Walsworth, 6 La. App. 610 (1928); *Sexton* v. *Stiles*, 130 So. 821 (La. App., 1930).

Under the circumstances of the principal case the court could not well have taken the question of proximate cause from the jury.

JUSTIN H. FOLKERTH

TRUSTS

RULE AGAINST PERPETUITIES — EXECUTOR AS TRUSTEE TO MAINTAIN GRAVES — GIFT FOR CHARITABLE PURPOSE

The testator by his will directed "that my executors . . . hold in trust the sum of $1500 and with the income thereof provide for the decoration of the graves of my parents . . . and also my own grave . . . executors to have the right at any time they desire to no longer act as trustees . . . to make arrangements with the Spring Grove Cemetery Association to continue the decoration of the above enumerated graves . . ." The question presented was whether this case was a chancery case and was appealable. This depended upon whether the will created a trust. The Court of Appeals, First District, held that there was no trust, in view of the fact that no cestui is named, but rather an intent on the part of the testator to create a power attached to the executorship. *Whiting* v. *Bertram*, 51 Ohio App. 40, 3 Ohio Op. 292, 199 N.E. 367, 19 Ohio Abs. 363 (1935).

It is an established principle of trust law that no trust can exist without a cestui. "A trust without a cestui is like an agent without a principal or a husband without a wife." Smith, "Honorary Trusts and the Rule Against Perpetuities," 30 Col. L. Rev. 60 (1930). Some courts have held that the cestui must be a living person, one who can enforce the trust. *Festorazzi* v. *St. Joseph's Church*, 104 Ala. 327, 25 L.R.A. 360 (1893). Where there is no such living cestui, "it would seem that they (the trusts) could be attacked on this ground in all cases." 1 Bogert, on Trusts, page 484. But see, Gray, "Rule Against Perpetuities" 3rd Ed. sec. 828.

A study of the cases, however, reveals two exceptions to this rule. The first is the classification of trusts known as honorary or imperfect trusts. This group involves trusts for the erection of monuments, tombs, mausoleums, and upkeep of graves for a limited time. The cases warrant the following general conclusions:

(a) Both the English and American courts have held overwhelmingly that a bequest for the erection of a monument, tomb, or gravestone

is a valid trust. *Musset* v. *Bingle*, 1 W.N. 170 (1876); *Masters* v. *Masters*, 1 P.Wms. 420 (1717); *Detwiler* v. *Hartman*, 37 N.J. Eq. 347 (1883); *McIlvain* v. *Hockaday*, 36 Tex. Civ. App. 1, 81 S.W. 54 (1904). See *Jones* v. *Creaner*, 13 O.C.C. N.S. 585 (1910), aff'd. without opinion, 87 Ohio S. 480, 102 N.E. 1126 (1912); *Re McArdle's Will*, 264 N.Y.S. 764, 147 Misc. 876 (1933).

(b) A trust for the upkeep of a grave, monument, etc., has generally been held invalid. The ground of the invalidity of these trusts was not the failure of the cestui, but rather that these cases were within the rule against perpetuities. "Only in rare instances do courts notice the fact that as private trusts, these cemetery upkeep trusts contain the vice of the lack of a living beneficiary." 1 Bogert on Trusts p. 484. The following authorities have held a trust for the upkeep of a grave invalid as contravening the rule against perpetuities or creating a trust in perpetuity: *Re Rogerson*, 1 Ch. 715, 70 L.J. Ch. N.S. 444 (1901); *Re Barker*, 25 T.L.R. 753 (1909); *Coit* v. *Comstock*, 51 Conn. 352, 50 Am. Rep. 29 (1883); *McCartney* v. *Jacobs*, 288 Ill. 568, 123 N.E. 557, 4 A.L.R. 1120 (1919); Cf. *Re Chardon*, L.R. Ch. 464 (1928) holding a trust to a cemetery association for the upkeep of two graves valid. See *Hoopert* v. *Geyel*, 25 O.N.P. *N.S.* 516 (1934). The common law rule against perpetuities intended to avoid restraints on alienation requires the vesting of an interest within the period of lives in being and twenty-one years. It has been applied to trusts on a rule of permissible duration, the courts holding that a trust may not exist longer than this period.

Where the period of upkeep of a grave, monument, etc., is so limited as not to continue beyond the period of the rule against perpetuities, the trust has been upheld despite the lack of a cestui. *Lloyd* v. *Lloyd*, 2 Sim. N.S. 255, 21 L.J. Ch. 596 (1852). Trusts for the upkeep of graves have now been made valid by statute, if a cemetery association be made the trustee. See Ohio G.C. 10110 to this effect; *Hiff* v. *Hibbs*, 215 Ia. 253, 245 N.W. 247 (1932).

The second exception to the rule requiring a cestui is the bequest for the maintenance of animals. Although the beneficiaries, horses, dogs, etc., cannot come into a court of equity and call the trustees to account, trusts for their maintenance have been upheld. *In Re Dean*, 41 Ch. Div. 552, 58 L.J. Ch. 693 (1889); *Re Kelly*, (1932) Irish Rep. 255; *Willett* v. *Willett*, 197 Ky. 663, 247 S.W. 739 (1923); Cf., *In Re Howells' Estate*, 260 N.Y.S. 598 (1932). See notes in 17 Minn. L. Rev. 563 (1933); 42 YALE L. J. 1270 (1933) and 33 Law Q. Rev. 343 at 359 (1917) "Restraints on Alienation." But the

trust cannot be limited specifically to the life of an animal; for if this were allowed, testators might choose a favorite crocodile as a measuring life which life might last longer than "lives in being and twenty-one years." And "lives" within the rule means human lives. See Gray, "Gifts for a Non-charitable purpose," 15 HARV. L. REV. 509, 530 (1902). Also see *In Re Howells' Estate, supra,* holding a trust measured by the lives of five animals and one human being void.

The foregoing trusts are private trusts and are to be distinguished from charitable trusts in legal consequence. The charitable trust is not affected by either the lack of a definite cestui or the rule with respect to duration of private trusts. Since the trust is for a public good, the attorney general may enforce it. Thus a bequest "to the Priests of Mt. Lebanon, Syria, to pay for masses" has been held valid as a charitable trust. *In re Stephen's Estate,* 269 N.Y.S. 614, 150 Misc. 27 (1934). See *Minutum* v. *Conception Abbey,* 166 Tenn. 290, 61 S.W. 2d 352 (1933). The upkeep of a public cemetery (as distinguished from a private grave) or a grave attached to a church have been upheld as charitable trusts. *Chapman* v. *Newell,* 146 Ia. 45, 125 N.W. 324 (1910). A trust to keep up a family ground has been sustained as a charitable trust. *Ford* v. *Ford,* 91 Ky. 572 (1891); *Naumann* v. *Weidman,* 182 Pa. St. 263, 37 Atl. 863 (1897); contra, *Kelly* v. *Nicholas,* 17 R.I. 306 (1890).

From the foregoing discussion it seems that the majority of the courts would have held this bequest for the upkeep of a grave an invalid trust, not because of the lack of a cestui, but because the attempted trust might continue beyond the period of the rule against perpetuities. The court found that the testator did not even intend a trust. The court suggested, that the fact that the testator gave his executor the privilege of transferring the power of caring for the grave to a cemetery association was indicative of the fact that no trust was to be imposed upon the executor. It is submitted that not only is it legal and proper to occupy the dual position of trustee and executor, but a trustee may transfer his duties to another trustee if the testator permits it. 1 Bogert on Trusts, sec. 512. It is difficult to see, therefore, how the court concludes that because the executor might pass his duty of upkeep of the graves to the cemetery association, he did not intend a trust. While the decision is in harmony with the weight of authority, it seems that the rationalization is not.

B. BERNARD WOLSON