The Duration and Indestructibility of Private Trusts

George Downing

Follow this and additional works at: https://scholarlycommons.law.case.edu/caselrev

Part of the Law Commons

Recommended Citation
George Downing, The Duration and Indestructibility of Private Trusts, 16 W. Res. L. Rev. 350 (1965)
Available at: https://scholarlycommons.law.case.edu/caselrev/vol16/iss2/13
The Duration and Indestructibility of Private Trusts

George Downing

To a lawyer thumbing through random court opinions and legal treatises in search of the rules governing trust duration and indestructibility, the law in this area must appear hopelessly out of focus. Consider, for example, the bewilderment of the researcher who had happened across the following statements on trust duration:

Private trusts which concern individuals are limited in their duration. They can endure only for a life in being and twenty-one years in addition.¹

A trust is not invalid, either in whole or in part, merely because the duration of the trust may exceed the period of the rule against perpetuities. ²

The utmost extent of a trust at common law is limited by lives in being at its creation and for twenty-one years thereafter.³

---

1. 1 PERRY, TRUSTS & TRUSTEES § 23 (3d ed. 1882). This statement was given without citation of authority. In later editions of the treatise, the following qualifying phrase was added: "It must be kept in mind, however, that this rule against perpetuities only applies to cases in which the power of alienation is suspended, and that the creation of a trust does not necessarily result in such suspension, for the trustee may have the right to alienate." 1 PERRY, TRUSTS & TRUSTEES § 23 (7th ed. 1929). This latter phrase suggests that the author regarded the Rule Against Perpetuities as controlling on the duration issue, a view which has been rejected by most writers since the common-law rule has become established as a rule against remoteness in vesting. See the discussion at note 41 infra. In states which have adopted the New York statutory perpetuities system, a system based on the undue suspension of the power to convey a fee, Perry's view may still have some force. See note 10 infra, and 1A BOGERT, TRUSTS & TRUSTEES § 219 (2d ed. 1951).

2. RESTATEMENT (SECOND), TRUSTS § 62, comment n (1959).

3. Fitchie v. Brown, 211 U.S. 321, 329 (1908) This famous case, in which Professor John Chipman Gray, the perpetuities expert, appeared as counsel for the appellees, involved the validity of a will provision calling for the creation of a trust which was to last "for as long a period as is legally possible, the termination or ending of such trust to take place when law requires it." The Court held the trust valid on the ground that certain named parties were intended to be the lives in being, although this had not been spelled out by the testator, and that the trust, therefore, would automatically end within the permissible period. The case has been criticized for its use of the language quoted in the text, the contention being that Justice Peckham had misconceived the role of the Rule Against Perpetuities. Cleary, Indestructible Testamentary Trusts, 43 YALE L.J. 393, 399 (1934) But this criticism is not altogether justified, since at the time of this decision it was orthodox thinking that the Rule Against Perpetuities, at least in its broader sense, did in fact limit the duration of trusts. See, e.g., 1 PERRY, op. cit. supra note 1. Although the quoted statement from Fitchie v. Brown supra is usually referred to as dictum, it would appear to rise somewhat above that level since the necessity of a limitation upon trust duration is implicit in the Court's handling of the vague will provisions. See, e.g., Fitchie v. Brown, supra at 333; see also the discussion of this case in Comment, 34 Mich. L. Rev. 553, 556 n.17 (1936).
There is no objection upon principle to a trust which lasts longer than the period of perpetuities.\(^4\) A trust for private purposes must terminate within a life or lives in being and twenty-one years.\(^5\)

[A trust with all interests vested may lawfully] continue beyond the period [allowed by the rule against perpetuities].\(^6\)

A private trust cannot be created to continue for a period greater than that established in the rule against perpetuities.\(^7\)

There is no rule, in the absence of statute, which limits the life of a trust to any specific number of years.\(^8\)

What accounts for the outright contradiction in these and many other statements that have been made on the subject of trust duration, and why, if there is no objection upon principle to a trust which lasts longer than the period of perpetuities, have so many writers and courts thought otherwise? In a general sense, these are the questions which are to be considered in this article.\(^9\)

---

5. Mercer v. Mercer, 230 N.C. 101, 103, 52 S.E.2d 229, 230 (1949), quoting from American Trust Co. v. Williamson, 228 N.C. 458, 463, 46 S.E.2d 104, 108 (1948). In the later case of McQueen v. Branch Banking & Trust Co., 254 N.C. 737, 68 S.E.2d 831 (1952), it was argued on the authority of Mercer v. Mercer, supra, that a certain postponement of enjoyment was void, for the reason that if given its intended effect the trust involved would by possibility endure beyond the permissible period of lives in being and twenty-one years. Without specifically overruling Mercer, the court held both the trust and the postponement of enjoyment valid on the ground that there was no violation of the Rule Against Perpetuities, all interests having vested within the required period. The court said that Mercer was beclouded by a vesting issue and that the case was not therefore controlling. This decision virtually overrules the quoted statement from the Mercer opinion. For strong criticism of the Mercer case, see Payne, The Rule Against Perpetuities and Its Application to a Private Trust, 1 Clev-Mar. L. Rev. 59 (1952); Recent Decision, 48 Mich. L. Rev. 235 (1949).
6. 1 Scott, Trusts § 62.10, at 543 (2d ed. 1956).
7. 53 Ohio Jur. 2d Trusts § 72 (1962). But see 42 Ohio Jur. 2d Perpetuities § 44 (1960), where it is more accurately said that "The operation of the common-law rule against perpetuities is confined to invalidating interests which vest too remotely. It is not concerned with the duration of interests or with their termination. Accordingly, the rule does not, in itself, limit the time for which trusts may endure." The latter reference goes on to say that the duration of indestructible private trusts may be subject to some limitation.
8. 2 Tiffany, Real Property § 408 (3d ed. 1939)
9. Other comment on the issues of trust duration and indestructibility may be found in the following sources:
   Treatises: Leach & Tudor, The Common Law Rule Against Perpetuities, in 6 American Law of Property § 24.67 (1952); Restatement, Property § 381 (1944); Restatement (Second), Trusts § 62 (1959); 1A Bogert, Trusts & Trustees § 218 (2d ed. 1951); Bogert, Trusts § 52 (3d ed. 1952); Carey & Schuyler, Illinois Law of Future Interests §§ 478-80 (1941); 70 C.J.S. Perpetuities § 27 (1951); Fratcher, Perpetuities and Other Restraints 426-28 (1954); Gray, The Rule Against Perpetuities ch. 4 (4th ed. 1942); Kales, Estates, Future Interests & Illegal Conditions & Restraints in Illinois §§ 658-59, 732-59 (1920); Leach, Cases on Wills 230-31 (2d ed. 1951); 5 Powell, Real Property § 772 (1962); Rubenstein, Introduction to Perpetuities ch. 32 (1959); 1 Scott, Trusts § 62.10 (2d ed. 1956); Simes, Future Interests §§ 1391-93 (2d ed. 1956); 2 Tiffany, Real Property § 408 (3d ed. 1939).
I.

THE PROBLEM OF TRUST DURATION

At the outset it should be pointed out that a rule limiting trust duration does not now exist in any jurisdiction which follows the common law Rule Against Perpetuities. Despite the multitude of off-the-cuff dicta, new as well as old, which suggest that such a rule has long existed, there have been only a handful of decisions in which private trusts have actually been invalidated because of their capacity for prolonged duration; and even those few decisions have since been overruled or disapproved by the courts which decided them. The explanation for this

L. REV. 157 (1938); Morray, The Rule Against Prolonged Indestructibility of Private Trusts, 44 ILL. L. REV. 467 (1949); Newman, Perpetuities, Restraints on Alienability, and the Duration of Trusts, 16 VAND. L. REV. 57 (1962); Payne, The Rule Against Perpetuities and Its Application to a Private Trust, 1 CLEV.-MAR. L. REV. (pt. 2) 59 (1962); Scott, Control of Property by the Dead, Part II, 65 U. PA. L. REV. 632 (1917); Note, 7 BAYLOR L. REV. 402 (1955); Note, 41 CALIF. L. REV. 549 (1953); Comment, 18 U. CHI. L. REV. 92 (1950); Note, 23 CORNELL L. Q. 629 (1938); Note, 47 DICK. L. REV. 177 (1943); Comment, 34 MICH. L. REV. 553 (1936), Recent Decision, 48 Mich. L. REV. 235 (1949); Comment, 24 TENN. L. REV. 1021 (1957)

10. See, e.g., 2 TIFFANY, op. cit. supra note 9, § 408; 5 POWELL, op. cit. supra note 9 § 722, and cases cited therein; Cleary, supra note 9, at 398.

In jurisdictions which follow the New York statutory perpetuities system, a system which is based on the principle that the power to convey an estate in fee simple cannot be unduly suspended, certain kinds of long-lasting trusts may be regarded as invalid in whole or in part, especially if the beneficiary's power of alienation is restrained by statute. See generally for a discussion and analysis of the New York system, Newman, supra note 9, at 60-75. See also 1 A BOGERT, op. cit. supra note 9, § 219, and the supplements thereto, for a list of the jurisdictions which have departed from the common-law perpetuities system and which have statutes governing the related problems of duration and indestructibility.

While there have been no recent cases from common-law perpetuities jurisdictions in which long-lasting trusts have been voided as against public policy, there are a number of cases from such jurisdictions in which trusts exceeding the perpetuities period have been sustained. See the cases collected by Cleary, supra note 9, at 398.

11. In addition to the dicta already quoted (see notes 3 and 5 supra), see the numerous dicta cited and quoted in 1 A BOGERT, op. cit. supra note 9, at 410-14, especially notes 54-57 and supplements thereto.

12. See, e.g., McQueen v. Branch Banking & Trust Co., 234 N.C. 737, 68 S.E.2d 831 (1952), impliedly overruling Mercer v. Mercer, 230 N.C. 101, 52 S.E.2d 229 (1949). Both cases are discussed at note 5 supra. See also Pulitzer v. Livingston, 89 Me. 359, 36 Atl. 635 (1896), overruling Slade v. Patten, 68 Me. 380 (1878). In Slade, a gift in trust was made by the testator to his daughters and their respective heirs. No provision having been made for an eventual termination of the trust, the court held that the trust created a "perpetuity" and was void. After Professor Gray had severely attacked the decision on the ground that there was no legal prohibition against the creation of an equitable fee in trust (see notes 18 and 19 supra), the Pulitzer court overruled Slade saying it could not be sustained either upon principle or authority.

An exceptionally interesting case in which a private trust created for successive generations of the settlor's issue was declared invalid ab initio as a "perpetuity" was Barnum v. Barnum, 26 Md. 119 (1866). Although the court in Barnum seems to have been more concerned with the suspension of the power of alienation over the trust property than with excessive trust duration per se, the following language from its opinion is noteworthy:

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 afterwards, during which time the property would be withdrawn from the market, or the power over
lack of direct authority for a rule limiting trust duration and for the many recent statements that there is no need for such a rule can be found in the analysis which the modern property and trust law experts have made of the related problems of trust duration and indestructibility.13

The Modern Analysis of the Duration Problem

The kind of prolonged duration with which this discussion is concerned arises when a private trust in favor of named beneficiaries is created in such a way that it may endure for a longer period than lives in being and twenty-one years, even though the interests of all beneficiaries must vest within that permissible period.14 This situation frequently occurs where a postponement has been imposed upon the last taker's enjoyment of principal, as for example in the case of a testamentary trust created in favor of A, a bachelor, for life, and then in favor of A's first born son in fee, with a direction to withhold principal from the son until he attains the age of forty-five, income to be paid him in the meantime. With this kind of trust limitation it is clear that there can be no problem of remote vesting, since the interest of A's son will necessarily vest during a life in being.15 At the same time, however, it is also

the fee suspended, it is a perpetuity and void as against the policy of the law, which will not permit property to be inalienable for a longer period. Id. at 169-70. This decision was followed for a time by the Maryland courts, but ultimately was disapproved, though not expressly overruled, in the case of Gambrill v. Gambrill, 122 Md. 563, 89 Atl. 1094 (1914). For a discussion of the Maryland decisions see Gray, The Rule Against Perpetuities § 245.2 (4th ed. 1942).

13. Representative commentary on these subjects may be found in Restatement (Second), Trusts § 62, comments n and o (1959); 5 Powell, op. cit. supra note 9, § 772; Cleary, supra note 9; Morray, supra note 9. Other authorities dealing with these related problems are listed at note 9 supra.

14. This article will deal only with the duration and indestructibility of private trusts having named beneficiaries. Charitable trusts, which for policy reasons are permitted to endure forever, and private trusts of a unique nature, such as "honorary" trusts, trusts for unincorporated associations, "business" trusts and employees' trusts, all lie outside of the scope of the present discussion.

Since the Rule Against Perpetuities is concerned only with the vesting of remote future interests, and not with the duration or indestructibility of trusts, the perpetuities period is used in the text illustration only for the sake of convenience. Actually, any rule which might be fashioned to meet the problems of duration or indestructibility could in theory adopt as a measuring period some period other than lives in being and twenty-one years, though it is likely that any such rule would follow the perpetuities period. See discussion at pp. 370-71 and pp. 375-76 infra.

15. It should be pointed out, in connection with limitations of this kind, that the Rule Against Perpetuities does indirectly limit trust duration by virtue of the fact that it limits the number of successive interests which may be created in a particular estate. Thus, in a trust limitation in favor of A, a bachelor, for life, then to A's children for their lives, then to A's grandchildren for their lives, remainder over in fee to B, the life interests created in favor of the grandchildren will be invalidated by the Rule Against Perpetuities and the trust term will be shortened to that extent. In such a case, it is the fact that the trust may endure for the life of A and then for the lives of his children, whose interest will vest within the permissible period, that the trust may come under attack because of its capacity for prolonged duration. For a general discussion of the role played by the Rule Against Perpetuities in indirectly limiting trust duration see Newman, supra note 9, at 72-74.
clear that if the postponement of the son's enjoyment is given its intended effect, the trust itself may by possibility endure beyond the perpetuities period — for a possible maximum period of a life in being and forty-five years.

In situations of this kind, it has come to be the almost universal view of the trust and property law experts that there is no need for a rule which would invalidate the trust ab initio simply because of its capacity for long duration.\(^{16}\) In the opinion of these writers, it is of absolutely no social or legal consequence how long private trusts last; they may go on forever — or at least anything short of forever\(^{17}\) — so long as the interests of the beneficiaries are not otherwise fettered. Trust duration itself is an entirely neutral phenomenon to these writers, and it is only when some direct or indirect restraint is imposed upon the beneficiary's interest that the law need take stock of the situation to determine whether any public policies have been violated. The legal conceit usually employed to illustrate or justify this view is the capacity for long life that inheres in legal fees. These writers argue that if a legal fee can in theory go on "forever" if that is what successive generations desire, there is no reason why an equitable fee should not be allowed to go forever if that is what successive generations of beneficiaries desire.\(^{18}\) As stated by Professor Gray: "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."\(^{19}\)

But while these writers may regard duration itself as an irrelevancy, they do concede that interests held in trust may be subjected to direct or indirect restraints of a kind which cannot be easily imposed on legal interests. Spendthrift provisions and postponements of enjoyments may be

---

16. In addition to the authorities cited at notes 2, 4, 6 & 8 supra, see also 5 Powell, op. cit. supra note 9, § 772; 2 Tiffany, op. cit. supra note 9, § 408; Cleary, supra note 9; Murray, supra note 9; RESTATEMENT (SECOND) TRUSTS § 62, comments m, o (1959). Of all of the authorities cited at note 9 supra, only two or three of the cited authors have suggested that prolonged duration, as distinguished from prolonged indestructibility, may be legally objectionable. See Metz, supra note 9, at 161; Comment, 18 U. CHI. L. REV. 92 (1952); see also Walsh, Indestructible Trusts & Perpetuities in New York, 43 YALE L.J. 1211, 1230 (1934).

17. Although it has been said by some authors that private trusts may go on forever in the absence of restraints on termination (see, e.g., Gray's statement on the validity of an equitable fee in trust at note 19 infra), it has also been said that there are rules, independent of the Rule Against Perpetuities, prohibiting the creation of a trust for an indefinite succession of lives or for an estate of inheritance. See, e.g., Newman, supra note 9, at 71 wherein it is stated that "the duration of a trust is nevertheless limited by the rule that there can be no trust of an estate of inheritance, that is to say, of a fee, or for an indefinite succession of lives." On the latter "rules," however, see contra Gray, op. cit. supra note 9, §§ 191-99.

18. See, e.g., the language quoted in the text accompanying note 23 infra.

taken as examples of such direct restraints;\textsuperscript{20} reduced marketability of equitable interests as an example of indirect, trust-imposed restraints.\textsuperscript{21} However, in the opinion of these writers, all of these restraints on the interests of trust beneficiaries, whatever form they may take, can be kept within socially acceptable limits by giving the beneficiaries the power to "destroy" their trusts, \textit{i.e.}, to compel their termination, after the perpetuities period of lives in being and twenty-one years has run its course.\textsuperscript{22} Thus, in the example which has already been posed of a trust to \(A\), a bachelor, for life, then to \(A\)'s first born son in fee, with directions to withhold principal until the son reaches forty-five, most of the property and trust law experts would concur that the direct restraints imposed by postponement of the son's enjoyment can be kept within permissible limits by giving the son the right to compel termination of the trust twenty-one years after the death of \(A\), his father. If the son chooses not to exercise that power of termination and the trust continues for the maximum period envisioned by the testator, that is of no legal or social significance.

The philosophy which underlies this modern approach to the related problems of trust duration and indestructibility is aptly summarized by one writer in the following language:

\begin{quote}
It should be noted that there is no limit to the length of time a trust may endure. Any rule that exists is against prolonged indestructibility and not against prolonged duration. Thus, if \(A\) by will leaves real estate to \(B\) in trust to pay the income to \(C\) and his heirs, the trust will continue for as long as \(C\) and his heirs forbear to compel termination. This may be a period exceeding lives in being and twenty-one years. The trust is, nevertheless, perfectly good. Similarly, if \(A\) leaves property in trust for \(B\), a bachelor, for life, then for the first-born son of \(B\) for life, remainder to the \(X\) corporation in fee, the trusts may, and probably will, continue throughout the life of \(B\) and the life of \(B\)'s first-born son, who was not alive at the creation of the trust. The trust is, nevertheless, valid. As soon as \(B\)'s first son is born and becomes sui juris, the three beneficiaries can join to compel the termination of the trust. Or two of them can convey their interests to a third, who can then compel termination. Or all three can convey to a stranger who can then compel termination.
\end{quote}

\textsuperscript{20} For a discussion of the validity of long-lasting spendthrift provisions directed at a beneficiary's interest in trust principal on income, see GRISWOLD, SPENDTHRIFT TRUSTS §§ 290-96 (2d ed. 1947); RESTATEMENT (SECOND), TRUSTS § 62, comment \(p\), § 153 (1959).

\textsuperscript{21} See language quoted in the text at notes 56 and 57 \textit{infra}. One writer has described an "indirect" restraint in this way:

\begin{quote}
An indirect restraint arises when an attempt is made to accomplish some purpose other than the restraint of alienability and the incidental result of the accomplishment of that purpose would be that the instrument would restrain \textit{practical} alienability. Such restraints are called indirect because nothing is said in the creating instrument about restricting alienability and the creator of the instrument did not have the restraint of alienability as his primary object. \textit{Metz, supra} note 9, at 159. (Emphasis added.)
\end{quote}

\textsuperscript{22} For a discussion of this "modern" point of view, see, in addition to the language quoted in the text accompanying note 23 \textit{infra}, Cleary, \textit{supra} note 9, at 395-403; RESTATEMENT (SECOND), TRUSTS § 62, comments \(n\), \(o\) (1959).
The crucial quality of indestructibility thus will end within the lifetime of B plus twenty-one years. Actual duration of the trust is immaterial.

This important distinction between indestructibility and potential duration is precisely analogous to the distinction between inalienability and long-term retention of title. The law forbids restraints on alienation. It does not compel periodic alienation. Property must be alienable though it need not be aliened. Similarly, trusts may have to be destructible though they certainly need not be destroyed.23

Weaknesses in the Modern Approach to Trust Duration and Indestructibility

If one can accede to the social policy premise on which this modern approach to trust duration is constructed, and can put out of mind the numerous practical problems which beset its implementation in actual cases,24 the logic and “doric simplicity” of the approach have an immediate appeal. Once it is assumed, as these writers have apparently assumed, that the ancient common law policies favoring the free circulation and maximum utilization of property are concerned only with unfettering the interests of individual property owners — of making those individuals the “masters” of their property — it can hardly be gainsaid that a rule empowering trust beneficiaries to terminate their trusts after the perpetuities period has elapsed, accomplishes all that the law requires. A trust beneficiary whose interest has been restrained by a postponement of enjoyment can hardly be heard to complain of that restraint if he has the legal power to terminate his trust and render the postponement ineffective. By the same token, a trust beneficiary who complains that his equitable interest will not command the same price on the market as its legal and “undivided” equivalent25 is not deserving of much sympathy if he has the power to merge the legal and equitable titles in his interest by compelling a termination of the trust. Such restraints, so far as the beneficiary himself is concerned, are not restraints at all if he has the power to rid himself of them. Under such circumstances, and taking the narrow view of public policy which has just been stated, the writers referred to seem quite correct in saying that the law should not be required to go the final step and automatically terminate trusts after lives in being and twenty-one years; it should be enough if the law provides individual beneficiaries with the means of accomplishing that result by their own action.

But all of this discussion, in this writer’s opinion, assumes too much.

23. Morray, supra note 9, at 470.
24. See the discussion at pp. 379-83 infra. Chief among the practical difficulties which beset the use of a rule against prolonged indestructibility is an independent rule of trust law which requires all beneficiaries to join in any petition for termination of a trust. See authorities cited at notes 112-14 infra. Armed with this rule, one writer has provided a sort of “short course” for trust draftsmen on how to make trusts indestructible even in the face of a rule prohibiting prolonged indestructibility. See Cleary, supra note 9, at 403-12.
25. See the language quoted in the text at note 56 infra.
Is it really fair to conclude, as the modern writers have in effect con-
cluded, that the common law policies favoring the free circulation and
maximum utilization of property are concerned only with unfettering indi-
vidual property interests? Or do those policies cut deeper, and concern
themselves in a larger and more fundamental sense with the interests
which society itself has in the free circulation and maximum utilization
of property? And if these policies are concerned primarily or funda-
mentally with the interests and needs of society itself—we using rules that
unfetter individual interests only as a means for achieving a greater end—
can it be said with conviction that granting individuals the power to
unfetter their own interests will perforce and in all cases satisfy society's
interest in the free circulation and maximum utilization of property?
These are the difficult policy questions which the modern writers and
courts seem too often to have glossed over in analyzing the related prob-
lems of trust duration and indestructibility.

The Policy Underpinnings of the Rule Against Perpetuities

It might be said with some justification that any question which asks
whether the public policies favoring the free circulation and maximum
utilization of property are concerned with the interests of society or with
the interests of the individual should be dismissed as so much rhetoric.
Obviously any "public policy" is concerned with the interests of the in-
dividual as well as with the interests of society as a whole. Nonetheless,
the question seems a valid one, for if nothing else it brings to mind the
immutable system of priorities which has always governed the adoption
of rules regulating property interests in our society. Stated briefly, that
system is that the interests and needs of society as a whole must be served
first, and that the interests of the individual members of society must be
compromised and subordinated where that is essential to the achievement
of some greater social end.

Although many rules of property law bear testimony to this system of
priorities, nowhere is this balancing of private and public interests more
clearly illustrated than in the rules which have been devised to regulate
the human predilection for imposing long-lasting controls on the use and
devolution of property. The earliest annals of the common law have re-

26. See the discussion of the Rule Against Perpetuities' evolution at pp. 358-60 infra, and
the discussion of the American Law Institute's evaluation of the rules social and economic
functions at pp. 361-63 infra. See also 4 RESTATEMENT, PROPERTY, Introductory Note
2129-33 (1944); Metz, supra note 9, at 159.
27. Rules pertaining to the condemnation of private property by public authorities, to the
regulation of "public" nuisances on private property, and to the use of private property in a
way that does not impinge upon the civil rights of other individuals, are just random ex-
amples of the many rules regulating the use of private property which the courts and legis-
latures have devised to meet what they have considered to be the pressing needs of the com-
munity or society as a whole.
corded the incredible lengths to which men of means have gone to memorialize themselves in long-lasting property settlements; and the same annals have recorded the hostility which the courts have from earliest times shown toward these efforts to tie up property for generations — a hostility bred not only from a desire to unfetter the property interests of individuals, but also from a desire to secure the competitive and progressive basis of society itself. At the beginning the efforts of property owners to restrict the use and devolution of property took the form of direct and naked restraints on alienation, as, for example, in the case of conditions calling for the immediate forfeiture of estates in fee tail upon the then owner’s attempt to bar the entail. Direct restraints of this kind, “clauses of perpetuities” as they were called, were soon invalidated outright by the common law courts on the ground that they did “befight against God” and pretended “to such a stability in human affairs as the nature of them admit not of.” But to take the place of these invalid direct restraints, property owners and their conveyances then began to fashion more subtle and ingenious devices for fettering the interests of future takers. One such device, a device which came into common currency

28. A concise history of these efforts is given in an introductory note on the Rule Against Perpetuities in 4 RESTATEMENT, PROPERTY, Introductory Note 2123-29 (1944). See also GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY (2d ed. 1895); 1 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW § 29-49 (2d ed. 1911).

29. It is generally agreed that “a strong bias in favor of alienation” has existed at common law since about the 13th Century. 2 POLLOCK & MAITLAND, op. cit. supra note 28, at 18-19. Paean to this “bias” have been sung by many legal historians, and it is universally acknowledged to be one of the singular glories of the common law. The most scholarly accounts of the development of this bias and its effect on the formulation of rules restricting direct and indirect restraints on alienation are to be found in GRAY, op. cit. supra note 28; GRAY, THE RULE AGAINST PERPETUITIES §§ 123-71 (4th ed. 1942); see also 4 RESTATEMENT, op. cit. supra note 28, at 2123-33.

For a discussion of the economic and psychological motives which cause men to impose dead hand restraints, and of society’s objectives in policing such restraints, see MCDOWALL & HABER, PROPERTY, WEALTH, LAND 246-49 (1948). See also SCOTT, Control of Property by the Dead, 65 U. PA. L. REV. 527, 632 (1917).

30. 4 RESTATEMENT, op. cit. supra note 28, at 2124.


32. This remark is attributed to Lord Edgerton, who is said to have used it in a perpetuities case decided at the Trinity Term of 1599. CARY, CASES IN CHANCERY 11 (1820).

33. Lord Chancellor Nottingham in the Duke of Norfolk’s case, 3 Ch. Cas. 1, 31, 22 Eng. Rep. 931, 949 (1683). It was not until this famous case that the judicial philosophy regarding property fettering received any degree of articulation. Before this time the “bias” in favor of free alienation was expressed more in conduct than in words. See 2 POLLOCK & MAITLAND, op. cit. supra note 28, at 18-19; GRAY, op. cit. supra note 28, § 21.

On the judicial invalidation of conditions of forfeiture, GRAY remarks: “But in 33 Ass. pl. 11 (1559), Green, J. said that a condition not to alien upon a feoffment in fee was void and in 21 Hen. VI. 33, pl. 21 (1443), Paston and Yelverton, JJ., agreed that such a condition was bad.” Id. at § 19. There is a technical distinction between a clause calling for forfeiture upon alienation and a direct restraint upon alienation, but the distinction is not a material one. Both are considered in the broad sense to be subject to the “rule against direct restraints on alienation.”
after the famous case of *Pells v. Browne*\(^4\) held future interests to be indestructible, was the remotely vesting future interest. Strictly speaking, interests of this kind imposed no direct restraints on the alienation of property since the estates to which they attached could be freely conveyed by their present owners.\(^6\) Nevertheless, the courts came to realize that these remotely vesting future interests could accomplish quite as much mischief in an indirect or practical way as the conditions of forfeiture and other restraints of old had accomplished in a direct way. Thus, while the courts could appreciate the present owner’s theoretical freedom of alienation, they were also practical enough to realize that these remotely vesting future interests could lessen the value of the present taker’s estate and indirectly inhibit its alienation by virtue of the fact that few purchasers would be willing to pay roundly for an estate that would come to an abrupt end at some indeterminate future date.\(^8\) The courts also realized that the present owner of an estate would not be inclined to invest heavily in the improvement of his estate, i.e., put it to its maximum use, if those improvements would pass as a windfall to some future taker.\(^7\)

The eventual result of these judicial misgivings over the harmful effects which remotely vesting future interests could have upon the free circulation and maximum utilization of property was the adoption of a rule invalidating any future interests which could by possibility vest at some “inconvenient” time in the future.\(^8\) Use of this test of “inconvenience” represented a sort of compromise by the courts — a compromise giving recognition not only to the fact that remotely vesting future interests only indirectly restrain alienation, but also to the fact that the

---


35. Gray was emphatic on this point: “a future interest is not a restraint on the alienation of an estate unless the contingency upon which the future interest depends is itself the alienation of the estate. The owner of an estate subject to a future interest can grant all that he has got, and the grantee has everything that the grantor would have had if the transfer had not been made.” **GRAY, op. cit. supra** note 28, § 8. See also **GRAY, op. cit. supra** note 29, § 2.


37. See authorities cited note 36 supra, especially 2 TIFFANY, *op. cit. supra* note 9, § 392.

38. The courts adopted as their method [of dealing with remotely vesting future interests] the customary procedure of the common law, namely, the decision of successive specific controversies as they arose, with a consequent ultimate establishment of a line separating limitations deserving the label “convenient” from limitations deserving the label “inconvenient.” 4 RESTATEMENT, *op. cit. supra* note 28, at 2128. The process by which remotely-vesting future interests were invalidated became recognizable at the time of the *Duke of Norfolk’s Case* in 1685. For a detailed history of the Rule Against Perpetuities’ development, see **GRAY, op. cit. supra** note 29, §§ 123-71.
interests which society has in stimulating the acquisition of wealth by giving those who acquire it some measure of control over its disposition must be balanced against the countervailing interests which society has in keeping property responsive to the needs of its present owners.\textsuperscript{39} With the passage of time this initial test of "inconvenience" was supplanted by the more rigid and mechanical test of lives in being and twenty-one years\textsuperscript{40} (though the same factors of compromise continued to support the new perpetuities test), and finally, toward the end of the last century, under the determined guidance of Professor Gray, the Rule Against Perpetuities took its final form as a rule prohibiting remoteness in vesting, as distinguished from a rule prohibiting undue suspension of the power of alienation.\textsuperscript{41} Since that time it has been familiarly known in all jurisdictions following the common law perpetuities system\textsuperscript{42} by Gray’s classic shorthand statement: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the time of the creation of the interest."\textsuperscript{43}

\begin{itemize}
  \item \textsuperscript{39} See, e.g., MORRIS & LEACH, op. cit. supra note 31, at 17; SIMES, op. cit. supra note 36, at 58; 4 RESTATMENT, op. cit. supra note 28, at 2129-33.
  \item \textsuperscript{40} The evolution of the "perpetuities period" is summarized in 4 RESTATMENT, op. cit. supra note 28, at § 374, comment a, and examined in detail in GRAY, op. cit. supra note 29, ch. 5.
  \item \textsuperscript{41} The exact nature of the Rule Against Perpetuities was at one time the subject of considerable controversy among the property law experts. The question argued was whether the rule looks solely to remoteness in vesting or whether it looks as well to the undue suspension of the absolute power to convey a fee simple. Those who favored the latter interpretation argued that the rule holds no objection to unvested interests as such, but only to those which might unduly suspend the power of alienation. Those who followed Gray in favoring a remoteness of vesting interpretation were not much concerned with the suspension of the power of alienation and argued that the rule invalidates all remotely vesting future interests, regardless of their effect upon the power to convey a fee. These opposing views were finally reconciled by Dean Fraser in his celebrated article: The Rationale of the Rule Against Perpetuities, 6 MINN. L. REV. 560 (1922). Dean Fraser concluded that the Rule Against Perpetuities is fundamentally and ultimately a rule which seeks to ensure the alienability of property, and that therefore the operation of the rule must depend upon the practical effect which any particular limitation may have upon the alienability of property. He found that both views were substantially correct and that while the cases talked of the suspension of the power of alienation the form of the rule was directed toward vesting. Fraser’s one finding which has significance for this discussion on trust duration was that, contrary to the orthodox theories relied on by the "suspension" advocates, the rule may be violated even though there are persons having the power through concerted action to convey a fee simple absolute in property. Thus he attributed to the practical nature of the rule, which he said looks not so much at the "theoretical possibility of a joint conveyance as at the practical improbability of it." Fraser, supra at 573. This principle will be of importance in a later context of this discussion. See discussion at pp. 379-83 infra.
  \item \textsuperscript{42} As indicated in note 10 supra, a number of jurisdictions have statutory perpetuities rules patterned after the early New York "suspension of alienation" perpetuities system. See generally 1A BOGERT, op. cit. supra note 9, § 219. Most jurisdictions, however, have retained either by statute or judicial decision the common-law remoteness of vesting rule that reached its final culmination with the publication of Gray’s famous treatise on the rule.
  \item \textsuperscript{43} GRAY, op. cit. supra note 29, § 201.
\end{itemize}
The Social and Economic Functions Served by the Rule Against Perpetuities

This thumbnail sketch of the Rule Against Perpetuities' evolution has been included in the present discussion for three reasons: first, because it calls to mind the ancient common law policies favoring the free circulation and maximum utilization of property which underlie the problems of trust duration as well as trust indestructibility; second, because it illustrates the eminently practical approach which has been taken by the common law in meeting problems of property fettering; and third, because it illustrates the way in which the courts have compromised and subordinated the rights of individual property owners in order to secure what they have regarded as the more important interests and needs of society as a whole.

Turning to the last of these reasons, it might be said that the Rule Against Perpetuities, and all of the other rules which have been designed to limit property fettering, have only been concerned with balancing the interests of respective classes of individuals — in the case of the Rule Against Perpetuities, the interests that present and future owners may have in a particular quantum of property — and that if the interests of society have benefited in the bargain, that benefit has been only accidental, not intentional. In a narrow sense this kind of observation has some truth to it, for of course it is a fact that the Rule Against Perpetuities has been used and will continue to be used as a means for balancing the interests of individual members of society. Yet, looking to the way in which the Rule Against Perpetuities was developed by the courts, and to the social and economic functions which it is still said to serve, it seems a distortion of history to say that the rule has not been fundamentally concerned with protecting society's own interest in the free circulation and maximum utilization of property. Consider, for example, the social and economic functions which the authors of the Restatement of Property have said are served by the rule: First, it has been said that the rule, by limiting the rights of present owners to curtail the use of property by future owners "embodies one of the compromises prerequisite to the maintenance of a going society controlled primarily by its living members." This compromise is regarded as a social necessity because "only by means of substantial restrictions upon the actions of [both present and future owners can] maximum liberty for all" be achieved. Second, it has been said that the rule "contributes to the

44. See in this regard the remarks of Dean Fraser, quoted in note 41 supra. See also Metz, supra note 9, at 159.
45. 4 RESTATEMENT, op. cit. supra note 28, at 2129-33.
46. Id. at 2129-30.
47. Id. at 2129.
probable utilization of the wealth of society,” as well as to the free circulation of that wealth, both by prohibiting those kinds of future interests which make sales of property either impossible or improbable, and by eliminating a fear in present owners that their investments and improvements will inure to the benefit of future takers. 48 Third, it has been said that the rule is necessary for the preservation of the competitive basis of society, since “limitations unalterably effective over a long period of time would hamper the normal operation of the competitive struggle. Persons less keen in the social struggle might be thereby enabled to retain property disproportionate to their skills in the competitive struggle.” 49 And, finally, it has been said that the rule “aids in the keeping of property responsive to the meeting of the exigencies of its current owners.” 50 This it accomplishes by restricting those kinds of successive interests which tend “to lessen the sum realizable upon a sale of the separated interests” 51 and by limiting the time during which a given quantum of wealth can be committed, as it may be committed under a trust, “to the satisfaction of specific and stated ends.” 52 In these latter applications, as the Restatement significantly observes, the rule is not being used to prevent “lessened freedom of alienation,” rather, in these applications “its function has broadened to include the prevention of limitations which ‘freeze’ or ‘tie-up’ or ‘fetter’ property for too long a time, even though no specific thing has been made inalienable, even for a moment.” 53

Viewed against these great social purposes, it is the writer’s opinion that the public policies which support the Rule Against Perpetuities and provide the essential framework for a discussion of trust duration and indestructibility must be regarded as being primarily concerned with society’s interest in promoting the free circulation and maximum utilization of property, and only secondarily concerned with unfettering the interests of individual property owners as a means for achieving those more fundamental ends. It is also the writer’s opinion that, given this view of the objectives of public policy, a rule of trust law which serves only to unfetter the interests of individual beneficiaries and which fails to meet the needs of society itself, is inadequate and unacceptable.

If one shares these opinions, it then becomes necessary to consider whether there is anything in the nature of long-lasting private trusts which may offend the interests which society itself has in the free circu-

48. Id. at 2130-31.
49. Id. at 2132.
50. Id. at 2131.
51. Ibid.
52. Id. at 2132.
53. Ibid.
lation and maximum utilization of property, and which cannot in all cases be remedied by giving trust beneficiaries the power of termination after the perpetuities period has run its course. This is really the most critical aspect of the whole duration and indestructibility problem, for on it the case for a rule strictly limiting trust duration must either stand or fall.

**The Economic Justification for a Rule Limiting Trust Duration**

In considering the economic reasons which might justify a rule limiting the duration of private trusts, it should be mentioned at the outset that there is a marked divergence of opinion among the property law experts as to whether the use of the trust device can ever defeat the public policies favoring the free circulation and maximum utilization of property where the property held in trust is, as it usually is today, corporate securities or government bonds. Professor Simes has taken the position in arguing that the Rule Against Perpetuities may in some respects be outmoded that the restraints imposed by a trust are wholly illusory where corporate securities are involved:

The subject matter of [a] trust is commonly corporate shares and government or corporate bonds. In the case of corporate shares, the economic value is neither in the interest owned by the beneficiaries of the trust, nor is it in the shares in the hands of the trustee. It is the property of the corporation. Certainly that is freely alienable. Indeed, the corporate directors are under a duty to make a profit for the stockholders, if they are able to do so, which is but another way of saying that they must make the property of the corporation productive.

The same view has been taken, somewhat more equivocally, by the Restatement of Property:

The contribution of the rule against perpetuities to the probable utilization of the wealth of society is greatest when the subject matter is specific land or some tangible thing. As to intangibles this socially desirable consequence of the rule is not so clear, since shares and bonds constitute an important bulk of intangibles, and, as to intangibles of these types, restrictions operative as to the shares or bonds would in no way hamper the utilization of its assets by the issuing corporation.

On the other hand, it has been argued that even where corporate securities are the subject of a trust, and even where the trustee is given the power of sale and substitution, the policies of the law may be defeated because the quantum of wealth represented by those securities is reduced by virtue of the separation of the legal and equitable titles. Thus, in justifying its rule limiting the time during which a private trust may be rendered indestructible, the Restatement says:

---

55. 4 Restatement, op. cit. supra note 28, at 2130-31.
The creation of a trust unavoidably fetters the subject matter of the limitation. Even when the trustee has an unqualified power to dispose of the assets constituting the trust corpus and to reinvest the funds so obtained, the fact remains that the continuance of the trust, as to the substituted assets, fetters the quantum of wealth subjected to the trust. If the interest of the beneficiary of such a trust is alienable, this enables the beneficiary merely to impair the efficacy of the trust as a provision for his needs. The assured continuance of the trust also makes it difficult for such a beneficiary to derive benefit from an exercise of his power of alienation, as few purchasers for such interests are available. Thus the creation of a trust fetters the subject matter of the limitation and this is a potentially inconvenient fettering, in the sense that public policy requires that it be kept within limits.56

And in its apology for the Rule Against Perpetuities’ application to interests created in trust, the Restatement goes on to say that

when assets are transferred to a trustee who is given unqualified power to change the form of the trust res, no inalienability of any specific tangible thing can be said to be caused by the limitation of future interests under or after the trust. Nevertheless, it is well established law that the rule against perpetuities applies not only to limitations made concerning intangibles, such as bonds and shares, but also to limitations of the beneficial interests under a trust where the trustee has unqualified power to change the trust res. Both of these situations have one common factor, namely, that a given quantum of wealth is sought to be committed to the satisfaction of specific and stated ends. Such a commitment, for its duration, lessens the availability of these assets for the meeting of current newly arising exigencies. Law which is animated by the idea that the world and its wealth exist for the living cannot tolerate too long a commitment of this sort. Thus the rule against perpetuities, by regulating the future interests which can be created in these two situations, assists in keeping property reasonably free to answer the exigencies, as they arise, of the possessor and of his family. In these applications of the rule, it no longer is preventing lessened freedom of alienation. Its function has broadened to include the prevention of limitations which ‘freeze’ or ‘tie up’ or ‘fetter’ property for too long a time, even though no specific thing has been made inalienable, even for a moment.57

While the writer would agree with these latter statements that the policies favoring the free circulation and maximum utilization of property can be hampered by use of the trust device, even in those cases where the trust assets are composed of corporate securities or government bonds, it must nevertheless be recognized that the reasons advanced in support of the quoted statements lend nothing of significance to the debate over whether there should be a rule against prolonged trust duration, as distinguished from a rule against prolonged trust indestructibility. When, for example, the Restatement says that the use of the trust device fetters the property interests of the beneficiary because the

56. Id. at § 381, comment a.
57 Id. at 2131-32.
Downing, Private Trusts

separation of the legal and equitable titles makes it more difficult for the beneficiary to dispose of his interest at a fair price, the emphasis is being placed squarely on the trust device’s effect on the beneficiary’s personal interest. Yet, as has already been demonstrated, the beneficiary himself has no reason to complain of prolonged trust duration as long as he is given the power to terminate his trust and merge the legal and equitable titles to his property. If he allows the trust to run its course despite his power to compel termination, he has only himself to blame for any continued fettering of his interests. This fact makes it plain that if any justification is to be found for a rule limiting the duration of a trust settled in corporate securities, that justification cannot be found in the effects which use of the trust device may have upon the beneficiaries’ interests; it must instead be found, if at all, in the effects which such a trust may have upon the interests which society itself has in the free circulation and maximum utilization of property.

The Investment Conservatism of Corporate Trustees

In the writer’s opinion, a justification for such a rule in terms of society’s interests does in fact exist, and in a word can be traced to the conservative investment control which corporate trustees exercise over the enormous assets which are held today in private trusts. Although this is a subject which has received only scant attention from economists and only passing comment from legal writers, it is nonetheless no secret that with the increasing industrialization of our society and the increasing polarization of wealth in corporate securities, the trust device has become an ever more popular means of disposing of private fortunes, both large and small. Corporate trustees, aided by tax laws which encourage the settlement of long-lasting trusts and by the complexities involved in administering wealth in today’s society, have become the managers of vast wealth, much of it represented by corporate securities. Yet,

58. See discussion at p. 356 supra.
59. Of all the legal literature on the subjects of trust duration and indestructibility, the writer has discovered only one article which discusses in any detail the serious economic consequences which may result from the centralization of vast wealth in long-lasting trusts. In this one article, Comment, 18 U. CHI. L. REV. 92 (1952), the student author collects such economic data and statistics as are available on the subject of conservative trustee control over great wealth and concludes from these data and statistics that use of the trust device must be drastically limited if a viable and progressive economy is to be maintained. Indeed, the author goes so far as to suggest that in order to curtail the “adverse economic effects of a trusteeship,” legislation should be introduced to limit the use of private trusts for the benefit of only three classes of beneficiaries: the elderly, the young, and the incompetent. Id. at 102.
60. The present gift and estate tax structure, by taxing multiple-generation gifts only once, provides a strong financial incentive to the creation of long-lasting trusts. The importance of this factor may be appreciated from the following example:

If A left $5,000,000 to B, who left it to C, who left it to D, who left it to E, assuming that there were no marital deductions involved and that the property
at the same time, it is also no secret that, while the assets under the investment control of these trustees have increased by geometric leaps and bounds, the inhibitions (practical if not legal) against their investment of even a small fraction of those assets in truly speculative ventures have in no way diminished. Nor are they likely ever to diminish, even with the continued liberalization of the rules regulating the investment powers of trustees, since gambling with trust assets and the welfare of trust beneficiaries has always been, and is likely to always remain, contrary to the corporate trustee’s role as protector and preserver of property.61

The inevitable result of all of this is the drying up of the available sources of risk capital. As more and more assets arefunneled into pri-

ced and unreasonable restrictions on trustees — such statistics as are available on the subject bear out the trus-

remain unchanged in value, four estate taxes would be imposed. E would finally inherit $718,721 or less than 15 percent of the original estate. If, on the other hand, B, C, and D had been given successive life estates with a final remainder to E, there would have been only one tax and E would inherit $2,569,600, or over 50 percent of the original estate. Lowndes, Introduction to Tax Planning for Estates, 27 N.C.L. REV. 2, 10 (1948) Although statistics on the amount of wealth held in private trusts are extremely hard to come by, the author of the article cited at note 59 supra, refers to one study which estimated that the total amount of assets held in private trust in 1939 was 50 billion dollars. See TNEC, SAVINGS AND INVESTMENT 3729 (1939), cited in Comment, 18 U. CHI. L. REV. 92, 99, n.28 (1952). The writer has searched without success for a more up-to-date estimate of the amount of assets that are subject to the conservative investment control of trustees; however, any such estimate would necessarily exceed by many billions the 50-billion dollar estimate given for the depression year of 1939.

61. Even with the very considerable liberalization of trustee investment powers in recent decades — a liberalization which has eliminated virtually all of the archaic and unreasonable restrictions on trustees — such statistics as are available on the subject bear out the trus-

improbable that risk capital will be furnished to any great extent by trustees in the future. The equities that they buy will continue to be those of large established enterprises with long records of regular dividend payments. Comment, 18 U. CHI. L. REV., 92, 100 (1952).
vate trusts administered by corporate trustees operating under an essentially conservative investment code, less and less capital is made available for those new and unproved ventures which, if the economists are to be believed, are the *sine qua non* of a progressive and "going" society. Small and fledgling enterprises, lacking the internal resources which large corporations can usually tap for expansion and development, are increasingly at pains to find adequate external sources of risk capital. The consequences of this struggle are a further aggrandizement of "big business" and a further throttling of speculative enterprises — consequences which most economists and social observers would agree are detrimental to our economic and social system.

But even if the existence of this risk capital problem is acknowledged, it might be wondered how a problem of such magnitude could be remedied by any single rule of trust law, let alone a rule which would merely limit the duration of a trust to the very considerable period of lives in being and twenty-one years? The answer to this question, of course, is that a rule against prolonged duration would not entirely remedy the problem, and in the nature of things would probably be limited to a very minor role in any coordinated effort to meet the problem head on.

---

62. See Comment, 18 U. CHI. L. REV. 92, 98 nn.23-25 (1952), and accompanying text.
63. Numerous studies have been made and reports issued on the financing problems of small business. Representative of these are the following: BROWN UNIVERSITY, THE EFFECT OF TIGHT MONEY ON SMALL BUSINESS FINANCING 119-121 (1963); FEDERAL RESERVE SYSTEM, FINANCING SMALL BUSINESS 13, 117, 122 (1958); SMITH, EQUITY AND LOAN CAPITAL FOR NEW AND EXPANDING SMALL BUSINESS 29-30 (1959); WEISSMAN, SMALL BUSINESS AND VENTURE CAPITAL ch. 3 (1945); U.S. SENATE, SPECIAL COMMITTEE TO STUDY PROBLEMS OF AMERICAN SMALL BUSINESS, FUTURE OF INDEPENDENT BUSINESS (1947) [hereinafter cited as U.S. SENATE REPORT]. The latter report concludes as follows:

One of the most serious handicaps confronting small business as it seeks to establish itself firmly and expand as rapidly as possible to ensure success and survival in this competitive society is lack of capital. When small business seeks capital, either as loans for current operations or for equity financing, it is faced with obstacles not encountered by its bigger business rivals. It must usually put up proportionately more security, submit to stiffer business terms, and pay relatively higher interest rates. It consequently starts off in the competitive race with serious handicaps which do not necessarily reflect relative business ability or chances of success under competitive conditions. Such handicaps may well account for failure of many businesses to survive the initial stages of development. *Ibid.*

64. See, e.g., PROXMIRE, CAN SMALL BUSINESS SURVIVE? 26 (1964); U.S. SENATE REPORT, op. cit. supra note 63, at 26; WEISSMAN, op. cit. supra note 63, at ch. 1.
65. As is pointed out at p. 371 infra, there is no magic in lives in being and twenty-one years as a period for limiting trust duration. Viewed from an economic standpoint, the period is no doubt an excessive one, and, were it not for the period's solid entrenchment in the law, the adoption of a much shorter measuring period could easily be justified.
66. Because of the gravity of the financing problems facing small business, the federal government has in the past several decades launched a broad campaign to assist small business in obtaining the necessary capital for development and expansion. See, e.g., FEDERAL RESERVE SYSTEM, op. cit. supra note 63, at 117; U.S. SENATE REPORT, op. cit. supra note 63, at ch. 3. In addition, private groups and institutions have made an all-out effort to sort out the causes for the financing problems of small business, and to propose remedies other than direct government support. See, e.g., BROWN UNIVERSITY, op. cit. supra note 63, at 119-121.
the fact that such a rule would not function as a universal remedy should not deter the courts from giving it careful consideration. Even if a rule limiting duration released to individual control only a small fraction of the total assets held in trust at any given time, that in itself would be of some benefit and would necessarily increase, in some small degree at least, the likelihood of small businesses' finding the risk capital needed to promote speculative ventures. On the other hand, if no action were taken on the duration issue, the problems posed by long-term trustee investment control could only stand to worsen, with a consequent emasculation of the social policies favoring the free circulation and maximum utilization of wealth.

The conclusion which is to be drawn from this discussion on the objectives of social policy and on the economic problems created by conservative trustee investment control over enormous resources is that a rule limiting the duration of private trusts can be legally and socially justified. Such a rule would serve to protect not only the interests of individual trust beneficiaries (except in those cases where the beneficiaries themselves want their interests to remain in trust after the perpetuities period has elapsed), but also the interests which society has in promoting the free circulation and maximum utilization of wealth. As an instrument of social policy, such a rule would serve much the same ends that the Rule Against Perpetuities has served for centuries, and could be explained and justified in much the same terms which the Restatement of Property has used in justifying the continued use of the latter rule:

In another quite different way the rule against perpetuities serves to keep property responsive to the needs of its current owners. When wealth takes the form of bonds or shares issued by a corporation, the assets represented by such bonds or shares are at least potentially productive in the business of the issuing corporation, regardless of how inalienable the bonds or shares may be in the hands of their owners. Similarly, when assets are transferred to a trustee who is given unqualified power to change the form of the trust res, no inalienability of any specific tangible thing can be said to be caused by the limitation of future interests under or after the trust. Nevertheless, it is well established law that the rule against perpetuities applies not only to limita-

op. cit. supra note 63, at 29-30. Obviously, in the wake of all this discussion and broadscale activity, the problems imposed by excessive trust duration shrink in relative importance.

67. On the role of social policy in judicial rule making, Mr. Justice Holmes has said:

The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy, most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis. HOMES, THE COMMON LAW 35 (1881)

68. It is in just such cases that the need for a duration rule is most urgent. See discussion pp. 369-70 and note 71 supra.
tions made concerning intangibles, such as bonds and shares, but also to limitations of the beneficial interests under a trust where the trustee has unqualified power to change the trust res. Both of these situations have one common factor, namely, that a given quantum of wealth is sought to be committed to the satisfaction of specific and stated ends. Such a commitment, for its duration, lessens the availability of these assets for the meeting of current newly arising exigencies. Law which is animated by the idea that the world and its wealth exist for the living cannot tolerate too long a commitment of this sort.69

The Problem of External versus Internal Attack

If one admits to the need for a rule against prolonged duration and finds legal justification for it in the same public policies which continue to support the Rule Against Perpetuities, the next question which must be considered is how such a rule should operate on long-lasting trusts. Should it invalidate such trusts ab initio, thereby subjecting them to immediate “external” attack by those persons who would stand to take if the trusts were held void; or should it permit long-lasting trusts to continue during the permissible period, whatever that might be, and then subject them to “internal” attack by those persons who would be entitled to take the proceeds upon termination?70 At first blush, the second of these alternatives seems by far the more reasonable one, for it would accomplish in large measure the objectives of the settlor. However, on closer examination, when it is seen that subjecting a trust to internal attack after the permissible period has elapsed is no different than giving the beneficiaries a power of termination under a rule against prolonged indestructibility, it becomes evident that a duration rule operating in such a fashion would achieve nothing. It is in just those situations where the trust beneficiaries have the power to terminate but choose not to exercise that power for reasons deemed satisfactory to themselves, that society’s need for a rule strictly limiting duration is most apparent. In fact, it is because society’s interests in the free circulation and maximum utilization of property are too important to be left in the hands of individual beneficiaries for their en-

69. 4 RESTATEMENT, op. cit. supra note 28, at 2131-32. (Emphasis added.)
70. Cleary was the first to employ the phrases “external” attack and “internal” attack in the context of trust duration and indestructibility. Cleary, Indestructible Testamentary Trusts, 43 YALE L.J. 393 (1934) Cleary defines the terms in this way:

Efforts to terminate trusts prior to the time indicated in the trust instrument fall into two classes: “external” attack and “internal” attack. By “external” attack the writer means an effort to destroy the trust in its entirety, i.e., to obtain a judgment holding void the interests of both trustee and beneficiaries. Such an attack is commonly made by the intestate successors or residuary devisees or legatees of the trustor, whose interests are opposed to those of the beneficiaries of the trust. By “internal” attack is meant an effort by the beneficiaries themselves to eliminate the trustee’s interest while maintaining their own beneficial interests and enlarging them into full possession and control of the trust property. Id. at 397.

The Restatement also employs the terms in its discussion of indestructibility. See 4 RESTATEMENT, op. cit. supra note 28, § 381, comment a.
forcement that a rule against prolonged duration is required. If society's interests and objectives could be satisfied by giving individual beneficiaries the power of termination, all that would be necessary to protect both classes of interests would be a rule limiting the time during which private trusts could be made indestructible. It follows, therefore, that any rule limiting trust duration must, to be effective, invalidate at the outset any trust having a capacity for excessive duration. Such a rule, while it might operate harshly on the objectives of the settlor, would at least accomplish its stated social objectives, and would in addition serve as a deterrent to the creation of long-lasting trusts. Furthermore, a rule couched in such terms would fit the pattern which has already been set in cases dealing with the duration of "honorary" trusts and trusts for unincorporated associations.

The Period of the Duration Rule

The other question which must be considered in formulating a rule against prolonged duration is the period which the rule should take. If one wanted to be doctrinaire on the subject, it could be argued that any use of the trust device, for however short a period, hampers society's interest in the circulation and utilization of property, since the quantum of wealth placed in a trust is subjected, even for only a limited time, to the conservative investment control of the trustee. But obviously such an argument could not be given serious consideration since private trusts serve so many useful purposes that their total abolishment would be unthinkable. What is needed, therefore, in adopting a permissible period for a rule on trust duration is the same spirit of compromise that was shown by the courts in fashioning a rule against remotely-vesting future interests, a spirit of compromise which gives recognition to society's in-

71. If it were a demonstrable axiom of human behavior that trust beneficiaries always want to unfetter their own property interests at the earliest possible moment, there would be no need to trouble with the problem of excessive trust duration. Under such circumstances, giving beneficiaries the right to destroy the trusts in which their interests were held would accomplish society's objectives at the same time that it accomplished the personal objectives of the beneficiaries. Unfortunately, however, experience has shown that many trust beneficiaries are quite content to have their interests remain safely in trust (where annoying details of management and administration are handled by a paid trustee), and have not the slightest interest in vindicating any social or economic policies by compelling the termination of their trusts after the perpetuities period has elapsed.

72. Compare the remarks quoted in the text at note 126 infra.

73. See generally 1A BOGERT, op. cit. supra note 9, §§ 415-18; 1 SCOTT, op. cit. supra note 9, § 62.10(e) and cases cited therein; see also authorities cited in notes 98, 100 infra.

74. Interestingly, one writer has suggested that all private trusts, except those settled for the benefit of the elderly, minors, and incompetents, should be abolished because of the injurious effects which trusts have upon the flow of capital in our economy. See Comment, 18 U. Chi. L. REV. 92, 102 (1952) The author recognized that there was little hope that this suggestion would be followed by the legislatures.

75. See discussion pp. 359-60 supra.
terest in preserving the trust device as a means for disposing of private wealth as well as to society's interest in limiting the use of that device for the sake of promoting the free circulation and maximum utilization of property.

If it were not for the incrustations of history, it would be feasible and perhaps desirable to adopt as a measuring period for trust duration some other, and preferably shorter, period than lives in being and twenty-one years. But in view of that period's long-standing service in the rules relating to illegal "perpetuities," it would be unrealistic to think that the courts would accept any other measuring period in fashioning a rule against the prolonged duration of private trusts. So much of history and judicial thinking is tied to the period of lives in being and twenty-one years, and so many of the judicial dicta and text statements on trust duration have assumed that that period regulates the permissible duration of trusts, that little hope could be harbored for adoption of some other, shorter period (except of course by means of legislation) It follows, therefore, that if any sympathy exists for a rule on trust duration — and the many dicta on the subject indicate that such sympathy does exist— that sympathy will find expression in the adoption of a rule that takes the perpetuities period of lives in being and twenty-one years as its measuring period. Here again, such a result would conform to the pattern which has already been established in the judicial invalidation of long-lasting "honorary" trusts and trust for unincorporated associations.

Conclusions on the Duration Issue

From the foregoing discussion on the problem of trust duration, it is plain that this writer regards the adoption of a rule against prolonged duration as a social and economic necessity and feels that legal justification for such a rule can be found in the common law policies which continue to support and justify the Rule Against Perpetuities. But this, it must be emphasized, is a conviction which most of the modern writers have not shared. It is also a conviction on what the law should be and not on what the law actually is today. As has already been pointed out, those older authorities which once took the view that long-lasting private trusts should be invalidated as illegal perpetuities have since been disapproved or repudiated and in their place have arisen authorities which take the view that prolonged indestructibility and not prolonged duration is what the law must regulate. It is to these latter authorities that the discussion of the second section of this article will be directed.

76. See, e.g., the cases and authorities cited at notes 1, 3, 5, 7 supra.
77. See authorities cited at note 73 supra.
78. See note 12 supra and accompanying text.
II.

THE PROBLEM OF TRUST INDESTRUCTIBILITY

The English and American Rules on Trust Termination

Once the view has been taken, as it has been taken by the modern property and trust law experts,\footnote{79. See discussion pp. 353-56 supra.} that trust duration is an irrelevancy and that trust indestructibility is the "evil" which the law must reckon with, the rules of trust law relating to termination by beneficiaries must be examined. In pursuing this topic, the same hypothetical trust limitation used in the previous discussion may be posed, \textit{viz.}, a testamentary trust in favor of \( A \), a bachelor, for life, then in favor of \( A \)'s first born son in fee, with instructions to the trustee to withhold principal from the son until he is forty-five, income to be paid him in the meantime. In such a situation, is the provision for postponement controlling upon the beneficiary or may he, after he becomes \textit{sic juris}, compel the termination of the trust and take his interest free of the restriction?

In England it was established at an early date that a postponement of enjoyment is not controlling on a beneficiary, and that once he is of legal age he may compel the trustee to convey the property to him free of any restrictions. This was the result reached in the leading case of \textit{Saunders v. Vautzer},\footnote{80. 4 Beav. 115, 41 Eng. Rep. 482 (1841)} in which the testator had bequeathed all of his stock in the East India Company to his trustees with the instruction to convey the stock to a certain nephew when he reached the age of twenty-five. The nephew, upon reaching twenty-one, petitioned the Master of the Rolls to order a transfer of the stock to him. This petition was ultimately granted by the Lord Chancellor who said little more than that he was "clearly of the opinion" that the nephew was entitled to the stock, despite the contrary instructions of the testator.\footnote{81. \textit{Id.} at 117, 41 Eng. Rep. at 485. The principal question of the case was whether the gift was vested or contingent. After holding the gift to be vested, the Lord Chancellor then ruled that the son should have an immediate right to the corpus. No authority was cited for the latter holding, a fact which prompted Lord Hershel to comment in \textit{Wharton v. Masterman}, [1895] A.C. 186, 193, that "the point seems, in the first instance, to have been rather assumed than decided."} Later English cases have adhered to this rule but have made no attempt to elaborate on the reasons behind it. Usually they have said only that a postponement of enjoyment is "repugnant to the gift."\footnote{82. The later authorities are collected in \textit{Gray, The Rule Against Perpetuities} § 120 n.2 (4th ed. 1942); \textit{Kales, Estates, Future Interests and Illegal Conditions and Restraints in Illinois} § 734 (1920). Kales gave a well-reasoned discussion of the English doctrine and cases. He differed with Gray in saying that there was no substantial foundation in policy for the rule of \textit{Saunders v. Vautzer}.}
In the United States the opposite rule obtains in a great majority of jurisdictions. This rule owes its existence and name to the famous case of \textit{Claflin v. Claflin},\textsuperscript{83} decided by the Supreme Judicial Court of Massachusetts in 1889. The trust in \textit{Claflin} provided that a gift of personal property which had been made to the testator’s son should be paid out by the trustees in the following manner: $10,000 when the son reached the age of twenty-one, $10,000 when he reached twenty-five, and the balance when he reached thirty. After the son had come of age, he asked, on the basis of the holding in the \textit{Saunders} case, that the whole fund be immediately paid to him. This petition was denied. After distinguishing earlier Massachusetts cases in which the \textit{Saunders} rule had apparently been followed,\textsuperscript{84} the court found that the postponement of enjoyment violated neither public policy nor the nature of the gift. Observing that the “restriction upon the plaintiff’s possession and control [was] . . . one that the testator had a right to make,” the court said that it could find “no good reason why the intention of the testator should not be carried out.”\textsuperscript{85}

The \textit{Claflin} decision experienced an uneven reception. On the one hand, it was greeted with favor by a great majority of the courts\textsuperscript{86} (who, after welcoming the spendthrift trust doctrine, could not easily turn away the holding in \textit{Claflin}\textsuperscript{87}). On the other hand, it was met with chilly disapproval by Gray and some of the other writers\textsuperscript{88} who had been waging a losing battle against spendthrift trusts. The eloquent and impassioned plea which Professor Gray had earlier made for abolition of spendthrift trusts\textsuperscript{89} set the tone for his handling of the \textit{Claflin} decision. He argued

\textsuperscript{83} 149 Mass. 19, 20 N.E. 454 (1889).

\textsuperscript{84} In Sears v. Choate, 146 Mass. 395, 398, 15 N.E. 786, 790 (1888), the court had reiterated the usual formulation of the \textit{Saunders v. Vautier} rule. In the \textit{Sears} case the court could find no good reason for denying termination; in \textit{Claflin} the court could find no good reason for granting it.

\textsuperscript{85} Claflin v. Claflin, 149 Mass. 19, 24, 20 N.E. 454, 456 (1889). Although the Massachusetts court did not decide whether such a postponement would be binding upon a creditor or other party to whom the beneficiary had transferred his interest in the trust, it has since been held that the transferee will be so bound. See, e.g., Ster v. Nashville Trust Co., 158 Fed. 601 (6th Cir. 1908); see also \textit{Restatement (Second), Trusts} § 337, comment k (1959). Any other treatment would render the postponement an empty recitation.

\textsuperscript{86} The \textit{Claflin} doctrine is now firmly established in almost every jurisdiction. 4 (pt. 2) \textit{Bogert, Trusts & Trustees} § 1002 (2d ed. 1948); \textit{Restatement (Second), Trusts} § 337 (2) (1959).

\textsuperscript{87} It is unlikely that the courts gave much thought to the indirect, practical restraints which \textit{Claflin} might impose upon the free circulation of property where it would result in a trust’s enduring beyond the period of lives in being and twenty-one years.

\textsuperscript{88} Professor Scott was one of those writers who deplored both spendthrift trusts and postponements of enjoyment. He remarked that “the purpose of a spendthrift trust is the coddling of a person against himself and as against third persons. The purpose of the postponement of enjoyment is simply the coddling of a person as against himself.” Scott, \textit{Control of Property by the Dead}, Part II, 65 U. Pa. L. Rev. 632, 648 (1917).

\textsuperscript{89} See GRAY, \textit{RESTRAINTS ON THE ALIENATION OF PROPERTY Preface} (2d ed. 1895)
that this decision had introduced a novel idea into the law, that of the inalienability of absolute interests, just as the Court of King's Bench in Pells v. Brown introduced a novel idea into the law, that of the indestructibility of future interests. And as the Rule against Perpetuities had to be invented to control the indestructible future interests created by Pells v. Brown, so some rule must be invented to control the inalienable interests created by Claflin v. Claflin.90

Gray's use of the word "inalienability" to describe the effects of a clause postponing enjoyment is a curious one. In the Claflin case, there had been no restraint on the alienation of the beneficial interest, at least none in the usual sense. Therefore, postponements of enjoyment and the Claflin rule which enforces them have not ordinarily been thought to impose, in their own right, any direct restraint on the alienation of a beneficial interest. But Gray disputed this, claiming that since a postponement of enjoyment "restrains the owner of the absolute property from exercising the right, he would otherwise possess, of transferring the immediate right to the enjoyment [it may] be properly called a restraint on alienation."91 Apart from this question, however, most of the writers have agreed with Gray that some restriction must be imposed upon the operation of the Claflin doctrine.92 Professor Kales was clearly of that opinion, though he differed with Gray by saying that there was nothing inherently objectionable in the Claflin decision. After delivering a long and well-reasoned apology for the decision,93 he concluded by warning that

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. Nothing ought to be more certain than that the postponed enjoyment clause, valid under the doctrine of Claflin v. Claflin must be subject [to time limitations]. It is, therefore, wholly void if it may possibly continue longer than a life in being and twenty-one years.94

Yet, despite this agreement among the writers that there must be some regulation of the indestructibility of private trusts, there has been very little agreement among the writers on the exact form which any rule

90. GRAY, op. cit. supra note 82, § 121.7
91. Id. at § 120 n.1. While there is some technical merit in this observation, it does not seem to have accounted for much so far as the courts or other writers have been concerned. Since direct restraints on alienation of an equitable interest are allowed under the spendthrift trust doctrine, there is no special importance in this added element of restraint.
92. See, e.g., 1 SCOTT, TRUSTS § 62.10 (2d ed. 1956); Cleary, Indestructible Testamentary Trusts, 43 YALE L.J. 393 (1934); Metz, Comment on the Application of the Rule Against Perpetuities to the Duration of Private Trusts in Pennsylvania, 4 U. PITT. L. REV. 159 (1938); Morray, The Rule Against Prolonged Indestructibility of Private Trusts, 44 ILL. L. REV. 467 (1949).
93. KALES, op. cit. supra note 82, § 732-38.
94. Id. § 737
against prolonged indestructibility should take. Certain important features of the proposed rule have not as yet been settled, and involve a consideration of many of the same difficult policy questions which have already been considered in connection with the problem of excessive trust duration.

The Rule Against Prolonged Indestructibility

The Permissible Period

A private trust which has been created in a Claflin jurisdiction and which carries a provision postponing enjoyment, or in some other way restraining termination, is according to present terminology an "indestructible" or "Claflin" trust. Therefore, the problem of indestructibility can be simply stated in these terms: if a trust is rendered indestructible by virtue of the Claflin doctrine, how long can public policy suffer that indestructibility to continue in effect? At the time of Gray's initial comments on the problem, there was little specific authority indicating what limitations of time would be put on indestructibility. Gray thought it likely that the period used by the Rule Against Perpetuities would be adopted by the courts, but said that "it would seem quite open to the courts to adopt some other period, if found more convenient." Although this comment was no doubt intended to underscore his position that the Rule Against Perpetuities itself had nothing to do with the problem of indestructibility, he realized at the same time that there would be little chance of the courts' adopting some other measuring period. As it has happened, Gray's predictions have been borne out: it is now quite clearly settled that any rule which limits the indestructibility of private trusts takes the period of lives in being and twenty-one years as its measuring period. Authority for this position has been found, by analogy, in the English cases holding restraints on alienation of a married woman's estate invalid if designed to endure beyond the perpetuities period, and

---

95. Gray, op. cit. supra note 82, § 121.7. The use of the perpetuities period was advocated at an early date in Clark, Unenforceable Trusts and the Rule Against Perpetuities, 10 Mich. L. Rev. 31, 37-38 (1911).

96. In some early cases it was said that indestructibility could not be prolonged for an "unreasonable" period, with no definite limits set on the term "unreasonable." See, e.g., DeLadson v. Crawford, 93 Conn. 402, 106 Atl. 326 (1919) (dictum); Armstrong v. Barber, 239 Ill. 389, 88 N.E. 246 (1909).

97. See authorities cited in discussion at pp. 384-89 infra, note 92 supra. In considering the period which would be used in any rule against prolonged indestructibility, it should be noted that it has been held that if there is a rule limiting the duration of trusts, the period during which the settlor has the power to revoke and destroy the trust is not counted in determining the validity of the trust. Cook v. Horn, 214 Ga. 289, 104 S.E.2d 461 (1958).

98. These cases are discussed in Gray, op. cit. supra note 89, §§ 272a-f. The most frequently cited case is In re Ridley, 11 Ch. D. 645 (1879).
also in the American and English cases dealing with honorary trusts and trusts for accumulations.  

When the Period Begins to Run

A far more perplexing problem has been that concerning the point of time from which the perpetuities period should begin to run. This problem is a particularly interesting one, for it places in high relief the confusing and often contradictory theories which underlie the modern analysis of the related problems of duration and indestructibility.

Strangely enough, it was Gray, the staunchest opponent of all restraints on alienation and property fettering, who took a position on this question which can lead to the greatest interference with the policies favoring free circulation. It will be recalled that Gray considered the evil consequences of Clift as flowing from the restraints on alienation and postponed enjoyment which that doctrine holds for the beneficiaries. He mentioned nothing of the effect which that doctrine might have upon excessive duration. It was natural, therefore, for Gray to consider the validity of a provision for postponed enjoyment in light of the particular trust interest to which that provision attached. He reasoned that any successive interest in trust could be subjected to the same postponements and restraints as a present interest, so long as that later interest vested within the required period. "The true doctrine," he wrote, is that "a future estate, not in itself too remote, can be subjected to the same restraints to which a present estate can be subjected." Accordingly, he quite strongly urged that any period adopted to limit the indestructibility of a trust should be measured from the time when the particular interest began to run. Thus, in a trust for the benefit of A, a bachelor, for

99. It is quite well settled that "honorary" trusts, i.e., trusts having no named beneficiaries, will not be valid unless they are confined in duration to the perpetuities period. See for a discussion of the duration issue which these "trusts" raise, Morris & Leach, THE RULE AGAINST PERPETUITIES 311-16 (1956); note 73 supra.

100. A direction to accumulate which might take effect for a longer period than lives in being and twenty-one years is invalid, as a general rule. See Gray, op. cit. supra note 82, ch. 20 and cases cited therein.

101. Id. ch. 4.

102. Id. § 437.2. To this contention it has been said: "It is not easy to see any answer to this argument." Sweet, The Monstrous Regiment of the Rule Against Perpetuities, 18 JURID. REV. 132, 143 (1906)

Dean Griswold, speaking particularly of spendthrift provisions rather than postponements of enjoyment, predicted that the American courts would follow Gray's viewpoint, and would reject the English decisions dealing with restraints upon a married woman's estate. Griswold, SPENDTHRIFT TRUSTS § 293 (2d ed. 1947). The one American case in which the issue was specifically decided did in fact adopt Gray's position. Tramell v. Tramell, 162 Tenn. 1, 32 S.W.2d 1025 (1930); see note 155 infra. However, with the increased attention which has been given to the question of trust duration and indestructibility in this country, there is reason to believe that other American courts will accept the English view and measure the perpetuities period from the time when the trust begins to run.

103. Gray, op. cit. supra note 82, § 121.8. Professors Kales and Gray engaged in friendly
life, then for the benefit of A's first born son, with distribution to be postponed until the son reached the age of forty-five, the postponement would be good. The validity of the postponement being measured from the time when the interest began to run, the son would be a life in being and would not, therefore, be deprived of the trust principal for longer than the permissible period.

If one is concerned only with the interests of the beneficiary and not with an independent public policy which disfavors property being held too long in trust, there is considerable logic in Gray's position. Since a present taker must accept with equanimity any restraints which have been imposed upon his equitable interest, a later taker should not be heard to complain if his interest has been subjected to similar restraints. However, if one's chief concern is with the broader objectives of public policy, it is apparent that Gray's position cannot be accepted. Interference with the free circulation and maximum utilization of property cannot be kept within reasonable limits if an interest vesting at the latest possible moment can in turn be subjected to postponements of enjoyment which will endure for another period of lives in being and twenty-one years.\(^{104}\)

It is at just this point that the theories underlying the modern approach to prolonged indestructibility begin to splinter. As previously noted, most of the present-day writers do not regard excessive trust duration as being in itself offensive to public policy, their contention being that only prolonged restraints against termination need be controlled by the law.\(^{105}\) Nevertheless, despite their predilection for viewing the trust duration problem solely from the standpoint of the beneficiary and his

\[^{104}\text{Gray, in the third and fourth editions of his famous work, held to his position. See § 121.8. Nevertheless, showing that he was not without humor, he jauntily remarked in a postscript to one of Kales' articles in the Harvard Law Review that the question was a "troublesome and difficult" one. "I feel no present call to enter upon it. 'Suave, mari magnus turbantibus aequora ventus, E terra magnum alterius spectare laborem.' or, translating rather freely 'Pleasant it is, from the firm land of the common law, to watch the votaries and victims of Claflin tossed among its rocks and quicksands.' " Gray, Note, 19 Harv. L. Rev. 604, 605 (1906). No doubt Gray's reference to the "votaries" of Claflin was given, as to Kales, with a light touch of malice, for Kales had written a strong defense of Claflin. See note 93 supra.}\]

\[^{105}\text{See Kales' argument at note 103 supra.}\]

\[^{106}\text{See discussion pp. 353-56 supra.}\]
interests, these writers have not acknowledged the logic of Gray's position that future estates, so far as their takers are concerned, should be amenable to the same restraints and postponements as present estates. They have continued to assume that public policy is concerned only with the beneficiary's interests and not with the broader interests of society itself, and yet they have failed to answer the arguments set down by Gray on the "time of measurement" issue. They have simply stated, without discussion or argument, that the perpetuities period should begin to run under a rule against prolonged indestructibility from the date when the trust takes effect.

Although this formulation of the rule accomplishes at least one of its essential objectives, it remains inconsistent in theory with the free termination approach to trust regulation which these same writers have endorsed. It represents, in effect, a bastardization of the strict duration and free termination approaches—a sort of amalgam in which the strict duration element and broad public policy basis are officially impugned but tacitly recognized at least in part. Apart from this inconsistency, however, and despite its failure to satisfactorily meet Gray's arguments on the "time of measurement" issue, this formulation of the rule against prolonged indestructibility does at least achieve a certain harmony with the fundamental and generally recognized policy that indirect restraints ought not to be given legal effect for a longer period than lives in being and twenty-one years. And with the decision made that the perpetuities period should begin to run from the time of the trust's taking effect, the modern rule comes more easily within its designation as a "corollary" of the Rule Against Perpetuities.

106. Of all the discussion of this subject, the author has found only one writer who was willing to admit that Gray's view of the "time of measurement" issue was a logical one. In contrasting Kales and Gray's positions, this writer, after endorsing Kales position, admitted that it "perhaps lacks the logical consistency and nicety of Gray's thesis that the period should run 'from the beginning of the interest which is subject to the postponing clause.'" Comment, 34 Mich. L. Rev. 553, 559 (1936). Another writer, taking just the opposite view, said that Kales' position had "more regard for logic." No reasons were given for this point of view. Cleary, supra note 92, at 400.

107. Morray states that Professor Kales' view, cited in note 103 supra, should prevail:

The fettering that is accomplished by the postponement provisions succeeds the fettering accomplished by the creation of the children's contingent interests. The total period of fettering by the settlor, however accomplished, should not be allowed to exceed lives in being plus twenty-one years. The public interest that limits the period of compulsory obedience to settlors should be proof against any multiplicity of devices. Morray, supra note 92, at 474.

108. The rule does in fact remove the indirect restraints on the interests of individual beneficiaries, or gives the beneficiaries the power to remove those restraints by their own action. See discussion at p. 356 supra. It does not, however, assure that the interest of society in the free circulation and utilization of property will be protected against such indirect restraints as trustee investment conservatism.

109. See the remarks of Professor Kales quoted at note 103 supra, and the remarks of Morray quoted at note 107 supra.

110. See note 148 infra.
When a Trust is "Indestructible"

An "indestructible" trust has previously been defined as a trust which has been created in a Claflin jurisdiction and which carries a clause postponing enjoyment or other language sufficient to restrain termination. This definition was given more out of convenience than out of accuracy, for, as will be seen in the following discussion, the question of when a trust is indestructible is a difficult one which has not yet been conclusively resolved by the writers and the courts.

It is frequently said that England has never been troubled with the problem of trust indestructibility because of its acceptance at an early date of a rule permitting the beneficiaries to terminate, against the settlor's wishes, a trust which is then held for them. It is submitted that these statements do not accurately reflect the situation. While it is true that the Saunders rule gives a single beneficiary who is suo jure the power to remove his interest from trust, the rule gives no assurance that every trust will be similarly destructible. Where there are two or more beneficiaries whose interests are subject to a postponement of enjoyment, as in the case of a remainder interest to a class comprised of the life taker's children, it is settled both here and in England that all of the beneficiaries must join in the petition for termination. If one of the beneficiaries refuses to join, termination will be denied as to all. Along with this rule goes the corollary that termination, in the absence of statute, will be denied where all possible beneficiaries are not yet in being or cannot be ascertained as a group.

In view of these independent rules of trust law, the question arises whether a trust should be regarded as "indestructible" if any single beneficiary is unable to compel its termination or withdraw his interest from the trust. In considering this question the following hypothetical case may be used: Suppose a testator provides that certain property is to be held in trust for the benefit of A, a bachelor, for life, then for the benefit of A's children in fee, with instructions to the trustee to withhold distribution of principal until the youngest of A's children reaches the

111. See, e.g., Comment, 24 TENN. L. REV. 1021, 1024 (1957), where it is said that "the problem of prolonged duration of a trust is one of American origin. In common law England there was no occasion for a problem of the type now under consideration to arise [because of the rule in Saunders v. Vautier]." See also 1A BOGERT, op. cit. supra note 86, § 218, at 409 (2d ed. 1951).


113. Harbin v. Masterman, [1896] 1 Ch. 551 (C.A.); see LEWIN, TRUSTS 626 (15th ed. 1950). Recent legislation in England has extended some relief from these rules.

114. See, e.g., Gray v. Union Trust Co., 171 Cal. 637, 154 Pac. 306 (1915); In re Dougan, 139 Ga. 351, 77 S.E. 158 (1913); Damhoff v. Shambaugh, 200 Iowa 1155, 206 N.W. 248 (1925); 4 (pt. 2) BOGERT, op. cit. supra note 86, § 1002, at 498.
age of thirty. Suppose also that A has died leaving four children, M, N, O and P; that P, the youngest, has just reached twenty-one; and that all four of the children wish to terminate the trust. In England, under the holding in the Saunders case, the petition for termination would be granted. In America, under the Claflin doctrine, the petition would be denied. In the latter case, the wishes of the testator would prevail over the wishes of the beneficiaries. But suppose further that the rule against prolonged indestructibility is in force in the particular American jurisdiction involved. Under this rule the postponement clause will be ineffective after a period of lives in being and twenty-one years has elapsed from the time of the testator’s death. Therefore, in the situation posed the four children could join in forcing a termination of the trust. It is because of this power of termination which the rule gives to the beneficiaries that the writers claim that such a rule completely vindicates public policy. But changing the facts again, suppose now that P is the only one of the four children who wishes to terminate the trust. In this case, the stated rule will have no application. P is still confronted with the settled rule, existing quite apart from the rule against prolonged indestructibility, that holds that all beneficiaries must join in a petition for termination. Despite the fact that the permissible period of “indestructibility” has expired, there is no way for P to free his share of principal from the trust.

While it can hardly be said in the latter situation that the rule limiting indestructibility has fulfilled its stated purpose, the writers seem to be indifferent to this problem. If public policy is defeated in such a case, the writers that have considered the problem seem to suggest that this is not so much because of any defect in the rule itself, but rather because of an independent rule of trust law which lies afield of the trust duration and indestructibility issue. Morray, for example, states that the “natural meaning” of an indestructible trust is “a trust the termination of which cannot be compelled by all of the living beneficiaries.” This indifference is unfortunate in view of the devices

---

115. The case of McClary v. McClary, 134 F.2d 455 (10th Cir. 1943), illustrates the situation discussed in the text. In this case the trust was to continue until such time as a majority of the beneficiaries signed a statement of consent to its termination. By its terms the trust might have continued beyond the perpetuities period, and on that basis a single beneficiary sought its termination. The court rejected this bid for termination, but never reached the “all must join for termination” issue because of its holding that the trust did not offend against the “Rule Against Perpetuities.”

116. In extreme and unusual situations, courts sitting in equity may occasionally be prevailed upon to terminate trusts either in whole or in part, or to find some other satisfactory remedy for the party moving for termination. See generally 4 (pt. 2) BOGERT, op. cit. supra note 86 § 1002, at 494.

117 Morray, supra note 92, at 471. Professor Scott seems also to have adopted this attitude. See 1 SCOTT, op. cit. supra note 92 § 62.10, at 547-48. It is now reflected in the formulation of the Rule Against Prolonged Indecomposability. RESTATEMENT (SECOND), TRUSTS § 62, comment o (1959).
which may be used to circumvent the rule and render it impossible for a single beneficiary to free his interest from trust.\textsuperscript{118} For example, simply by making a corporate trustee the beneficiary of a small share of the trust, it may be possible for a trust draftsman to save the trust from internal attack for as long as the settlor or testator chooses. A corporate trustee is in business to serve the interests of its clients, and if made a partial beneficiary in a long-lasting trust arrangement could hardly be expected to disobey the wishes of its client by joining with those beneficiaries who were seeking termination of the trust.

To illustrate this situation, assume the following extreme example: A testator appoints a corporate trustee to act as trustee for a large testamentary trust settled for the benefit of the XYZ Corporation. For some reason known only to himself, the testator does not want the principal of the trust to be distributed until a period of 125 years has elapsed from the time of his death; however, he does specifically intend the corporation to take the income from the trust property during that period. With this in mind the trust draftsman is put to the task of ensuring the continuation of the trust for the desired period. Although he is aware that the Claflin rule is followed in his jurisdiction, the draftsman also realizes that the embryonic rule against prolonged indestructibility may seriously limit the operation of Claflin. Therefore, not wishing to risk the chance that some future court would apply this rule at the insistence of the XYZ Corporation, the draftsman, with approval of both testator and trustee, makes the corporate trustee the beneficiary of a small share of the trust. The trustee is made fully aware of the plan and agrees never to join with the corporation in petitioning for the termination of the trust. The result achieved by this plan, seemingly lawful in all respects, is that the trust will not end until the testator wanted it to end, 125 years from the time of his death. Meanwhile, the XYZ Corporation is deprived of the trust principal, and the policies favoring the free circulation and utilization of property are defeated.

\textit{A Proposed Modification of the Rule Against Prolonged Indestructibility}

Certainly in a case such as that posed above it cannot be said that the proposed rule against indestructibility functions as an effective remedy to property fettering, even under the view that public policy is concerned only with unfettering individual interests. If any praise is there in order, it must go to the trust draftsman not to the rule itself. Bearing in mind this fundamental weakness in the present formulation of the rule, it is the opinion of the writer that one slight but important modifica-

\textsuperscript{118} One writer, indeed, has gone so far as to give trust draftsman a short course on how to avoid and defeat the application of the rule against prolonged indestructibility. See Cleary, \textit{Indestructible Testamentary Trusts}, 43 YALE L.J. 393, 403-12 (1933).
tion should be made to the rule before it achieves a real foothold in the law. Under this modification, a trust would be regarded as "indestructible" when any single beneficiary was unable to compel its termination, and, accordingly, the rule would permit any single beneficiary to take his interest free of trust after the perpetuities period had run its course. The result achieved by such a modification would be that in those cases where some but not all of the beneficiaries wanted termination, those beneficiaries seeking termination would be able to force a conveyance from the trustee of their respective shares of the trust corpus.

Authority for such a modification may be found by analogy in the Rule Against Perpetuities' practical mode of operation. Under that rule the possibility of concerted action is not always enough to satisfy the policy of the rule where, as a practical matter, concerted action is improbable. For example, if land is conveyed to A and his heirs with a proviso that if A's issue ever fails the land shall go to B and his heirs, the executory interest will be declared void, even though, ostensibly, the purpose of the rule is satisfied because of B's present right either to release his interest to A or to join with A in a conveyance of a fee simple to C. Here the possibility of concerted action is not enough to save the otherwise invalid future interest. In such cases the rule does "not look so much at the theoretical possibility of a joint conveyance as to the practical improbability of it." Numerous factors may be present which will rule out the possibility of a joint conveyance: B may be incompetent, or an infant, or just stubborn in his refusal to convey, and thus the power of joint conveyance will accomplish nothing so far as the policy of the law is concerned. Since these same factors and

119. Although there are enough extant decisions and dicta to support a statement that a rule against prolonged indestructibility does "exist" in the law today, that existence is at best a tentative and embryonic one. See discussion at pp. 384-91 infra.

120. These are by no means original suggestions. Kales at an early date took for granted the right of any single beneficiary to free his interest from trust. Kales, op. cit. supra note 82, § 658. Professor Whiteside strongly endorsed this position, saying that "a trust for the benefit of a class would seem to be indestructible as to the share of any cestus que trust without the consent of all the others. The result is that for all practical purposes an indestructible trust is created, which would seem to be objectionable, where the duration of the trust is not limited to some reasonable period." Whiteside, Restrictions on the Duration of Business Trusts, 9 CORNELL L.Q. 422, 430 (1924) (Emphasis added.); see also Note, Duration of Indestructible and Spendthrift Trusts, 23 CORNELL L.Q. 629, 633 (1938).

121. See Gray, op. cit. supra note 82, § 269, at 299 and cases cited therein.

122. Fraser, The Rationale of the Rule against Perpetuities, 6 MINN. L. REV. 560, 573 (1922).

123. An English judge stated the proposition in this way:

If the owner in fee of an estate, or the absolute owner of any property could be fettered from disposing of it by a springing use or executory devise or future contingent interest which might not arise till after the period allowed by the rule, it would be easy to tie up property for a very long time indeed. The present interest under the executory limitations might be vested in an infant, a lunatic, or in a person who would refuse to release it, and thus the estate would be practically in-
same improbability may be present when a trust settled for several beneficiaries has endured beyond the permissible period, it is submitted that a rule designed to limit indestructibility cannot rely on the possibility that the trust will be ended by virtue of the concerted action of all the beneficiaries. The approach of "practicality" lying at the core of the Rule Against Perpetuities ought also to lie at the core of any rule against prolonged indestructibility — which all of the writers concede to be a corollary of the earlier rule. The fact that a settled rule of trust law would require modification should not give reason for hesitation. The Claflin rule is also a settled rule of trust law, yet that has not prevented the formulation of a rule limiting indestructibility.

**The Effect of the Rule Against Prolonged Indestructibility**

There is still another point of controversy which has attended the "drafting" of the rule against prolonged indestructibility. That point concerns the effect which is to be given a clause which attempts to restrain termination for a period longer than lives in being and twenty-one years. Should such a clause be declared void *ab initio*, thereby giving the beneficiary the right to terminate the trust at any time even though the perpetuities period has not elapsed, or should the clause be allowed to stand until the permissible period has run its course? On this question, as on most of the others in the duration area, the courts and the writers are in conflict. By numerical tabulation it would appear that most of the courts and writers have accepted the former view. The decisions have clearly shown that bent,* as has much of the scholarly commentary. Kales it will be remembered joined Gray in this view; he said that a clause calling for too long a period of indestructibility should be "wholly void." And Morray, a more recent observer, endorsed this view by stating that "to provide an effective sanction against attempting prolonged indestructibility, the provision should be held entirely nugatory if it exceeds the legal limit." While this position has much to commend it, recent developments seem to foreshadow a wider acceptance of the second, or "lopping-off," view. The Restatement (Second), Trusts, for example, has specifically adopted the latter view, adding its own minor qualification:

A provision, express or implied, in the terms of the trust that the trust shall not be terminated is effective where the trust is limited in duration to lives in being and twenty-one years. Where, how-

---

124. See cases discussed at pp. 386-88 supra.
125. See KALES, op. cit. supra note 93, § 737
126. Morray, supra note 92, at 476.
ever, the trust is to continue beyond that period, such a provision is ineffective so far as it is applicable beyond the period, and is wholly ineffective unless it is severable.127

Because of the general uncertainty which exists in the area of trust duration and indestructibility, future courts may be inclined to adopt with relief this clear-cut statement of the "lopping-off" view. On the other hand, it is possible that future courts will choose to follow what may be loosely referred to as the "weight of authority" and declare such restraints void ab initio.

Present Status of the Law Regarding Indestructibility

Few positive statements can be made in assessing existing law on the subject of trust indestructibility. The confusing legal metaphysics which have beset the rule's formulation have accounted for as disorderly an array of decisions and dicta as may be found in any area of the law. Totally irreconcilable statements have been issued on the subject by different courts and even by the same court;128 and rules espoused by a court in one case have sometimes been abjured by it in the next129 — often without comment or explanation. Moreover, those decisions which have attempted to deal directly with the problem of indestructibility have been so differently interpreted by the experts in the field that it is difficult to determine for just what principle of law they stand.

Despite all of this confusion, however, it can be safely said that a substantial number of reported dicta stand for the proposition that the indestructibility of private trusts cannot be prolonged for a period in excess of lives in being and twenty-one years. The following are representative:

[B]ut where such a restraint [against termination] is held permissible for a limited time, it would be deemed unreasonable, and contrary to the policy of the law, to allow it to continue beyond the period fixed by the rule against perpetuities.130

[W]e are under the impression that in order to prevent an express active trust from being at once subject to internal attack, it should by either clear implication or express provision be limited in point of time so as to comply with the rule against perpetuities 131

Professor Bogert has written that dicta of this character outnumber those which suggest that there is no limitation upon the indestructibility of a

128. See the discussion of the various Maryland, North Carolina, and Pennsylvania cases at notes 5, 12 supra, and note 152 infra.
129. See, e.g., the vacillation and uncertainty which has characterized the recent North Carolina Supreme Court decisions, discussed at note 5 supra.
131. Harshbarger v. Harrison, 124 W Va. 688, 696, 22 S.E.2d 303, 307 (1942) Many other dicta of similar nature may be found among the reported decisions. A number of them are collected in 1A BOGERT, op. cit. supra note 86, § 218, at 413 n.57.
private trust. 132 Whether this statement accurately reflects the present trend of recent decisions is almost impossible to determine. 133 A mathematical tabulation of the holdings and dicta which have been reported in the current digests might at first seem to require a different conclusion, for nearly all of these recite that there is no limit to which a vested interest may be postponed. However, from a closer reading of these recent cases it appears that in very few was the core issue of prolonged indestructibility actually considered by the courts. In most of them the courts have simply held that the Rule Against Perpetuities, confined as it is to the vesting of estates, cannot be invoked to invalidate a clause unduly postponing the enjoyment of a vested estate; the question of whether a corollary to that rule may limit the indestructibility imposed by long-lasting postponements was not reached by the courts. 134 Only in a few isolated cases does it appear that any real argument against prolonged indestructibility was advanced by the litigants on the basis of the public policies favoring the free circulation and maximum utilization of property. An indication of this can be found in the recent case of Black v. Gettys, 135 where the court, after holding that a postponement of enjoyment did not come within the purview of the Rule Against Perpetuities, raised on its own motion the issue of prolonged indestructibility — only to let it fall to rest again because the issue had not been argued by the parties. The court stated:

[T]his interesting question [of prolonged indestructibility] need not now be decided and we intimate no opinion thereabout. No attack is made on the duration of the trust as violative of public policy. Here appellants have invoked only the common-law rule against perpetuities. 136

The approach in the Black case seems typical of that followed by most courts. Although there are a few cases in which it has been held or said that the Rule Against Perpetuities will of itself invalidate an undue postponement of enjoyment relating to a vested interest, 137 most courts have

133. The many situations in which the questions of indestructibility can arise has led to a far-flung scattering of the cases under various topic headings in the current digests. For those interested in pursuing the matter, the following subdivisions of the "Perpetuities" section in the American Digest System are suggested: 4(12), 4(15), 4(16), 6(1), 6(2), 6(4), 6(7) and 6(10).
136. Id. at 177, 119 S.E.2d at 664.
137. See, e.g., In re Shallcross's Estate, 200 Pa. 122, 125, 49 Atl. 936, 937 (1901), where it was said: "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 of perpetuities." The North Carolina court deciding Mercer v. Mercer, 230 N.C. 101, 52 S.E.2d 229 (1949) (note
continued to abide by the orthodox view that the rule is concerned only with the vesting of future interests. For this reason it is difficult to predict what the attitude of the courts will be once the rule against prolonged indestructibility achieves wider currency and is effectively employed by counsel in the argument of cases.

The Decisions on Indestructibility

Turning to the decisions which have been said to deal directly with the question of indestructibility, there is further evidence of the general confusion in the court opinions and scholarly commentary on the proper application and operation of the rule against prolonged indestructibility. The case of Pennsylvania Co. for Ins. on Lives v. Price, is a typical example. That case was decided in 1870, nineteen years before the Claflin decision. Nevertheless, it is universally cited as authority for the proposition that indestructibility may not be unduly postponed by a testator. This is somewhat mystifying when it is remembered that the whole problem of trust indestructibility has always been thought to have originated with Claflin. Putting that problem aside, however, the case does have considerable importance for any discussion on prolonged indestructibility. In Price a father conveyed certain real property to a trustee by inter vivos deed, with instructions to hold the property in trust for the testator's eight children. According to the deed, the children were to take vested interests in fee, with distribution of their respective shares of the principal to be made when each of them came of age. However, a proviso was attached to this gift authorizing the trustee to withhold distribution of the principal if in his discretion he deemed it prudent to do so. It was provided that if distribution were withheld by the trustee, he was to hold the particular beneficiary's share of the property in trust, paying over to the beneficiary only the income derived from his share. No provision was made for the eventual termination of any such trust. The result of this limitation was that each child received a share in the equitable fee, subject to the discretionary power of the trustee to forever withhold the principal. This, in effect, amounted to a postponement of enjoyment of indefinite duration, and in the court's opinion constituted "an attempt to tack to the fee a condition inconsistent with its proper enjoyment."

5 supra) also claimed that the trust in question was violative of the "Rule Against Perpetuities" because of its capacity for excessive duration.

138. A great number of these cases are digested in 25 SITH DEC. DIG. Perpetuities § 4(12) (1958)

139. 7 Phila. 465 (Pa. C.P. 1870)

140. See, e.g., Cleary, supra note 92, at 402; Comment, 24 TENN. L. REV. 1021, 1026 (1957).

Viewed under these facts, it would seem that the case should have fallen squarely within the rule of *Saunders v. Vauter* But the court, without commenting on that rule, went on to decide the issue of prolonged postponement. It found that the power of the trustee and his successors in office to forever withhold the principal from the beneficiary was in "direct conflict with the policy of the law which abhors a perpetuity," and held, that the postponement, not the trust itself, was therefore "null and void." Significantly, however, the court added that if the trustees "had been required to exercise within a reasonable time, that is, within the common law period, the discretion with which they are by the terms of the deed clothed, the present [petition] would be without merit." This dictum suggests that the court was adopting a *Claflin* type rule on indestructibility, qualified by restrictions similar to those imposed by the "modern" rule against prolonged indestructibility — a remarkably advanced approach for that stage of the law’s development.

Another case which is cited as authority for the rule against prolonged indestructibility is *Van Epps v. Arbuckle.* There the trustees were to collect the rents from certain real property held in trust and apply them to encumbrances on that land and on certain other lands which were owned by a party other than the trustor. Once those encumbrances had been satisfied the trustees were to distribute the trust property to the beneficiaries named in the will, unless in the trustees’ discretion they deemed it expedient to postpone distribution until some later date. No limit was placed upon the duration of these possible postponements. From these provisions it appeared that the testator had intended to vest in the beneficiaries an equitable remainder in fee, subject only to the above mentioned trust provisions. To this extent the situation presented was not unlike that found in the *Price* case, that is to say, an absolute gift made subject to a postponement on the beneficiaries’ enjoyment which might by possibility go on indefinitely. In *Van Epps*, however, there was the additional problem created by the clause calling for payment of the encumbrances on the land. This clause appears to have contributed importantly to the court’s decision to invalidate the discretionary postponement power of the trustees. Evidence was introduced by the beneficiaries, all of whom had joined in seeking termination, that at the present rate of income the specified encumbrances could not be satisfied for 275 years. The court would not countenance this amount of delay, and,

144. *Id.* at 469.
145. 332 Ill. 551, 164 N.E. 1 (1928).
in upholding the lower court’s termination of the trust, gave the following indication of its position:

The trust was of unlimited duration. The distribution was postponed to such time as the trustees in their discretion might deem best or expedient. It seems clear that the devise to the trustees to distribute being without limitation as to time is void. It deprived the devisees of the use of the remainder or the power to sell it to advantage until the indebtedness mentioned was paid. The devisees had a right to have the unlawful trust terminated, and its termination did not affect the valid portions of the will.  

Here again the provision allowing for an unlimited postponement of enjoyment resulted in no postponement at all.

It appears that the Pennsylvania courts have been the most active in dealing with the problem of indestructibility In addition to Price, there have been two recent decisions specifically holding that undue postponements of enjoyment are repugnant to public policy The first of these, Howard’s Estate, might be styled the “leading decision” under the rule against prolonged indestructibility Although the opinion is brief, it deals squarely with the issues raised by an undue postponement of enjoyment. The testamentary trust in that case gave the testatrix’s daughter an equitable life estate with remainder over in fee to the daughter’s children, to be distributed when the youngest of them reached the age of thirty, income to be paid to them in the meantime. The daughter died leaving one child, a son, who at the age of twenty-five petitioned the court to terminate the trust. This petition was granted. Noting that the Rule Against Perpetuities was not applicable because of the absence of a vesting issue, the court nevertheless went on to state:

[W]e believe there is, or should be, a corollary to the rule against remoteness of the vesting of estates or interests, a ban against a too remote enjoyment or use; we believe such a corollary is as warranted as the rule itself, and its basis just as logical as that of the original rule.

Interestingly, the court was not at all concerned with the scant authority for its holding. Although it did at one point cite an important dictum of the Pennsylvania Supreme Court,  it went on to say that:

The fact that there is no evidence that such a rule exists in Pennsylvania does not bother us, for we consider ourselves competent to declare such a rule in existence. The original rule against perpetuities was judge-

146. Id. at 558, 164 N.E. at 4.
147. 54 Pa. D. & C. 312 (Orphans Ct. 1943)
148. Id. at 314. It is evident that the case was well argued by counsel, for at one point the court quoted with approval a passage from Kales argument on the prolongment of indestructibility. See note 94 supra.
149. The court referred to the dictum in Shallcross’s Estate, 200 Pa. 122, 125, 49 Atl. 936, 937 (1901), part of which is quoted at note 137 supra.
made, as the crystallization of public policy; let this rule be judge-made as well, for the same reasons. 150

The other recent Pennsylvania case, Throm's Estate (No. 2), 151 also involved a postponement of enjoyment attached to the equitable remainder in fee taken by the life tenant's children. Here again, the age at which distribution was to be made to the "children" was set at thirty. In this case, however, the major issue was whether the remainder interest had been intended to vest at the death of the life taker, or whether it was contingent upon the remaindermen's reaching the prescribed age of thirty. The court concluded, first, that the testator intended to vest the remainder in the children and, second, that the postponement of enjoyment was invalid. On the latter issue, the court confined its remarks to a single sentence:

The testamentary direction that actual payment be deferred until [the children] should attain the age of thirty years is void as being an illegal restraint of property in which no one but the beneficiary has an interest. 152

Conclusions on the Indestructibility Issue

The cases just discussed are the only ones discovered by this writer which specifically hold that indestructibility may not be prolonged for a period in excess of lives in being and twenty-one years. Standing alone, they might seem of only minimal importance. However, when it is borne in mind that there are a number of decisions which tend in the direction taken by these cases, 153 that a majority of the dicta in this area

152. Id. at 169, 106 A.2d at 818, In making this statement and holding, it is likely that the court was not consciously adopting the rule against prolonged indestructibility. It took no particular notice that the postponement of enjoyment in this case would extend for a period greater than lives in being and twenty-one years, and did not specifically treat the policy questions relating to trust indestructibility. Moreover, it made no mention of the case of Howard's Estate. In support of its conclusion the court cited, inter alia, Decker's Estate, 353 Pa. 509, 46 A.2d 218 (1946), a case in which a postponement, not in excess of the perpetuities period, was held invalid, ostensibly on the basis of the Saunders v. Vautier doctrine, which had found support in other Pennsylvania cases cited in that case.

As an illustration of the confusion which abounds in this area of trust duration and indestructibility, both Decker's Estate and Throm's Estate cited the dictum found in Shallcross's Estate. See notes 137 and 141 supra. That dictum was specifically directed to the issues of excessive postponements of enjoyment and trust indestructibility, and made no pretense of representing the Saunders v. Vautier rule (which is not concerned with the period of postponement). This might indicate that the court in Throm's Estate was intending to make that earlier dictum law and was not purporting to base its decision on the rule of Saunders v. Vautier.

153. See, e.g., Southard v. Southard, 210 Mass. 347, 96 N.E. 941 (1911). The decision in this case is obscured by the factual situation, but does stand for the proposition that a trust will be terminated where the trust res is rendered inalienable for an "unreasonable" period. See
appear to favor a limitation upon indestructibility; and that there have been exceedingly few decisions which have concluded, after due consideration of the policy questions involved, that there is no need for a rule limiting indestructibility, the impression received is that there is a marked judicial attitude favoring restriction of trust indestructibility to the perpetuities period. This impression is made all the more real by the significant change of position taken by the American Law Institute. In 1944, at the time of the publication of the Restatement of Property, the Institute issued a caveat on the subject of indestructibility. Although it found that a provision calling for perpetual indestructibility was void, and that one calling for indestructibility for only the life of a beneficiary living at the creation of the trust was good, it refused to take a position on any period of indestructibility falling between those two limits. This was a continuation of the policy which had earlier been set down in the Restatement of Trusts. However, in 1959, with the publication of the Restatement of Trusts, Second, the Institute removed the caveat and laid down the rule that indestructibility could not be prolonged beyond the perpetuities period as measured from the testator’s death.

In an area where there is so little conclusive authority and so much uncertainty, this adoption of the rule against prolonged indestructibility by the Restatement may be expected to have a wide influence upon the future course of the law of trusts. Even though all the features of this

also Allen Estate, 347 Pa. 364, 32 A.2d 301 (1943) (here it is not clear whether termination was decreed because of the undue postponement of enjoyment or because of the Saunders v. Vautier rule); Angell v. Angell, 28 R.I. 592, 68 Atl. 583 (1908).


155. The one case which is universally cited for this proposition is Knecht v. George, 69 N.E.2d 228 (Ohio Ct. App. 1943), appeal dismissed, 142 Ohio St. 635, 53 N.E.2d 647 (1944). In this case the issue was very lightly treated, the court holding only that the apparent postponement (the facts were not set out in the opinion) violated neither the Rule Against Perpetuities nor the rule against direct restraints on alienation. The court did not mention any question of public policy relating to prolonged indestructibility, though it is of course possible that this issue was argued by the parties.

No cases have been found which directly repudiate the rule against prolonged indestructibility after argument in support of that rule has been made by counsel. One case which seems to disfavor any such rule (though it does not discuss the rule) is Trammell v. Trammell, 162 Tenn. 1, 32 S.W.2d 1025 (1930) In that case the court adopted Gray’s view that future estates could be subjected to the same restraints to which a present estate could be subjected. See discussion pp. 376-78 infra. However, unlike Gray, the court did not state that any such restraints would have to be limited to the period of lives in being and twenty-one years. The court said only that general equitable and trust principles might be applied where the restraint was completely unreasonable.

156. Restatement, Property § 381 (1944). In comment a under this section, the Institute adopted the same terminology of “external” and “internal” attack which Cleary had used. See the discussion of these terms at note 70 supra.

157. Professor Simes remarked that this position was taken out of “abundant caution.” SIMES, FUTURE INTERESTS § 1393, at 245 (2d ed. 1956).

158. Section 62, comment k (1935)

159. Section 62, comments n and o, quoted and discussed at note 127 supra.
new rule have not been settled by the courts or the writers, the basic approach to the problem has now been definitely staked out. And while excessive duration itself may no longer subject a trust to immediate external attack, despite the important social and economic reasons for sustaining such external attacks, it is now quite clear that a well-presented argument on behalf of the beneficiaries may expose a trust to internal attack and termination once the perpetuities period has expired.

160. See discussion pp. 352-71 supra.