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## TRUSTS-RULE AGAINST PERPETUITIES-TETAMENTARY TRUST FOR MAINTENANCE OF TESTATRIX' HOME AS DEPOSITORY FOR ASHES OF TESTATRIX AND DAUGHTER

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TRUSTS—RULE AGAINST PERPETUITIES—TESTAMENTARY TRUST FOR MAINTENANCE OF TESTATRIX' HOME AS DEPOSITORY FOR ASHES OF TESTATRIX AND DAUGHTER—Testatrix provided that her body should be cremated, the ashes mixed with the ashes of her deceased daughter, and both placed in a designated room on the second floor of testatrix' home. The executors were directed not to sell the home but to use rentals from the first floor to maintain it, such rentals to be obtained from any member of the Socialist Party whom the executors should find proper and able to pay the rental. *Held*, the attempted disposition was invalid as a violation of the rule against restraints on alienation.<sup>1</sup> *Alexander v. House*, (Conn. 1947) 54 A. (2d) 510.

<sup>1</sup> It is probable that this statement was intended to mean that a private trust may not be rendered indestructible for longer than lives in being and twenty-one

The validity of honorary trusts, as such, has been questioned by secondary authorities;<sup>2</sup> but many have been sustained by the cases<sup>3</sup> despite the general rule that a valid trust must have a definite beneficiary.<sup>4</sup> Such trusts are, however, subject to two important limitations: they must not be capricious,<sup>5</sup> and they must not last too long.<sup>6</sup> The court in the principal case does not consider the first of these,<sup>7</sup> but rests its decision on the second. Where the honorary purpose has been denominated a charitable one by statute,<sup>8</sup> the problem of duration does not arise. Such a statute was present in the principal case,<sup>9</sup> but the court reasonably concluded that the present trust could not be brought within the scope of the most applicable provision, "for the preservation, care, and maintenance of any cemetery, cemetery lot, or of the monuments thereon." Nor did the court consider the provision for rental to a member of the Socialist Party to be one for the relief of the needy or for any other charitable purpose. The party was not intended to be a beneficiary,<sup>10</sup> but merely designated the class from which the executors were to select a tenant. The honorary trust is indestructible in the sense that no living person has the power to dispose of the property as he wishes,<sup>11</sup> thereby raising a problem of duration similar to that of the indestructible private trust recognized in this country<sup>12</sup> but not in England.<sup>13</sup> The cases generally do not state the exact legal theory on which they arrive at the conclusion that an honorary trust is invalid because it may last too long, confining their conclusions to "void as a perpetuity" and similar expressions.<sup>14</sup> It has been ably argued that the rule against perpetuities is

years, rather than that the rule generally termed the rule against restraints on alienation is being applied. See previous opinions of the same justice in *Colonial Trust Co. v. Brown*, 105 Conn. 261, 135 A. 555 (1926); *Russell v. Russell*, 109 Conn. 187, 145 A. 648 (1929).

<sup>2</sup> The objection is that there is no competent beneficiary to enforce the trust. *Gray*, "Gifts for a Non-Charitable Purpose," 15 HARV. L. REV. 509 (1902); 1 BOGERT, TRUSTS AND TRUSTEES, § 166 (1935); Sweet, "Restraints on Alienation," 33 L. Q. REV. 342 (1917).

<sup>3</sup> For collection of authorities see SCOTT, CASES ON TRUSTS 281, note 1 (1919); 4 A.L.R. 1124 (1919); 14 Ann. Cas. 1025 (1909); 15 Ann. Cas. 606 (1910). Also see Ames, "Failure of the Tilden Trust," 5 HARV. L. REV. 389 (1892).

<sup>4</sup> *Morice v. Bishop of Durham*, 10 Ves. 522, 32 Eng. Rep. 947 (1805).

<sup>5</sup> *Brown v. Burdett*, 21 Ch. D. 667 (1882); *Kelly v. Nichols*, 17 R.I. 306, 21 A. 906 (1891); 1 TRUSTS RESTATEMENT, § 124 (1935).

<sup>6</sup> 1 TRUSTS RESTATEMENT, § 124 (1935); 1 SCOTT, TRUSTS, § 124.1 (1939). Cases pertaining to perpetual maintenance of burial lots are collected in 4 A.L.R. 1124 (1919), 14 A.L.R. 118 (1921).

<sup>7</sup> It is suggested that the case could have been decided on this ground alone. See cases cited note 5, supra.

<sup>8</sup> 2 SIMES, FUTURE INTERESTS, § 555 (1936) and statutes cited note 7, supra.

<sup>9</sup> Conn. Gen. Stat. (1930) § 5000.

<sup>10</sup> An "incidental" beneficiary cannot enforce the trust. 1 SCOTT, TRUSTS, § 126 (1939); 1 TRUSTS RESTATEMENT, § 126 (1935).

<sup>11</sup> 2 SIMES, FUTURE INTERESTS, § 555 (1936).

<sup>12</sup> *Claffin v. Claffin*, 149 Mass. 19, 20 N.E. 454 (1889).

<sup>13</sup> *Saunders v. Vautier*, 4 Beav. 115, 49 Eng. Rep. 282 (1841).

<sup>14</sup> *Detwiller v. Hartman*, 37 N.J. Eq. 347 (1883); *Hoare v. Osborne*, L. R. 1 Eq. 585 (1866).

applicable;<sup>15</sup> and, on the other hand, that a special rule analogous to the rule against perpetuities must be applied.<sup>16</sup> It has also been held that honorary trusts violate the rule against direct restraints on alienation;<sup>17</sup> but that rule generally renders an absolute restraint wholly void even though limited in time,<sup>18</sup> whereas the cases indicate that an honorary trust limited to lives in being and twenty-one years will be sustained.<sup>19</sup> Whether or not the proper terminology was employed, a weighing of the purpose of the trust against the policy of free alienation<sup>20</sup> indicates that the result of the principal case is correct.

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<sup>15</sup> Smith, "Honorary Trusts and the Rule against Perpetuities," 30 COL. L. REV. 60 (1930); 2 SIMES, FUTURE INTERESTS, § 555 (1936).

<sup>16</sup> KALES, ESTATES AND FUTURE INTERESTS, 2d ed., § 658 (1920); 2 TIFFANY, REAL PROPERTY, 3d ed., § 408 (1920); Clark, "Unenforceable Trusts and Perpetuities," 10 MICH. L. REV. 31 (1912).

<sup>17</sup> Hampton v. Dill, 354 Ill. 415, 188 N.E. 419 (1933). That the rule against restraints on alienation is not applicable to the usual honorary trust, see Smith, "Honorary Trusts and Restraints on Alienation," 16 TEX. L. REV. 149 (1938).

<sup>18</sup> Schnebly, "Restraints Upon the Alienation of Legal Interests," 44 YALE L. J. 961, 1186, 1380 (1935) and cases cited at 974; 67 A.L.R. 1319 (1930).

<sup>19</sup> Angus v. Noble, 73 Conn. 56, 46 A. 278 (1900); Leonard v. Haworth, 171 Mass. 496, 51 N.E. 7 (1898); Lloyd v. Lloyd, 2 Sim. (N.S.) 255, 61 Eng. Rep. 338 (1852); In re Dean, 41 Ch. D. 552 (1889); Matter of Kelly, [1932] 1 Ir. R. 255.

<sup>20</sup> Manning, "The Development of Restraints on Alienation Since Gray," 48 HARV. L. REV. 373 (1935). It should be noted, however, that the effect of the perpetual honorary trust has been accomplished by a gift to charity on express condition that the honorary purpose be carried out, if not carried out then over to a second charity. In re Tyler, [1891] 3 Ch. 252.