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STATUTORY RESTRICTIONS ON THE ACCUMULATION OF INCOME

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IS IT more subversive of the public welfare to tie up income as well as principal than merely to tie up principal? Should the rule of law which prohibits accumulations be more drastic than that which prohibits perpetuities? The English Parliament and the legislatures of thirteen American states have answered in the affirmative. With little more to guide them than the shocking will of Peter Thellusson[†] and the astounding possibilities of compound interest, these legislators turned out a body of restrictive rules which has endured for decades. But it has not endured without amendment nor without numerous attempts at judicial clarification. At this time, therefore, it is believed to be worthwhile to examine the record of our experience with legislation on accumulations. An examination will aid in determining whether restrictive rules on this subject are desirable, and, if so, what should be their form and content. In this discussion of statutes and of decisions interpreting them, no attempt is made to state the whole law of accumulations as it exists in jurisdictions having legislation on this subject. Rather the purpose is to show what has been the legislative trend in amending these statutes; what sort of difficulties have been encountered by the courts, or are likely to arise, in in-

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[†] Peter Thellusson died in England in 1797, leaving a will which provided for an accumulation until the death of the last survivor of nine persons. From actuarial statistics it was concluded that this period would be not less than seventy to eighty-five years. The estate directed to be accumulated was estimated at £600,000. Computations indicate that, at five per cent interest compounded, this would accumulate in the period named to nearly £30,000,000, *Thellusson v. Woodford*, 4 Ves. Jr. 227 (Ch. 1798); Leach, *Cases and Materials on Future Interests*, 796 and 797 (1935). This will came before the House of Lords in the case of *Thellusson v. Woodford*, 11 Ves. Jr. 112 (H.L. 1805), in which it was held that the will was valid, there being no common law restriction on such a trust for accumulation other than the rule against perpetuities.

interpreting and applying them; and what is the present trend of judicial decision with respect to certain major problems which have arisen.

Before proceeding to a discussion of this body of legislation, a brief observation may be made in passing as to the situation at common law. In England, since the decision of *Thellusson v. Woodford*² it has been clear that, in the absence of statute, if a trust for accumulation of income complies with the rule against perpetuities, it is valid. However, the English courts also hold that if the sole beneficiary of a trust for accumulation is *sui juris* he may compel the payment of income to himself (and, indeed, the termination of the trust), despite the terms of the trust.³ In the United States, however, following the doctrine of *Clafin v. Clafin*,⁴ to the effect that the beneficiary of a trust cannot ordinarily demand its termination if that would defeat a material purpose of the trust, the rule is otherwise.⁵ It would seem then, in this country, in addition to the common law rule against remotely contingent future interests, there may also be a rule which limits the duration of private indestructible trusts. Precisely what this rule is the cases do not too clearly indicate. However, a private trust is not bad merely because it is to be indestructible for no longer than the period of the rule against perpetuities, namely, lives in being and twenty-one years.⁶ If it is limited to be indestructible for a longer period than this, it would seem that the law imposes some sort of restriction, in the interests of public policy.⁷ A trust for the accumulation of income is obviously intended to be indestructible for a time, otherwise the income would not be accumulated. Thus, if there is any common law rule of policy restricting trusts for accumulation, other than the rule against perpetuities, it is presumably a rule against the duration of indestructible trusts.⁸

I. GENERAL SURVEY OF THE STATUTES⁹

As has already been indicated, following litigation over Peter Thellusson's will, and doubtless as a result of that, the Thellusson Act was passed

² 11 Ves. Jr. 112 (H.L. 1805).

³ *Saunders v. Vautier*, 4 Beav. 115 (Ch. 1841). ⁴ 149 Mass. 19, 20 N.E. 454 (1889).

⁵ Rest., Trusts § 337 (1935); 4 Bogert, Trusts and Trustees § 1002 (1935); 3 Scott, Trusts § 337 (1939).

⁶ Scott, op. cit. supra note 5, at § 62.10.

⁷ 1 Bogert, op. cit. supra note 5, at § 218; Scott, op. cit. supra note 5, at § 62.10.

⁸ 1 Bogert, op. cit. supra note 5, at § 215. See Rest., Trusts § 62, comment 1 (1935).

⁹ For the text of some accumulation statutes, see Appendix, p. 428 infra. In general, on accumulation statutes, see the following: Hargrave, *The Thellusson Act* (1842); Scott, *Trusts for Accumulation* (1888) (published as a supplement to the American edition of the 8th English edition of Lewin on Trusts); 1 Bogert, op. cit. supra note 5, at §§ 216, 217; Gray, *Rule against*

in 1800.¹⁰ It prohibited accumulations for a longer term than any one of the following: (1) the life of the grantor; (2) twenty-one years from the death of the grantor or testator; (3) during the minority or respective minorities of any person or persons who shall be living or in *ventre sa mere* at the death of the grantor or testator; or (4) during the minority or respective minorities of any person or persons who under the instrument directing accumulations would, for the time being, if of full age, be entitled to the income so directed to be accumulated. Directions for accumulation in excess of these periods were to be void. There were exceptions as to payment of debts, raising portions for children, and as to "any direction touching the produce of timber or wood upon any lands or tenements." In 1892 Parliament added the Accumulations Act, which restricted accumulations for investment in "lands only" to the period of the minority of the beneficiary. The Law of Property Act of 1925 re-enacted these various statutes with minor revisions.

Legislation in the United States on this subject begins with the New York Statutes of 1828.¹¹ There were two distinct statutes, one applicable to realty and the other to personalty. The one on accumulations of real property consists of five sections. After a preliminary section, the next states that accumulations are permissible in two cases: (1) if to commence on the creation of the estate, it must be for the benefit of one or more minors then in being and must terminate at the expiration of their minority; (2) if to commence at a subsequent time, then it must commence within the period limited for the vesting of future estates and during the minority of the beneficiaries, and must terminate at the expiration of such minority. The following section indicates that accumulations for longer periods than those mentioned in the preceding section are void as to the excess. The next section is of a sort to be found in a number of American states, but which has no counterpart in the English act. It provides for the application of accumulations for the maintenance and education of infants, "where such rents and profits are directed to be accumulated for the benefit of infants entitled to the expectant estate." The last section provides

Perpetuities app. B (3d ed. 1915); Schnebly, Some Problems under the Illinois Statute against Accumulations, 26 Ill. L. Rev. 491 (1932); Kain, Limitations upon Accumulations of Income in Pennsylvania for Non-Charitable Purposes, 38 Dickinson L. Rev. 29 (1933); Bogert, Funded Insurance Trusts and the Rule against Accumulations, 9 Corn. L. Q. 113 (1924); Chaplin, Accumulation—Death of the Minor, 14 Corn. L. Q. 289 (1929); 27 Col. L. Rev. 197 (1927); 29 Mich. L. Rev. 1100 (1931).

¹⁰ For the various English statutes, including those now in force, see Appendix, p. 428-9 *infra*.

¹¹ The New York legislation of 1828 as it appeared in the Revised Statutes (1829) is quoted in the Appendix, p. 430-2 *infra*.

for a case when the "rents and profits shall be undisposed of and no valid direction for their accumulation is given," and states that "such rents and profits shall belong to the persons presumptively entitled to the next eventual estate." It will be seen that, in a rough way, the New York rule restricts valid accumulations to the period of the minority of the beneficiary, and that even this accumulation may yield to the necessities of the infant for support or education. The provision for accumulations of personal estate in the New York statute parallels this in every way except that there is no section analogous to the last one as to rents and profits passing to the persons entitled to the next eventual estate. While the New York statutes differ greatly from the Thellusson Act, the influence of the latter cannot be doubted. The revisers, indeed, even suggested as an alternative that provisions similar to the English exceptions might be added as to accumulations to pay debts and to raise portions,¹² but this was never done.

The New York statutes furnished the model for a majority of the states which have legislation on the subject.

In 1846 legislation substantially identical with the New York enactments as to accumulation of the income of real property appears as a part of the Revised Statutes of Michigan of that date.¹³ These sections have remained unchanged from that day to this;¹⁴ but there has never been any corresponding legislation as to accumulations of personal property. Wisconsin legislation, restricting accumulations of the income of real property, came in about 1849, shortly after the Michigan statutes. In its original form it was substantially the same as the Michigan legislation. But since 1878 it has included a provision permitting accumulations for char-

¹² The Revisers' Notes, as published in the Appendix to the Revised Statutes (2d ed. 1836), p. 578, contain the following statement as to the statute on accumulations on real property: "The propriety of permitting the rents and profits to be applied, under the direction of the chancellor to the support and education of infants, who, if of full age, would be entitled to them, we presume will not be doubted. This provision will effectually prevent such an unnatural abuse of power, as was practised by Mr. Thellusson, in the will which occasioned the passage of the British act. . . . The British statute contains an exception of provisions made for the payments of debts, and the raising of portions. Should this section be deemed expedient, the Revisers recommend the following section, which embraces it in a qualified form:

"(SEC. 41. The preceding section shall not be construed to extend to any trust or direction, in any grant or devise, for accumulating the rents and profits of lands for the payment of debts, or for raising a portion for any child or descendant of the grantor or testator; but no such trust or direction shall be valid for any longer period than twenty-one years from the death of the grantor or testator.'"

¹³ Mich. Rev. Stat. (1846) tit. 14, c. 62, §§ 36-40.

¹⁴ The present statute is Mich. Comp. Laws (1929) §§ 12956-60; Mich. Stat. Ann. (Henderson, 1936) §§ 26.36-26.40.

ity for a period of twenty-one years.¹⁵ The Minnesota statute, also applying to land and following the form of the Michigan statute, was enacted about the year 1851.¹⁶ One other state, Arizona, also has statutory restrictions on accumulations which apply only to the income of land.¹⁷ Its legislation appears to have followed the Wisconsin statute.¹⁸ Indiana,¹⁹ on the other hand, follows the New York legislation only as to accumulations of personalty, but has no legislation restricting accumulations of land. The Dakota territorial code contains legislation applicable to both realty and personalty and patterned closely after the New York model.²⁰ Substantially similar legislation appears both in the present North Dakota and South Dakota statutes.²¹ The original California statute, applicable to both realty and personalty, and following closely the New York model, was enacted in 1872.²² This seems to have remained unchanged until 1929. At that time the statute was changed to permit accumulations for a period no longer than "the time within which the absolute power of alienation of property may be suspended."²³ At that time this period was, and still is, lives in being (with one situation where a minority might be added), or in the alternative twenty-five years.²⁴ The Montana legislation,²⁵ applicable to both realty and personalty, followed the California statute of 1872. In 1939, it was amended by language substantially identical with the California amendment of 1929, so that the period of permissible accumulation is "the time within which the absolute power of alienation of property may

¹⁵ Wis. Rev. Stat. (1849) pt. 2, tit. 15, c. 56, §§ 36-40. The present statute is Wis. Stat. (1937) §§ 230.36-230.40. The exception as to charity appears in Wis. Rev. Stat. (1878) § 2061. There is no limitation apparently on accumulations of gifts to cemetery associations. See Wis. L. 1887, c. 388, p. 427; Wis. Stat. (1937) § 157.11(9) (g).

¹⁶ Minn. Rev. Stat. (1851) c. 43, §§ 36-40. The present statute is Minn. Stat. (Mason, 1927) §§ 8066-70.

¹⁷ Ariz. Rev. Code Ann. (Struckmeyer, 1928) §§ 2773-5. This is substantially the same as Ariz. Rev. Stat. (1913) §§ 4701-5.

¹⁸ The marginal notes to Ariz. Rev. Stat. (1913) §§ 4701-5 indicate that the source of these statutes was Wis. Ann. Stat. (Sanborn & Berryman, 1898) §§ 2060-4.

¹⁹ The present statute is Ind. Stat. Ann. (Burns, 1933) §§ 50-102, 51-103. This was enacted as 2 Ind. Rev. Stat. (1852) pt. 2, c. 9, §§ 2-3.

²⁰ Dakota L. 1870-1, c. 8, enacted as Art. IV, §§ 204-8, § 210 of Civ. Code.

²¹ N.D. Comp. L. Ann. (1913) §§ 5290-4, 5296; S.D. Code (1939) §§ 51.0301-51.0307.

²² Cal. Civ. Code (1872) §§ 722-6, 733.

²³ Cal. L. 1929, c. 143, p. 276. For the present California legislation, see Appendix, p. 435 *infra*. See also note 73 *infra*.

²⁴ Cal. Civ. Code (Deering, 1937) §§ 715, 772.

²⁵ Mont. Rev. Codes (Anderson & McFarland, 1935) §§ 6709-13, 6715; practically the same as Mont. Civ. Code (1895) §§ 1160-4, 1171.

be suspended."²⁶ In Montana, however, that period of time is (with one exception) lives in being,²⁷ and there is no period in gross such as is provided in California.

The original Alabama act on accumulations appears in the Code of 1852.²⁸ The period for permissible accumulations is ten years or the minority of a beneficiary in being when the instrument takes effect.²⁹ However, the statute purports to apply to trusts "for the purpose of accumulation *only*."

Next to the New York legislation, the Pennsylvania statute in 1853,³⁰ seems to have provoked most litigation. It is modeled after the Thellusson Act but it does not contain all the permissible periods named in that act. Unlike the Thellusson Act it has always contained an exception as to charities. Its ambiguous language, still in force, declares that accumulations of real or personal property are not permissible "for any longer term than the life or lives of any such grantor . . . or testator, and the term of twenty-one years from the death of any such grantor . . . or testator, that is to say, only after such decease during the minority or respective minorities, with allowance for the period of gestation, of any person or persons, who, under the uses or trusts of the deed, will or other assurance directing such accumulation, would, for the time being, if of full age, be entitled unto the rents, issues, interests and profits so directed to accumulate. . . ."

The Illinois statute on accumulations was enacted in 1907,³¹ and follows almost verbatim the Thellusson Act, even to the exception about permitting accumulations to pay debts and to "raise portions"; although one wonders whether the legislators knew what was meant by a "portion."

It thus appears that we have ten statutes originally fashioned on the New York model. Of these, four apply to realty only, one to personalty

²⁶ Mont. L. 1939, c. 212, p. 564.

²⁷ Mont. Rev. Codes (Anderson & McFarland, 1935) §§ 6705, 6734.

²⁸ Ala. Code (1852) § 1310.

²⁹ The present act is Ala. Code Ann. (Michie, 1928) §§ 6914-5. The first of these sections is the original act. The second, which is concerned with applying for the benefit of a minor, income directed to be accumulated, appears with its present section number in the Code of 1923.

³⁰ The original act is Pa. L. 1853, no. 304, § 9, p. 503. For the present enactment, see Appendix, p. 436-7 *infra*.

³¹ Ill. L. 1907 § 1, p. 1. The present form is Ill. Ann. Stat. (Smith-Hurd, 1934) c. 30, § 153. Ill. L. 1923, § 1, p. 168 allowed unlimited accumulations for a cemetery association, but this was repealed by Ill. L. 1939, § 1, p. 1175, with a saving clause excepting existing rights. Ill. L. 1927, c. 21, p. 191, now Ill. Ann. Stat. (Smith-Hurd, 1934) §§ 63-4 permits unlimited accumulations for a municipal cemetery and for a cemetery association.

only, and the rest to both kinds of property. California and Montana have, however, by recent amendments, departed radically from the New York model in that the period for accumulations is the same as that for the suspension of the absolute power of alienation. Illinois has practically a replica of the Thellusson Act. The Pennsylvania act, while following to some extent the form of the Thellusson Act, has been interpreted so strictly that its effect is, in many respects, similar to the New York act. The Alabama act appears to be unique.

II. THE PERMISSIBLE PERIOD OF ACCUMULATIONS

Difficulties in determining the permissible period of accumulation may arise for two reasons: first, under all of the statutes a direction for accumulation is not void in its entirety, but only void as to the excess over the permissible period; second, in some jurisdictions, there are two or more permissible periods.

The English statute lists four possible periods. Since only one is permitted, the question may be asked: Which period do we apply in a given case? This question is particularly difficult when a part of the accumulation is admittedly illegal and it is a matter of determining how much is valid. It has been said that the determination of the appropriate period under the English act is a matter of construction; and it would seem that such appropriateness is determined as of the time the instrument takes effect.³²

Since the Illinois statute is substantially the same as the Thellusson Act, the same question could arise in that jurisdiction but apparently has not.

In Pennsylvania difficulties in determining the period arise from the inherent ambiguities of the language. As has been suggested,³³ the statute names three periods also named in the Thellusson Act, but this is done by saying: the permissible period shall be periods (1) and (2) of the English act, to-wit, period (4) of that act. Apparently, however, this means merely period (4), that is to say "during the minority or respective minor-

³² *Jagger v. Jagger*, 25 Ch. Div. 729 (1883); *In re Errington*, 76 L. T. R. 616 (Ch. 1897). In the latter case, Kekewich, J., said: "The Legislature has left me at large to apply one or other of those two periods whichever will fit the case. What it has said according to the cases about which there is no doubt is, that you cannot apply more than one, and that you must choose that one which fits the case. You are not to choose the one which will give the longest period of accumulation; you are not to choose the one which you may suppose would best effectuate the intention; but you are to take the one that actually fits the intention as declared." See also 1 *Wolstenholme & Cherry, Conveyancing Statutes* 523 (12th ed. 1932).

³³ *Kain, Limitations upon Accumulation of Income in Pennsylvania for Non-Charitable Purposes*, 38 *Dickinson L. Rev.* 29, 37 (1933).

ities, with allowance for the period of gestation of any person or persons, who, under the uses or trusts of the deed, will or other assurance directing such accumulation, would, for the time being, if of full age, be entitled unto the rents, issues, interests and profits. . . .” Indeed, it has been construed to mean practically the minority of the beneficiary,³⁴ although it is possible to justify a quite different construction.³⁵

The New York type of statute presents little difficulty in applying the period. The period of accumulation may begin either at the inception of the instrument or at a later time within the period for the permissible suspension of the absolute power of alienation. If the minor beneficiary is unborn when the instrument takes effect, the permissible period cannot begin until the time when the infant is born.³⁶

In general, it is worthy of note that such general changes as have taken place by amendment of the statutes have, for the most part, been in the direction of lengthening the permissible period. The California and Montana amendments are of this sort. On the other hand, the English Accumulations Act of 1892, while it tends in the direction of a stricter rule, can be easily avoided, since it is applicable merely when the accumulation is “for the purchase of land *only*.” A contemporary comment on it is to the effect that it was perhaps “intended simply to prevent the trustees of a settlement or will . . . from having to continue purchasing land long after they have acquired as much as they can reasonably look after and enjoy; and, of course, if there is an alternative object for the accumulations they can be expended on it, and more land need not be purchased.”³⁷

III. WHAT IS AN ACCUMULATION?

It is obvious, of course, that the voluntary accumulation of one's own property is not illegal. The statutes are directed against accumulations provided for by deed, will, or other instrument, by a “direction” or in a trust. Doubtless, the trust device is the usual method of accumulation with which the statutes are concerned.

But when we inquire what sort of accumulation in a trust is meant by these statutes, we enter a happy hunting ground of legal technicians. An

³⁴ Carson's Appeal, 99 Pa. 325 (1882); see Washington's Estate, 75 Pa. 102 (1874).

³⁵ It is entirely arguable that the accumulation might be valid even though the minor was not necessarily the beneficiary, but, as has been seen, the courts have held otherwise. Gray, Rule against Perpetuities § 717 (3d ed. 1915). It is arguable that the Pennsylvania statute permits an accumulation for the life of the settlor plus a minority.

³⁶ United States Trust Co. v. Soher, 178 N.Y. 442, 70 N.E. 970 (1904); Kilpatrick v. Johnson, 15 N.Y. 322 (1857); In re Raab's Will, 79 Misc. 185, 139 N.Y. Supp. 869 (1913); see Mason v. Mason's Exec'r, 2 Sandf. Ch. (N.Y.) 432, 475 (1845).

³⁷ 93 L.T. 267, 268 (1892).

illegal accumulation obviously means some sort of retention of income beyond the permissible period. This would seem to involve three groups of questions, namely: (1) What is income? (2) What is an improper retention? (3) What expenditures of income are indirectly an addition to capital and therefore an improper retention?

1. What is income for purposes of an accumulation statute? Here we face most of the problems involved in determining what is income for purposes of allocation between life tenant and remainderman. But there is this important difference: the intent of the settlor solves the problem in the allocation cases wherever that intent can be found. Not so in the accumulation cases. Here, while intent may turn what is normally principal into income, intent cannot go far in turning what is normally income into principal; for, if that were so, then a mere expression of intent would offer an easy mode of evading the statute. The problem here is: what is income, regardless of the settlor's intent.

The allocation of the stock dividend at once suggests itself as a source of difficulty. If any part of a stock dividend is income, then a provision in a trust instrument allocating it to principal and providing for its retention for longer than the permissible period would be an illegal accumulation. Indeed, it has been so held.³⁸ But the New York Court of Appeals held otherwise, concluding that, whatever it might be for other purposes, the stock dividend, for this purpose, was essentially principal.³⁹ The whole matter has been of sufficient importance to bring about statutory changes in both New York and Pennsylvania.⁴⁰

Suppose a settlor inserts in the trust instrument the common provision giving the trustee broad discretionary powers to determine what is principal and what is income. Does this involve an illegal accumulation? A New York surrogate thought not, explaining his conclusion by saying that the court would not presume that the trustee was intended to do anything illegal.⁴¹ But suppose the settlor had been more specific. Suppose he directed replacements for bonds bought at a premium, and the local rule as to the allocation of premiums between life tenant and remainderman was otherwise. The cases give us no clear answer to this problem.

What if the trustee has a wasting asset? He retains, either by the terms of the trust instrument, or of his own volition, sufficient of the income to provide for replacement. This question arose in the case of a valuable

³⁸ *In re Maris's Estate*, 301 Pa. 20, 151 Atl. 577 (1930).

³⁹ *Equitable Trust Co. v. Prentice*, 250 N.Y. 1, 164 N.E. 723 (1928).

⁴⁰ See Appendix, p. 433-5, 436-7 *infra*.

⁴¹ *In re Talbot's Will*, 170 Misc. 138, 9 N.Y. Supp. (2d) 806 (1939).

lease which was to expire during the period of the trust. The New York court held that a capitalization for the replacement of a wasting asset was proper even though it continued for a time beyond that allowed for accumulations.⁴²

A similar result was reached in California where bonds secured at a premium were regarded as a wasting asset.⁴³

2. What sort of *retention* of income is an accumulation within the statutes? Suppose a testator gives his estate in trust to accumulate the income during the minority of his son X, and on X attaining his majority, to capitalize and pay the income on such principal and accumulations to X for his life, and then to transfer to X's estate. Here there is no retention of interest on interest beyond the permissible period. The accumulations during X's minority are valid. The difficulty is that at the end of his minority they are capitalized and not released. It is generally held that this constitutes an illegal accumulation, even though interest is not compounded beyond the permissible period.⁴⁴

Can we go so far as to say, then, that any withholding of interest from the beneficiary of a trust beyond the permissible period is an unlawful accumulation? If that were true, then a provision for the payment of income *annually* to the beneficiary might be an unlawful accumulation, if, as is likely to be the case, the trustee is receiving income from investments more frequently than this. Yet no case has been found which holds that such a provision would be illegal. Suppose, however, the trustee were directed to pay the beneficiary the income biennially, or every five years, would not that be an illegal accumulation under some of the statutes? Probably so. The difference is that annual payment of income is a usual administrative provision; while biennial payment is not.

The apportionment of periodic payments of rent, interest and other income as between life tenant and remainderman has been a source of difficulty with respect to the application of the New York accumulations statute. Legislation in that state (unconnected with accumulation statutes herein considered) has made periodic payments apportionable, but provides: "This section shall not apply to any case in which it shall be ex-

⁴² In re Hall's Estate, 130 Misc. 313, 224 N.Y. Supp. 376 (1927); see *Palms v. Palms*, 68 Mich. 355, 36 N.W. 419 (1888); cf. *Minnesota L. & T. Co. v. Douglas*, 135 Minn. 413, 161 N.W. 158 (1917).

⁴³ But see *Estate of Gartenlaub*, 185 Cal. 648, 198 Pac. 209 (1921).

⁴⁴ The following cases are to this effect: *Pray v. Hegeman*, 92 N.Y. 508 (1883); *Barbour v. DeForest*, 95 N.Y. 13 (1884); *In re Kirby's Estate*, 227 Pa. 69, 75 Atl. 1026 (1910); *In re Hawkins*, [1916] 2 Ch. 570; *In re Garside*, [1919] 1 Ch. 132. Contra: *In re Pope*, [1901] 1 Ch. 64.

pressly stipulated that no apportionment be made.”⁴⁵ An estate is given in trust to pay the income to A for life and then to transfer the corpus to B. The creating instrument expressly provides that income which has accrued on the death of A but is not yet payable shall go with the corpus. A payment of interest is made to the trustee immediately after the death of A. Assuming that a portion of the period for which this payment is made preceded the death of A, is there an illegal accumulation? It may be argued that there can be nothing unlawful about paying this sum to B, since the amount is not accumulated after the time of payment; and, since it would not have been payable to A, had he lived, any sooner than it is, under the stipulation in the instrument, payable to B, there is no accumulation. Without squarely passing on the point several New York cases have indicated that this is an illegal accumulation.⁴⁶ In *In re Lamb*⁴⁷ the court said: “Even if interest is deemed to accrue from day to day, it is not collectible daily. The trustees could not have collected it before Mrs. Gibb [the life tenant] died. But that is not the test. The interest was an incident of the principal and had no unrelated and independent status. Each unit of principal grows through continuing time and is owned by the person who owns the principal. Who owned the principal while it was so increasing? The trustees did. But their title was only to support the trust to pay to Mrs. Gibb. How could they take title to pay her and yet to pay to somebody else? It is answered that they could do so because the will so directs. If so, the will gives the trustees title to the principal among other things for the purpose of earning money thereon during a precedent estate, to pay to the remaindermen.” In *Matter of Juillard*,⁴⁸ however, it was determined that a direction of this sort did not create an illegal accumulation. The court said: “When the legislature expressly permitted such a stipulation, it was not laying a trap for the unwary by giving an apparent option which in fact could be exercised only in a limited class of cases determined by the very technical distinctions which were otherwise abolished by the same statute.” Undoubtedly this is the practical conclusion to be reached. Yet the question still remains: how far may a different intent vary the normal determination of what is income in the case of periodic payments to the trustee?

⁴⁵ N.Y. Surrogate's Court Act, § 204.

⁴⁶ See *In re Lamb*, 182 App. Div. 180, 169 N.Y. Supp. 614 (1918), aff'd 224 N.Y. 577 (1918); *Equitable Trust Co. v. Miller*, 197 App. Div. 391, 189 N.Y. Supp. 293 (1921), aff'd 233 N.Y. 650, 135 N.E. 955 (1922); cf. *In re Watson's Will*, 144 Misc. 213, 258 N.Y. Supp. 755 (1932), 237 App. Div. 625, 262 N.Y. Supp. 394 (1933), aff'd 262 N.Y. 284, 186 N.E. 787 (1933).

⁴⁷ 182 App. Div. 180, 169 N.Y. Supp. 614 (1918).

⁴⁸ 238 N.Y. 499, 144 N.E. 772 (1924).

Courts frequently are asked to determine whether temporary retention of income by a trustee in the interests of a judicious administration may amount to illegal accumulations, and commonly they have answered in the negative.⁴⁹ However, it has been held that, where a trust is set up to pay a fixed sum as an annuity to a given adult beneficiary, and the income of the trust may in some years exceed the annuity and in others may be less than that amount, excess income may not be retained by the trustee for the purpose of making up the full amount of the annuity in less profitable years.⁵⁰

A problem sometimes arises in connection with the accumulation of income by the trustee of an adult person who is *non compos mentis*. It would seem that, even if there is no direction for retention by the trustee, the trustee, or else the beneficiary's guardian, will necessarily have to retain income which is not used for his maintenance. Hence, it would seem that, if the trust instrument directs retention of amounts not needed for maintenance, it should not be deemed an illegal accumulation. Such a result has been reached where the accumulation is regarded as belonging to the incompetent;⁵¹ but, if there is a gift over of the accumulations, the answer is likely to be different.⁵²

The funded life insurance trust in which a trustee applies income of investments to the payment of premiums on a life insurance policy has been held not to be an accumulation.⁵³ The matter in at least two jurisdictions is now settled by statute.⁵⁴ In a jurisdiction like England in which a permissible period is the life of the settlor, it would seem that this question is not likely to arise.⁵⁵

⁴⁹ *In re Bavier*, 164 App. Div. 358, 149 N.Y. Supp. 728 (1914); *In re Bavier*, 164 App. Div. 363, 149 N.Y. Supp. 731 (1914); *Sinnott's Estate*, 310 Pa. 463, 165 Atl. 44 (1933); *Robertson v. Hatfield*, 244 Pa. 84, 90 Atl. 449 (1914); *Spring's Estate*, 216 Pa. 529, 66 Atl. 110 (1907); *Howell's Estate*, 180 Pa. 515, 37 Atl. 181 (1897). But see *Billing's Estate*, 268 Pa. 71, 110 Atl. 768 (1920), indicating that income cannot be accumulated to pay a collateral inheritance tax.

⁵⁰ *Spencer v. Spencer*, 38 App. Div. 403, 56 N.Y. Supp. 460 (1899); *In re Hollenbeck's Will*, 134 Misc. 554, 236 N.Y. Supp. 232 (1929); *Bankers Trust Co. v. Moy*, 148 Misc. 38, 265 N.Y. Supp. 77 (1933) (semble).

⁵¹ *In re Littman's Estate*, 165 Misc. 285, 300 N.Y. Supp. 398 (1937); see *In re Langdon*, 89 Misc. 333, 153 N.Y. Supp. 574 (1915); *Curtis v. Curtis*, 184 App. Div. 274, 171 N.Y. Supp. 510 (1918).

⁵² *In re Meyer's Estate*, 140 Misc. 1, 249 N.Y. Supp. 451 (1931); *Craig v. Craig*, 3 Barb. Ch. (N.Y.) 76 (1848).

⁵³ *In re Hartman's Estate*, 126 Misc. 862, 215 N.Y. Supp. 802 (1926).

⁵⁴ See Appendix, p. 434 *infra*.

⁵⁵ A question can arise as to insurance on the life of someone other than the testator, but it has been held that the act does not apply. *Bassil v. Lister*, 9 Hare 177 (Ch. 1851). And it has been held that payment out of income to insure the replacement of leases is not an accumulation within the act. *In re Gardiner*, [1901] 1 Ch. 697.

Suppose a trust for a perpetual loan fund is set up, loans to be made with interest. It would seem that this is a perpetual accumulation. But it has been held that this would not be illegal because nothing is retained or accumulated by the trustee.⁵⁶ It is difficult to follow this reasoning, since in an ordinary case of illegal accumulation, the income is likely to be paid out in reinvestments and not actually retained. Of course, a trust for a perpetual loan fund may be valid on the ground that it is charitable and therefore within an exception.

3. Suppose income is neither reinvested nor paid to the beneficiary, but is applied for the satisfaction of certain claims or charges. When is this an accumulation? Charges which are normally payable out of income, such as current taxes, insurance and repairs for upkeep, undoubtedly can be paid out of income without causing an illegal accumulation.⁵⁷ And a sinking fund for such purposes is likewise proper.⁵⁸ Indeed, it has even been held that income may be used to pay debts or to discharge incumbrances,⁵⁹ and to make permanent improvements on other trust property.⁶⁰ Of course, by the Thellusson Act, and its Illinois counterpart, payment of debts is expressly excepted from the operation of the statute. But the New York courts consistently adhere to the view that the payment of encumbrances on the trust property out of income is an accumulation.⁶¹

IV. EXCEPTIONS

Perhaps the most revealing part of the legislative history of the law of accumulations is that concerned with the exceptions which have been made to the operation of restrictive legislation. It will be seen that the whole trend of amendments, aside from the case of exceptions as to charities, has been in the direction of broadening the exceptions and adding to their number.

The Thellusson Act, as has been seen, excepted provisions for the payment of a debt of the settlor or of "other person or persons." It requires

⁵⁶ *In re Davidge's Will*, 200 App. Div. 437, 193 N.Y. Supp. 245 (1922). A similar argument is made in *Wright's Estate*, 284 Pa. 334, 131 Atl. 188 (1925); see *Summers v. Chicago Title & Trust Co.*, 335 Ill. 564, 167 N.E. 777 (1929).

⁵⁷ *Matter of Nesmith*, 140 N.Y. 609, 35 N.E. 942 (1894).

⁵⁸ *Webb v. Webb*, 340 Ill. 407, 172 N.E. 730 (1930); *In re Mason* [1891], 3 Ch. 467.

⁵⁹ *Hutchins v. Security Trust & Savings Bank*, 208 Cal. 463, 281 Pac. 1026 (1929), noted in 65 A.L.R. 1059 (1929).

⁶⁰ *Estate of Rogers*, 179 Pa. 602, 36 Atl. 1130 (1897). But cf. *Lutz's Estate*, 9 Pa. Co. Ct. 294 (1890). The *Rogers* case may be explainable on the ground that the beneficiary was regarded as having the power, when of age, to terminate the accumulation.

⁶¹ The leading case is *Hascall v. King*, 162 N.Y. 134, 56 N.E. 515 (1900), noted in 76 Am. St. R. 302 (1900). For other New York cases see the note in 65 A.L.R. 1069 (1929).

only a little imagination to see the possibilities of accumulations under that provision. A further exception in the same statute is that of an accumulation "for raising portions for any child or children of any grantor, settlor or devisor, or any child or children of any person taking any interest under such conveyance, settlement, or devise." While "portions" apparently may not be the whole estate, it would seem that they may constitute quite a large part of it.⁶² The English Property Act of 1925 amends this exception so that in both clauses where the words "child or children" appeared, it now reads "child, children or remoter issue." The exception in the Thellusson Act of a "direction touching the produce of timber or wood upon any lands or tenements" requires no explanation. A new exception, which is more significant than might at first be supposed, appears in the Property Act of 1925 and is to the effect that accumulations of surplus income "made during a minority under any statutory power or under the general law" are not to be taken into account in determining the legality of a period of accumulation.⁶³

The New York legislation on accumulations has gone through a long process of expansion of the exceptions. An exception as to charity appears in 1846;⁶⁴ another in 1855;⁶⁵ and a broader one in 1915.⁶⁶ Legislation making an exception as to stock dividends was enacted in 1922 and in 1926.⁶⁷ An exception as to stock bonus, pension or profit sharing plans appeared in 1927,⁶⁸ and was broadened in 1928.⁶⁹ An exception as to insurance trusts was enacted in 1927.⁷⁰ Thus, as appears in the Appendix, there are now five provisos attached to the personal property act and three attached to the real property act, whereas the original legislation contained none.

The original Pennsylvania act included a blanket exception as to charities. This was subsequently modified by a provision fixing a maximum amount which could be accumulated by charitable corporations; but this

⁶² In re Elliott, [1918] 2 Ch. 150; In re Stephens, [1904] 1 Ch. 322.

⁶³ The "statutory power" is regarded as referring to accumulations under the Conveyancing Act of 1881, 44 & 45 Vict., c. 41, § 43. See In re Maber, [1928] 1 Ch. 88.

⁶⁴ N.Y.L. 1846, c. 74, p. 76. It provided for an accumulation of income from property given in trust to an incorporated college or literary institution or for support of any teacher in a grammar school or institute.

⁶⁵ N.Y.L. 1855, c. 432, p. 805. It permitted trustees of certain charities to accumulate income when principal had been diminished.

⁶⁶ N.Y.L. 1915, c. 670, p. 225. This is substantially the third proviso in the present accumulation statutes as to realty and as to personalty. See Appendix, p. 432-5 *infra*.

⁶⁷ N.Y.L. 1922, c. 452, § 2, p. 964; N.Y.L. 1926, c. 843, p. 1563.

⁶⁸ N.Y.L. 1927, c. 384, p. 873.

⁶⁹ N.Y.L. 1928, c. 172, p. 311.

⁷⁰ N.Y.L. 1927, c. 681, p. 1710.

legislative limit on non-profit corporations now no longer exists.⁷¹ In 1939 the Pennsylvania legislature passed an act validating directions for the application of stock dividends and extraordinary dividends to principal.⁷²

Attention should also be called to a California statute limiting the term of accumulations by non-profit corporations for charitable or eleemosynary purposes, unless approved for a longer term by the Attorney General.⁷³

As has already been pointed out, Wisconsin and Arizona have a special provision permitting an accumulation for charity for a period of twenty-one years. It seems that in Illinois there is an implied general exception as to charity, although the statute states none.⁷⁴ Undoubtedly the English act contains no exception as to charities either express or implied.⁷⁵ Whether, in other jurisdictions whose statutes on accumulations contain no exception as to charities there would be an implied exception, the cases do not disclose.

V. EFFECT OF PROVISION FOR ILLEGAL ACCUMULATION

It is clear in all these statutes that the illegal provision for accumulation is, as a rule, only void as to the excess over the permissible period. If, however, the limitation is bad under the rule against perpetuities, then the accumulations act does not render it valid as to a part.⁷⁶ In rare instances it has been determined that, in the particular case, the illegal portion of the direction for accumulation constitutes such a major part of the whole that the entire trust fails.⁷⁷ The California statute, however, seeks to forestall such a construction in that it provides that "the direction only, whether separable or not from the other provisions of the instrument, is void as respects the time beyond the limits prescribed in said last section, and no other part of such instrument is affected by the void portion of such direction."

⁷¹ Pa. L. 1855, no. 347, § 12, p. 328; Pa. L. 1889, no. 40, p. 42, amended by Pa. L. 1929, no. 16, p. 21, and repealed by Pa. L. 1933, no. 105, art. XI, § 1101, p. 289, 345.

⁷² Pa. L. 1939, no. 108, § 1, p. 201.

⁷³ Cal. Civ. Code (Deering, 1937) § 606, enacted first as Cal. Stat. (1927), c. 231 at 547.

⁷⁴ *Webb v. Webb*, 340 Ill. 407, 172 N.E. 730 (1930). But see Ill. Stat. Ann. (Smith-Hurd, 1934) c. 21, §§ 60, 63 as to accumulations for a cemetery association and for the upkeep of cemetery lots. § 60 was repealed, Ill. L. 1939, p. 1175.

⁷⁵ See *Wharton v. Masterman*, [1895] A.C. 186 (H.L.); *Re Jeffries*, [1936] 2 All Eng. L. Rep. 626 (Ch. Div.).

⁷⁶ See *Girard Trust Co. v. Russell*, 179 Fed. 446 (C.C.A. 3d 1910); *Curtis v. Lukin*, 5 Beav. 147 (Ch. 1842). But see *Manice v. Manice*, 43 N.Y. 303, 375 (1871).

⁷⁷ *Herzig v. Herzig*, 140 App. Div. 514, 125 N.Y. Supp. 402 (1910); *Dresser v. Travis*, 39 Misc. 338, 79 N.Y. Supp. 924 (1902).

Statutes have varied as to what shall become of void accumulations, and this question is a major source of difficulty in interpreting all of them. The English statutes provide that the illegal accumulation shall "go to and be received by the person or persons who would have been entitled thereto if such accumulation had not been directed." The Pennsylvania and Illinois statutes contain exactly the same words. The New York statute as to accumulations of real property has a different solution of this problem. If there is a valid limitation "resulting in a suspension of the power of alienation, or of the ownership, during the continuance of which the rents and profits are undisposed of, and no valid direction for their accumulation is given, such rents and profits shall belong to the persons presumptively entitled to the next eventual estate."⁷⁸ All the other states having accumulation statutes have enacted some form of the "next eventual estate" provision, except Indiana and Alabama, whose statutes are silent on the matter.

The English type of provision seems rather easy to apply. Yet courts have not been without problems of construction. In Pennsylvania for a time it appeared that, if there was a direction to accumulate for an infant until his majority, and then to capitalize accumulations and pay to the infant the income for life, the accumulations at the time the infant reached majority should be given to the infant.⁷⁹ But a later line of authority would give such an accumulation to the residuary legatee or to the next of kin.⁸⁰

Though the English type of provision for the disposition of illegal accumulations gives rise to a number of questions, the "next eventual estate" type such as is found in New York gives rise to many more. An entire article could be written on the meaning of those three words. Who is the person presumptively entitled to the "next eventual estate"? And when does this statute apply? It has been said that, if the next eventual estate is indefeasibly vested so that there is no "suspension of the power of alienation" as required in the statute, then the statute does not apply. On the other hand, if the next eventual estate is limited in favor of an un-

⁷⁸ There is no "next eventual estate" provision in the New York Personal Property Law, but it has been held that the provision of the Real Property Law applies to personalty, *Gilman v. Reddington*, 24 N.Y. 9 (1861); *Matter of Harteau*, 204 N.Y. 292, 97 N.E. 726 (1912).

⁷⁹ *Stille's Appeal*, 4 Weekly Notes Cas. 42 (1877); *Farnum's Estate*, 191 Pa. 75, 43 Atl. 203 (1899); see *Washington's Estate*, 75 Pa. 102 (1874).

⁸⁰ *Wright's Estate*, 227 Pa. 69, 75 Atl. 1096 (1910); *Weinmann's Estate*, 223 Pa. 508, 72 Atl. 806 (1909). See the discussion of these two lines of authority in *Kain, Limitations upon Accumulation of Income in Pennsylvania for Non-Charitable Purposes*, 38 Dickinson L. Rev. 29, 42 (1933).

born or unascertained person, likewise it seems the statute does not apply. If an illegal direction for an accumulation can be stricken out, and the creating instrument still contains a valid direction for the disposition of the accumulations, then it is not a case where there is "no valid direction" within the terms of the statute, and again the statute does not apply. Moreover, it appears that if to give the income to the owner of the next eventual estate would be the equivalent of carrying out an illegal direction for accumulation, again the statute may not be applied.

This latter difficulty, as well as others encountered in applying the "next eventual estate" statute, is suggested in *Hawthorne v. Smith*,⁸¹ one of the most recent cases in which the New York Court of Appeals considered the accumulations statute. The facts were as follows. The settlor, by a trust indenture, assigned to T shares of corporate stock to hold in trust and expend for maintenance and education of C so much of the income as T deemed wise until C should be twenty-one years of age. Unexpended income and principal were to be accumulated and paid over to T beneficially when C reached his majority. A large amount of income was accumulated during C's minority. When C reached twenty-one T's successor trustees, T being dead, demanded the accumulated income. The court below held that, since the direction to accumulate unexpended income and pay the accumulations to another person than the infant was void, such unexpended income belonged to T, the "person presumptively entitled to the next eventual estate." This was reversed by the Court of Appeals on the ground that the "next eventual estate" statute had no application; the trustee could have paid all the income to C if he desired; hence the income vested in C, subject to the gift over to T; since the gift over was illegal, C should be entitled; to give it to T as the owner of the "next eventual estate" would be to effectuate the illegal direction.

It is apparent that the New York courts may, in any given case, reach the same result as the English courts on the question of the effect of an illegal accumulation; and that, whether such a result is to be reached, or whether the "next eventual estate" statute is to be applied, is a matter of the greatest difficulty.⁸²

VI. POSSIBILITIES OF EVASION

Do these statutes effectually prevent the sort of accumulations they were designed to prohibit? Or is it easy for a skillful draftsman to evade

⁸¹ 273 N.Y. 291, 7 N.E. (2d) 139 (1937).

⁸² In general, on the meaning of the "next eventual estate" statute, see 20 Col. L. Rev. 887 (1920); 29 Col. L. Rev. 99 (1929). It has been said that "The persons presumptively entitled to the next eventual estate are those who are entitled to the estate which is to take effect at

their operation? In the four jurisdictions which limit their legislation to accumulations of the profits of land, it would seem that a direction to the trustee to convert the estate into personalty would take the trust out of the operation of the statute.⁸³ And probably in Indiana, where the statutory restriction is limited to the income of personalty, a direction to the trustee to convert into freehold interests in land would have a like effect. In Alabama the fact that the statutory restriction is limited to trusts for the purpose of "accumulations *only*" would seem to make it easy to evade the statute by setting up a trust with some minor additional purpose. Under the English and Illinois acts income may be used to pay debts either of the settlor or of anyone else; and it is conceivable that quite an accumulation may be worked out along these lines. Moreover, since in California it is held that it is proper to use income to pay off encumbrances on the estate, a considerable accumulation could be worked out by creating an encumbrance before setting up the trust and then providing that it be paid off. The exception about "raising portions" for children, which is found in the English and Illinois statutes, would seem to suggest great possibilities of statutory evasion to a clever draftsman.⁸⁴ In New York with a period which amounts practically to the minority of the beneficiary, the possibilities of extensive accumulation are probably limited unless the instrument can be brought within one of the six exceptions. However, the insurance trust exception, recently enacted, is very broad, and undoubtedly would permit considerable accumulation of a sort.⁸⁵

One more possibility may be briefly suggested, if only to discard it, namely, that of the corporate device. A man may accumulate income on

the end of the period during which the rents and profits are undisposed of, or are invalidly accumulated." *Matter of Kohler*, 231 N.Y. 353, 376, 132 N.E. 114, 121 (1921). The following cases deal with the application of the "next eventual estate" statute: *Dodge, Exec'r of Phelps v. Pond*, 23 N.Y. 69 (1861); *Pray v. Hegeman*, 92 N.Y. 508 (1883); *Cochrane v. Schnell*, 140 N.Y. 516, 35 N.E. 971 (1894); *United States Trust Co. v. Soher*, 178 N.Y. 442, 70 N.E. 970 (1904); *St. John v. Andrews Institute*, 191 N.Y. 254, 83 N.E. 981 (1908); *Matter of Har-teau*, 204 N.Y. 292, 97 N.E. 726 (1912); *Matter of Ossman v. Von Roemer*, 221 N.Y. 381, 117 N.E. 576 (1917); *Morris v. Morris*, 272 N.Y. 110, 5 N.E. (2d) 56 (1936); *In re Hoyt*, 116 App. Div. 217, 101 N.Y. Supp. 557 (1907), *aff'd* 189 N.Y. 511, 81 N.E. 1166 (1907); *Hill v. Guaranty Trust Co.*, 163 App. Div. 374, 148 N.Y. Supp. 601 (1914).

⁸³ *Will of Schilling*, 205 Wis. 259, 237 N.W. 122 (1931); see *Congdon v. Congdon*, 160 Minn. 343, 200 N.W. 76 (1924); *Toms v. Williams*, 41 Mich. 552 (1879).

⁸⁴ See *Fearne, Contingent Remainders* 541 (Butler's 10th ed. 1844), the editor says, referring to the exception as to the raising of portions: "... but this exception admits of a latitude which may be productive, in a great degree, of all the inconveniences which were felt or apprehended under the rules of the common law; because, by a will or settlement artfully prepared, every purpose aimed at by Mr. Thellusson may be accomplished."

⁸⁵ For the text of this provision, see Appendix, p. 434 *infra*.

his own property. Likewise, so long as the stockholders do not object, a corporation may accumulate income, and "plow in" surplus instead of distributing it as dividends. Would it then be possible for a settlor to have his trustee hold all the stock of a corporation which made profits but declared no dividends? Probably not. A New York decision would seem to indicate that the court will look through the corporate entity in such a case and regard the transaction as an illegal accumulation.⁸⁶ Of course, if a trustee holds stock in a corporation which, for good business reasons applicable to the success of the corporate venture, retains a portion of its profits, this is not an illegal accumulation.

VII. CONCLUSIONS

From this brief survey of legislation restricting trusts for the accumulation of income, it is apparent that, after more than a century of experience in the United States, we still have a field of law fairly bristling with legal problems. To discuss them fully would require a treatise as long as Gray's "Rule against Perpetuities," but with the important difference that on many questions there would be no relevant decisions.

Some of the problems arise from the form of the statute. This is the case with respect to the poorly worded statement of the permissible period in the Pennsylvania statute. And from the difficulties which the New York courts have had in applying the "next eventual estate" statute, it would seem that this provision has not been satisfactorily drawn.

Many of the problems, however, are inherent in the substance of the legislation; no modification of form is likely to eliminate them. Thus, all the uncertainties of the law involved in determining what is income, and in determining what payments are properly made out of income, give rise to problems in this field. These are particularly acute because an indication of intent in the creating instrument, to the effect that certain property should be treated as principal, does not aid in solving the problem.

There is, also, a group of problems involving a short-time retention of income for purposes which may be purely administrative. In none of these cases would it appear that the retention involved has serious social consequences. Yet under the New York legislation, these matters often have to be litigated.

Then there are other transactions, admittedly accumulations in substance, which are likely to violate some of the statutes, but of which society generally approves. Examples of these are the use of income for the

⁸⁶ *In re Adler's Estate*, 164 Misc. 544, 299 N.Y. Supp. 542 (1937); *In re McLaughlin's Estate*, 164 Misc. 539, 299 N.Y. Supp. 559 (1937).

payment of encumbrances or insurance premiums, for the accumulation of income for pension or old age benefit plans, or for charity.

An examination of the various amendments which have been made to the statutes under consideration shows a trend toward increasing the number of exceptions to their operation, and also toward increasing the period of permissible accumulations.

In the light of this experience, it is not at all clear that it is worth while to establish a shorter period for permissible accumulation of income than the period of the rule against perpetuities. Mathematical calculations may lead one to suppose that a trust to accumulate for lives in being and twenty-one years would grow to enormous proportions, and as Justice Gibson of Pennsylvania once said,⁸⁷ "would ultimately draw into its vortex all the property in the state." But until thorough factual studies of the operation of trusts for accumulation are made, this conclusion may well be doubted.⁸⁸

In the meantime, the following tentative conclusions, as to legislation on accumulations, are suggested:

1. There should be a period in gross of permissible accumulations as in the English and Illinois acts. This would eliminate difficulties of temporary retention for purposes which are in a twilight zone between judicious administration and the addition of income to capital.

2. The "next eventual estate" provision is not desirable; the corresponding provision of the English act is to be preferred.

3. A list of carefully worked out exceptions should be included in any well drawn statute. These probably could at best only draw approximately the ideal line between desirable and undesirable accumulations.

4. In general, the English or the California statutes now in force furnish the best models for legislation restricting accumulations.

APPENDIX

Since it is necessary to examine the text of several accumulation statutes in order to appreciate the point in this discussion, and since they may not be readily available to all readers, the more important ones are set out below.

The Thellusson Act (40 Geo. 3, c. 98) is as follows:

WHEREAS it is expedient that all dispositions of real or personal estates, whereby the profits and produce thereof are directed to be accumulated, and the beneficial enjoyment thereof is postponed, should be made subject to the restrictions hereinafter contained: may it therefore please your Majesty that it may be enacted; and be

⁸⁷ *Hillyard v. Miller*, 10 Pa. 326, 336 (1849).

⁸⁸ The Thellusson estate did not accumulate in any such manner as was calculated. See *Leach*, *Cases on Future Interests* 802 (1935).

it enacted by the King's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons in parliament assembled, and by the authority of the same, That no person or persons shall, after the passing of this act, by any deed or deeds, surrender or surrenders, will, codicil, or otherwise howsoever, settle or dispose of any real or personal property, so and in such manner that the rents, issues, profits, or produce thereof, shall be wholly or partially accumulated for any longer term than the life or lives of any such grantor or grantors, settlor or settlors, or the term of twenty-one years from the death of any such grantor, settlor, deviser, or testator, or during the minority or respective minorities of any person or persons who shall be living, or in *ventre sa mere* at the time of the death of such grantor, deviser, or testator, or during the minority or respective minorities only of any person or persons who, under the uses or trusts of the deed, surrender, will, or other assurances, directing such accumulations, would, for the time being, if of full age, be entitled unto the rents, issues, and profits, or the interest, dividends, or annual produce, so directed to be accumulated; and in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits, and produce of such property so directed to be accumulated, shall, so long as the same shall be directed to be accumulated contrary to the provisions of this act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed.

II. Provided always, and be it enacted, That nothing in this act contained shall extend to any provision for payment of debts of any grantor, settlor, or deviser, or other person or persons, or to any provision for raising portions for any child or children of any grantor, settlor, or deviser, or any child or children of any person taking any interest under any such conveyance, settlement, or devise, or to any direction touching the produce of timber or wood upon any lands or tenements, but that all such provisions and directions shall and may be made and given as if this act had not passed.

III. Provided also, and be it enacted, That nothing in this act contained shall extend to any disposition respecting heretable property within that part of Great Britain called Scotland.

IV. Provided also, and be it enacted, That the restrictions in this act contained shall take effect and be in force with respect to wills and tenements made and executed before the passing of this act, in such cases only where the deviser or testator shall be living, and of sound and disposing mind, after the expiration of twelve calendar months from the passing of this act.

* * * *

The provisions of the Law of Property Act (1925) concerning accumulations (15 Geo. 5, c. 20, §§ 164-6) are given below. Section 166 (1) is a revision of the Accumulations Act of 1892 (55 & 56 Vict., c. 58).

164.—(1) [Substantially the same as the part of the first section of the Thellusson Act which follows the preamble.]

(2) This section does not extend to any provision—

(i) for payment of the debts of any grantor, settlor, testator or other person;

(ii) for raising portions for—

(a) any child, children or remoter issue of any grantor, settlor or testator;
or

(b) any child, children or remoter issue of a person taking any interest under any settlement or other disposition directing the accumulations or to whom any interest is thereby limited;

(iii) respecting the accumulation of the produce of timber or wood;

and accordingly such provisions may be made as if no statutory restrictions on accumulation of income had been imposed.

(3) The restrictions imposed by this section apply to instruments made on or after the twenty-eighth day of July, eighteen hundred, but in the case of wills only where the testator was living and of testamentary capacity after the end of one year from that date.

165. Where accumulations of surplus income are made during a minority under any statutory power or under the general law, the period for which such accumulations are made is not (whether the trust was created or the accumulations were made before or after the commencement of this Act) to be taken into account in determining the periods for which accumulations are permitted to be made by the last preceding section, and accordingly an express trust for accumulation for any other permitted period shall not be deemed to have been invalidated or become invalid, by reason of accumulations also having been made as aforesaid during such minority.

166.—(1) No person may settle or dispose of any property in such manner that the income thereof shall be wholly or partially accumulated for the purchase of land only, for any longer period than the duration of the minority or respective minorities of any person or persons who, under the limitations of the instrument directing the accumulation, would for the time being, if of full age, be entitled to the income so directed to be accumulated.

(2) This section does not, nor do the enactments which it replaces, apply to accumulations to be held as capital money for the purposes of the Settled Land Act, 1925, or the enactments replaced by that Act, whether or not the accumulations are primarily liable to be laid out in the purchase of land.

(3) This section applies to settlements and dispositions made after the twenty-seventh day of June, eighteen hundred and ninety-two.

* * * *

New York Revised Statutes (1829), Pt. 2, c. 1, tit. 2, art. 1, §§ 36-40, with reference to the accumulations of the rents and profits of real estate, are as follows:

SEC. 36. Dispositions of the rents and profits of lands, to accrue and be received at any time subsequent to the execution of the instrument creating such disposition, shall be governed by the rules established in this Article, in relation to future estates in lands.

SEC. 37. An accumulation of rents and profits of real estate, for the benefit of one or more persons, may be directed by any will or deed, sufficient to pass real estate, as follows:

1. If such accumulation be directed to commence on the creation of the estate, out

of which the rents and profits are to arise, it must be made for the benefit of one or more minors then in being, and terminate at the expiration of their minority.

2. If such accumulation be directed to commence at any time subsequent to the creation of the estate out of which the rents and profits are to arise, it shall commence within the time in this Article permitted for the vesting of future estates and during the minority of the persons for whose benefit it is directed, and shall terminate at the expiration of such minority.

SEC. 38. If, in either of the cases mentioned in the last section, the direction for such accumulation shall be for a longer term than during the minority of the persons intended to be benefitted thereby, it shall be void as respects the time beyond such minority. And all directions for the accumulation of the rents and profits of real estate, except such as are herein allowed, shall be void.

SEC. 39. Where such rents and profits are directed to be accumulated for the benefit of infants entitled to the expectant estate, and such infants shall be destitute of other sufficient means of support and education, the chancellor, upon the application of their guardian, may direct a suitable sum out of such rents and profits to be applied to their maintenance and education.

SEC. 40. When in consequence of a valid limitation of an expectant estate, there shall be a suspense of the power of alienation or of the ownership, during the continuance of which, the rents and profits shall be undisposed of, and no valid direction for their accumulation is given, such rents and profits shall belong to the persons presumptively entitled to the next eventual estate.

* * * *

New York Revised Statutes (1829), Pt. 2, c. 4, tit. 4, §§ 3-5, are as follows:

SEC. 3. An accumulation of the interest of money, the produce of stock or other income or profits arising from personal property, may be directed by any instrument sufficient in law to pass such personal property as follows:

1. If the accumulation be directed to commence from the date of the instrument, or from the death of the person executing the same, such accumulation must be directed to be made for the benefit of one or more minors then in being, or in being at such death, and to terminate at the expiration of their minority:

2. If the accumulation be directed to commence at any period subsequent to the date of the instrument, or subsequent to the death of the person executing such instrument, it must be directed to commence within the time allowed in the first section of this Title, for the suspension of the absolute ownership of personal property, and at some time during the minority of the persons for whose benefit it is intended, and must terminate at the expiration of their minority.

SEC. 4. All directions for the accumulation of the interest, income or profit of personal property, other than such as are herein allowed, shall be void; but a direction for an accumulation, in either of the cases specified in the last section, for a longer term than the minority of the persons intended to be benefitted thereby, shall be void only as respects the time beyond such minority.

SEC. 5. When any minor, for whose benefit a valid accumulation of the interest or income of personal property shall have been directed, shall be destitute of other sufficient means of support or of education, the chancellor, upon the application of

such minor or his guardian, may cause a suitable sum to be taken from the monies accumulated or directed to be accumulated, and to be applied to the support or education of such minor.

* * * *

Provisions of the New York Real Property Law now in force concerning accumulations are as follows:

SEC. 60. Disposition of rents and profits. [Substantially the same as Sec. 36, in provisions of New York Revised Statutes of 1829, *supra*, with reference to accumulations of real estate.]

SEC. 61. Accumulations.

All directions for the accumulation of the rents and profits of real property, except such as are allowed by statute, shall be void. An accumulation of rents and profits of real property, for the benefit of one or more persons may be directed by any will or deed sufficient to pass real property, as follows: 1 and 2. [Substantially the same as subsections 1 and 2 of Sec. 37, provisions of New York Revised Statutes of 1829, *supra*, with reference to accumulations of real estate.]

3. If in either case, hereinbefore provided for, such direction be for a longer term than during the minority of the beneficiaries, it shall be void only as to the time beyond such minority.

Provided, that the income arising from any real property granted, conveyed, or devised in trust to any incorporated college or other incorporated literary institution for any of the purposes specified in section one hundred and fourteen of this chapter, or for the purposes of providing for the support of any teacher in a grammar school or institute, may be permitted to accumulate until the same shall amount to a sum sufficient, in the opinion of the regents of the university, to carry into effect any of the charitable uses and trusts mentioned either in section one hundred and fourteen of this chapter or in this paragraph of this section.

Provided, if any of the principal of any trust fund actually received by any incorporated college or other incorporated literary institution, or by the corporation of any city or village, or by the commissioners of common schools of any town, or by the trustees of any school district, under any grant, conveyance, or devise, for any of the purposes for which trusts are authorized under section one hundred and fourteen of this chapter, shall subsequently become diminished from any cause, such diminution may be made up by the accumulation of the interest or income of the principal of such trust fund, in accordance with the directions, if any contained in the grant, conveyance or devise of any such trust fund; and if no directions for that purpose are contained in such grant, conveyance or devise, then such diminution may be made up in whole or in part by such accumulation, in the discretion of the trustees of such trust fund; but in no case shall such accumulation be allowed to increase the trust fund, beyond the true amount or value thereof, actually received by the trustees, to be estimated after the deduction of all liens and incumbrances on such trust fund, and of all expenses incurred or paid by the trustees in the collection or obtaining the possession of the same.

Provided further, that where a gift, grant, devise or bequest of real and personal property, or of real property alone, is made in trust by the owner thereof to a religious, educational, charitable or benevolent corporation, for any of the purposes specified or comprehended in its charter, not more than one-fourth of the total value

of such gift, grant, devise or bequest of real and personal property, or of real property alone, not exceeding in value the sum of fifty thousand dollars, may be set apart for the accumulation of the rents and profits, and income, of such property, for the benefit of such corporation until such time as such accumulation shall amount to the sum of one hundred thousand dollars, whereupon such accumulation shall be available for the use of such corporation, as a part of the permanent endowment fund thereof, or otherwise as provided in the conditions of the gift, grant, devise or bequest to such corporation.

SEC. 62. Anticipation of directed accumulation.

Where such rents and profits are directed to be accumulated for the benefit of a minor entitled to the expectant estate, and such minor is destitute of other sufficient means of support and education, the supreme court, at a special term, or, if such accumulation has been directed by will, the surrogate's court of the county in which such will has been admitted to probate, may, on the application of his general or testamentary guardian, direct a suitable sum out of such rents and profits to be applied to his maintenance or education.

SEC. 63. Undisposed profits.

When, in consequence of a valid limitation of an expectant estate, there is a suspension of the power of alienation, or of the ownership, during the continuance of which the rents and profits are undisposed of, and no valid direction for their accumulation is given, such rents and profits shall belong to the persons presumptively entitled to the next eventual estate. But any and all persons who legally shall have begun heretofore, or shall begin hereafter, to receive any such undisposed of rents and profits or any part thereof by virtue of this section or otherwise, shall continue to receive and enjoy the same notwithstanding the birth thereafter of a child or children to any person or persons receiving all or any part of such rents and profits.

* * * *

Provisions of the New York Personal Property Law now in force concerning accumulations are as follows

SEC. 16. Validity of directions for accumulation of income.

An accumulation of the income of personal property, directed by any instrument sufficient in law to pass such property is valid: 1 and 2. [Substantially the same as subsections 1 and 2 of Sec. 3 of provisions of New York Revised Statutes of 1829, *supra*, with reference to accumulations of personal property.]

3. All other directions for the accumulation of the income of personal property, not authorized by statute, are void. In either case mentioned in subdivisions one and two of this section a direction for any such accumulation for a longer term than the minority of the persons intended to be benefitted thereby, has the same effect as if limited to the minority of such persons, and is void as respects the time beyond such minority.

Provided that, the income arising from any personal property granted or conveyed, or bequeathed, in trust to any incorporated college or other incorporated literary institution, for any of the purposes specified in section thirteen of this chapter, or for the purpose of providing for the maintenance of any teacher in a grammar school or institute, may be permitted to accumulate until the same shall amount to a sum sufficient, in the opinion of the regents of the university, to carry into effect any of the charitable

uses and trusts mentioned in either section thirteen of this chapter or in this paragraph of this section.

Provided, if any of the principal of any trust fund actually received by any incorporated college, or other incorporated literary institution, or by the corporation of any city or village, or by the commissioners of common schools of any town, or by the trustees of any school district, under any grant, conveyance or bequest, for any of the purposes for which trusts are authorized under section thirteen of this chapter, shall subsequently become diminished from any cause, such diminution may be made up by the accumulation of the interest or income of the principal of such trust fund, in accordance with the directions, if any, contained in the grant, conveyance, or bequest of such trust fund; and if no directions for that purpose are contained in such grant, conveyance, or bequest, then such diminution may be made up in whole or in part by such accumulation, in the discretion of the trustees of such fund; but in no case shall such accumulation be allowed to increase the trust fund beyond the true amount or value thereof, actually received by the trustees, to be estimated after the deduction of all liens and incumbrances on such trust fund, and of all expenses incurred or paid by the trustees in the collection or obtaining the possession of the same.

Provided, further, that where a gift, grant, devise or bequest of real and personal property, or of personal property alone, is made in trust by the owner thereof to a religious, educational, charitable or benevolent corporation, for any of the purposes specified or comprehended in its charter, not more than one-fourth of the total value of such gift, grant, devise or bequest of real and personal property, or of personal property alone, not exceeding in value the sum of fifty thousand dollars, may be set apart for the accumulation of the rents and profits, and income, of such property, for the benefit of such corporation, until such time as such accumulation shall amount to the sum of one hundred thousand dollars, whereupon such accumulation shall be available for the use of such corporation, as a part of the permanent endowment fund thereof, or otherwise as provided in the conditions of the gift, grant, devise or bequest to such corporation.

Provided, further, that the income arising from any personal property held in trust created by an employer as part of a stock bonus plan, pension plan, disability or death benefit plan, or profit sharing plan for the exclusive benefit of some or all of his employees, to which contributions are made by such employer, or employees or both, for the purpose of distributing in accordance with such plan to such employees the earnings or the principal, or both earnings and principal, of the trust fund, may be permitted to accumulate until the fund shall be sufficient, in the opinion of the employer, to accomplish the purposes of such plan.

Provided that a deed or other instrument which creates or declares a trust in property consisting of or including a policy or policies of life, health, accident or disability insurance and directs that the income of such trust shall be applied in whole or in part to the payment of premiums upon such policy or policies shall not be considered as affecting an accumulation either of the income so used for the payment of premiums or of the dividends on such policy or policies.

SEC. 17. Anticipation of directed accumulation. [Substantially the same as Sec. 62 of present New York Real Property Law, *supra*, except that this refers to accumulations of personal property.]

SEC. 17a. Stock dividends.

Unless otherwise provided in a will, deed, or other instrument, which shall hereafter be executed and shall create or declare a trust, any dividend which shall be payable in the stock of the corporation or association declaring or authorizing such dividend and which shall be declared or authorized hereafter in respect of any stock of such corporation composing, in whole or in part, the principal of such trust, shall be principal and not income of such trust. The addition of any such stock dividend to the principal of such trust, as above provided, shall not be deemed an accumulation of income within the meaning of this article.

SEC. 17b. [Concerns distribution of income earned during period of administration of decedents' estate.]

* * * *

Alabama legislation on accumulations now in force is as follows (Ala. Code Ann. (Michie, 1928)):

SEC. 6914.—Trusts for accumulation merely; limitation upon extent.—No trust of estate for the purpose of accumulation only can have any force or effect for a longer term than ten years, unless when for the benefit of a minor in being at the date of conveyance, or if by will, at the death of the testator; in which case the trust may extend to the termination of such minority.

SEC. 6915.—Application of income for accumulation to support of minor or beneficiary.—When a minor for whose benefit an accumulation has been directed is destitute of other sufficient means of support and education, the appropriate court, upon application, may direct a suitable sum to be applied thereto out of the fund.

* * * *

California legislation on accumulations, now in force, is as follows (Cal. Civ. Code (Deering, 1937)):

SEC. 722. Dispositions of the income of property to accrue and to be received at any time subsequent to the execution of the instrument creating such disposition, are governed by the rules prescribed in this title in relation to future interests.

SEC. 723. All directions for the accumulation of the income of property, except such as are allowed by this title, are void.

SEC. 724. An accumulation of the income of property may be directed by any will, trust or transfer in writing sufficient to pass the property or create the trust out of which the fund is to arise, for the benefit of one or more persons, objects or purposes, to commence within the time in this title permitted for the vesting of future interests and not to extend beyond the period limiting the time within which the absolute power of alienation of property may be suspended as prescribed by law.

SEC. 725. If the direction for an accumulation of the income of property is for a longer term than is limited in the last section, the direction only, whether separable or not from the other provisions of the instrument, is void as respects the time beyond the limit prescribed in said last section, and no other part of such instrument is affected by the void portion of such direction.

SEC. 726. When one or more persons for whose benefit an accumulation of income has been directed is or are destitute of other sufficient means of support or education,

the proper court, upon application, may direct a suitable sum to be applied thereto out of the fund directed to be accumulated for the benefit of such person or persons.

SEC. 733. When, in consequence of a valid limitation of a future interest, there is a suspension of the power of alienation or of the ownership during the continuation of which the income is undisposed of, and no valid direction for its accumulation is given, such income belongs to the persons presumptively entitled to the next eventual interest.

* * * *

Pennsylvania legislation on accumulations now in force is as follows (Pa. Stat. Ann. (Purdon, Supp. 1939), tit. 20):

SEC. 3251. No person or persons shall, after the passing of this act, by any deed, will or otherwise, settle or dispose of any real or personal property, so and in such manner that the rents, issues, interest, or profits thereof, shall be wholly or partially accumulated for any longer term than the life or lives of any such grantor or grantors, settlor or settlors, or testator, and the term of twenty-one years from the death of any such grantor, settlor, or testator, that is to say, only after such decease during the minority or respective minorities with allowance for the period of gestation of any person or persons who, under the uses or trusts of the deed, will, or other assurance directing such accumulation, would, for the time being, if of full age, be entitled unto the rents, issues, interests, and profits so directed to accumulate, and in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void in so far as it shall exceed the limits of this act, and the rents, issues, interests and profits, so directed, to be accumulated contrary to the provisions of this act, shall go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed: Provided, That any donation, bequest, or devise, for any literary, scientific, charitable, or religious purpose, shall not come within the prohibition of this section, which shall take effect and be in force, as well in respect to wills heretofore made by persons yet living and of competent mind, as in respect to wills hereafter to be made: And provided, That notwithstanding any direction to accumulate rents, issues, interest, and profits, for the benefit of any minor or minors, it shall be lawful for the proper court as aforesaid, on the application of the guardian, where there shall be no other means for maintenance or education, to decree an adequate allowance for such purpose, but in such manner as to make an equal distribution among those having equal rights or expectations whether at the time being minors or of lawful age: And provided, That whenever in the course of the administration of a trust created by deed or by the will of a decedent, who, either before or after the passage of this act, shall have died domiciled in this State, by the provisions of which deed or will the grantor or testator shall have directed the payment of an annuity or annuities, or created an estate for life or for lives or for a term of years, with vested remainder to a corporation or association formed for literary, scientific, charitable, or religious purposes, it shall be made to appear to the court having jurisdiction of the administration of such estate or trust that all parties in interest in said estate or trust, still living or in corporate existence, have agreed that the trust be settled and ended upon terms mutually satisfactory to them, or that the interests of the annuitant or annuitants or of the beneficial owner or owners of the estate for life or for years have been donated to or acquired by the corporation or

association formed for literary, scientific, charitable, or religious purposes, holder of the vested interest in remainder, said court may—due notice having been given to all parties in interest, and the court being satisfied that all parties who are or may be interested in the trust property are in existence, or sui juris and are agreed, and that annuitants or cestui qui trustent are properly protected—decree that the trust be settled and ended in whole or in part and award to such literary, scientific, charitable, or religious corporation or association the sums to which it may be entitled: Provided further, however, That the provisions of the foregoing proviso shall not be effective to bring about the termination of a trust created by deed or will, as aforesaid, if, in the instrument under which the trust arises, the grantor or testator, as the case may be, shall have declared his purpose to create, by accumulation, a fund for the benefit of a literary, scientific, charitable, or religious corporation or association, and shall also have specified the number of years during which such accumulation shall be made by his trustees for that purpose, which term shall not have expired; or shall have specified a sum that it was his intention to accumulate, which sum shall not have been attained; or shall have specified a particular object to be accomplished for which the trust fund is not yet sufficient.

SEC. 3252. In wills, deeds of trust, or other instruments creating trusts, becoming effective hereafter, provisions directing that extraordinary dividends declared upon corporate stock held in trust, whether payable in cash, stock, rights to subscribe to stock of the issuing or another corporation, or otherwise, or directing that profits realized from such stock, either upon its sale or upon the sale or dissolution of the issuing corporation, or otherwise, shall be treated, in whole or in part, either as principal or income, shall be valid and enforceable.