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LIMITATIONS UPON ACCUMULATION OF INCOME IN PENNSYLVANIA FOR NON-CHARITABLE PURPOSES

The problem of this paper is to inform other lawyers with the benefit of an investigation of the Pennsylvania authorities as to the limits to which they may safely advise a client that directions to accumulate income of a trust, created either by will or by deed, will be upheld. The paper first discusses the Thellusson litigation in England and the effect of the Thellusson Act upon the law there. A comparison is then made of the English act with the Pennsylvania act which was modelled from it. The law of accumulations in Pennsylvania is almost entirely controlled by the Act of April 18, 1853, P. L. 503, and the confusing line of decisions made under this act, although such accumulations, which would have been void before the passage of the act as a violation of the rule against perpetuities, are still invalid without reference to the act. The more important of these Pennsylvania decisions are then discussed, and in conclusion, the probable results of accumulation directed by deed are considered.

I

Peter Thellusson made a will. Such it seems to me must be the first sentence in any monograph upon statutes against accumulations. The Act of 39 and 40 Geo. III, c. 98, was passed as a direct result of the Thellusson will, and the statutes which have since been passed in other jurisdictions have been so influenced by this act that they can fairly be said to have been copied.¹ A very general discussion of the important events in the Thellusson estate will therefore

¹For a study of such statutes see Runk, AMERICAN STATUTORY MODIFICATIONS OF THE RULE AGAINST PERPETUITIES, OF TRUSTS FOR ACCUMULATIONS AND OF SPENDTHRIFT TRUSTS, in 80 Univ. of Penna. Law Rev. 397 (1932).

be not without interest and importance to readers of this paper.

Peter Thellusson, a native of Geneva, became a successful London merchant. By his will, dated April 2, 1796, he devised all of his residuary estate, valued at about 600,000 pounds, to three trustees named in the will. The duration of the trust was to be as follows: during the natural lives of his three sons, and of the sons of his said sons, and of such issue as any of his grandsons might have, as should be living at the time of his decease or born in due time afterwards, and during the natural lives of the survivors or survivor of the said several persons. The trustees were to invest all income from the trust estate in the purchase of real estate, throughout the duration of the trust. At the death of the last survivor of the persons named the real estate originally devised together with that accumulated was to be divided into three parts, one part to be settled on "the eldest male lineal descendant then living" of each of the testator's three sons in tail male, etc. If there were a failure of male descendants of one or more of the sons the whole property was to be divided into two parts, or allowed to remain intact for one "eldest male lineal descendant then living." These limitations were not followed by any limitations to the heirs general of the testator, but if there was a general failure of such heirs, then the property was to be converted into money and given to the then King of England to be applied to the use of the Sinking Fund, in such manner as should be directed by Parliament.

The testator being at the time of writing the will aged sixty-one, and having his three sons married and still having children, it might have been that at the death of the testator the list of *cestuis que vie* would include great grandchildren, and might quite conceivably have numbered several dozen. Mr. Thellusson, however, died soon after the will was written and left so far as his male line was concerned, three sons and six grandsons, two of the grandsons having been born after the death of the testator, but having

been born within six months of the death of the testator, they were included as being born "within due time".

Mr. Morgan, the celebrated actuary of the Equitable Life Assurance Company, calculated that the probability was that one of these nine would survive for seventy years, or until the year 1868. There was then also the possibility of one or more of the beneficial takers being a minor, in which case the accumulations would continue, while not under the will, but as a matter of law, until the date of his majority. It was thought that the reasonable minimum probable continuance of the accumulation was eighty years. Accumulating the estate left for this period at 5% (although it was probable it could accumulate faster) in seventy-five years it would amount to some 23,000,000 pounds.

The Thellusson will was the cause of an extended and very expensive litigation. Lord Chancellor Loughborough in 1801 delivered the opinion in *Thellusson v. Woodford*,² upholding the validity of the limitations and directing that the trusts be performed. On appeal the case was affirmed by the House of Lords in 1805.³ In 1821 the case of *Oddie v. Woodford*⁴ was brought to determine the meaning of "male lineal descendants". In 1833, the expenses of management, combined with the inefficiencies of disinterested trustees resulted in leasing the whole of the properties held under the Thellusson trust to Lord Rendlesham, Thellusson's eldest male lineal descendant, at an adequate rent.⁵ This solution was consented to by all the cestuis que vie and by his Majesty so far as his interests in the ultimate limitation were concerned. Under this Act the lessee managed the property, and the annual rent was applied to the purposes mentioned in the will. An examination of the statement of the trustees⁶ will show something of the nature of the accumulations until 1833.

²⁴ Ves. 343.

³*Thellusson v. Woodford*, 11 Ves. 112, 1 New Repr. 357.

⁴³ M. & C. 584.

⁵³ & 4 Wm. IV. c. 27, Private, 14 Aug. 1833.

⁶Jour. H. of L. vol. lxxv. p. 490 (1833), reprinted in Hargraves, A TREATISE ON THE THELLUSSON ACT, p. 13 et seq. (1842).

Concerning the legal validity of the Thellusson limitations, Hargraves says,⁷

"it must be admitted, . . . that although the testator had abused the right of alienation, and had violated the spirit and intention of the law of executory devise, in the creation of a trust of the most unjust and inequitable character; in short, although Mr. Thellusson's will well merited every epithet indignantly applied to it in the argument of learned and enthusiastic counsel for his family, and although injustice, absurdity, eccentricity, ambition, avarice, and heartlessness had all combined in the creation of this testamentary trust, yet the law would not have been justified in annulling Mr. Thellusson's will, nor equity in declining to execute his trust. Every court before which this cause was successively taken, concurred in disclaiming any such power. It was no new thing for Judges to have to lament their inability to overturn such dispositions of property. Sometimes, indeed, some fortunate technical error or omission in the frames or words of such instruments enables the court to overturn entire dispositions, to declare testators legally intestate, and to distribute their property according to the law of intestacy.

". . . (p. 25) But in Mr. Thellusson's will, although the purposes to which the accumulations were to be applied were as selfish, inequitable, and eccentric as can be easily conceived, no such technical error or fatal ambiguity could be found."

The rule against perpetuities fixes the latest period at which an estate may vest as a life or lives in being plus a period of twenty-one years, whether or not in reference to any minority, plus one or two periods of gestation, if, and only if, they exist. The only limitation upon the lives in being seems to be the one of practical necessity that the individuals so selected must be such that there is a probability of being able to ascertain the date of the death of the survivor. Mr. Thellusson chose the lives of all of his male descendants at the time of his death, hence all were lives in being, and avoided using the further period of twenty-one years, which was then less certainly a period which could

⁷Hargraves, *Supra*. note 6 pps. 21, 22.

be in gross (not definitely decided until 1833).⁸ Thus it is obvious that the estate in the beneficial takers could not by any possibility be prevented from vesting for a longer period of time than that allowed by the rule against perpetuities.

Mr. Hargraves probably voiced the feeling of the English people in the epithets with which he characterizes Mr. Thellusson's purposes. It may be doubted whether Mr. Thellusson was so very unusual in his ambitions. Few people have attempted to accumulate the entire income of such a large fortune. The idea of accumulation, however, is a very old one, which many, if not all of us, have contemplated. Give me one grain of wheat today, two grains tomorrow, four the next day, and so on for a month, and at the end of that time I shall be a rich man. How often do people calculate a similar thing with pennies! The idea of setting aside a small sum, which amounts to very little at present, and allowing it to accumulate at compound interest for a long time, presents a very interesting mathematical phenomenon, which has excited the imaginations of many. "The ingenious Dr. Franklin," whose philanthropy is above reproach, adopted the idea of accumulations for charitable purposes.⁹ By his will he left legacies to the cities of Boston and of Philadelphia of 1,000 pounds each to be accumulated by being loaned to young married artificers at interest for 100 years. By this plan he calculated that each legacy would be then worth 131,000 pounds, of which 100,000 pounds was to be spent on public improvements, while the balance was to be accumulated for another century, at which time it would amount to 4,061,000 pounds, which was then to be expended on public improvements by the cities and states respectively. Use of the same system has been considered by many for purposes of building up a family aristocracy based upon wealth. It thus seems that Mr. Thellusson should not be thought the selfish scoundrel which Hargraves tries to make him.

⁸*Cadell v. Palmer*, 1 Clark & F. 372.

⁹See Hargraves, *Supra.*, note 6, p. 34.

The position of the state on the other hand in desiring to prevent, or at least control, accumulations is not only sensible but necessary. The history of Mortmain goes to the roots of English law. The growth of the rule against perpetuities is a well known chapter. Exactly the same broad principles and policy demand the limitation of accumulations. The Thellusson trust, having been drawn so as to avoid the clutches of the law as it then existed, demanded some legislative action in order to prevent its too frequent recurrence. Indeed, even before the decision of the House of Lords in 1805 on the Thellusson will, instructions had been given for two wills to be drawn up with all beneficial enjoyment of the testator's estate prevented until "the death of the last survivor of all the members of the peerage" living at the testator's decease.¹⁰ To remedy the Thellusson abuse of existing law, Parliament passed the Act of 39 & 40 Geo. III, c. 98, 1800,¹¹ known usually as The Thellusson Act, which was substantially copied by Pennsylvania in the Act of April 18, 1853, P. L. 503.¹²

II

Were it not for the Thellusson Act, trusts for accumulation in England might exist for the full limit of executory devises, that is, for lives in being plus twenty-one years. Under the *Státute*, Hargraves states the limits of accumulation as follows:¹³

"(1) real or personal property may be limited by way of executory devise so that the vesting of the beneficial ownership of the original corpus of the property so settled by a testator shall be in suspense until twenty-one years after the decease of the last survivor of all the testator's children; (2) until which period he may also postpone the beneficial enjoyment of the aggregate rents, profits and produce, or of the estates

¹⁰*Ibid.*, p. 36.

¹¹See Appendix A.

¹²See Appendix B. The amendment of this act by the Act of April 14, 1931 P. L. 29 does not concern the topic of this paper.

¹³Hargraves, *Supra.* note 6, p. 112.

wherein the trustees have invested such rents, profits and produce, during an accumulation continuing for twenty-one years from his own decease; (3) but with respect to the intermediate period between the end of the twenty-one years from his own decease, and the end of twenty-one years from the decease of the last survivor of his children, the rents, profits and produce arising from the aggregate trust property during such period (being item (1) plus (2)) must be either limited so as to vest in beneficial ownership at the end of the twenty-one years from the testator's own decease or else be allowed to go as in cases of intestacy."

From this it will be seen that although the accumulations which it was legally possible for Peter Thellusson to direct have been greatly curtailed by the English Act, it is still possible to direct accumulations for the term of twenty-one years as a period in gross from the death of the testator, and to capitalize these accumulations at that time, to be restricted to the period of remoteness allowed by executory devises. How much more restrictive than this is the law of Pennsylvania, under an almost identical statute, will be discussed in the remainder of this paper.

The law of Pennsylvania as to accumulations prior to the passage of the Statute of Accumulations¹⁴ is well summarized in the Report of the Commissioners on the Price Act:¹⁵

"As the law now stands here, an estate may be made to accumulate and double many times, so long as any number of designated persons, living at the death of the testator, shall live, and twenty-one years and about nine months thereafter; and such persons can easily be so selected, as with said additional years to tie up the estate for a century."

It will be seen that this is similar to the English law before the Act of 1800.

The Pennsylvania Act of 1853 is a clumsy copy of a portion of the first section of the Thellusson Act.¹⁶ The

¹⁴Supra. n. 12.

¹⁵Price, *THE ACT FOR THE SALE OF REAL ESTATE*, p. 58 (1874).

¹⁶Foulke, *A TREATISE ON THE RULES AGAINST PERPETUITIES, RESTRAINTS ON ALIENATION AND RESTRAINTS ON ENJOYMENT AS APPLICABLE TO GIFTS OF PROPERTY IN PENNSYLVANIA*, Paragraph 624 (1909).

English Act provides four periods to which accumulation may lawfully be made (numbers and italics supplied), to wit:

“(1) for any longer term than the life or lives of any such grantor or grantors, settler or settlers; (2) or the term of twenty-one years from the death of any such grantor, settler, deviser, or testator; (3) 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; (4) or during the minority or respective minorities only of any such person or persons who, under the uses or trusts of the deed . . . , would, for the time being, if of full age, be entitled unto the . . . profits . . . so directed to be accumulated.”

Of the language of this English Act, Lord Chancellor Brougham, is quoted on the title page of Hargraves book as saying,¹⁷

“An act, which has hardly ever been discussed, in Courts either of Law or Equity, without the Judge having occasion to observe upon the inartificial, and, in several respects, ill defined language, in which its provisions are expressed.”

By comparing the two acts¹⁸ it will be observed that the framers of the Pennsylvania Act made an almost literal transcript of the first, second, and fourth clauses of the English Act, but carefully omitted the third clause. The relevant text (numbers and italics supplied) follows:

“(1) for any longer term than the life or lives of any such grantor or grantors, settler or settlers, or testator, (2) *and* the term of twenty-one years from the death of any such grantor, settler, or testator, (4) *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 . . . (etc.).”

¹⁷Supra. note 6.

¹⁸Supra., notes 11 and 12.

Four periods are created by the English Act but only one of them can be taken.¹⁹ In the Pennsylvania Act, instead of "(1), or (2), or (3), or (4)" as in the English Act, we find merely by changes in explanatory words, "(1), and (2), that is to say (4)." The result is that although the wording is copied almost verbatim from the English Act, a single period is prescribed as a limit for accumulations in Pennsylvania. The three periods are amalgamated into one.

The strict construction which has been placed on the Pennsylvania Act by its courts has confined within narrow limits the duration of trusts for accumulation, and has led to unfavorable criticism of the Act, and of the decisions under it.²⁰ It is interesting to note, however, that the Commissioners who drafted the act did not intend the act to allow accumulations to the extent to which they were allowed by the Act from which they drew their wording.²¹ The Commissioners reported as follows, after summing up the then existing law (see *supra*):

"We have, therefore, added the ninth section to the bill, being in substance the English Act of 39 & 40 Geo. III, c. 98, limiting the period of accumulation to the minorities of such minors as may be interested, and allowing them a living out of it, when without other means of subsistence. In this latter respect the bill goes beyond the English Act."

The leading Pennsylvania case under the Act is *Washington's Estate*.²² The facts were: T bequeathed to trustees, to accumulate surplus over a stipulated maintenance to T's infant daughter, said accumulations to be added to the principal of T's estate upon the daughter's arriving at 21. Guardian petitions for increased maintenance—held for petitioner.

¹⁹Authorities collected in Gray, *THE RULE AGAINST PERPETUITIES*, Paragraph 695, (2nd. Edit. 1906).

²⁰Gray, *Supra.*, note 19, Paragraph 717; Scott, *TRUSTS FOR ACCUMULATIONS*, Paragraph 155, p. 71. (1888).

²¹See Price, *Supra.*, note 15 pps. 57, 58.

²²75 Pa. 102 (1874), affirming 8 Phila. 182 (1871).

The actual holding of the case seems correct, i. e., that where there is a direction to accumulate the income of a minor, the guardian can have an adequate allowance decreed out of the income. The trouble with the case comes from the reasoning of the Judges who wrote the opinions in the Orphans' Court and in the Supreme Court.

The defense of the trustees was that the minor should not be entitled to increased maintenance because the accumulations were for the benefit of the remaindermen, and not for the minor.

Paxson, J., reasoned that the court could not grant increased allowance if the accumulations were to go to the remaindermen without considering the Act, but that since the Act provided that an adequate allowance could be granted, it must follow that the accumulations must go to the minor and not to the remaindermen.²³

His error does not seem difficult to discover. If the accumulations were to go to the minor, the court would not need the aid of the proviso of the statute to grant an increased allowance. Hence the proviso of the statute would be meaningless unless the legislature meant that the accumulations during the minority not needed for support of the minor could be capitalized for the benefit of the estate or made the subject of other gift over.

In the Supreme Court, Gordon, J., bases his decision on the theory that the direction to add the accumulations to principal was void, and so the minor would have the right to the accumulations upon attaining majority, as "the person, or persons who would have been entitled thereto, if such accumulation had not been directed." If this premise had been correct, his conclusion allowing the increased allowance would have followed.

Gordon, J., says it is a contradiction in terms to allow the income of a minor to be accumulated, and when he comes of age to give the accumulations to someone else. Concerning this, Foulke says:²⁴

²³8 Phila. at p. 187.

²⁴Foulke, *Supra.*, n. 16, page 386.

"There was no contradiction in terms. The gift took a portion of the income away from B and gave it to A, and the court overlooked the fact that when the statute permitted a direction to accumulate during that period, it also permitted a disposition of that accumulation."

The result of the dicta in the Washington case is probably wrong. Considering the provisos of the English Act, and the amalgamated proviso of the Pennsylvania Act, it would seem that they were intended to mark out the respective times during which accumulations could lawfully be made. Both statutes say "No person . . . shall . . . (accumulate) for any longer term than . . . " The Pennsylvania Act goes further in allowing a reasonable support to the minor out of these accumulations. But the Pennsylvania Courts relying on the decision in Washington's Estate allow, in effect, only what would occur anyhow by operation of law, that when there is a gift to a minor, that which is not required for his support will be accumulated until he becomes of age.

The Pennsylvania Act, it is true, allows accumulation only during the minority of a person who would, for the time being, if of full age, be entitled to the *income* so directed to be accumulated. The result of Washington's Estate is that accumulation is restricted to one who would be entitled to the *accumulations*. The distinction is between the words *income* and *accumulations*. Professor Gray gives the following suppositious case:²⁵

"Income cannot be accumulated during the minority of A, unless A would be entitled to the income if of full age. Suppose property is given in trust to pay the income to A for life, and on A's death to transfer the principal to B, and there is a direction to accumulate the income during A's minority, and to add the accumulations to the principal. Such a direction would certainly appear to be authorized by the Statute. If A was of full age, he would be entitled to the income; and that is enough, according to the

²⁵Gray, THE RULE AGAINST PERPETUITIES, paragraph 717 (3rd Edit. 1915).

Statute, to make the accumulation lawful. If A would get the income if over age, accumulations made while he is under age ought to be good, to whomsoever they go, for there is nothing in the Statute requiring them to go to A or any other person. Nevertheless, it has been held that such a direction is void altogether, and however little such a doctrine is justified by the Statute, it is now well settled."

Scott, writing in 1888,²⁶ seemed to think the decision fully justified from the statute, saying:

"The construction placed upon the Act of 1853 in Washington's Estate, and which has been followed by many decisions to the same effect, is undoubtedly a strict construction, confining within very narrow limits the duration of all trusts for accumulation in Pennsylvania. Perhaps it is to be regretted that the language of the Pennsylvania Statute is so sweeping in its terms, for, says Paxton, J., in Washington's Estate, (8 Phila. 189) 'it is difficult to see the wisdom of any Act which requires in a large estate, the accumulated income of a minor to be paid to him upon his arrival at full age. There are many instances where such a thing would be injurious to him in the highest degree. The capitalization of the income and the payment to him of only the interest after majority, would often promote his best good. There would seem to be no reason of public policy demanding such a change in the right of disposing of property. And I desire to call the attention of the profession to the fact that our Act does not, as the Thellusson does, allow accumulation for the purpose of the payment of debts or to provide for raising portions for children.' It would seem also, that, in such cases, the same policy of the law which favors accumulation during minority, should have repelled the idea of the compulsory subjection of such accumulations to the free control of the minor when just of age."

The above quotations indicate one very unfortunate result of the Pennsylvania law, whether such is due to the Act or the decision of the court.

*Carson's Appeal*²⁷ came before the Supreme Court in

²⁶Supra., note 20, page 21, paragraph 155..

²⁷99 Pa. 325 (1882).

1882. There, the settlors, by trust deed attempted to capitalize the accumulations during an existing minority, the income on the accumulations to be paid to the minor after attaining majority. In a short opinion, based largely on the decision of *Washington's Estate*, it was held that the attempt to capitalize accumulations for the period of an existing minority was illegal. The finality of the decision of the Court on the attempted capitalization of accumulations is seen from the following quotation from the opinion by Trunkey, J. :—²⁸

"time enough has elapsed for legislative correction, if the intendment of the statute has been misapprehended by the courts. The ingenious argument for the appellants (that the thing prohibited by the Act is the accumulating of income beyond a certain term, not the donor's free disposition of the income accumulated within a permitted term) is convincing that much may be said favorable as to the opposite construction, and that the intendment is not so clear as to preclude doubt; but we are not convinced that the repeated and uniform decisions upon the very question now presented should be overruled. *Stare decisis*. Decree affirmed and appeal dismissed at the costs of appellants."

The rule which we have been discussing so far as the result of the unnecessary decision of *Washington's Estate*, and confirmed by *Carson's Appeal* may be stated thus :

A direction to accumulate is void, though it be only for the minority of a person in being, if the accumulations are not to go to the minor upon his attaining majority.

Subsequent cases have evinced no intention to qualify the rule, and the offer to the legislature to correct that interpretation of the statute, if erroneous, has remained unaccepted. The later cases state this rule with a citation to *Washington's Estate* as they would state a fundamental axiom. Discussion of the later authorities for this proposition would be of no advantage as the Pennsylvania courts always go back to *Washington's Estate* as the original authority, and such

²⁸99 Pa. at p. 329.

citation of authority would have the disadvantage of adding to the confusion of the erroneous holding on the disposition of accumulations unlawfully directed. Most of the late cases come before the court with the illegality of the accumulations unquestioned, the sole point for consideration being the disposition of such accumulations as have accrued.

We will therefore turn to the line of cases qualifying and modifying *Washington's Estate* on the problem of disposition of income directed to be accumulated for other than the benefit of the minor.

III

In *Stille's Appeal*,²⁹ there was a direction to accumulate the income of a portion of the residue of the estate until a granddaughter reached twenty-one, then to pay the income of the whole sum to the granddaughter for life. It was held in the court below and affirmed by the Supreme Court that the direction to accumulate was void as not being a direction to accumulate the income of a minor, but decided on the authority of *Washington's Estate* as follows:³⁰

"if a will directed unlawful accumulations to be made during the minority of an infant to be capitalized, and the interest of the capitalized accumulations to be paid to the person, formerly an infant, during life, from and after the attainment of majority, the unlawful accumulations are the property of the minor."

The general proposition derived from the cases of *Washington's Estate* and *Stille's Appeal*, is that the minor gets the accumulations upon arriving at majority, although the testator in the will provided that the minor should get only the income from the accumulations: in short, that where the accumulations for the period of an existing minority are to be capitalized, the minor takes merely because his minority marked out the period for the accumulation to take place.

²⁹4 W. N. C. 42, (1877).

³⁰4 W. N. C. at p. 43.

In *White's Estate*,³¹ an estate which has created several cases in the reports on the Act of 1853, the facts being slightly different from *Washington's Estate* and *Stille's Appeal*, a conclusion was reached that illegally accumulated income fell into the residuary estate of the testator.

The testator provided a trust fund for A for life, a baby at the testator's death, but until A reached twenty-five only so much of the income to be paid him as the 'executors thought proper. At A's death the accumulations and the principal were to go to A's issue.

It was held that the accumulation impliedly directed was inoperative, as for a period longer than a minority, and for the ultimate benefit of other than the minor. But the accumulations resulting from income not expended on the minor during minority were distributed under the residuary clause of the will, and did not go to the minor as contended.

The following quotation from the opinion of Penrose, J., later became very important in the law of distribution of illegally accumulated incomes.³²

"Accumulation is forbidden by the act no less where it results by indirection than where it is expressly ordered; the striking down of the illegal accumulation leaves the will as if it had been silent on the subject, and future gifts are not accelerated; if the accumulation relates to a vested interest taking effect in possession, the released income goes at once to the beneficiary—if to an interest not vested in possession, the income goes to the residuary legatee or devisee, unless the residuary estate itself be the subject of the provisions, in which case the income goes under the intestate laws to the next of kin or heirs: 1 Jarman on Wills, 274; Mitcheson's Estate, 11 W. N. C. 547; Gray on Perp., secs. 671, et seq."

The year following the decision of *White's Estate*,³³ the Supreme Court handed down the decision in *Farnum's Estate*.³⁴ A fund was given to trustees to accumulate two-thirds of the income until a minor daughter attained twenty-

³¹8 Dist. 33, (1898).

³²8 Dist. at p. 35.

³³Supra. n. 31.

³⁴191 Pa. 75 (1899).

one, then to "set over out of her share, the sum of \$20,000." As against the trustee's contention that the \$20,000 should be paid out of the accumulations, the daughter was given the \$20,000 out of principal, as well as the accumulations, under the rule of *Washington's Estate*.³⁵

In 1909 *Weinmann's Estate*³⁶ the will created a fund to accumulate until the grandson reached forty, then to capitalize whole fund, and pay income to grandson for life, then over to his children or into residue of estate. Held, that the illegally accumulated income went to the residuary legatee of the testator and not to the grandson. Here the fact that the grandson was entitled to nothing until he reached forty, made it easy to distinguish the case from *Washington's Estate*, and hold rather that it fell into the category of *White's Estate*. The logic of the court seems to be this: since the grandson could not have taken the accumulations if the direction had been legal, it cannot be that under an illegal direction he should have a higher right. Lamorelle, J., in the opinion of the Orphans' Court remarked that this case was not to be confused with the line of cases commencing with *Washington's Estate*, where the trust began in an actual minority and the accumulations have been given to the minor when he becomes of age, regardless of the provision of the will that he is not to take them. "Whether the cases above cited are sound or not they embody the law; but there is no reason why their doctrine should be extended."³⁷ The case is not to be distinguished from *White's Estate*.³⁸ Since by the will the grandson is under no circumstances given the accumulations, he cannot be such a person as the Act speaks of as "otherwise entitled." Had the grandson been given the accumulations upon arriving at forty, he would have been such a person.

In 1909 then, the situation was this: there were two

³⁵Compare *Stocking's Estate*, *Infra*. n. 62.

³⁶223 Pa. 508 (1909).

³⁷223 Pa. at p. 510.

³⁸*Supra*. n. 31.

lines of authority each fortified with subsequent cases, and doubt had been cast upon the merit of the line of cases beginning with *Washington's Estate* by the remark of the lower court judge in *Weinmann's Estate*, although he assumed that the law had become settled for better or for worse. In all of the four cases discussed, the will had provided for other disposition of the accumulations than giving it to the minor, the only difference between the cases seeming to be that when the accumulation was for a period of an existing minority, and the accumulations were to go elsewhere than to the minor, the minor took regardless of the will, whereas if the accumulations were void as an attempt to accumulate for a *longer* period than an existing minority, then the accumulations would not go to the minor but would be disposed of as though the provision for accumulation had not been made.

In 1910 *Wright's Estate*³⁹ came before the court. The facts were: A fund was bequeathed to trustees to invest and reinvest income until granddaughter X reached twenty-one, then to pay the income from the corpus and the accumulations as an entire fund to X until her youngest daughter reached twenty-one, then to be divided among the living children of X. Appeal by F, father of X as residuary legatee of T, on the theory that the accumulations were as undisposed property under the will. Held, for F.

The accumulations were void under the statute because an accumulation for other than the minor, although the period through which the accumulations were to be made was an existing minority. This was the same fact which made illegal the accumulations in *Stille's Appeal*,⁴⁰ and *Farnum's Estate*.⁴¹ That the accumulations were unlawful was admitted by both sides, showing the closed situation which exists as to that particular holding of *Washington's Estate*.⁴² The auditing judge held that the accumulations

³⁹227 Pa. 69 (1910).

⁴⁰Supra. n. 29.

⁴¹Supra. n. 34.

⁴²Supra. n. 22.

should go to the minor. In the opinion of the lower court the case could not be distinguished from *Stille's Appeal*,⁴³ and the decision of the auditor was affirmed. The Supreme Court said:⁴⁴

Potter, J... "This has made it necessary for us to examine carefully the decision on *Stille's Appeal*, to ascertain whether the grounds upon which it was based are tenable, and we are satisfied that they are not . . . As the decision in *Stille's Appeal* was thus based upon a misapprehension of one of the points decided in *Washington's Estate*, it cannot be regarded as authority upon the particular point in question. The same may be said of *Farnum's Est.*, 191 Pa. 75, in which by similar inadvertence, in supposed conformity with *Washington's Estate*, it was announced that accumulations unlawfully made during a minority, are to go to the minor, absolutely upon arriving at maturity. . .

"We think the present case is not to be distinguished in principle from *Weinmann's Estate*, 223 Pa. 508 . . ."

Thus finally in 1910 the cases on distribution of illegally accumulated income were brought into harmony by adopting the rules laid down by Penrose, J., in *White's Estate*.⁴⁵ The unfortunate and seemingly unnecessarily restricted interpretation by the Supreme Court in *Washington's Estate* continues, criticized but unquestioned, to limit accumulations under the Pennsylvania statute to those of the estate of a minor, during his minority, with power in the proper court to grant an adequate allowance out of those accumulations for his support. Such an accumulation, it

⁴³Supra. n. 29.

⁴⁴227 Pa. at p. 73.

⁴⁵Supra. n. 31 (8 Dist.) at p. 35. See also *Kerr's Estate* 13 D. & C. 557, (1930), where a will created a trust for payments in specified amounts to certain beneficiaries for life, with a vested gift over to remaindermen. Held that the income in excess of the specified amounts was a void accumulation which would pass to the next of kin under the intestate laws and not to the remaindermen, because the latter having no right to present possession could not be persons "who would have been entitled thereto, if such accumulation had not been directed." See also *Ludescher's Estate* 14 D. & C. 645 (1930).

would seem, would be permissible by operation of law, even in the face of a statute which would make a blanket prohibition of all accumulations, with no exception provisos.

Since 1910 the Supreme Court has consistently followed the state of authority as it then stood, but there is one recent development of considerable importance.

Nirdlinger's Estate,⁴⁶ shows that Pennsylvania has firmly decided to follow the apportionment doctrine in the distribution of extraordinary corporate dividends. In that case, the Court in a twenty-page opinion gives a very comprehensive digest of the cases under the Massachusetts, the Kentucky and the Pennsylvania or American rules. It seems to be the doctrine of the Pennsylvania cases that the remainderman is entitled to just what the stock was actually worth at the time of the creation of the trust, no less and no more. To this end the stock dividend is divided in order to place in the capital account a sufficient amount to maintain the intact value of the stock.

In *Boyer's Appeal*,⁴⁷ Mr. Justice Potter says:

"And then after all, the rule for the determination of controversies over dividends, between life tenants and remaindermen, should be to give to each just what the donor intended each to have. As has been said, the intent of the grantor or testator is the pole star for the guidance of the Courts."

The importance of a consideration of the distribution of such extraordinary corporate dividends in the drafting of any trust instrument is obvious. By placing these extraordinary dividends to the income account, the estate of the remaindermen may be seriously impaired, while by throwing them to the capital account, the estate of the immediate income beneficiary may likewise be impaired. If allowed, the direction of a testator to direct that stock dividends be placed in the capital account might result in an accumulation. The general opinion of the Bar after the statement of the Court in *Boyer's Appeal*⁴⁸ that the donor's opinion

⁴⁶290 Pa. 457 (1927)..

⁴⁷224 Pa. 144, 153, (1909).

⁴⁸*Supra.* n. 42.

would be followed, was that in a trust a provision to place all stock dividends in the capital account would be upheld. For this reason it was customary to make such a provision in wills and deeds of trust to protect the remaindermen against the effects of the apportionment doctrine, and to render the administration less complicated on the part of the trustee.

In 1928 some doubt was cast upon the validity of such a provision. In *Jones v. Integrity Trust Company*,⁴⁹ dealing with the apportionment of a certain stock dividend, but not involving the Act of 1853, Mr. Justice Simpson, in the final paragraph of his opinion, says:⁵⁰

"Our attention has been called to the fact that in some quarters it is supposed that our prior decisions on the subject would be applicable in cases of extraordinary stock dividends and rights to subscribe, even though the testator or settlor who created the trust, had provided a different method of distribution under such circumstances. This is incorrect; what the will or deed specifies must be carried into effect, so far as it is legal." (Italics supplied).

Thereupon, members of the bar who had drafted trusts with the aforementioned provisions became apprehensive, lest the above qualification of Mr. Justice Simpson was directed toward bringing such a provision within the Act of 1853.

This doubt was soon settled. In *Maris' Estate*,⁵¹ a husband by will created a trust to pay the net income to his widow for life and made the provision that "all stock dividends consisting of shares of stock of the corporations issuing them shall be considered as principal." The court below held that this latter provision was in effect a direction to accumulate contrary to the provisions of the Act of 1853, and its conclusion was affirmed by the Supreme Court, Mr. Chief Justice Moschzisker writing the opinion.

⁴⁹292 Pa. 149 (1928).

⁵⁰292 Pa. at p. 156.

⁵¹301 Pa. 21 (1930).

The decision in *Maris'* case seems to be in line with the previous decisions of the Pennsylvania courts on the Act of 1853 and with their view of the distribution of extraordinary corporate dividends. Although it may be a disappointment to some testators who have prepared wills to obtain the greatest advantage of the Act of 1853, it is well that the law has become settled on this point.

A distinction must be made between an accumulation which is void under the statute and a gift which is void as a violation of the rule against perpetuities, because of remoteness in vesting. In the case of an accumulation, the trust is void only as to the excess of accumulations not allowed by the Act of 1853 and the balance of the gift is enforced under the terms of the will; whereas in a gift void for remoteness under the rule against perpetuities, the entire gift fails. In such a case, of course, the entire accumulations fail with the gift itself. An example of this is *Lilley's Estate*,⁵² where a rich coal operator attempted to leave his residuary estate, amounting to almost his entire holdings, in trust, to be managed and accumulated for a period of ninety-nine years as a term in gross, then to be divided among the then living heirs of two named persons. The Court found that the testator died intestate as to his residuary property, and the vast estate passed under the Intestate Laws.

In the case of *Brown v. Williamson's Executors*,⁵³ Justice Strong said:

"The trust indeed may be transgressive, but even under the Ripon Act, 39 & 40 Geo. III, ch. 98, in England the excess only beyond the period allowed for trusts of accumulation is void. They are sustained for the statutory period. Our Act of 1853 was modelled after the Ripon Act and it avoids only the excess in transgressive trusts."

In doubtful cases, therefore, a lawyer, so long as he keeps his original gift within the requirements of the rule

⁵²272 Pa. 143 (1922).

⁵³46 Pa. 338, 341 (1860).

against perpetuities, can assure a client insisting upon an accumulation of doubtful legality that the gift will not fail entirely and that the worst that can happen to the client's wishes will be that the excess accumulations will be distributed and not capitalized.

It is to be remembered that this act has been held by the Pennsylvania courts to have no extra-territorial operation. In *Fowler's Appeal*,⁵⁴ the will in question had been executed in Illinois, where the grantor lived, and the beneficiary was a citizen of Colorado. The trustee, however, was a Pennsylvania corporation. It was held that the mere fact of the trustee being a Pennsylvania corporation would not invalidate a trust valid by the law of the state where created and by the law of the state where it was to be enjoyed. Mr. Chief Justice Paxson said:⁵⁵

"The Act of 1853 was only intended to apply to our own citizens and a trust intended to take effect beyond our own territory cannot be affected by it."

Similarly, a trust for accumulation valid in the state of original administration is valid as to ancillary administration in Pennsylvania, though void under the act. In *De Renne's Estate*,⁵⁶ a testator who had died domiciled in Georgia created a trust for accumulation valid there but invalid under Pennsylvania law. It was held that the fund should be remitted to the domicile of the testator for distribution.

It has been held that a reasonable contingent fund which the trustee might require in the administration of the trust is not an accumulation within the prohibition of the statute.⁵⁷ In *Eberly's Appeal*,⁵⁸ the testator devised upon an active trust to maintain certain realty, and to pay to a

⁵⁴125 Pa. 388 (1899).

⁵⁵Supra. n. 54, (125 Pa.) at p. 393.

⁵⁶12 W. N. C. 94 (1882).

⁵⁷*Howell's Estate*, 180 Pa. 515, (1897). But an intent to add such income to a fund of permanent nature is invalid, *McKee's Appeal*, 96 Pa. 277, (1880). See also *Sinnof's Estate*, 310 Pa. 463, (1933).

⁵⁸110 Pa. 95 (1885).

son an annuity. Upon the son's reaching majority, the trustee was to pay him \$500.00 annually until the son reached twenty-five, when the corpus was to be paid to him if the trustee thought fit. At the son's majority, the trustee had accumulated income to the extent of about \$5,000.00, which amount was held to be a reasonable contingent fund and not an accumulation payable to the son. *Eberly's Appeal* shows the investigation by the courts into the meaning with which the word "accumulation" was used in the statute. Perhaps the best authority upon the meaning of the word "accumulation" as used occurs in *Wahl's Estate*.⁵⁹ There a devise of \$500.00 was to be paid out of rents as soon as there was a sufficient accumulation for that purpose. Held: this was not a direction to accumulate within the provisions of the act, Judge Penrose of the Orphans' Court saying:⁶⁰

"In all cases, however, the first inquiry is, how far, if at all, has the will under consideration directed, or indirectly occasioned an accumulation contrary to the statute. The term itself implies a withholding of income for the purpose of creating an increased and constantly increasing fund for distribution at a future time; and, manifestly, a present beneficial gift of income until a certain sum shall have been received by the donee, is not in itself forbidden by anything in either the letter or spirit of the Act. A direction to apply rents or income in payment of a specified sum to a designated person is no more a direction to accumulate than a gift of the estate, until out of the rents the donee has received an equivalent amount, would be. Such a direction gives to the legatee a vested interest in the rents, etc., as they arise; and if there be coupled with it a provision for accumulation until the trustee shall have enough to pay in full, the only person having the right to complain is the legatee himself—the person who in the language of the Act, 'would have been entitled . . . if such accumulation had not been directed'."

Rogers' Estate,⁶¹ gives Supreme Court authority to the

⁵⁹26 W. N. C. 249 (1890).

⁶⁰Supra. n. 59, (26 W. N. C.) at p. 250.

⁶¹179 Pa. 602, (1897).

foregoing quotation from Judge Penrose. In that case, reported with a somewhat misleading syllabus, the daughter of the testator sought to set aside a provision for accumulation for the benefit of the granddaughters of the testator. The testator had provided for an accumulation until the sum of \$10,000.00 was obtained, which sum was then to be used in the construction of a four-story brick business house. From the terms of the will, the accumulation might have been invalid, but as the beneficiaries were minors and it was agreed that the desired accumulation would be attained before the eldest granddaughter attained her majority, the holding of the Court really amounts to no more than that an appellant, without interest, cannot set up the invalidity of a direction to accumulate.

In *Stocking's Estate*,⁶² the testator directed an accumulation until his grandson reached twenty-three, at which time he was to be paid the sum of \$7,000.00. Upon arriving at twenty-one, the grandson demanded and obtained the accumulations to that date. In the case cited, he attempted to obtain \$7,000.00 out of the principal of the estate. It was held that the testator's intention was that the \$7,000.00 should be paid out of accumulated income and that as the grandson had already obtained the accumulations up to the time of his majority, the sum so received by him was a credit against the legacy, and that he could not now enforce his claim for the full amount of the gift. The opinion, written by Mr. Justice Kephart, contains the following expression as to the importance of carrying out the testator's intention:⁶³

"The specific object of the statute is otherwise to maintain testator's intention; if that intention is in part frustrated by the act, it will only be to the extent necessary to carry out the act's mandate. Otherwise that intention will be effectuated, as in the distribution here made. The act against accumulations was not intended to punish the testator or penalize his estate because his will ran counter to that law. The effect

⁶²304 Pa. 476, (1931).

⁶³Supra. n. 62, (304 Pa.) at p. 480.

of our decision is that, though the accumulation beyond the grandson's majority was unlawful and he was entitled to take the accumulated income immediately on his reaching twenty-one, and the income yearly thereafter, he cannot carve out of the principal of the trust estate what the testator intended to be made up of income."

Flinn's Estate,⁶⁴ indicates that the Supreme Court as at present constituted will not allow any expansion within the field of permissible accumulations. There a will permitted the executors five years in which to complete the administration of the estate. The question before the court was at what time the intact value of certain testamentary trusts should be calculated. The court after citing the general rule of *Waterhouse's Estate*,⁶⁵ that the intact value must be determined as of the date of death, through Mr. Justice Kephart, said:

"To hold that the trust was not effective at death, or was suspended or held in abeyance until the estate was settled, permits the income from these stocks to accumulate in violation of the Act of April 18, 1853, P. L. 503, condemning such accumulations of income."

IV

The limits to which accumulations may be directed by will have occupied almost entirely the preceding discussion. It will be remembered that the Act applies to accumulations directed either by will or by deed, and also applies to accumulations whether directed for the life of the grantor or during an existing minority. The authorities seem absolutely bare of any helpful material upon accumulations directed by deed for the life of the grantor. There is one case, however, of an accumulation directed by deed for an existing minority. This is *Carson's Appeal*,⁶⁶ where there was a direction by deed to accumulate for an existing minority, accumulations to be capitalized when the minor

⁶⁴310 Pa. 206 (1932).

⁶⁵308 Pa. 422 (1932).

⁶⁶Supra. n. 27.

attained majority, and the income to be paid thereafter to the former minor. The opinion follows *Washington's Estate*⁶⁷ and gives no help whatever to an understanding of the extent to which an accumulation by deed for the period of the life of the grantor would be held valid. From this case, it seems clear, however, that the authorities as to trusts for accumulation created by will would be followed in cases where accumulations are directed by deed. In *Carson's Appeal*, the appellants, after the decision awarding the accumulations absolutely to the minor, presented a petition for a modification of the decree as to the portion of the fund derived from the accumulations of income prior to the death of the grantor. Their motion for rehearing was refused, Mr. Justice Trunkey saying:⁶⁸

"This deed contains no direction for accumulation during the grantor's life. It vests the property in the trustees, for use of certain persons, with directions for accumulation during their minority. After its delivery the grantor had no interest in, or power to control, the estate. The Act of 1853 applies to an estate held under a deed, just as it would if held upon the same terms under the will. In either case directions for accumulation are void so far as in conflict with the statute, and it can make no difference whether such accumulations, when the property passed by deed, accrued within the lifetime of the grantor, or after his decease. The authorities cited by the appellants relate to cases where the trusts were created by will, and show no distinction between them and like trusts created by deed, as respects the question presented in the prayer for a modification of the decree."

This opinion would seem to leave as an open question the power of a grantor to direct by an inter vivos trust deed a direction to accumulate until the death of the grantor. It would seem from the phraseology of the Act that such an accumulation would be valid, even though the beneficiary attained his majority before the death of the grantor.

⁶⁷Supra. n. 22.

⁶⁸Supra. n. 27, (99 Pa.) at p. 330.

It seems surprising that there is no case on this point, but one explanation may be that if such deeds of trust are made, the minor, upon attaining his majority in the lifetime of the grantor, would hesitate to litigate his right to attain the accumulations, in the fear that should he do so, he might be less fortunate when the will of the grantor was probated.

It would seem, then, that there is grave doubt as to whether the courts would permit the accumulation of income, under a trust created by deed, during the life of the grantor; and it is possible that they would follow the analogy of the will cases and hold that the only accumulation of income permitted under deeds of trust is the income of a minor beneficiary during his or her minority, without regard to the fact that the grantor may still be living; and of course, such accumulation would be subject to the control of the court, under the terms of the Act, as to allowances for the support of the minor. On the other hand, it may be that when the question arises, the courts will follow the language of the Act, and permit the accumulation of income during the lifetime of the grantor, even though the beneficiary be of full age. It is submitted that such a holding would be correct; accumulations are invalid, not because of any rule of public policy, but merely because of statutory prohibition; and the Act of 1853 does not seem to prohibit accumulations during the life of the grantor.

APPENDIX A

The Act of 39 & 40 Geo. III c. 98, 1800, reads as follows:

AN ACT

To restrain all Trusts and Directions in Deeds or Wills, whereby the Profits or Produce of real or personal Estate shall be accumulated, and the beneficial Enjoyment thereof postponed, beyond the Time therein limited.
(28th July, 1800)

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 please your Majesty, that it may be enacted, and be 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, settler or settlers; or the term of twenty-one years from the death of any such grantor, settler, 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, settler or deviser, or other person or persons, or to any provision for raising portions for any child or children of any grantor, settler 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 heritable 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 testaments made and executed before the passing of this Act, in such cases only where the devisor or testator shall be living, and of sound and disposing mind, after the expiration of twelve calendar months from the passing of this Act.

APPENDIX B

The Act of April 18, 1853, P. L. 503, section 9, as amended by the Act of April 14, 1931, P. L. 29, reads as follows:

"Section 9. That 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, settler or settlers, or testator, and the term of twenty-one years from the death of any such grantor, settler, 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, interests, 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."

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