Journal of Accountancy

Volume 36 | Issue 3 Article 2

9-1923

Rule Against Perpetuities Applied to Trusts

Frederick Vierling

Rule Against Perpetuities Applied to Trusts

By Frederick Vierling

Those familiar with the rules of law concerning the duration of trust estates have learned that private trusts may not be created for unlimited lengths of time. The rule of law controlling the duration of private trusts is the rule known as "the rule against perpetuities." The law permits the establishment of private trusts for only reasonable lengths of time, so as not permanently to withdraw from commerce the realty and personalty bequeathed in trust. The rule does not apply to charitable or benevolent trusts, as such trusts may continue indefinitely or, in contemplation of law, perpetually.

RULE LIMITING DURATION OF TRUSTS

Under the rule against perpetuities, private trusts may be created for the life of the last survivor of any number of designated persons, in being at the commencement of the trust, and for periods of 21 years thereafter. If at the death of the survivor there be any unborn beneficiary in gestation, additional time is allowed for the birth of such posthumous beneficiary. The period of gestation varies, and usually does not extend beyond nine or ten months. If a trust be created by will, the time of commencement of the trust is the date of death of testator. If a trust be created by conveyance or transfer in trust, the time of commencement of the trust is the execution and delivery of the instrument.

ORIGIN OF RULE

The rule against perpetuities, as applied to an accumulating trust, was for the first time applied by the courts of England in 1799, in the famous case known as the *Thellusson* case, reported in 4 Ves. Jr., 227. Up to that time, there was no case definitely deciding for how long a time a trusteeship might be made to continue. Thellusson died in 1797, leaving a will dated 1796. After making provisions for his wife and a number of others, he devised and bequeathed the residue of his estate in trust to accumulate for the lives of his three sons and such of their issue as should be living at the time of his death or born in due time afterwards. He directed, on the death of the survivor of said beneficiaries, that the estate should be divided in three parts and conveyed and transferred to the then beneficiaries absolutely and

free of trust. At the time of Thellusson's death, he was survived by 15 descendants, namely, his three sons and their issue. It appeared that the estate would be tied up from alienation and enjoyment for three generations.

DECISIONS DECLARING RULE

Suit was brought to have the Thellusson trust declared void, on the ground that the period of time specified for the trust to continue was too remote. It was urged that most attempts to create perpetuities are made with a view to continuing the enjoyment of property for a long series of years in the families of the testators; that Thellusson contrives how long it is possible to keep any of his descendants from the enjoyment of his property; that no one who had ever breathed the same air with Thellusson could inherit; that he excludes three generations from all chance of enjoyment; that Thellusson did not wish to continue the property in his family, but to preclude his family and all mankind from alienating and even enjoying his property during the longest possible period; that, by carrying out Thellusson's plan, only a revenue equal to the civil list of England may, by no very remote possibility, be centered in one family, with absolute command over the capital. Prior to the hearing of the Thellusson case, the courts of England held that the period of limitation of an executory devise is "a life or lives in being and 21 years and a few months," to allow the birth of posthumous children; that, under such rule, the vesting of an estate, given by way of an executory devise, is restrained only during the life of one person, the survivor; that restraint for such period does not tend to a perpetuity; that, if any devisee be a minor, the law itself would restrain alienation until the devisee became of age; that it was permissible, by way of executory devise, to include posthumous children as devisees. Having the precedent theretofore set with respect to an executory devise, in deciding the Thellusson case the court concluded it would follow such precedent and held that trusts may be created for any terms certain to end within periods not exceeding periods permitted for estates granted by way of executory devise.

LIMITATIONS AT COMMON LAW

Before the enactment in England in 1535 of the statute of uses and in 1540 of the statute of wills, no questions of remoteness connected with estates seem to have come before the English

courts. In 1576, in case of *Manning vs. Andrews,* 1 Leon, 256, the court indicated that if a devise be made to one for life, and then to his heir for life, and so from heir to heir in perpetuam for life, by use of special words, such devise would be good. The effect of indefinite restraint in the alienation of property became manifest, resulting in the passage of the statutes mentioned to give relief.

EXECUTORY DEVISES

The foundation case, in establishing the period of limitations permissible in the case of an executory devise, is the famous case known as the *Duke of Norfolk* case, decided in England in 1685 and reported in 3 Ch. Cas. 1. In that case, the testator attempted to keep his property in his family and prevent alienation of the estate for a period of two hundred years. It was urged in court that a perpetuity is a thing odious in law and destructive of the commonwealth; that it would put a stop to commerce and prevent the circulation of the riches of the kingdom, and should not be countenanced in equity; that if in equity one should come nearer to a perpetuity than the rules of common law would admit, all men, being desirous of continuing their estates in their families, would settle their estates by way of trusts. Upon consideration of the case, the court held that a future interest might be limited to commence on a contingency which must occur within lives in being, and thus was stated the basis of limiting estates by executory devises.

The second important case, in the development of the rule in question, is the case decided in England in 1736, *Stephens vs. Stephens,* reported in 25 Reprint Eng. Cas. 751. In the Stephens case it was held: (1) an executory devise to a child living at testator's death and on such child reaching majority was good; (2) if a devise be given to a posthumous child, there could be no alienation until he should attain the age of 21. It is now held, that the term of 21 years need have no reference to the minority of the devisee, nor indeed to any minority at all.

The third important case is the case decided in England in 1793, *Taylor vs. Biddall,* reported 2 Mod. Cas. 289. In that case the court held, as the power of alienation will not be restrained longer than the law restrains it, namely, during the infancy of the first taker, the restraint cannot reasonably be said to extend to a perpetuity.

The principles announced in the three cases mentioned became embodied in the rule against perpetuity, as applied to interests created by way of executory devise. These principles were adopted by the sages hearing the cases, who deemed that a reasonable restraint against alienation of property should be enforced, and, at the same time, had the wisdom to realize that perpetual restraint would be unwise and would become a shackle upon posterity. The principles have been repeatedly affirmed in the courts of England and in the courts of our various states. In a number of our states the period has been cut down by statute and the rule as originally adopted does not now apply in such states.

TWO MODERN CASES OF GENERAL INTEREST

The case of *Cadell vs. Palmer,* decided in England in 1832, reported in 6 Reprint Eng. Cas. 956, is an interesting case bearing on the rule against perpetuities. The will provided that the trust should continue for one hundred and twenty years, if any of the persons named should so long survive, otherwise until the death of the last survivor, and then in trust for twenty additional years. Of the persons during whose lives the trust was to continue, there were twenty-eight persons living at the death of the testator, of whom seven only were to take interests under the devise. The trust was sustained.

The case of *Madison vs. Larman,* decided in Illinois in 1897, reported in 170 Ill., 65, is an interesting American case. In that case, the trust was for the life of the survivor of seventeen persons living at the death of the testator. The trust was sustained.

DUKE OF NORFOLK CASE

In the *Duke of Norfolk* case, as above mentioned, the testator attempted to restrain the alienation of property for a period of two hundred years. The testator did not attempt to create an accumulating estate, as in the *Thellusson* case. The facts in the Duke of Norfolk case may be utilized to demonstrate the menace to posterity of permitting estates to accumulate for long periods of time or indefinitely. The Duke of Norfolk case was decided in 1685. Since that time 238 years have elapsed. Suppose the testator had directed the accumulation of the estate to 1923, and suppose his plan had been allowed to operate, the accumulation would have been enormous. The value of the estate is not given

in the above-mentioned report of the case, so figures of actual value cannot now be used. Assuming a growth at a yearly rate of increase equivalent to yearly interest of the decimal value of .045, compounded annually, in 238 years the sum of $1 would have accumulated to the amount of $35,454.96. On that basis, it would have required a fund of only about $28,205.56 to accumulate to $1,000,000,000 in the 238 years. A reading of the report of the case gives one the impression that the estate was of considerable value, far in excess of $28,000.

THE THELLUSSON CASE

Benjamin Franklin died in 1790. Under codicil to his will he bequeathed £1,000 to trustees in Boston, to be used for benevolent purposes. He directed the accumulation of the fund for one hundred years, and the distribution at the end of that period of about 76 per cent. of the then fund, and directed that the remaining 24 per cent. be continued in trust for a second period of one hundred years, the amount at the end of the second one hundred years to be finally distributed. An examination of the record of the Franklin fund shows it has grown at a yearly rate of increase equal to yearly interest of the decimal value of .044626, compounded annually.

Thellusson died seven years after Franklin. The records show that Thellusson left real estate in England of an annual value of £4,500, which it may reasonably be assumed had a capital value of £90,000. The records also show that Thellusson left a personal estate of the value of £600,000. The two amounts total £690,000, on a gold parity basis being the equivalent in dollars of the sum of $3,357,919. From the records of the Thellusson case, it appears that it was estimated that the trust would continue for not less than seventy years and might possibly continue for one hundred and twenty-five years, or practically until the present time. If the Thellusson trust had continued until the present time, or one hundred and twenty-six years, and if the fund, the equivalent of $3,357,919, had increased at a rate of growth equal to the rate of growth of the Franklin fund accumulated in Boston at practically the same time, to wit: at an interest rate equal to the decimal value of .044626, compounded annually for one hundred and twenty-six years, the fund would have increased to a total of about $822,493,238. At that rate of growth, it would require one hundred and eighty-four years for the principal of

$3,357,919 to grow to $10,348,158,000, or to more than recent estimates of the total amount of all gold and silver money in the world.

Under the rule against perpetuities, as approved in the Thellusson case the Thellusson estate might have been continued in trust, after the death of the last survivor of the fifteen persons mentioned, for the period of gestation of posthumous children, if any, and 21 years. The full period of accumulation allowed under the rule is indeed liberal.