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Wills - Rights of Devisees and Legatees - Whether Income Arising under a Testamentary Trust Released from Unlawful Accumulation Passes by Intestate Succession

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and the Courts). But the *Cohn* case[57] holds that depreciation deductions should be disallowed to the extent that the taxpayer underestimates the proceeds to be realized upon resale. In the application, therefore, capital gains on depreciable property[58] are totally eliminated, a result that is impossible to reconcile with the adoption of Section 1231. What is more, this same result is quite repugnant to the purpose behind the liberalized depreciation method[59] for it tends to block the incentive for a rapid turnover of depreciable property. So, it would appear that at long last, the Treasury Department has achieved through the courts the curtailment of capital gains treatment which it has been attempting to attain since 1947 through legislation.[60]

"Many inequities are inherent in the income tax. We multiply them needlessly by nice distinctions which have no place in the practical administration of the tax law."[61]

J. P. GRAVES

WILLS—RIGHTS OF DEVISEES AND LEGATEES—WHETHER INCOME ARISING UNDER A TESTAMENTARY TRUST RELEASED FROM UNLAWFUL ACCUMULATION PASSES BY INTESTATE SUCCESSION—An interesting question concerning the disposition to be made of income which had accumulated in a testamentary trust for a longer period than permitted by law, was recently presented to the Supreme Court of Illinois in the case of *Murphy* v. *Northern Trust Company*.[1] In that case, the testator had left his residuary estate in trust under a will dated in 1932 which directed the trustee to pay his widow a specified sum monthly from the net income thereof and to accumulate any sums in excess and to add them to the

[57] Cohn v. United States, 259 F. 2d 371 (6th Cir., 1958).

[58] Note 56, ante.

[59] Note 49, ante. "The stimulus to investment through liberalized depreciation is most important with respect to the creation of new assets."

[60] In 1947 and 1948 Congress held extensive Revenue Revision Hearings. The Treasury Department submitted an accelerated depreciation report in an attempt to reduce the effect of Section 117(j) of the 1939 Internal Revenue Code. Congress, in adhering to a policy of encouraging the sale and purchase of capital equipment failed to take any action on this attempt. Again in 1950 the Secretary of the Treasury attempted to persuade Congress to treat losses on depreciable property as capital rather than ordinary losses. Congress rejected this recommendation as it did a similar one drafted by the Committee on Federal Taxation of the American Institute of Accountants and submitted to Congress during the hearings on the 1954 Code. Finally, on January 18, 1960, during the course of this litigation, the President in his budget message to Congress, recommended that gain on the sale of depreciable property be treated as ordinary income.

[61] United States v. Lewis, 340 U. S. 590, 71 S. Ct. 522, 95 L. Ed. 560 (1951) (Douglas, Dissenting).

[1] 17 Ill. (2d) 518, 162 N. E. (2d) 428 (1959), affirming 20 Ill. App. (2d) 244, 155 N. E. (2d) 821 (1959).

principal. The will further directed the trustee to divide the corpus and accumulated income among certain remaindermen after the death of the widow. When the testator died in 1937, the Illinois version of the so-called *Thellusson Act*[2] prohibited the accumulation of income for more than twenty-one years from the death of the testator. After the permissible accumulation period had expired, the widow brought an action to construe the will, claiming a right to the income so released. The surviving remaindermen named in the will also asserted a right thereto.[3] The trial court decreed that the trustee should distribute the remainder of the net income to the remaindermen and, on appeal, the Appellate Court for the First District affirmed. The Supreme Court of Illinois, following the granting of leave to appeal, reversed and remanded with a direction that the released income was to pass by intestate succession when it concluded that it was impossible, from the language of the will, to identify the person or persons who would have been entitled to the income if the proper accumulation thereof had not been directed.

The instant decision exposes the problem of the uncertainty as to whom distribution of the void accumulation should be made. The statute provided that such income shall go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed. This provision would seem rather easy to apply. Yet the courts are still posed with a problem of construction, as in the instant case, where the testator made no express provision for the destination of the released income. Thus, the crucial question which faced the court was whether the will indicated such a person or persons entitled to the income and what was to be done if it did not.

It was strongly urged by the trustee on behalf of the remaindermen that in determining where the released income goes, the testator's intention is controlling.[4] The trustee claimed that the testator clearly intended his widow to have not more than three-hundred dollars per month, and, that his collateral heirs should take his entire estate subject only to the monthly annuity to his widow. To this, the widow responded that the will showed an equally firm intention that none of the remaindermen

[2] Ill. Rev. Stat. (1937), Vol. 1, Ch. 30, § 153. The Statute was first enacted in 1907.

[3] The testator's scheme for the ultimate distribution of his estate apparently contemplated a division thereof, after the death of his widow, into equal shares among his brothers and sisters or to the lawful issue of any one of them (except as to one named sister) who failed to survive the widow, with a further provision against lapse in case any remainderman died without issue surviving at the time for distribution.

[4] Webb v. Webb, 340 Ill. 407, 172 N. E. 730 (1930); Carlberg v. State Savings Bank, 312 Ill. 181, 143 N. E. 441 (1924).

should take anything under the will during her life and that only the survivors should take anything at all. The court noted that the will did not direct a periodic distribution of the released income to anyone. The court further deemed that the presumption against intestacy did not warrant it to supply the omitted provision, under the guise of construing the will, when no language was used to show an intention of the testator to dispose of the property.[5] Consequently, the court construed the will as if the testator made no effective disposition of the released income with the result that it passed by intestate succession.

Although there have been earlier Illinois cases concerning the interpretation and application of the *Thellusson Act*, these decisions did not make a specific adjudication as to the proper distribution of income released by the operation of the statute.[6] Of the other states which have enacted *Thellusson* statutes, only the Pennsylvania Act contains similar phraseology in the section relevant in the instant case.[7] However, the precise factual situation involved in the instant action has never been presented in the Pennsylvania cases, and, besides, construction of the Pennsylvania Act by her courts is substantially different from that of the Illinois decisions so as to render those Pennsylvania cases of very little persuasiveness in this state.[8]

Though the Illinois and Pennsylvania type of provision for the disposition of illegal accumulation gives rise to a number of questions, the "next eventual estate" type such as is found in New York does not neces-

[5] Hampton v. Dill, 354 Ill. 415, 188 N. E. 419 (1933); Glaser v. Chicago Title & Trust Co., 393 Ill. 447, 66 N. E. (2d) 410 (1946).

[6] Booth v. Krug, 368 Ill. 487, 14 N. E. (2d) 645 (1938); Webb v. Webb, 340 Ill. 407, 172 N. E. 730 (1930); French v. Calkins, 252 Ill. 243, 96 N. E. 877 (1911); Walliser v. Northern Trust Co., 338 Ill. App. 263, 87 N. E. (2d) 129 (1949); Carlberg v. State Savings Bank, 312 Ill. 181, 143 N. E. 441 (1924); Sullivan v. Harris Trust & Savings Bank, 8 Ill. App. (2d) 397, 132 N. E. (2d) 69 (1956).

[7] Purdon's Pa. Stat. Ann., Tit. 20, § 3251.

[8] In Pennsylvania, directions to accrue and to add the accumulations to the principal of the fund during the life of a life-tenant are bad altogether; Lowe's Estate, 326 Pa. 375, 192 A. 405. This view has been rejected in Illinois where only accumulations in excess of the permitted periods are void: Sullivan v. Harris Trust & Savings Bank, 8 Ill. App. (2d) 397, 132 N. E. (2d) 69 (1956); Webb v. Webb, 340 Ill. 407, 172 N. E. 730 (1930). A different, though not necessarily inconsistent, result was reached in the decision of In re Maris' Estate, 301 Pa. 20, 151 A. 577, wherein the testator directed that all the net income from a testamentary trust be paid to his wife, specifying, however, that all stock dividends be accumulated as principal. The Court, in holding that dividends must be considered as income and that the wife was entitled thereto, sets forth a technical distinction between a vested estate in possession and vested estate not in possession stating that the beneficiary must hold a vested possessory interest in order to be entitled to the income released under the Pennsylvania Act. See also Thistle's Estate, 263 Pa. 60, 106 A. 94 (1919); In re Wright's Estate, 277 Pa. 69, 75 A. 1026 (1910).

sarily provide a solution to these problems.[9] The New York Real Property Law states that where no valid direction for the accumulation of income is given, such income shall belong to the persons presumptively entitled to the "next eventual estate".[10] The wording of the statute immediately raises the question as to who is the person presumptively entitled to the "next eventual estate"?[11] Also there is a question whether the Statute is applicable in a case where an illegal direction for an accumulation can be stricken out, and the creating instrument still contains a valid direction for the disposition of the accumulation.[12]

In 1953, the *Illinois Thellusson* Act was amended in order to remove the ambiguity as revealed by the instant decision. The amendment provides that the illegally-accumulated income should "go to and be received by the person in whom the beneficial interest in the corpus of the estate from which such income was derived is vested".[13] Although the amendment has no retroactive effect, one might have expected the court to render a decision in accord with this recent enactment in order to remove the cloud of uncertainty connected with void accumulations of income created prior to 1953. Nonetheless, the court did attain a different result, but by doing so, it left corporate and individual trustees still faced with the disquieting situation as to who is entitled to void accumulations of in come which are not covered by the recent amendment.

However, once a will is construed to the effect that the testator made no disposition of the accumulated income, the decision provides an answer as to the destination of the accumulation by holding that such residuary income released under the Act will pass as intestate property to those who are entitled under the Statute of Descent.

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[9] For a thoughtful discussion of the Thellusson Act and the problems arising under it, see Simes, "Statutory Restrictions on the Accumulations of Income", 7 U. Chi. L. Rev. 409 (1940).

[10] N. Y. Real Prop. Law § 63. 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, In re Harteau, 204 N. Y. 292, 97 N. E. 726 (1912).

[11] 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 the end of the period during which the rents and profits are undisposed of, or are invalidly accumulated." In re Kohler, 231 N. Y. 353, 132 N. E. 114 (1921). See also annotation with respect thereto in 48 C. J. 996, Note 46 and cases there cited.

[12] See Matter of Hoyt, 116 App. Div. 217, 101 N. Y. Supp. 557 (1906) (aff. 189 N. Y. 511, 81 N. E. 1166 (1907)).

[13] Ill. Rev. Stat. 1959, Vol. 1, Ch. 30, § 153.