary." [31]

It must be pointed out that this definition of a vested interest fails to take into account the modern method of tying up property. There are many settlements which have been held to create a contingent interest, and rightly so, but which would be clearly vested under the definition of Professor Gray. For instance, a gift, through the medium of trustees or otherwise, to the beneficiaries at a certain age, or upon the expiration of a certain period of time, is contingent.[32] This situation is to be distinguished from a

[24] 1 PERRY, TRUSTS AND TRUSTEES (6th ed. 1911) § 382.
[25] Shepperd v. Fisher, *supra* note 3.
[26] KALES, *op. cit. supra* note 2, § 662.
[27] KALES, *op. cit. supra* note 2, § 662.
[28] Barton v. Thaw, 246 Pa. 348, 92 Atl. 312 (1916).
[29] 21 R. C. L. 302.
[30] GRAY, *op. cit. supra* note 4, § 279.
[31] GRAY, *op. cit. supra* note 4, § 9.
[32] Post v. Herbert, 27 N. J. Eq. 540 (1876).

case in which a present gift is made, but payment or delivery is deferred until a future time. In other words, if futurity be annexed to the substance of the gift, the gift itself becomes future and not present, contingent and not vested. The same is true if the expiration of a certain number of years be made a condition precedent to the taking effect of the gift.[33] Another rule is that, where there is no direct gift to the beneficiaries except such as is implied from a direction to trustees or executors to pay, turn over, or divide at a future time, then the gift is future and not present, for until that time there is no gift.[34] That is, where the gift is in this form, survivorship at the time when the estate is to be divided or paid is a condition precedent to the acquisition of an interest in the subject-matter.[35] This is known as the "divide and pay" rule, and is held applicable even where the beneficiary is designated by name rather than as a member of a class.[36] Indeed the line of demarcation between a class and an individual is not entirely clear and satisfactory. Gifts have been held to be to a class whether the beneficiaries were designated by name, or as the children of *A*, or "my nephews and nieces". [37]

In addition to the rule that a gift to be made at a future time is contingent, as well as a gift implied only from a direction to divide and pay at a future time, or to turn over at a future time, it seems well settled that a gift of property to be held by trustees, with discretion as to the payments to be made to the beneficiaries, is, in the absence of an expression of contrary intention by the testator or settlor, to be construed as contingent.[38] Also, it seems

---

[33] Lewisohn v. Henry, 179 N. Y. 352, 72 N. E. 239 (1904); Johnson's Trustee v. Johnson, 79 S. W. 293 (Ky. 1904); Delafield v. Shipman, 103 N. Y. 463, 9 N. E. 185 (1886).

[34] Dougherty v. Thompson, 167 N. Y. 472, 60 N. E. 760 (1901); Giddings v. Gillingham, 108 Me. 512, 81 Atl. 951 (1911); Colt v. Hubbard, 33 Conn. 281 (1865); *In re* Blake's Estate, 157 Cal. 448, 108 Pac. 287 (1910); Willet v. Rutter, 84 Ky. 317, 1 S. W. 640 (1886); Fulton v. Fulton, 179 Iowa 948, 162 N. W. 253 (1917).

[35] Klinger v. Klinger, 140 N. Y. Supp. 147 (1913).

[36] Shufeldt v. Shufeldt, 130 Wash. 253, 227 Pac. 6 (1924).

[37] Chase v. Peckham, 17 R. I. 385 (1888); Roosevelt v. Porter, 36 Misc. 73, 73 N. Y. Supp. 800 (1901); KALES, *op. cit. supra* note 2, § 554.

[38] Andrews v. Lincoln, 95 Me. 541, 50 Atl. 898 (1901); Kountz's Estate, 213 Pa. 390, 63 Atl. 1105 (1905); Hall v. Williams, 102 Mass. 343 (1869); Meeks v. Briggs, 87 Iowa 610, 54 N. W. 456 (1893).

that no importance is given to the fact that the property is placed in trust for the beneficiaries.[39] However, a controlling circumstance is thought to exist in the fact that the property is given to the trustees or executors for the use and benefit of specific beneficiaries, and this seems to be enough to make their interest vested.[40]

It is clear that Professor Gray's definition of a vested interest is wholly inadequate to comprehend the situations above discussed, and the same may be said of most other definitions. In the case of the "divide and pay" rule, the beneficiaries were at all times during the continuance of the particular estate ready to come into possession whenever and however the preceding estate determined, and yet that preceding estate could not determine until the expiration of a period longer than that allowed by the rule. Even if Professor Gray's definition of a contingent interest be broad enough to cover the case of a gift at a future time, it certainly does not include cases where a discretion is given to the trustees as to when and in what amount they will pay to the *cestui que trust,* whereas gifts in this form are clearly contingent.

We find that Mr. Tiffany, in his work on *Real Property,* laid down the rule with respect to contingent interests as follows:

> "In the case of a gift to a person in trust for another, if there are specific and *effectual* directions that the trust shall continue for a specified time, and that the trust *res,* or principal shall not be turned over to the beneficiary, or beneficiaries until a certain time named, the *cestui que trust* cannot be considered as having a vested interest therein until the arrival of the time named; and consequently, it would seem, if the time named is more remote than the period allowed by the rule, the gift would be void. It has been so decided in a number of decisions in this country." [41]

---

[39] Kountz's Estate, *supra* note 38.

[40] Kimball v. Crocker, 53 Me. 263, 273 (1865).

[41] 1 TIFFANY, THE LAW OF REAL PROPERTY (1st ed. 1903) § 155. It is to be regretted that Mr. Tiffany receded from this position in the second edition of his work, 1 TIFFANY, THE LAW OF REAL PROPERTY (2d ed. 1920) § 183. While none of the cases cited by Mr. Tiffany in his first edition seem to support the statement in the text, the following are cases that do support it: Andrews v. Lincoln, *supra* note 38; Anderson v. Menefee, 174 S. W. 904 (Tex. Civ. App. 1915); Closset v. Burtchaell, 112 Ore. 585, 230 Pac. 554 (1924). In the last case the court quoted and approved the quotation in the text of this article.

Professor Gray takes the position that, if a future interest be destructible at the pleasure of the present owner, it is not regarded as an interest at all, and the rule does not apply to it.[42] This position is unsound and untenable on principle. If the vesting of the interest be too remote under the rule, how can its destructibility affect the matter? The rule either operates or it does not.[43] The true object of the rule is to prevent the creation of interests which might remain contingent for too long a time. Only incidently does the rule prevent the tying up of property, since, as already seen, it applies to contingent interests even though they are alienable.[44] It would certainly seem as logical to say that the rule will not destroy an alienable interest as to say that it does not apply to a destructible interest, for destructibility, like alienability, has nothing to do with the operation of the rule. It is contended that the reason for removing destructible interests from the operation of the rule no longer exists. It seems that Professor Gray was influenced to some extent by the supposed rule that a trust of which the beneficiaries are all *sui juris* may be terminated by them at any time. However, the destructibility of trusts at the will of the beneficiaries, even though all are free from disabilities, has been rendered doubtful by *Claflin v. Claflin*[45] and *Sheldon v. King*,[46] and of course these decisions weaken the position of Professor Gray.[47]

The word "vest" may mean come into possession in the modern sense, or come into possession in a certain feudal sense, or vest in interest in the feudal sense in which the word is used in speaking of vested remainders. The rule against remoteness is satis-

[42] GRAY, *op. cit. supra* note 4, §§ 203, 672, 692.

[43] The position here taken was recognized, if not in fact declared, in Curtis v. Lukin, 5 Beav. 147 (1842). See also GRAY, *op. cit. supra* note 4, § 675. It seems impossible to reconcile Professor Gray's statements in §§ 203, 672, 692, with those in § 675. Certainly his position is opposed to the decision in Claflin v. Claflin, 149 Mass. 19, 20 N. E. 454 (1889), and Shelton v. King, 229 U. S. 90, 33 Sup. Ct. 686 (1913). These decisions will be considered *infra* p. 876.

[44] Edgerly v. Barker, *supra* note 7.

[45] *Supra* note 43.

[46] *Supra* note 43.

[47] FOULKE, *op. cit. supra* note 15, at 221.

fied if the future interest vests in any one of these ways within the time prescribed.[48]

It should be remembered at all times that the rule against remoteness is not a rule of construction, since its object is to defeat intention. Therefore every provision in a will or settlement is to be construed as if the rule did not exist, and then the rule remorselessly applied.[49] In spite of the fact that the rule defeats the intention of testators, it is beneficial and wholesome, because its application is largely restricted to the many testators who, when releasing their last feeble grasp upon the substance accumulated throughout the years, begrudgingly allow any benefit to those who remain.[50]

The Rule Against Restraints on Alienation

This rule declares that the absolute power of alienation of an interest may not be restrained by the settlor or testator beyond lives in being and twenty-one years, plus, the period of gestation, or for twenty-one years only where the measure of lives is not employed.[51] Many writers and courts take the position that no restraint on the alienation of an absolute interest may be imposed.[52] But this is not so, for a donor may tie up the property and restrain the object of his bounty from disposing of the title for the same length of time as prescribed by the rule against remoteness. However, the point that we desire to emphasize in this connection is that every restraint upon alienation allowable under any theory, is allowable not by reason of the rule against

---

[48] Kales, *op. cit. supra* note 2, § 654.

[49] Gray, *op. cit. supra* note 4, § 629.

[50] "The law is wise in not consenting to give effect to all the intentions of testators, for if it did it would not be many generations before all the land in this country would be effectually shackled so that the generation in possession of it would have but little power over it." Lowrie, J., in Walker v. Vincent, 19 Pa. 369 (1852).

[51] 21 R. C. L. 332, n. 1.

[52] Mandlebaum v. McDonell, 29 Mich. 78 (1874); Bennett v. Chapin, 77 Mich. 538, 43 N. W. 893 (1889); Collins v. Foley, 63 Md. 158 (1884); Gray, Restraints on the Alienation of Property (2d ed. 1895) § 13, *et seq.* In Mandlebaum v. McDonell, *supra*, it is said: "Iniquum est ingenuis hominibus non esse liberam rerum suorum alienationem. (Freely translated): It is a wrong to free men to restrain the free alienation of their property."

remoteness, but by virtue of an independent rule.[53] Mr. Kales seems to think that *Claflin v. Claflin* has something to do with the restraints on alienation, but a careful study of the opinion in that case does not sustain his view.[54] The court there said:

> "It is true that the plaintiff's (the beneficiary's) interest is alienable by him, and can be taken by his creditors to pay his debts. . . ."[55]

Substantially the same holding is announced in *Shelton v. King.* It may be conceded, however, that the rule prohibiting restraints upon alienation is not so fully developed and clearly understood as the other rules discussed in this article.[56]

An active express trust suspends the power of alienation during its continuance.[57] This seems to be true although the trustees are empowered to sell and reinvest, since the proceeds thus arising would be held upon the same trusts.[58] In some states the suspension of the power of alienation is regulated by statute, and the courts, by assuming this to be legislation upon the rule against remoteness, have rendered more difficult a proper understanding of that rule.[59] The rule against restraints upon alienation seems to apply to a vested, as well as to a contingent, interest.[60] Thus it is a separate and distinct rule of law applicable to many cases clearly not coming within the inhibition of the rule against remoteness.[61]

The Rule Against Accumulations

It is quite well settled that the creator of an interest may control accumulations of rents and profits for the same period of time

---

[53] Kales, *op. cit. supra* note 2, § 658.

[54] Kales, *op. cit. supra* note 2, § 658.

[55] Claflin v. Claflin, *supra* note 43, at 23, 20 N. E. at 456.

[56] Manierre v. Willing, 32 R. I. 104, 78 Atl. 507 (1912).

[57] Penfield v. Tower, 1 N. D. 216, 46 N. W. 413 (1890); Cosgrain v. Hammond, 134 Mich. 419, 96 N. W. 510 (1903).

[58] Wheeler v. Fellows, 52 Conn. 238 (1884).

[59] Whitney v. Dodge, 105 Cal. 192, 38 Pac. 636 (1894). In this case it clearly appears that the court confused the statutory rule against the suspension of power of alienation with the rule against perpetuities. See also Johnson's Trustee v. Johnson, *supra* note 33.

[60] Lewin, Trusts (8th ed. 1888) § 89; Bogert, Trusts (1921) 176.

[61] Kales, *op. cit. supra* note 2, § 658; 1 Perry, *op. cit. supra* note 24, § 393.

as is allowed for the vesting of interests under the rule against remoteness, namely, lives in being and twenty-one years beyond, plus a fraction for gestation, or a period of twenty-one years only, where the measure of a life or lives is not employed.[62] This was settled by the case of *Thelluson v. Woodford*.[63] The holding in that case led the English Parliament to pass what is commonly known as the *Thelluson Act*,[64] which prohibits accumulations except under certain conditions and for certain periods of time. It is very generally believed that the *Thelluson Act* is not in force in the great majority of states in this country. However, the court of appeals of the state of California, under the wording of the statute of that state, adopting the common law, has held that the *Thelluson Act* is a part of the common law and is in force without enactment. A number of the other Pacific Coast States have similar statutes adopting the common law. It would seem, therefore, under the authority of the California case, that the *Thelluson Act* is in force in a number of the Western States.[65]

It is immaterial, so far as a trust for accumulation is concerned, that the accumulation may result by virtue of the exercise of a discretion vested in the trustees, for such an accumulation nevertheless offends against the rule.[66] The fact that the interest directed to be accumulated is vested does not prevent its destruction.[67]

The Rule Against Indestructibility of Trusts

This rule provides that no trust of a private nature may be created for a time longer than lives in being and twenty-one years, plus a fraction for the gestative period, or for the period of twenty-one years only, where the measure of lives is not availed of.[68] It may be observed at the outset that this rule is not clearly

[62] Helme's Estate, 95 N. J. Eq. 197, 123 Atl. 43 (1923).

[63] *Supra* note 8.

[64] 39 & 40 Geo. III, c. 98.

[65] McCray's Estate, 260 Pac. 940 (Cal. 1927). Examine McCray's Estate, 268 Pac. 647 (Cal. 1928).

[66] Lincoln v. Andrews, *supra* note 38.

[67] Claflin v. Claflin, *supra* note 43; Shelton v. King, *supra* note 43; Lewin, *op. cit. supra* note 60, § 89.

[68] Siedler v. Syms, 56 N. J. Eq. 275, 38 Atl. 424 (1897).

formed and that there is a hopeless conflict among the decisions. However, we can assert with confidence that the great weight of authority now sustains the existence of this rule. Some confusion has crept into the statement of this rule because courts fail to distinguish it from the rule against remoteness.

It seems that the court in *Barnum v. Barnum* [69] clearly recognized the fact that the rule against remoteness was not involved in that case, but that the case called for a consideration of the rule against indestructibility of trusts. The court there says:

> "If an estate be so limited as by possibility to extend beyond a life or lives in being at the time of its commencement, and twenty-one years and a fraction of a year (to cover the period of gestation), during which time the property would be withdrawn from the market, or the power over the fee suspended, it is a perpetuity and void as against the policy of the law, which will not permit property inalienable for a longer period." [70]

Up to this period in the opinion, if the use of the word "perpetuity" had been avoided, we would have a clear statement of the rule for which we now contend. The court continued:

> "The question whether an estate is a perpetuity, generally arises in cases in which a future contingent estate or executory devise is limited upon a fee, and if the contingency upon which the executory estate is to vest, is not necessarily to happen within the time fixed by the rule as the legal boundary, then the precedent estate or estates are denominated a perpetuity, and the executory estate or devise fails for want of a legal estate to support it. In all such cases, to give effect to the limitation over, the contingency *must* happen within the time prescribed by the rule. If it *may* happen after that time, then the preceding estate tends to a perpetuity which the law abhors and forbids. The object of the rule is to prevent the tying up of property, real or personal, and rendering it inalienable longer than the period designated by it. For that time the power over the inheritance or absolute interest of property may be suspended, but no longer." [71]

---

[69] 26 Md. 119 (1866).
[70] *Ibid.* 171.
[71] *Ibid.*

The principle announced by this case is fully sustained by other cases in Maryland and other jurisdictions.[72] The Supreme Court of the United States has clearly recognized the rule against indestructibility of trusts and declared that:

> "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; that the lives must be selected by the testator in his will; that they must be ascertained lives, *i. e.*, lives that can be distinguished. . . ." [73]

And again it has been said that:

> "It is the time of vesting of the estate, and not its duration after it has vested, that is to be considered upon the question as to whether the limitation upon which it depends is in conflict with the rule. But vested trusts of unlimited duration, requiring the application of funds to continuing uses, and involving the performance of active fiduciary duties to that end, beyond the period prescribed by the rule, have likewise been held to be perpetuities and consequently void." [74]

There are cases holding contrary to this position; that is to say, language has been used that would indicate that a trust need not be limited in duration. Probably the cases that are cited most on this point are *Loomer v. Loomer* [75] and *In re Johnston's Estate.*[76] In these cases the courts' failure to recognize the existence of a distinct rule against indestructibility of trusts was due, in large part, to their inability to see through the inaccurate phraseology used in cases typified by *Barnum v. Barnum,*[77] where the court in fact applied this rule, but designated it by using broadly the phrase "rule against perpetuities".

It is to be regretted that such an eminent authority as Professor Gray fell into the error of subscribing to the untenable doc-

[72] American Colonization Soc. v. Soulsby, 129 Md. 605, 99 Atl. 944 (1917); Siedler v. Syms, *supra* note 68; Detweiller v. Hartman, 37 N. J. Eq. 347 (1883); Otterback v. Bohrer, 87 Va. 548, 12 S. E. 1013 (1891).

[73] Fitchie v. Brown, *supra* note 9, at 329, 29 Sup. Ct. at 108.

[74] Ortman v. Dugan, 130 Md. 121, 124, 100 Atl. 82, 83 (1917); Turner v. Safe Deposit & Trust Co., 148 Md. 371, 128 Atl. 294 (1925).

[75] 76 Conn. 522, 57 Atl. 167 (1904).

[76] 185 Pa. 179, 39 Atl. 879 (1898).

[77] *Supra* note 69.

trine that a private trust might be created to last forever. We find Professor Gray saying:

> "If land is devised to A, in trust for B and his heirs, the Rule against Perpetuities has no application. . . . The trust is perfectly good. B's equitable fee is no more objectionable because it may last forever than is a devise of a legal fee simple; that, too, may last forever. B may at once demand from the trustee a conveyance of the legal fee. An equitable fee cannot be made inalienable." [78]

Of course, Professor Gray in that statement is assuming that the doctrine of *Claflin v. Claflin* and *Shelton v. King* has no application, whereas today the weight of authority supports *Claflin v. Claflin* and *Shelton v. King.*[79] We would hesitate to take the position that a trust cannot be rendered indestructible for a time longer than that limited by the rule against remoteness, but for the fact that we find eminent authority aligned with our view.

Mr. Kales has said:

> "At the outset of this discussion it must be conceded that the duration of the postponement must be limited in time. The allowance of postponements calculated to make trusts indestructible forever, or for a great length of time, is not to be sustained under any consideration. Fortunately for the argument, the length of time that a postponed enjoyment may last, assuming it to be valid, has been settled by the English cases themselves. In England the restraint upon alienation of an absolute equitable interest has been permitted only when imposed for the benefit of married women, and to be effective during coverture.
>
> "With regard to such a restraint upon alienation, it has now become the settled rule of the English cases that it is wholly void if it may possibly last longer than a life in being and twenty-one years. Nothing ought to be more certain than that the postponed enjoyment clause, valid under the doctrine of *Claflin v. Claflin,* must be subject to the same qualification. It is, therefore, wholly void if it may possibly continue longer than a life in being and twenty-one years. It should be observed, however, *that the above qualification is not an applica-*

[78] GRAY, *op. cit. supra* note 4, § 236.

[79] BOGERT, *op. cit. supra* note 60, at 579, 580, 581.

tion of the Rule against Perpetuities so long as it is assumed that the cestui has a present absolute interest subject only to the postponed enjoyment, no future interest is involved. There can, therefore, be no question of the application of the Rule against Perpetuities. The rule governing the creation of postponements is a separate one which limits the time during which a trust may be rendered indestructible." [80]

Mr. Kales has correctly stated the rule against indestructibility of trusts in the section quoted above. It seems that Professor Gray was very much alarmed at the doctrine announced in *Claflin v. Claflin* and *Shelton v. King* and other similar cases. He called it a local doctrine confined to Massachusetts and Illinois.[81] If we keep in mind the distinctions between the four separate rules, and particularly note the rule against the indestructibility of trusts, there will be no difficulty in accepting the doctrine of these cases. In *Claflin v. Claflin* the will provided that when the beneficiary arrived at the age of twenty-one years he was to receive ten thousand dollars, at the age of twenty-five ten thousand dollars more, and the balance when he was thirty years of age, the last payment of course including the accumulations. The situation in *Shelton v. King* was practically the same. Then how could these cases conflict with any of the rules announced herein? Manifestly they do not. It does not contravene the rule against remoteness. That rule applies only to contingent interests, and prohibits the postponement of the vesting of the interest for a time longer than prescribed by the rule. The courts held that the interests in the case of *Shelton v. King* and *Claflin v. Claflin* were vested, and in *Shelton v. King* it was explicitly stated that the rule against remoteness was not involved. The courts held that the interests of the beneficiaries in each of these cases were alienable, so that there was no conflict with the rule against restraints on alienation, but even if it be conceded that the power of alienation may be restrained, these cases do not violate that rule. Here the alienation would not be restrained even for a life, because the interests were to come into enjoyment before the termination of the lives of the

[80] KALES, *op. cit. supra* note 2, § 737. Italics are the author's.
[81] GRAY, *op. cit. supra* note 4, §§ 121C, 121D, 121E, 121F, 121H.

beneficiaries, parts of the principal being turned over to them upon reaching specified ages. If the life ended before arriving at such age, then the interest became alienable at once for the reason that the trust would automatically terminate. The heirs of the beneficiaries of the interests would inherit, and would be entitled to the possession thereof, as we shall attempt to show hereinafter. These cases did not provide for an accumulation beyond a life in being, and therefore did not offend the rule prohibiting the accumulations of rents and profits. What we have said about the termination of the trusts on the death of the beneficiaries in discussing the rule against restraints on alienation applies with equal force here. The accumulations could not possibly continue longer than a part of a life in being, *i. e.,* up to the time the beneficiaries arrived at the specified age, if the *cestui que trust* lived to reach such an age. If the beneficiaries' lives terminated before reaching that age, then the law would stop the accumulations and the heirs would inherit both legal and equitable title to the interest. These cases are thus in harmony with the rule against indestructibility of trusts, for under that rule a trust may be created to last for the same period of time as allowed by the rule against remoteness for the vesting of an interest. What we have said in discussing the application to these cases of the rules against restraints on alienation and against accumulations of rents and profits, applies again here. It is clear that if the beneficiaries died before the times at which they were to come into possession of the property under the will, the purposes for which the trusts were created would thereby become impossible of performance, and the trusts would terminate in accordance with the rule by which a trust will be executed when its purpose becomes impossible.[82] The principal object of the trusts in *Claflin v. Claflin* and *Shelton v. King* was to accumulate, and deliver to the *cestuis que trustent,* the corpus together with the accumulations, if any, upon their arriving at the stated ages. Therefore, death before that time would render the object of the trust impossible of accomplishment and would thereby terminate the trusts.

[82] Stark v. Conde, 100 Wis. 633, 76 N. W. 600 (1898); Wilce v. Van Anden, 248 Ill. 358, 94 N. E. 42 (1911).

If the existence of the rule against indestructibility of trusts be denied, what is the situation? Then all the rules discussed herein would be of no avail, and the labors of the judges who have through the centuries shaped, declared and upheld the rule against remoteness, or the rule against accumulations, or the rule against restraints on alienation, would go for naught. The Thellusons who desire to prevent their immediate descendants from enjoying the property left by them could easily accomplish their object. They could create a trust, being careful to vest the interest, and thus escape the application of the rule against remoteness; they could avoid imposing any restraint on alienation, and thus not offend that rule; and they could carefully avoid accumulations, and thereby not contravene the rule in regard to them. Thus the trust would go on forever unless the rule against indestructibility of trusts were brought into play. We submit that the creation of perpetually indestructible trusts is contrary to the policy and all the traditions of our law.