



6-1-1945

New Indiana Rule against Perpetuities

Lawrence Irwin Ferguson

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

Recommended Citation

Lawrence I. Ferguson, *New Indiana Rule against Perpetuities*, 20 Notre Dame L. Rev. 397 (1945).

Available at: <http://scholarship.law.nd.edu/ndlr/vol20/iss4/2>

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

THE NEW INDIANA RULE AGAINST PERPETUITIES

SOME SUGGESTIONS FOR STUDY

Among the more important acts of the 1945 session of the Indiana legislature is the new statute concerning perpetuities and accumulations which is set out below in full for the convenience of the reader.

This discussion will not be an attempt to annotate the new statute, since such an attempt would be presumptuous in view of the fact that neither the Supreme nor Appellate Courts has construed it as yet. Therefore, we will confine this discussion to suggestions of material which should be of use to anyone who must attempt to construe the statute, and to citations to other states which have statutes of a similar nature whose decisions may be of persuasive value in construing the new Indiana statute.

ACTS OF 1945, CHAPTER 216 (H. 408. Approved March 6, 1945)

AN ACT concerning the law of property, perpetuities, restraints on alienation and the accumulation of income; and declaring an emergency.

Section 1. *Be it enacted by the General Assembly of the State of Indiana*, that an interest in property shall not be valid unless it must vest, if at all, not later than twenty-one years after a life or lives in being at the creation of the interest. It is the intention by the adoption of this act to make effective in Indiana what is generally known as the common law rule against perpetuities, except as provided in sections 2, 3, 4, and 5 of this act.

Section 2. No person may by any instrument or otherwise settle or dispose of any property in such manner that the income thereof shall, save as provided in section 3, be wholly

or partially accumulated for any longer period than one of the following, namely:

- (a) the life of the grantor or settler, or
- (b) a term of twenty-one years from the effective date of the instrument, or,
- (c) a term of twenty-one years from the death of the grantor, settler, or testator; or
- (d) ten years beyond the minority of a beneficiary in being on the effective date of the instrument for the benefit of such minor.

Section 3. Section 2 above does not prohibit:

- (a) any provision for the accumulation of such income of a trust estate as may reasonably be needed for the upkeep, repair, or proper management of the subject-matter of said estate; or
- (b) any direction in a trust which shall provide for the allocation wholly or in part to corpus of stock dividends or stock rights derived from shares held in such trusts; or
- (c) any provision for a sinking or reserve fund; or
- (d) any statutory provision directing an accumulation.

Section 4. (a) In every case where any accumulation is directed otherwise than as permitted under the terms of this act the direction shall be void as respects the time beyond the limit prescribed herein; and the income of the property directed to be accumulated shall, so long as the same is directed to be accumulated contrary (contrary) to the provisions of this act, go to the person or persons who would have been entitled thereto if such accumulation had not been directed. If by reason of a disposition in the creating instrument subject to a condition precedent it is impossible to determine what person or persons would have been entitled to the income had no accumulation contrary to the provisions of this act been directed, such income so directed to be accumulated shall go to those persons who would have been

entitled thereto had no such disposition subject to a condition precedent been made.

(b) In determining the time within which a direction for accumulation shall be valid only one of the periods named in section 2 of this act shall be applied.

Section 5. Where one or more persons who are the beneficiaries or presumptive beneficiaries of an otherwise effective direction for the accumulation of income 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 income directed to be accumulated for the benefit of such person or persons.

Section 6. Sections 40 and 41 of Chapter 23 of Volume I of the Revised Statutes of 1852 (Sections 56-142, 56-143, Burns Ind. Stat. Ann. 1933) and Sections 1, 2, and 3 of Chapter 9 of Part II, Volume II of the Revised Statutes of 1852 (Sections 51-101, 51-102, 51-103, Burns Ind. Stat. Ann. 1933) and Chapter 92, Acts 1943 (Sections 51-102, 51-102a, Burns Ind. Stat. Ann. Supp. 1933), and all other laws and part of laws in conflict herewith, are hereby repealed.

Section 7. Any interest created by any instrument, including any will, which instrument became effective prior to the effective date of this act which interest was valid under the provisions of the acts repealed in section 6 shall not be affected by the passage of this act. Any interest created by any instrument, including a will, executed prior to the passage of this act shall be governed by the terms of this act unless to apply this act to such interest would divest otherwise vested interests.

Section 8. Whereas an emergency exists for the immediate taking effect of this act, it shall be in full force and effect from and after July 1, 1945.

As it will be seen, the act falls into two divisions, Section 1 setting forth the rule against perpetuities, and Sections 2, 3,

4 and 5 dealing with accumulations. Therefore, our study of the act shall take up these two divisions separately.

I

THE RULE AGAINST PERPETUITIES

Legislative changes in the rule against perpetuities, which was of judicial rather than legislative origin,¹ fall into three main classifications in the United States.² They are:

1. *A general provision that perpetuities shall not be allowed.* These are usually found in the constitution of the state in question. Gray dismisses these stating: "These provisions seem to be simply pieces of declamation without juristic value, at least on any question of remoteness."³ In view of this, we shall therefore not consider these provisions at any greater length.

2. *A short and simple statute declaring or modifying the common law.*⁴ By its very terms, the new statute falls into this category. The former statutes on the subject⁵ modified the common law in several particulars, none of which should properly be noticed in this discussion. The rule has now been expressly changed on this question, and the statute in Indiana now is merely a simple declaration of the common law.

3. *An elaborate scheme to be substituted for the common law.*⁶ New York is the most notable example of this system, and to some extent, its statutes have been followed in several other states. The Indiana statutes were formerly in this classification.

There has been no attempt in the foregoing discussion to consider the statutes of other states at any length or the for-

1 Gray: The Rule Against Perpetuities, Section 729.

2 Op. cit.

3 Ibid: Section 730.

4 Ibid: Section 629.

5 Burns' Indiana Statutes Annotated (1933), Sections 56-142, 56-143, 51-101.

6 Gray: Op. cit., Section 747.

mer Indiana statute. Gray⁷ cites the Georgia,⁸ Iowa,⁹ and Kentucky¹⁰ statutes as being in this classification, i.e. declarative of the common law, and it is recommended that these statutes be consulted by anyone interested. Also, Indiana decisions prior to the Revised Statutes of 1852 may have some bearing under the new act. The annotations in Burns' Indiana Statutes Annotated should also be consulted. For a general discussion, Gray's *The Rule Against Perpetuities* should prove helpful.¹¹

II

ACCUMULATIONS

Sections 2, 3, 4, and 5 of the new act deal with accumulations and is a variation of what is commonly known as the Thelluson Act.¹² Peter Thelluson died in 1797, devising his property to trustees who were directed to accumulate the income therefrom during the lives of all of his sons, grandsons, and grandsons' children who were living at his death and at the death of the last survivor, to transfer the property in three lots to the then living eldest male descendants of his three sons.¹³ This will was upheld in the courts,¹⁴ but led to the passage of what is known as the Thelluson Act.¹⁵ Gray cites¹⁶ Pennsylvania,¹⁷ Alabama,¹⁸ and Illinois¹⁹ as having statutes based on this act. In addition, the New York system has provisions on this subject, and the former Indiana statute dealing with accumulations was based on the New

⁷ Op. cit., Section 735.

⁸ Georgia Code of 1933, Section 85-707.

⁹ Iowa Code of 1935, Section 10127.

¹⁰ Kentucky Statutes (1936), Section 2360.

¹¹ See Appendix C of this work.

¹² Gray: Op. cit., Section 686.

¹³ Ibid.

¹⁴ *Thelluson v. Woodford*, 4 Ves. 227, 11 Ves. 112.

¹⁵ Statute 39 and 40, Geo. III, c. 98.

¹⁶ Gray: Op. cit., p. 643.

¹⁷ 20 Purdon Pennsylvania Statute Annotated, Section 3251.

¹⁸ Alabama Civil Code (1923), Section 6914.

¹⁹ Ill. Rev. Stat. (1937), c. 30, Section 153.

York act, although only in regard to personal property.²⁰ The new statute is apparently equally applicable to both real and personal property, as its terms do not differentiate between the two. It would seem that the new statute most nearly resembles the Thelluson Act than the New York Act, therefore, and the decisions under statutes of this type should be consulted rather than decisions under the New York type of statute. Also, Gray has a valuable general discussion on this type of statute,²¹ together with the leading decisions under it, both in England and the United States. See annotations in Burns' Indiana Statutes Annotated (1933) Section 51-102 concerning the former act.

In this short discussion, we have not attempted to set forth all the possible sources of material, such as the digests, the encyclopedias, nor annotations in the select case system, as these are readily available, but we have rather confined ourselves to the leading sources of information on the subject which we feel will be the most useful to the practitioner who wishes to make a study of the statute for brief purposes.

Lawrence Irwin Ferguson.

²⁰ Gray: Op. cit., Section 727.

²¹ See Appendix B.