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## Wills--Construction--Trusts--Perpetuities (Matter of Gallien, 247 N.Y. 195 (1928))

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of the Haverty decision. The principal case is judicially and logically sound, the Haverty Case is not.<sup>12</sup>

Under recent Congressional legislation, which has yet to meet the test of constitutionality, a system of compensation is substituted for the pre-existing rules and counter-rules.<sup>13</sup>

WILLS — CONSTRUCTION — TRUSTS — PERPETUITIES. — Testator died leaving an estate of \$150,000 to \$200,000, and survived by his wife, a son and a foster-daughter (who had never been adopted). By his will, he gave the entire estate to a trustee in trust "from the income thereof to pay monthly to our foster-daughter, Mabel Crans, so long as she may live, the sum of fifty dollars (\$50) per month for her personal use. The balance of the income of my estate is to be paid to my wife, Ida L. Gallien, as she may desire it. If my said wife should be survived by our son, Brace Goodwin Gallien, then the said balance of income or so much thereof as may be necessary is to be expended for his proper support and maintenance. \* \* \* When the above payments shall cease by reason of the deaths of the beneficiaries mentioned, I direct my said trustee to pay the following bequests. \* \* \*" The foster-daughter survived the testator but four days. The Surrogate and the Appellate Division (by a divided court) held the entire will void, the trust for the wife, son and foster-daughter being deemed violative of statutory prohibitions against the suspension of the power of alienation<sup>1</sup> and absolute ownership<sup>2</sup> for more than two lives in being at the time of testator's death. Upon further appeal it was held: that under familiar canons of construction,"

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the power of the master \* \* \*. One might as well bring within that class a laborer employed by a contractor to repair a vessel in a drydock \* \* \*. Such a laborer is subject to the general maritime law, but not to the distinctive features of that law which apply to seamen and no others. No one would think of saying that his damages would be measured by maintenance, cure and wages \* \* \*. 'Words,' as we are told, 'are flexible.'"

<sup>12</sup> See 1 St. John's L. Rev. 76. "It is manifestly unsound to construe the 'Jones Act' as applying to stevedores and longshoremen. The whole tenor of the act is for the protection of seamen and has no reference in any of its provisions to other maritime employments. It is submitted that if Congress intended to include other employments, it would not have restricted its language to 'seamen'."

<sup>13</sup> Longshoremen's and Harbor Workers' Compensation Act of Congress. March 4, 1927. 1927 A. M. C. 525. 556.

<sup>1</sup> N. Y. Real Prop. L. § 42: " \* \* \* Every future estate shall be void in its creation, which shall suspend the absolute power of alienation, by any limitation or condition whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate. \* \* \*"

<sup>2</sup> N. Y. Pers. Prop. L. § 11: "The absolute ownership of personal property shall not be suspended by any limitation or condition, for a longer period than during the continuance and until the termination of not more than two lives in being. \* \* \*"

<sup>3</sup> Phillips v. Davies, 92 N. Y. 199 (1883); Roe v. Vingut, 117 N. Y. 204. 22 N. E. 933 (1889); Greene v. Greene, 125 N. Y. 506, 26 N. E. 739 (1891).

effect might be given to the will by eliminating entirely the provision for the foster-daughter and declaring intestacy as to the sum required to secure her income. *Matter of Gallien*, 247 N. Y. 195 (1928).

Distribution of the corpus of the trust was directed "when the above payments shall cease by reason of the deaths of the beneficiaries mentioned." Obviously the question was as to the time of division—did the will require that it be postponed until the deaths of all the beneficiaries, or might it take place "when the payments severally cease and the deaths severally occur." The latter result was obtained by interpreting the word "when" at the beginning of the direction as equivalent to "as". The testator's sentence was reconstructed by the majority to read, "as the above payments shall cease (or shall severally cease) by reason of the deaths of the beneficiaries mentioned, etc." "Internal evidences" of the testator's intention induced the reconstruction. Upon the death of the wife and son, the foster-daughter surviving, the will, if literally construed, would require the continuance of the trust of the entire estate to secure an annual payment of but \$600. Of more significance than this argument having its "roots in verbal criticism," is a consideration of the consequences. The testator's wife and incompetent son were the primary objects of his solicitude. Comparatively, the provision for the foster-daughter was trifling. Her share would not be increased by the prior deaths of both the wife and son. The death of the wife, the son surviving, would not call for distribution; he would without further act succeed to his mother's interest. The Court avoided the consequence of holding the will unlawful by "construing the cessation of payments as several or distributive, rather than general or collective."

If the foster-daughter died, survived by the wife and son, her portion of the income would go to swell the larger gift. Here was a possible situation in which there would be a suspension for more than the permissible two lives in being. Necessarily the trust must fall unless the invalid feature, the provision for the foster-daughter, be in some wise separable. Indicia of the testator's intent supplied the need. As to the sum which would produce the payments to the daughter, the testator died intestate; the bulk of his estate passed subject to his wishes.

Judge Kellogg, dissenting, objected that the reconstructed sentence wrought no improvement. He argued that under it, should the wife die survived by the son, distribution would *then* be compulsory, leaving nothing in the trust for the son. It is believed, however, that the majority did not offer the revised sentence in substitution for the provisions *establishing* the trust, but merely in lieu of the unhappily worded direction for division and distribution. The dissent is valuable as evidencing the reaction of the "conservative" legal mind to the "common sense appraisal" of the brilliant Chief Judge. Assuredly, the Court he heads "struggles to preserve and surrenders to nothing short of obvious compulsion."<sup>4</sup>

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<sup>4</sup> 247 N. Y. 195, 200, per Cardozo, C. J.