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TRUSTS - ACCUMULATION OF INCOME

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TRUSTS — ACCUMULATION OF INCOME — Testator left his estate in trust until twenty-one years after the death of two nieces, the trust income to be used first to pay several annuities and the remainder "to be re-invested by the trustee for the increase and benefit of this trust fund." At the expiration of twenty-one years after the death of both nieces the trust was to terminate and the estate to be distributed. The lower court held[1] that, while the trust did not violate the rule against perpetuities nor the District of Columbia statute as to the suspension of the power of alienation, the trust income could not be accumulated for so long a period. *Held,* reversed. Under common law of the United States and the District of Columbia a provision for the accumulation of income of a trust is permitted for a period of twenty-one years after lives in being; any change in this rule is for the legislature, not the courts. *Gertman v. Burdick*, (App. D. C. 1941) 123 F. (2d) 924.[2]

Not infrequently trusts which provide for the accumulation of income for a long period of time involve contingent future interests which may not vest within lives in being and twenty-one years; thus the interests are void under the common-law rule against perpetuities. If, however, the future interests are vested, or are certain to vest, within the period of the rule against perpetuities, the question is then squarely presented whether there is any rule, other than the rule against perpetuities, which restricts the creation of trusts for the accumulation of income.[3] More than a century ago, in the case of *Thellusson v. Woodford*,[4] the English House of Lords held that a trust for accumulation of income for a period short of lives in being and twenty-one years was good. But Parliament promptly enacted legislation substantially reducing the period of permissible accumulation.[5] The lower court in the principal case appears to be the

[1] Burdick v. Burdick, (D. C. D. C. 1941) 33 F. Supp. 921.

[2] The opinion of the lower court is noted in 40 COL. L. REV. 1430 (1940); 29 GEORGETOWN L. REV. 392 (1940); 54 HARV. L. REV. 834 (1941); 6 Mo. L. REV. 111 (1941); 14 So. CAL. L. REV. 183 (1941). The opinion of the appellate court is noted in 36 ILL. L. REV. 567 (1942). The Supreme Court of the United States denied certiorari on March 30, 1942. Burdick v. Burdick, (U. S. 1942) 62 S. Ct. 917.

[3] If the interest in question is vested, the rule against perpetuities is commonly considered inapplicable. GRAY, RULE AGAINST PERPETUITIES, 3d ed., § 322 (1915); KALES, FUTURE INTERESTS, 2d ed., §§ 658, 660, 737 (1920).

[4] 11 Ves. Jr. 112 at 145, 32 Eng. Rep. 1030 (1805) which involved a trust to accumulate income for lives of nine living persons. The court said: "If the law is so as to postponing alienation, another question arises out of this will which is a pure question of equity: whether a testator can direct the rents and profits to be accumulated for that period, during which he may direct that the title shall not vest, and the property shall remain unalienable; and, that he can do so, is most clear law." It is apparent that this case did not decide what the rule would be if the beneficial interests had vested but the trust was to last for a period in excess of lives in being and 21 years.

[5] The Thelluson Act, 40 Geo. III, c. 98 (1800), which limited trust accumulation. However, in view of the doctrine of Saunders v. Vautier, 4 Beav. 115, 49 Eng. Rep. 282, Cr. & Ph. 240, 41 Eng. Rep. 482 (1841), and the case of Wharton v. Masterman, [1895] App. Cas. (H. L.) 186, it would appear that the present rule in England is that if no statute is violated and the beneficial interest is vested, a trust

first to hold that, as a matter of common law, a provision for accumulation for a period short of lives in being and twenty-one years is bad.[6] While it recognized that the English common law was otherwise, and that the Thellusson Act,[7] which restricted accumulations in England, was no part of the common law of the District of Columbia, nevertheless it held that the English common law, so far as it allowed accumulations of large sums of money in testamentary trusts for a long period of time, is repugnant to American conditions and principles of democracy.[8] The appellate court, in reversing this decision, approved the English common-law doctrine, and suggested some of the questions which the courts would have to answer if the position of the court below were to be maintained. Where, it was asked, should the court find a standard to determine the length of the period of permissible accumulations? What limit should be set on the amount of the accumulation? Should the standard apply to realty as well as to personalty? When a period is found, what should be the consequences of exceeding it? What exceptions should be made? It would seem that, entirely aside from any questions of policy, the practical difficulties in applying a judge-made rule to restrict accumulations to a period shorter than that of the rule against perpetuities are very considerable. Moreover, the legislative experience of jurisdictions which have enacted statutes limiting trusts for accumulation to a shorter period does not clearly indicate the desirability of such restriction.[9] One important question is left unanswered by the decision of the appellate court in the principal case: Is there any rule other than the rule against perpetuities which restricts accumulations of income to the period of lives in being and twenty-one

might be allowed to accumulate for a period longer than lives in being and 21 years if the beneficiary did not destroy the trust. See 2 SIMES, FUTURE INTERESTS, § 589 (1936).

[6] This court, in setting aside the accumulation provision, did not say that all provisions of that kind would be void or that if made in a reasonable time they would be upheld. Compare earlier opinion of the Court of Appeals of the District of Columbia in King v. Shelton, 36 App. D. C. 1 (1910), affirmed Shelton v. King, 229 U. S. 90, 33 S. Ct. 686 (1913).

[7] See note 5, supra.

[8] 33 F. Supp. at p. 928 the court said: "Public interest and welfare forbid that a dead hand from the past should shape and control the present except so far as permitted by law. Permitting *unreasonable* restraints on alienation are [*sic*] inconsistent with the principles of democracy. They are the concomitants of an aristocracy. Such restraints are relics of a feudal society, are obsolete and are repugnant to our institions and conditions."

[9] See Simes, "Statutory Restrictions on the Accumulation of Income," 7 UNIV. CHI. L. REV. 409 (1940). The following statutes have changed the common law rule on accumulations: Ala. Code (1940), tit. 47, §§ 146-147; Ariz. Code Ann. (1929), §§ 71-118, 71-120; Cal. Civ. Code (Deering, 1941), §§ 724-726; Ill. Rev. Stat. (Bar ed., 1941), c. 30, § 153; Ind. Stat. Ann. (Burns, 1933), §§ 51-102, 51-103; Mich. Comp. Laws (1929), §§ 12956-12960; Minn. Stat. (Mason, 1927), §§ 8066-8070; Mont. Rev. Code (1935), §§ 6709-6713, 6715; N. Y. Consol. Laws (McKinney, 1938), tit. 40, Personal Property Law, §§ 16-17, tit. 49, Real Property Law, §§ 61-63; N. D. Comp. Laws Ann. (1913), §§ 5290-5294, 5296; Pa. Stat. Ann. (Purdon, Supp. 1941), tit. 20, §§ 3251, 3252; S. D. Code (1939), §§ 51.0301 to 51.0307; Wis. Stat. (1939), §§ 230.36 to 230.40.

years? [10] That is to say, if all interests involved in a trust for accumulation are certain to vest within lives in being and twenty-one years, but the trust and the accumulations may continue for a longer period, would any rule of law strike down the provisions of the trust? In this country, where indestructible trusts are recognized under the doctrine of *Claflin v. Claflin*,[11] it would seem that there are peculiar reasons for such a rule. It has been said that trusts which remain indestructible for a period longer than lives in being and twenty-one years are not permitted.[12] Doubtless a trust for the accumulation of income is one kind of indestructible trust, and thus is subject to the rules restricting such trusts. The precise character of the rules restricting indestructible trusts, however, has yet to be determined by the courts.[13]

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[10] The courts seem to say that trusts cannot accumulate income beyond lives in being and 21 years. Fitchie v. Brown, 211 U. S. 321, 29 S. Ct. 106 (1909). Here the settlor wanted his estate put in trust for as long as legally possible, and the trust income to accumulate. The Court, after holding that the trust was indestructible for lives in being and 21 years, said, "We think the surplus . . . must accumulate as part of the trust estate until the time arrives for the distribution of that estate. . . ." 211 U. S. 321 at 334. In Hoadley v. Beardsley, 89 Conn. 270, 93 A. 535 (1915), the court held that "trusts for accumulation must be strictly confined within the limits of the rule against perpetuities and if such trust exceeds those limits it is void." See also Wilson v. D'Atro, 109 Conn. 563, 145 A. 161 (1929); Lewis Oyster Co. v. West, 93 Conn. 518, 107 A. 138 (1919); Odell v. Odell, 10 Allen (92 Mass.) 1 (1865); Pelton v. First Savings & Trust Co., 98 Fla. 748, 124 So. 169 (1929) (a direction to accumulate without any time limit was held invalid). But see Trautz v. Lemp, 329 Mo. 583, 46 S. W. (2d) 135 (1932); Hanna, "Some Legal Aspects of Life Insurance Trusts," 78 UNIV. PA. L. REV. 346 (1930). In Moeller v. Kautz, 112 Conn. 481, 152 A. 886 (1931), the court says that the general rule of accumulations is limited to lives in being and 21 years, but that it might find an accumulation unreasonable if the situation arose. 1 BOGERT, TRUSTS AND TRUSTEES 650 (1935): "If they [accumulating provisions] are useless, wasteful, and arbitrary, the courts may refuse to enforce them even though the period and beneficiaries are satisfactory." See also, 1 TRUSTS RESTATEMENT, § 62, Comment 1 (1935).

[11] Claflin v. Claflin, 149 Mass. 19, 20 N. E. 454 (1889), where an active trust was held indestructible at the wish of the cestui, even though he was under no disability and had an absolute and indefeasible interest. See also: Shelton v. King, 229 U. S. 90, 33 S. Ct. 686 (1913); In re Estate of Yates, 170 Cal. 254, 149 P. 555 (1915); DeLadson v. Crawford, 93 Conn. 402, 106 A. 326 (1919); Wallace v. Foxwell, 250 Ill. 616, 95 N. E. 985 (1911); Matter of Hamburger's Will, 185 Wis. 270, 201 N. W. 267 (1924). See also 37 A. L. R. 1420 (1925).

[12] KALES, FUTURE INTERESTS, 2d ed., § 737 (1920); Clark, "Unenforcible Trusts and the Rule against Perpetuities," 10 MICH. L. REV. 31 (1911); Warren, "Progress of the Law: Estates and Future Interests," 34 HARV. L. REV. 639 (1921); Scott, "Control of Property by the Dead," 65 UNIV. PA. L. REV. 632 (1917). It has even been proposed that "it would be unimportant whether we say there are two separate rules or two subdivisions of the same rule." 2 SIMES, FUTURE INTERESTS 432 (1936).

[13] When the accumulation is to last beyond the rule for indestructible trusts, three solutions seem possible: (1) The whole trust may be void. 1 BOGERT, TRUSTS AND TRUSTEES, §§ 215, 218 (1935); 2 SIMES, FUTURE INTERESTS, § 589 (1936);

Cleary, "Indestructible Testamentary Trusts," 43 YALE L. J. 393 (1932). (2) The provision for indestructibility may be held ineffective and the entire trust and accumulation made terminable by the beneficiary. Van Epps v. Arbuckle, 332 Ill. 551, 164 N. E. 1 (1928). (3) The trust may continue with an accumulation valid for the period of indestructibility and then terminable on the option of the beneficiary. Hussey v. Sargent, 116 Ky. 53, 75 S. W. 211 (1903); BOGERT, supra, § 215. See also Edgerly v. Barker, 66 N. H. 434, 31 A. 900 (1894), where the court used the same reasoning in a case of remoteness of vesting. It has been held that in such a case the accumulation for the period of indestructibility passed by intestacy and the trust was otherwise valid. Wilson v. D'Atro, 109 Conn. 563, 145 A. 161 (1929).

In limiting the alienability interests under the rule of the Claflin case, the authorities who agree that lives in being and twenty-one years should be the limit do not agree on the question when the period time should start. In GRAY, RULE AGAINST PERPETUITIES, 4th ed., § 121.8 (1942), it is argued that the period should start from the beginning of the future interest. Prof. Kales, "Vested Gifts to a Class and the Rule against Perpetuities," 19 HARV. L. REV. 598 at 604 (1906), and "Several Problems of Gray's Rule against Perpetuities, Second Edition," 20 HARV. L. REV. 192 at 202 (1907), takes the view that the period should begin on the death of the testator. See also TRUSTS RESTATEMENT, § 62, Comment K (1935).