Cornell Law Review

Volume 46
Issue 1 *Fall 1960*

Article 2

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PROPOSED CHANGES IN THE NEW YORK STATUTES ON ACCUMULATIONS

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A prior article by the author discussed the 1960 amendments to the New York statutes on perpetuities and power of appointment, enacted on the recommendation of the Law Revision Commission.[1] This article will discuss certain other matters, relating to accumulations, on which the Commission (a) made no recommendations, or (b) made recommendations which did not result in legislation. Although this article is based on two studies prepared by the author as consultant to the Law Revision Commission,[2] nothing contained herein purports to represent the official position of the Commission, except where its recommendations are actually quoted.

I. The 1959 Legislation on Accumulations

As pointed out in the prior article,[3] chapters 453 and 454 of the Laws of 1959 amended the New York statutes on accumulation of the rents and profits of real property, and the income of personal property, so as to permit any direction for accumulation which is to commence within the time allowed for the "vesting of future estates" in the case of real property, or for "suspension of the absolute ownership" in the case of personal property. Any direction for accumulation for a period extending beyond expiration of such time is to have the same effect as if such accumulation were directed to terminate upon such expiration. The latter rule was the same under the old law, and is the rule under most state statutes, although at common law the entire accumulation would probably be void.[4]

With certain exceptions to be noted below, all other provisions directing accumulation are invalid. Again, this is an echo of the prior law, but with the liberalization of the purposes and the period for which accumulation can now be directed, it is hard to imagine how any direction for accumulation would be totally void.

With the enactment of chapter 448 of the Laws of 1960, providing a

† See contributors' section, masthead p. 138, for biographical data.

1 Pasley, "The 1960 Amendments to the New York Statutes on Perpetuities and Powers of Appointment," 45 Cornell L.Q. 679 (1960).

2 Rule Against Perpetuities and Related Matters, N.Y. Leg. Doc. No. 65 (G) (1960); Accumulations of Rents and Profits of Real Property and Income of Personal Property, N.Y. Leg. Doc. No. 65 (I) (1960).

3 Pasley, op. cit. supra note 1, at 686.

4 Simes, Future Interests, § 129 (1951).

permissible perpetuities period of lives in being and twenty-one years, the permissible period for accumulation now becomes the same as at common law. The prior restrictions, limiting accumulations to those for the benefit of one or more minors for the period of their minority, have been eliminated. It would now seem permissible to direct an accumulation for the benefit of any person, or for any other purpose, so long as the permissible period is not exceeded.

In addition, there are certain specific statutory exemptions and provisions which were not changed by the 1959 amendments. It is to these that the balance of this article will be addressed. For convenience, they will be treated under three headings:

(1) Exemptions relating to pension funds, insurance trusts, and other miscellaneous matters.
(2) Disposition of accumulations not validly disposed of.
(3) Exemptions relating to accumulations for the benefit of charity.

II. Accumulations for Pension Funds, Insurance Trusts, and Miscellaneous Purposes

The New York statutes continue to include the following provisions, which have not been affected by the 1959 amendments:

(1) Provisos in Real Property Law, section 61, and Personal Property Law, section 16, permitting accumulations under employee stock bonus plans, pension plans, disability or death benefit plans, or profit-sharing plans.

(2) A proviso in Personal Property Law, section 16, permitting funded insurance trusts.

(3) Provisions in Personal Property Law, section 13-d, exempting from the laws against accumulation of income a trust created under a retirement plan for which provision has been made under the laws of the United States exempting such trust from federal income tax, and permitting accumulation of income from such trust until the period set for distribution.

(4) Provisions in the Decedent Estate Law, section 47-3(5) and (6), authorizing accumulation of income in the case of a testamentary gift to an unincorporated association to preserve its property pending incorporation.

(5) Provisions in the Insurance Law, section 200(9), authorizing accumulation of income in the case of a trust created under a "retire-

ment system" authorized by said section 200 until, in the opinion of the trustees, a sufficient sum exists to accomplish the purposes of the trusts.

(6) A provision in Personal Property Law, section 17-a, to the effect that, unless otherwise directed, stock dividends arising under a trust shall be treated as principal rather than income, and that addition of such stock dividends to principal shall not be deemed an accumulation of income.

(7) A provision in Personal Property Law, section 17-b, for the distribution of income from real or personal property earned during the period of administration of the estate of a testator.

(8) Provisions in Personal Property Law, section 17-c, setting forth rules for apportionment of principal and income arising from mortgage investments under trusts and arising from mortgage salvage operations.

(9) Provisions in Personal Property Law, section 17-d, for apportionment as between principal and income under trusts consisting of bonds or other obligations bought with a premium or at a discount, or maturing with loss or gain.

(10) Provisions in Personal Property Law, section 17-d for determining the date of accrual of dividends on stock held in an estate, trust, or other fund, for purposes of apportionment as between principal and income.

It was recommended to the Commission that no action be taken on these statutory provisions at this time. They are all of relatively recent enactment and deal with certain special situations which are peripheral to the main problems under consideration, but which in the absence of statute might raise a technical problem of unlawful accumulation.

III. Disposition of Income Where No Valid Direction for Accumulation

Real Property Law, section 63, provides that, where the power of alienation has been suspended by a validly limited future interest, and during such suspension there are undisposed rents and profits, and no valid direction for their accumulation, they shall belong to the persons presumptively entitled to the next eventual estate. If any person or persons shall legally begin to receive such rents and profits, by virtue of section 63 or otherwise, they shall continue to receive the same notwithstanding the subsequent birth of a child or children to any person or persons receiving all or any part of such rents and profits. This section has been held applicable to income from personal property.[5]

[5] Matter of Harteau, 204 N.Y. 292, 97 N.E. 726 (1912).

It should be noted that this statute covers two distinct situations: (1) where there has been an invalid direction for accumulation; and (2) where there has been no direction for accumulation.[6] The underlying theory of the statute is said to be that those who are presumptively entitled to the estate and the rents and profits when the period of accumulation ends are entitled to anticipate the event and take the rents and profits undisposed of or unlawfully directed to be accumulated.[7] The statute applies only where the following conditions are met: (1) there is a valid limitation of an expectant estate (2) causing suspension of the power of alienation, and (3) there is income undisposed of, and (4) no valid direction for its accumulation.[8] The person "entitled to the next eventual estate" is the person who would presumptively be entitled to the estate at the end of the period of accumulation.[9] This may be the remainderman, a successor life tenant or legatee, or the life beneficiary himself.[10]

The ramifications of this statute are reviewed in a comprehensive opinion by the late Surrogate Wingate, in which he declares that the section is all-embracing and provides an exclusive rule of devolution in those situations contemplated by its provisions.[11] This opinion analyzes the statute in terms of its purpose, scope, and operation, and reviews all the important decisions down to the time of the decision. In another case, however, also decided by Surrogate Wingate, the statute was held inoperative if its application would result in circumventing the basic principle of the statutes (as they stood before amendment) invalidating all accumulations not for the benefit of minors.[12]

No attempt will be made here to explain the detailed operation of this statute. It will suffice to note that the subject is one of considerable complexity and the application of the section is often very difficult. It has been before the courts on numerous occasions. As one treatise puts it, speaking of this statute and parallel statutes in other jurisdictions, "it has caused a mass of litigation."[13]

There is reason to believe that the relaxation of the rules governing accumulations effected by the 1959 amendments will reduce somewhat

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6 6 American Law of Property § 25.111 (Casner ed. 1952).
7 Ibid.
8 Matter of Childs, 207 Misc. 1126, 143 N.Y.S.2d 527 (Surr. Ct. Suffolk County 1955).
9 St. John v. Andrews Institute for Girls, 191 N.Y. 254, 83 N.E. 981 (1908).
10 6 American Law of Property § 25.111 (Casner ed. 1952) (citing illustrations from the New York cases).
11 Matter of Shupack, 158 Misc. 873, 287 N.Y. Supp. 184 (Surr. Ct. Kings County 1936).
12 Matter of Densen, 163 Misc. 232, 296 N.Y. Supp. 567 (Surr. Ct. Kings County 1937).
13 3 Simes & Smith, Law of Future Interests § 1468 (1956) (citing annotation in 157 A.L.R. 668 (1946) and cases construing a similar Wisconsin statute).

the number of cases in which this section will have to be invoked because of an invalid direction for accumulation. It will not however affect situations where there has been no direction at all for accumulation. Extension of the permissible period by a gross period of twenty-one years may increase somewhat the difficulty of determining the "persons presumptively entitled to the next eventual estate," but this is wholly speculative at this stage.

The statute does not apply to all invalid accumulations, but only to those where the necessary criteria for its application are present. In any situation not covered by the statute, it seems that income accruing under an invalid provision for accumulation is payable to the person or persons who would take if such accumulation had not been directed. This might be the income beneficiary, the persons having an indefeasibly vested interest in the principal, the residuary legatees, or the statutory distributees.[14] The same result follows in any case of a void accumulation under the English statute on accumulations, as well as under many American statutes.[15] The rule seems to be the same at common law.[16]

In 1947 Pennsylvania enacted a comprehensive statute on accumulations which provided, *inter alia,* for distribution of income released under a void provision for accumulation. This statute provided generally that such income "should be distributed as if no such accumulation had been authorized," but also established a presumptive order of priority favoring: first, the current income beneficiaries, if any; second, the persons, if any, who would be entitled to the accumulations if the time for payment thereof were accelerated to the time of accrual of the income; third, the persons, if any, who, when the income accrued, were entitled to other income from the same trust; fourth, the residuary legatees; and fifth, the persons entitled to property undisposed of by the conveyance.[17] Although characterized by Professor Powell as a "well worked out statute,"[18] it was repealed in 1955 and replaced by a much more liberal

[14] Hawthorne v. Smith, 273 N.Y. 291, 7 N.E.2d 139 (1937) (surplus income paid to life beneficiary); United States Trust Co. v. Soher, 178 N.Y. 442, 70 N.E. 970 (1904) (surplus income paid to next of kin); Matter of Vanderbilt, 229 App. Div. 574, 243 N.Y. Supp. 165 (1st Dep't 1930) (surplus income paid to residuary legatee); Matter of Clarkson, 201 Misc. 943, 107 N.Y.S.2d 289 (Surr. Ct. Suffolk County 1951) (surplus income paid to life beneficiary); Matter of Withall, 191 Misc. 1016, 76 N.Y.S.2d 467 (Surr. Ct. Monroe County 1948) (surplus income paid to life beneficiary); 3 Simes & Smith, Law of Future Interests § 1468 (1956).

[15] Law of Property Act of 1925, § 164(1), 15 Geo. 5, c. 20; 3 Simes & Smith, Law of Future Interests § 1468 (1956).

[16] Wilson v. D'Atro, 109 Conn. 563, 145 Atl. 161 (1929); 5 Powell, Real Property § 828, at 840 (1956); 3 Simes & Smith, Law of Future Interests § 1468 (1956).

[17] Pa. Laws 1947, P.L. 100, § 8.

[18] Powell, "Changes in the New York Statutes on Perpetuities and Accumulations: A Report and a Proposal," 58 Colum. L. Rev. 1196, 1198 (1958); see also 5 Powell, Real Property § 835, at 876 (1956).

statute on accumulations. The latter includes a provision that income subject to a void direction or authorization to accumulate shall be distributed to the person or persons in whom the right to such income has vested by the terms of the instrument or by operation of law.[19]

Despite its complexity and the "mass of litigation" said to have been provoked by it, there is a lack of convincing evidence that Real Property Law, section 63, is working unsatisfactorily. The Pennsylvania statute of 1947 probably offered a better solution, but experience under it was too short-lived to permit of any conclusions. The author accordingly recommended to the Commission that any proposal to amend section 63 be withheld until there had been a reasonable opportunity to observe its operations under the amended statutes on accumulations generally. The Commission accepted this recommendation and made no proposal for amendment of section 63 in its 1960 program.

IV. Exceptions to Rule Against Accumulations—Charities

The present statutes (Real Property Law, section 61, and Personal Property Law, section 16) include complex provisions permitting accumulations for various educational and charitable purposes, which have not been amended. These provisos may be summarized as follows:

(1) The first proviso permits accumulation of the income from property granted, conveyed, devised, or bequeathed in trust to any incorporated college or other incorporated literary institution for any of the purposes specified in Real Property Law, section 114, or Personal Property Law, section 13,[20] or for the purpose of providing for the support of any teacher in a grammar school or institute, until the same shall amount to a sum sufficient, in the opinion of the regents of the university, to carry into effect any of such purposes.

(2) The second proviso states that if the principal of a trust fund received by any incorporated college or other incorporated literary institution, or by the corporation of any city or village, or by the commissioners of common schools of any town, or by the trustees of any school district, under any grant, conveyance, devise, or bequest for any purpose for which trusts are authorized under Real Property Law, section 114, or Personal Property Law, section 13,[21] shall become di-

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19 Pa. Stat. Ann. tit. 20, § 301.7 (Purdon Supp. 1959).

20 (i) To establish and maintain an observatory; (ii) to found and maintain professorships and scholarships; (iii) to provide and keep in repair a place for the burial of the dead; or (iv) for any other specific purposes comprehended in the general objects authorized by their respective charters.

21 In addition to the purposes specified in note 20 above, these statutes authorize gifts in trust to certain municipal corporations for the purpose of education, the diffusion of knowledge, or the relief of distress, or for parks, gardens, or other ornamental grounds,

minished from any cause, such diminution may be made up by the accumulation of income from principal, in accordance with the directions contained in the original gift, or if no such directions were given, then in the discretion of the trustees; but in no case shall such accumulation be allowed to increase the trust fund beyond the amount or value actually received in the first instance, less liens and incumbrances and expenses of acquisition.

(3) The third proviso states that where property is given, granted, devised, or bequeathed in trust to a religious, educational, charitable or benevolent corporation for any of its corporate purposes, up to one-fourth of the value of such property, but not more than $50,000, may be set aside for the accumulation of income until principal and accumulated income reach $100,000, whereupon such accumulation shall be available as part of the permanent endowment of such corporation.

These provisos differ from the basic statutory provisions on accumulations in the following respects:

(1) They are not limited to cases where accumulation is directed in the granting instrument but also cover accumulation within the discretion of the trustees or other officials by expressly permitting it within stipulated limits.

(2) There is no time limit on the accumulation permitted.

(3) There are quantitative limitations, as follows:

(a) In the case of the educational institutions mentioned in the first proviso, accumulation is permitted until, in the opinion of the "regents of the university," the fund is large enough to accomplish its purposes.

(b) Under the second proviso, applicable to the same educational institutions and to certain municipal corporations, accumulation is permitted to restore impairment of capital, but not beyond this.

(c) Under the third proviso, applicable to charitable corporations generally, it is necessary to earmark a limited portion of the principal (up to twenty-five per cent or $50,000, whichever is less) for accumulation, and the total accumulated fund may not exceed $100,000.

These provisos were enacted in 1846, 1855, and 1915, respectively, and subsequently amended several times. Apparently they take the form they do because of the restrictive statutory language in New York relating to charitable uses and trusts. Gifts to charitable corporations were authorized only to specific types of donees for certain restricted

or grounds for the purpose of military parades and exercises, or health and recreation, and gifts in trust to commissioners of common schools for any town, and to trustees of any school district, for the benefit of the common schools of such town, or the schools of such district.

purposes.[22] Charitable trusts as such were first held unauthorized under the Revised Statutes and were only later authorized by statute.[23] The wording of the provisos accordingly reflects the rather restricted language of sections 113 and 114 of the Real Property Law and sections 12 and 13 of the Personal Property Law relating to charitable uses and trusts. It is in many respects obsolete and inapplicable to present-day conditions. Moreover it is uncertain whether the phrase "regents of the university" in the first proviso refers to the trustees of the educational or literary institution concerned or to the Regents of the University of the State of New York.

In considering possible amendments, the following questions seemed relevant:

(1) What are the rules on accumulation for charity under the statutes as amended in 1959?

(2) Do these rules apply only to cases where accumulation has been directed in the granting instrument, or do they have a broader application?

(3) To what extent do these rules apply to charitable corporations and foundations, as distinguished from charitable trusts?

(4) What is the extent of (a) judicial and (b) executive supervision over all these matters under present law?

(5) What is the effect of current provisions of the United States Internal Revenue Code on the subject of accumulations for charitable purposes?

(6) What is the common law rule on accumulations for charitable purposes?

(7) What are the statutory provisions of other representative jurisdictions on this subject?

These questions will be taken up in order.

(1) Present Statutory Rules in New York on Accumulations for Charitable Purposes

Under Real Property Law, section 61, and Personal Property Law, section 16, as amended in 1959, an accumulation may be validly directed so long as it is to commence and terminate within the period allowed for the vesting of future estates,[24] or for suspension of absolute owner-

[22] N.Y. Sess. Laws, 1840, ch. 318; N.Y. Sess. Laws, 1841, ch. 261 (now N.Y. Real Prop. Law § 114).

[23] Tilden v. Green, 130 N.Y. 29, 28 N.E. 880 (1891); Holland v. Alcock, 108 N.Y. 312, 16 N.E. 305 (1888); Holmes v. Meade, 52 N.Y. 332 (1873); N.Y. Sess. Laws 1893, ch. 701 (now N.Y. Real Prop. Law § 113), overruling Bascom v. Albertson, 34 N.Y. 584 (1866).

[24] This phrase is inappropriate, since the New York statutes speak in terms of suspension

ship. If the direction is to accumulate for a longer time, it shall have the same effect as if the accumulations were directed to terminate at the end of such period.

There is no limitation as to the purpose for which or the person for whose benefit such accumulation may be directed. There is no reason why the present statute should not be construed as permitting an accumulation for charity within the permissible period. A contrary result could be reached only if the subsequent provisos were read as limiting the generality of the basic permissive provisions. This is, of course, possible (which in itself is a good reason for recommending repeal of the provisos) but it is unlikely. It would convert provisos which in their origin were liberalizing into provisos which serve to restrict. It is possible to give effect to both parts of the statute. The basic provision would apply to any direction for accumulation, including one for charity, measured by the permissible period. The provisos would apply (a) where no specific period for accumulation is specified in the granting instrument, or (b) where a period is specified in excess of the permissible period for vesting of future estates, or (c) where no direction for accumulation is contained in the granting instrument, but accumulation is deemed desirable by the trustees.

Prior to the 1960 amendments, the period allowed for the vesting of future estates was any reasonable number of lives in being. This period is not convenient for charitable trusts. It would not normally be selected except (a) by a settlor or trustee who was very conscious of the statutory rules, or (b) where the gift to charity, with accumulated income, followed a life interest in a named person or persons.

In 1960, however, the statutes were amended to permit a period in gross, whether following the measuring lives, or in lieu thereof.[25] This will be readily applicable to charitable trusts and might in fact obviate the need for any special provision applicable thereto.

(2) Applicability of Restrictive Rules to Discretionary as Opposed to Mandatory Accumulations

There is some authority outside of New York for the proposition that the rules prohibiting or limiting accumulations, whether common law or statutory, apply only where the accumulation is *directed* by the granting instrument, and have no application where the trustee is merely author-

of the power of alienation rather than remoteness of vesting. However the error, if it is one, appeared in prior versions of Real Property Law, section 61, and was not a 1959 innovation. See Pasley, op. cit. supra note 1, at 686 n.27.

[25] N.Y. Sess. Laws 1960, ch. 448.

ized or permitted to accumulate.[26] A fortiori, under such a view, these rules would have no application where the granting instrument is silent on the subject, or the accumulation is accomplished by the trustee in his own discretion, assuming such exercise of discretion did not violate the terms of the granting instrument.[27]

The Restatement of Property takes the opposite view. It first defines the term "accumulation" so as to exclude any retention of income or application of income to increase principal which is "found to be merely in the course of judicious management of the trust."[28] If however the retention of income, or the application thereof to increase principal, is not "in the course of judicious management," then it is an "accumulation" and is subject to regulation as to its duration, whether the trustee is under a duty to accumulate or merely has a discretionary power to do so.[29]

There is little question but that New York follows the Restatement view and applies its statutory policy restricting accumulations, whether the accumulation is mandatory, permissive, or discretionary (while at the same time not fully adopting the liberal Restatement view which excludes from the definition of "accumulation" any retention of income or application thereof to principal which is "in the course of judicial management"). Holdings and dicta in a number of cases make this clear.

Thus, in *Hascall v. King*,[30] the application of income to the payment of mortgages was held an invalid accumulation. Although here the accumulation was directed by the terms of the will, the language of the case indicates that the result would have been the same even if the provision had been only permissive.

In *Equitable Trust Co. v. Prentice*,[31] the question was whether a provision in a deed of trust, permitting the trustee to allocate stock dividends to capital rather than income, violated the statutory rules against

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[26] Gerin v. McDonald, 64 F.2d 394 (8th Cir. 1933) (applying law of South Dakota). See Cohen, "The Rule Against Accumulations and 'Wait and See'," 33 Temple L.Q. 34, at 46 n.62 (1959); Brownell v. Leutz, 149 F. Supp. 98 (D.N.D. 1957) (applying law of North Dakota).

[27] Cases cited note 26 supra.

[28] Restatement, Property § 439 (a) (ii) (1944). Provisions for a reserve fund for depreciation and obsolescence is cited as an example of "judicious management." Id. illustration 2. Cf. In re Smith's Will, 253 Wis. 72, 33 N.W.2d 320 (1948), citing and applying this section.

[29] Id comment b. The comment explains that this follows from the use of the word "can" in the definition set forth in § 439(a) (i):

> A limitation provides for an accumulation, as the term is used in this Restatement, when
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> (a) a trust is so limited
>
> (i) that part or all of the current income can be retained in the trust or can be so applied by the trustee as to increase the fund subject to the trust, ...

[30] 162 N.Y. 134, 56 N.E. 515 (1900).

[31] 250 N.Y. 1, 164 N.E. 723 (1928).

accumulations.[32] The court held that it did not, but on the ground that stock dividends are predominantly not increments to income, but subdivisions of principal. "The quality that is typical must determine whether they are permitted or forbidden. Doubts, when nicely balanced, are resolved in favor of legality." The implication is that, if such dividends are clearly income, the statutes would be violated, and the fact that the trustee was authorized in his discretion, rather than directed, to treat them as principal would not change this. This is the clear import of the case, despite the fact that the court stated the question as being: "Does the founder of a trust 'direct' an illegal accumulation . . . when he provides . . .?"[33]

In *Morris v. Morris*,[34] the trustees were permitted by the terms of the trust to withhold part of the income from the life beneficiary (a minor) and to accumulate it for the purpose of increasing the principal, in such manner and in such amounts as to them seemed proper. The court held this provision illegal and void and directed that the income accumulated during the lifetime of the life beneficiary (who had now reached her majority) be paid to her, on the ground that this was the only disposition consistent with the statutory framework. Payment to the donor, as holder of the "next eventual estate" under Real Property Law, section 63, would in this situation permit an evasion of the statutory policy. The court said:

> By the last sentence of paragraph three the trustees were permitted to accumulate the income to increase the principal. This was illegal and void as contrary to the provisions of the Personal Property Law, above quoted.[35]

The court pointed out:

> It will be noted that the donor in this trust agreement does not direct or command any accumulation. At most he permits it.[36]

And in conclusion:

> But such an accumulation, says the statute, can only be made for the benefit of the infant, and when we once begin accumulating, and such accumulation for a period of years is legal, then the accumulation must be disposed of as the statute directs, that is, it must be paid to the infant.[37]

In *Matter of Clark*,[38] what might otherwise have been an invalid ac-

[32] Pers. Prop. Law § 17-a, which permits this, bad been enacted but did not apply to the facts of this case.
[33] 250 N.Y. 1, 10, 164 N.E. 723, 724 (1928).
[34] 272 N.Y. 110, 5 N.E.2d 56 (1936).
[35] Id. at 115, N.E.2d at 58.
[36] Id. at 119, 5 N.E.2d at 60.
[37] Id. at 120, 5 N.E.2d at 60.
[38] 306 N.Y. 733, 117 N.E.2d 910 (1954), affirming 281 App. Div. 905, 120 N.Y.S.2d 126 (2d Dep't 1953).

cumulation (use of depreciation reserves[39] to pay off a mortgage and to offset a capital loss of a subsidiary) was upheld, apparently on the theory that these were corporate acts and not acts of the trustee as such, the corpus of the trust consisting of the stock of the corporation. The trust instrument itself contained no directions on the subject. Judge Froessel, dissenting in the Court of Appeals, and Justice Beldock, dissenting in the Appellate Division, argued that where, as here, the trustee controlled the corporation, the corporation entity should be disregarded and the payments held invalid. Judge Froessel argued that such payments "violated the settled policy of the State against accumulations." Justice Beldock thought that income was being taken from the income beneficiary and given to the remainderman.

In two prior lower court cases, *Matter of Adler*[40] and *Matter of McLaughlin,*[41] very similar on their facts to *Matter of Clarke,* the courts disregarded the corporate entity and held invalid the use of income to reduce mortgage indebtedness, where the effect was to withhold income from the income beneficiaries and enhance the interests of the remaindermen. The decisions were placed on the twofold ground that the public policy of the State is against accumulations and that income belonging rightfully to the income beneficiary may not be used to increase the interest of the remainderman. Here again, the trustees, in controlling the operations of the corporations whose stock they held, were acting in their discretion and not in accordance with any directions contained in the trust instrument. As Surrogate Delehanty said in the *McLaughlin* case:

> The testator here did not in his will direct his executrix-trustee expressly to use corporate net income to extinguish the debt. : . . While the statute forbids a *direction* by a testator for an accumulation it is aimed essentially at the *fact of accumulation* rather than the state of mind of the testator. It is intended to prevent the sterilizing of the usufruct of an estate.[42]

In *Matter of Talbot,*[43] the will directed that all cash conceded to be income be distributed accordingly. The court said, by way of dictum:

> There might be unsurmountable legal obstacles to the capitalization of any income other than that earned during the period of administration,

[39] From an accounting standpoint, of course, depreciation reserves cannot be "used" to pay off anything since they are only bookkeeping credits corresponding to charges against income. But once the dubious assumption is made that a charge against trust income on account of depreciation is an "accumulation" of income, it follows that a subsequent payment of cash on capital account, charged against the depreciation reserve thus created, is a "use" of accumulated income which would violate the former statutory rule that accumulations may only be for the benefit of a minor.

[40] 164 Misc. 544, 299 N.Y. Supp. 542 (Surr. Ct. N.Y. County, 1937).

[41] 164 Misc. 539, 299 N.Y. Supp. 559 (Surr. Ct. N.Y. County 1937).

[42] Id. at 542, 299 N.Y. Supp. at 563.

[43] 170 Misc. 138, 9 N.Y.S.2d 806 (Surr. Ct. Orange County 1939).

> for by section 16 of the Personal Property Law such income cannot be accumulated, except for the benefit of one or more minors in being at the death of the testator, which accumulations must end at or before the expiration of their minority.
>
> . . . The prohibition of accumulation of income represents the public policy of the State.[44]

In *Matter of James*,[45] the trustee requested authority to use the principal of a sinking fund (previously accumulated in accordance with the provisions of the trust instrument with the approval of the court) to discharge certain mortgage indebtedness in accordance with an authorization contained in the trust instrument. The court refused to reconsider the validity of the sinking fund itself, holding that this question was res judicata, but denied the application to use the moneys in the sinking fund to discharge mortgages, on the ground that this would be an invalid accumulation. Even though building up a sinking fund out of income, as a reserve against future reduction in the value of the corpus, subject to control of the court, might be valid, the use thereof to discharge capital indebtedness is as objectionable as a direct use of income for the purpose would be.

The court said:

> . . . the legislative policy against accumulations of income is applicable to any income retained for the deliberate purpose of addition to corpus or principal. The suggestion is, in effect, precisely the same as if the settlor had unequivocally required the trustee to directly apply the income to increase the principal of the trust. The statute intends that income must be used as it accrues and not to build up future estates where some of the beneficiaries are adults.[46]

Concededly, none of these cases involved accumulations for charity. But the principle would be the same, given the existence of legal restrictions on the duration or extent of such accumulations. Thus, the Restatement of Property, after first laying down the rule that,

> An otherwise effective limitation which provides for an accumulation in favor of a charity is subject to judicial supervision as to its duration.[47]

states in the comment,

> . . . . It is immaterial that the accumulation for the charity is to occur only "in the trustee's discretion," if expenditure for charitable purposes is the alternative.[48]

On the other hand, there is a line of cases indicating that the New York statutory restrictions on accumulations apply only where the trustee is directed or authorized to accumulate by the granting instrument. The

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[44] Id. at 141, 9 N.Y.S.2d at 810.
[45] 6 Misc. 2d 849, 159 N.Y.S.2d 989 (Sup. Ct. Onondaga County 1957).
[46] Id. at 851-52, 159 N.Y.S.2d at 992.
[47] Restatement, Property § 442 (1944).
[48] Id. comment e.

strongest, as well as the most recent, statement to this effect is found in a federal district court case arising under the law of New York, *Kibbe v. City of Rochester*.[49] Testator left the residue of his estate to the City of Rochester for the purpose of erecting, equipping, and maintaining a "Library and Fine Arts Building" for the use and enjoyment of the people of Rochester, to be known as the "Rundel Memorial Building." The city received a portion of the residue, $353,968, in 1919, and the balance, $369,618, in 1928 (after an intervening life estate had terminated). The city held these funds for several years without doing anything with them. Testator's heirs and next of kin then sued to have the funds paid over to them on a resulting trust, on the theory that the original trust had failed through the city's neglect and non-user, and that this was in effect an abandonment of the trust.

The court held that the legacy created a trust with legal title in the city, with an obligation on the trustee to carry out the testator's purposes, that the trust had not been abandoned, and that plaintiffs had no interest in the fund. The court said the result would be the same if the legacy were construed as an outright gift, not in trust. The court overruled the plaintiffs' contention that the statutes on accumulation had been violated (the fund having accumulated during the period of non-user), saying

> In the Rundel will there is no direction for an accumulation, and there is no necessity for the immediate expenditure of the income from the funds set aside for the building. No definite time has been set for the erection of the building, but it is rather, and wisely, left to the discretion of the donee. If the donee has not seen fit to build immediately, it cannot be said that the gift is invalid because the donee has not kept it so that there would be no income . . . . The defendant does not contend that it could not use the money immediately on its becoming available for carrying out the testator's purpose, but only that it deemed it inadvisable to so do, and that it was not required to do so by the terms of the gift.[50]

The decision is unquestionably sound in holding that the plaintiffs had no interest in the fund. That being so, plaintiffs had no standing, as heirs or next of kin, to challenge the legality of a *de facto* accumulation which had not been directed or expressly authorized by the testator. This is not to say, however, that in a proper proceeding, brought by the Attorney General or interested member of the public, to compel proper application of the trust funds, a court might not have held the accumulation illegal and directed its termination.

In going further and holding that the New York law condemns only

[49] 57 F.2d 542 (W.D.N.Y. 1932).
[50] Id. at 548-49.

those accumulations which are directed, or expressly or impliedly authorized, by the trust instrument the court cited four New York cases.[51] An examination of these cases, and of certain others cited by them in turn, discloses the following:

(a) None is more recent than 1918.

(b) In two,[52] the statements to this effect are dicta, or at best alternative grounds for the decisions reached.

(c) In four,[53] there were special circumstances, in that the income beneficiary was either incompetent or imprisoned and could not use all the income. In each of these situations the court held that the surplus income should be held for later payment to the income beneficiary and that this would merely be an accumulation arising incidentally from the administration of the trust and not within the condemnation of the statutes.

(d) In the one remaining case,[54] which involved a charitable trust, the fund had been allowed to accumulate to some extent. The court refused to uphold the contention of the residuary legatees that the accumulations were invalid and therefore should fall into the residue, but directed their application cy pres. This would have been the correct result even if the court had held the accumulations illegal.[55]

It seems fair to conclude that the New York statutory restrictions on accumulation apply, in the case of both private and charitable trusts, whether the trustee is directed by the trust instrument to accumulate or is expressly or impliedly authorized to do so, and also (except perhaps the special situations found in the *City of Rochester* case and the cases cited therein) when he does so in his own discretion.

(3) Applicability of Statutory Restrictions on Accumulations to Charitable Corporations and Foundations

The basic restrictions on accumulation set forth in Real Property Law, section 61, and Personal Property Law, section 16, apply (so far as

[51] Matter of Bavier, 164 App. Div. 358, 149 N.Y. Supp. 728 (1st Dep't 1914); Hill v. Guaranty Trust Co., 163 App. Div. 374, 148 N.Y. Supp. 601 (1st Dep't 1914); Camp v. Presbyterian Soc'y, 105 Misc. 139, 173 N.Y. Supp. 581 (Sup. Ct. Jefferson Eq. T. 1918); Matter of Langdon, 89 Misc. 333, 153 N.Y. Supp. 574 (Surr. Ct. N.Y. County (1915).

[52] Livingston v. Tucker, 107 N.Y. 549, 14 N.E. 443 (1887); Matter of Stevens, 46 Misc. 623, 95 N.Y. Supp. 297 (Surr. Ct. Chautauqua County 1905).

[53] Hill v. Guaranty Trust Co., 163 App. Div. 374, 148 N.Y. Supp. 601 (1st Dep't 1914); Matter of Bavier, 164 App. Div. 358, 149 N.Y. Supp. 728 (1st Dep't 1914); Matter of Bavier, 164 App. Div. 363, 149 N.Y. Supp. 731 (1st Dep't 1914); Matter of Langdon, 89 Misc. 333, 153 N.Y. Supp. 574 (Surr. Ct. N.Y. County 1915). Cf. Matter of Meyer, 140 Misc. 1, 249 N.Y. Supp. 451 (Surr. Ct. Kings County 1931).

[54] Camp v. Presbyterian Soc'y, 105 Misc. 139, 173 N.Y. Supp. 581 (Sup. Ct. Jefferson Eq. T. 1918).

[55] Cf. Matter of Kirkbride, 261 App. Div. 853, 24 N.Y.S.2d 375 (3d Dep't 1941), motion for leave to appeal denied, 285 N.Y. 859, 32 N.E.2d 835 (1941).

their wording is concerned) to "directions" for accumulation contained "in any instrument sufficient to pass such property." The provisos in favor of charities, which as noted above are not limited to situations where the original instrument "directs" an accumulation, all refers to transfers of property "in trust" (first and third provisos) or to a "trust fund" received by the institution concerned (second proviso).

Regardless of wording, it is obvious that a restriction on accumulation can operate only where property is held in some sort of trust or fiduciary relationship. It is clear that the New York restrictions apply to express trusts. It is equally clear that they do not and cannot apply to property owned outright. "A man may accumulate income on his own property. Likewise, so long as the stockholders do not object, a corporation may accumulate income, and 'plow in' surplus instead of distributing it as dividends."[56]

But what of the charitable corporation or foundation? Does it hold its property "in trust" or does it hold it outright? The answer would seem to lie somewhere in between these two extremes and to require the drawing of certain distinctions. Scott says:

> It is not infrequently stated in the cases that a charitable corporation does not hold upon a charitable trust property conveyed or bequeathed to it. In fully as many cases, however, it is stated that a charitable corporation holds its property in trust. It is sometimes said that a charitable corporation holds property in trust if the property is to be used only for a particular charitable purpose or if only the income is to be used.
>
> A charitable corporation certainly does not hold its property beneficially in the same sense in which an individual or non-charitable corporation can hold it beneficially, since in the case of a charitable corporation the Attorney General can maintain a suit to prevent a diversion of the property from the purposes for which it was given. In states which, like New York, formerly did not permit charitable trusts, a conveyance inter vivos or a devise or bequest to a charitable corporation was valid, unless forbidden by statute, even though by the terms of the instrument of conveyance or will it was provided that the corporation should use the property only for a particular one of its purposes, and even though it was provided that the principal should be held in perpetuity and only the income expended . . . .
>
> . . . . The truth is that it cannot be stated dogmatically either that a charitable corporation is or that it is not a trustee. The question is in each case whether a rule which is applicable to trustees is applicable to charitable corporations, with respect to unrestricted or restricted property. Ordinarily the rules which are applicable to charitable trusts are applicable to charitable corporations, as we have seen, although some are not. It is probably more misleading to say that a charitable corporation is not a trustee than to say that it is, but the statement that it is a trustee must be taken with some qualifications.[57]

[56] Simes, "Statutory Restrictions on the Accumulation of Income," 7 U. Chi. L. Rev. 409, 426-27 (1940).

[57] 4 Scott, Trusts § 348.1, at 2553-59 (1956).

The Restatement is to the same effect:

> Where property is given to a charitable corporation, particularly where restrictions are imposed by the donor, it is sometimes said by the courts that a charitable trust is created and that the corporation is a trustee. It is sometimes said, however, that a charitable trust is not created. This is a mere matter of terminology. The important question is whether and to what extent the principles and rules applicable to charitable trusts are applicable to charitable corporations.[58]

Bogert is more definite in drawing a distinction:

> Occasionally it becomes important to learn whether a donor intended to make an absolute gift to a charitable corporation to be used by it for one or more of its corporate purposes, or desired to make the charitable corporation trustee of a charitable trust. It is clear that there is a distinction in these two intents and the legal results of their expression. In the first case the gift is outright and absolute. No trust in a technical sense is involved. There is merely the duty on the part of the corporation to use its property for its corporate purpose, and not to do an ultra vires act. The state, through the Attorney General, could doubtless force the corporation to live within its charter. In the second instance the charitable corporation takes the bare legal interest and is subject to a bill brought by the Attorney General to compel obedience to the duties of a charitable trustee.[59]

In general, the New York courts have taken the position that a gift to a charitable corporation, where no words of trust are used and no intent to create a trust can be found, does not establish a trust but is an outright gift to the corporation to use for its corporate purposes.[60] This result has sometimes been reached even when words of trust were used, if the primary intention seemed to be to make an outright gift to the corporation to be used by it for one or more of its corporate purposes.[61]

It is true that many of the earlier decisions so holding were inspired, in part at least, by a desire to uphold charitable gifts at a time when the law of New York did not recognize charitable trusts.[62] Be that as it may, the rule has continued to be affirmed in virtually all the New York cases.

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58 Restatement (Second), Trusts § 348, comment f (1957).

59 2 Bogert, Trusts and Trustees § 324, at 439-43 (1953).

60 Cadman Memorial Congregational Soc'y v. Kenyon, 306 N.Y. 151, 166, 116 N.E.2d 481, 487 (1953); St. Joseph's Hosp. v. Bennett, 281 N.Y. 115, 22 N.E.2d 305 (1939); Matter of Durand, 194 N.Y. 477, 87 N.E. 677 (1909); Bird v. Merklee, 144 N.Y. 544, 39 N.E. 645 (1895); Wetmore v. Parker, 52 N.Y. 450 (1873).

61 Tabernacle Baptist Church v. Fifth Ave. Baptist Church, 60 App. Div. 327, 70 N.Y. Supp. 181 (1st Dep't 1901), aff'd, 172 N.Y. 598, 64 N.E. 1126 (1902). Cf. Fowler, The Law of Charitable Uses, Trusts and Donations in New York 115 (1896).

62 2 Bogert, Trusts and Trustees § 324, at 443 (1953); Note, "The Charitable Corporation," 64 Harv. L. Rev. 1168, 1171-72 (1951); N.Y. Law Revision Commission, Recommendations and Study re Application of Cy Pres Doctrine to Prevent Failure of a Gift for Charitable Purposes, N.Y. Leg. Doc. No. 65 (S) pp. 17-19 (1953).

Some of these cases expressly state or hold that the rules applicable to perpetuities, and other rules applicable to private trusts, do not apply to property held outright by a charitable corporation.[63] Relatively few cases, however, involve the subject of accumulations. Such cases as there are suggest the following conclusions:

(a) A gift to a charitable corporation for a specific, limited purpose, whether or not considered a technical trust, is subject to the restrictions set forth in the provisos in the accumulation statutes relating to charities. For example, the case of *Matter of Whittelsey*[64] involved a will making a gift in remainder to the Metropolitan Museum of Art to purchase objects of art for "The Elisha Whittelsey Collection," the income from the fund to be first accumulated, if necessary, until it reached the value of the estate as originally fixed in the transfer tax proceedings. When the remainder took effect in possession, the fund had been substantially impaired in value and was much less than the value originally fixed. Surrogate Foley applied the statute and held that the accumulation could be upheld only to the extent permitted by the third proviso of section 16 of the Personal Property Law (the other two being inapplicable).

Similarly, in *Matter of Lewis*[65] it was held that a legacy to Cornell University to establish a permanent endowment for the "Nellie M. Lewis Scholarship" in the College of Arts and Sciences of said University, to be awarded annually by the Scholarship Committee of the Federation of Cornell Women's Clubs to a woman undergraduate in any class of said College, involved an invalid accumulation, in that the testator had provided that if the value of the legacy should prove to be less than $10,000, the annual income therefrom should be added to principal until the latter, with accumulated income, reached $10,000. The court upheld the gift without the accumulation.

(b) If the gift is for the general purposes of the corporation, without limitation to specific objects, but with a proviso that only income is to be used and the principal is to remain intact, it would seem that the accumulation rules do not apply, but substantially the same result is reached by virtue of the courts holding that the income must be expended in accordance with the directions of the donor and may not be

[63] St. Joseph's Hosp. v. Bennett, 281 N.Y. 115, 119, 22 N.E.2d 305, 307 (1939). Cf. Brayton v. Christ Church, 249 App. Div. 290, 292 N.Y. Supp. 131 (4th Dep't 1936), aff'd, 275 N.Y. 631, 11 N.E.2d 792 (1937) (personal exemption from double liability enjoyed by a trustee holding bank stock not available to a charitable corporation holding such stock); Bird v. Merklee, 144 N.Y. 544, 550, 39 N.E. 645, 646-47 (1895); Wetmore v. Parker, 52 N.Y. 450, at 459 (1873).

[64] 180 Misc. 602, 41 N.Y.S.2d 815 (Surr. Ct. N.Y. County 1943).

[65] 199 Misc. 463, 99 N.Y.S.2d 986 (Surr. Ct. Erie County 1950).

added to principal, for example by being used to discharge a mortgage or to make capital improvements.[66] Conversely, in such a case principal may not be used for current expenditures contrary to the directions of the donor.[67] On a proper showing of necessity, however, the court may, under a doctrine akin to cy pres, known as "deviation," authorize the use of income to make capital improvements or the use of principal to meet current expenses, where otherwise the charitable purpose would fail.[68] The fact that this power exists and is exercised, although rarely, seems to indicate that the restrictions on accumulations do not apply. The point is not, however, mentioned in the cases.

(c) In the case of a wholly unrestricted gift to a charitable corporation, it would appear that the statutory restrictions on accumulations do not apply. This follows from the considerations, repeated over and over in the cases, (i) that such property is not held in trust, and (ii) the only restriction on its use is that it be applied to corporate purposes. While no cases have been found expressly so holding, in a few this seems to be the actual result under the facts and the decisions reached.[69] There is a dictum in one Court of Appeals case that "section 61 of the Real Property Law . . . as to accumulations and section 221 of the Tax Law . . . refer generally to such [i.e., charitable] corporations,"[70] but this seems to be too broad.

Even in this situation (as will be more fully discussed in the next section) the courts have the power to prevent any improper use of the funds of a charitable corporation, or to correct a failure to use them for corporate purposes, and the Attorney General may bring an action to such end.[71] This could, of course, include situations where an unreasonable accumulation of income had prevented the carrying out of the corporate purpose.

(d) A related but nevertheless distinct rule is that, where there is an immediate gift to a charitable corporation or unincorporated association to be formed, the corporation or association, when it is formed, takes the gift plus all accumulations of income arising in the interval, and

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[66] St. Joseph's Hosp. v. Bennett, 281 N.Y. 115, 22 N.E.2d 305 (1939); Matter of Mauser, 151 N.Y.S.2d 993 (Surr. Ct. Herkimer County 1956).

[67] Matter of Brooklyn Children's Aid Soc'y, 269 App. Div. 789, 55 N.Y.S.2d 323 (2d Dep't 1945).

[68] Knickerbocker Hosp. v. Goldstein, 181 Misc. 540, 41 N.Y.S.2d 32 (Sup. Ct. Sp. T. N.Y. County 1943).

[69] Cf. Corporation of the Chamber of Commerce v. Bennett, 143 Misc. 513, 257 N.Y. S.2d (Sup. Ct. N.Y. County 1932); Matter of James, 123 N.Y.S.2d 520 (Surr. Ct. N.Y. County 1953).

[70] Sherman v. Richmond Hose Co., 230 N.Y. 462, 130 N.E. 613 (1921).

[71] St. Joseph's Hosp. v. Bennett, 281 N.Y. 115, 119, 22 N.E.2d 305, 307 (1939).

there is no violation of the rules against accumulation.[72] Where, however, the gift is to take effect in the future, for example, at the termination of an intervening life estate, the accumulation statutes do apply.[73]

(4) Extent of Judicial Supervision Over Charitable Trusts and Charitable Corporations

In nearly all Anglo-American jurisdictions it is recognized that a court of equity has general supervisory power over charitable trusts and, perhaps to a less extent, over charitable corporations.[74] Most commonly this power is exercised to direct compliance with the trust or corporate purpose,[75] or to prevent a failure thereof by applying cy pres,[76] but it also covers such matters as decreeing a termination of a charitable trust in an appropriate case,[77] appointment of trustees of a charitable corporation to fill vacancies where no other method is available,[78] and other matters.[79] It includes supervision of the reasonableness of an accumulation.[80]

Normally the intervention of an equity court is sought by the Attorney General as representative of the public interest,[81] or by the trustee or corporation itself in an action naming the Attorney General as a party

[72] Matter of Juillard, 238 N.Y. 499, 144 N.E. 772 (1924); Trustees of Sailors' Snug Harbor v. Carmody, 211 N.Y. 286, 105 N.E. 543 (1914); Matter of Potts, 205 App. Div. 147, 199 N.Y. Supp. 880 (3d Dep't 1923). Cf. N.Y. Real Prop. Law § 113 (2-a); N.Y. Pers. Prop. Law § 12 (2-a).

[73] Matter of Juillard, 238 N.Y. 499, 144 N.E. 772 (1924); St. John v. Andrews Institute, 191 N.Y. 254, 83 N.E. 981 (1908); Cf. Matter of Donchian, 120 Misc. 535, 199 N.Y. Supp. 107 (Surr. Ct. N.Y. County 1923).

[74] Sherman v. Richmond Hose Co., 230 N.Y. 462, 130 N.E. 613 (1921); Allen v. Stevens, 161 N.Y. 122, 55 N.E. 568 (1899); 4 Scott, Trusts §§ 348, 348.1, at 2552, 2554 (1956); Tudor, Charities 174-93 (5th ed. 1929); Note, "The Charitable Corporation," 64 Harv. L. Rev. 1168 (1951).

[75] St. Joseph's Hosp. v. Bennett, 281 N.Y. 115, 22 N.E.2d 305 (1939); Matter of James, 123 N.Y.S.2d 520, 525 (Surr. Ct. N.Y. County 1953).

[76] Matter of Brundrett, 87 N.Y.S.2d 851 (Surr. Ct. N.Y. County 1940); Newman, Trusts 180, 194-99 (1955); 4 Scott, Trusts §§ 348.1, 399, at 2554, 2824-55 (1956).

[77] Matter of Stafford, 258 Pa. 595, 102 Atl. 222 (1917). This power is, however, not exercised where it would be contrary to the interest of the settlor and it is possible to carry out the original trust; 4 Scott, Trusts § 367A, at 2622-27 (1956); Franklin Foundation v. Attorney General, 163 N.E.2d 662 (Mass. 1960); Winthrop v. Attorney General, 128 Mass. 258 (1880).

[78] Goldstein v. Trustees of Sailors' Snug Harbor, 277 App. Div. 269, 98 N.Y.S.2d 544 (1st Dep't 1950).

[79] E.g., disposition of surplus: 4 Scott, Trusts § 400, at 2858-62 (1956). (But apparently this applies ouly to a charitable trust. It has been held that the court may not control the disposition of the surplus funds of an existing charitable corporation, not held in trust, so long as they are used for corporate purposes. Corporation of the Chamber of Commerce v. Bennett, 143 Misc. 513, 257 N.Y. Supp. 2 (Sup. Ct. N.Y. County 1932). Quaere whether this is still good law after the ruling in the St. Joseph's Hosp. case, supra note 75, which seemed to indicate a trend to assimilate the law of charitable corporations with that of charitable trusts. See Taylor, "A New Chapter in the New York Law of Charitable Corporations," 25 Cornell L.Q. 382 (1940).)

[80] St. Paul's Church v. Attorney General, 164 Mass. 188, 204, 41 N.E. 231, 237 (1895); 2 Bogert, Trusts and Trustees § 353, at 523; Restatement, Property § 442 (1944).

[81] 4 Scott, Trusts § 391, at 2753-56 (1956); See, e.g., Goldstein v. Trustees of Sailors' Snug Harbor, 277 App. Div. 269, 98 N.Y.S.2d 544 (1st Dep't 1950).

defendant.[82] Occasionally, though rarely, the court's jurisdiction may be invoked by another "interested party," usually a beneficiary having a definite claim,[83] or a donor having some sort of special interest in performance of the trust or a reversionary interest on its termination or failure.[84]

In New York these rules are codified in Real Property Law, section 113, and in Personal Property Law, section 12.[85] In brief, these statutes provide as follows:

(a) The Supreme Court has control over all gifts, grants, devises, and bequests to religious, educational, charitable or beneficial uses which are otherwise valid. This includes express recognition of the cy pres power.

(b) The Surrogate's Court has concurrent and similar jurisdiction with the Supreme Court in the case of devises and bequests to charitable uses.

(c) These powers extend to gifts to corporations or unincorporated associations for religious, charitable, educational or beneficial purposes, whether or not an express trust is created.

(d) The Attorney General is to represent the beneficiaries in all such cases, and it is his duty to enforce "such trusts" by proper proceedings in the courts.

(e) The Supreme Court is empowered, in appropriate cases, to authorize the sale or mortgage of property held by a charitable trustee or corporation, on notice to the Attorney General and to any persons having reversionary or remainder interests in such property.

These powers have been invoked in numerous cases. In nearly all of them the Attorney General has been a party, whether as plaintiff or defendant, appellant or respondent. There is every reason to believe that the Attorney General takes his duties under these statutes very seriously. He has not been a mere nominal party in the cases in which he has appeared. Some of these he has initiated as party plaintiff; in many he has appealed from lower court rulings which he considered erroneous.

Although no New York cases have been found in which the equitable power of the court has been invoked or exercised on the specific subject of accumulations (except in cases involving a question of validity or invalidity under the statutes), there is no question but that, under the

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[82] See, e.g., St. Joseph's Hosp. v. Bennett, 281 N.Y. 115, 22 N.E.2d 305 (1939).

[83] 4 Scott, Trusts § 391, at 2758-62 (1956). Cf. Matter of Jones, 191 Misc. 617, 78 N.Y.S.2d 34 (Surr. Ct. Erie County 1948) (proceeding to construe will).

[84] 4 Scott, Trusts § 391, at 2762-64 (1956). Cf. Associate Alumni v. Theological Seminary, 163 N.Y. 417, 57 N.E. 626 (1900).

[85] See, generally, N.Y. Law Revision Commission, Recommendation and Study re Application of Cy Pres Doctrine to Prevent Failure of a Gift for Charitable Purposes, N.Y. Leg. Doc. No. 65 (S) 1953.

general law recognized throughout the United States, the power exists with respect to the reasonableness or propriety of an accumulation for charitable purposes, as well as with respect to its legality.[86] There is no reason to believe that the law of New York is otherwise.

Of recent, there has been considerable discussion of the question whether this traditional approach to the supervision of charitable trusts, corporations, and foundations is adequate. Some of the literature is cited in the footnote.[87] The answer generally given is that it is not, and that legislation is necessary. The reasons given, among others, are:

(a) While the amount of wealth held in charitable trusts or by charitable corporations and foundations has reached staggering proportions, in the absence of statute there is no effective means for obtaining information on the subject or for requiring such trustees, corporations, and foundations to render regular accountings.

(b) Partly for this reason and partly because of the preoccupation with other seemingly more pressing problems, the intervention of the Attorney General is apt to be sporadic and ineffective.

(c) The courts are reluctant to exercise their powers, except in clear cases where funds are being diverted from their purpose or it is necessary to invoke cy pres to prevent failure of a charitable purpose.

(d) The cy pres power itself is inadequate in the light of modern conditions.

The most comprehensive study yet made is the 1952 Report of the British Charitable Trusts Committee, commonly called the Nathan Report.[88] The findings and recommendations of this report have been ably reviewed and compared with the American situation by Professor Bogert.[89] The Nathan Report found that the private charity still has a place in the "welfare state," but that there is need for improved procedures for keeping records and making reports, that the rules on investments should be liberalized, that the cy pres power should be en-

86 Supra note 80.

87 4 Scott, Trusts § 391, at 2755-56 (1956); Taylor, Public Accountability of Foundations and Charitable Trusts (Russell Sage Foundation 1953); Bogert, "Proposed Legislation Regarding State Supervision of Charities," 52 Mich. L. Rev. 633 (1954); Bogert, "The Nathan Report and the Supervision and Enforcement of Charitable Trusts," 29 N.Y.U.L. Rev. 1069 (1954); Forer, "Forgotten Funds: Suggesting Disclosure Laws for Charitable Funds," 105 U. Pa. L. Rev. 1044 (1957); Karst, "The Efficiency of the Charitable Dollar: An Unfilled State Responsibility," 73 Harv. L. Rev. 433 (1960); Vestal, "Critical Evaluation of the Charitable Trust As a Giving Device," 1957 Wash. U.L.Q. 195; Note, "Supervision of Charitable Trusts," 21 U. Chi. L. Rev. 118 (1953). Cf. Simes, Public Policy and the Dead Hand, ch. 5 (1955); Scott, "Education and the Dead Hand," 34 Harv. L. Rev. 1 (1920).

88 Report of the Committee on the Law and Practice Relating to Charitable Trusts, Cmd. No. 8710 (1952).

89 Bogert, "The Nathan Report and the Supervision and Enforcement of Charitable Trusts," 29 N.Y.U.L. Rev. 1069 (1954). See also "The Nathan Committee Report," 102 L.J. 703 (1952); Graveson, "The Report on Charitable Trusts," 215 L.T. 326 (1953).

larged, and that the existing administrative machinery for supervision of charities (through the Charity Commission) should be improved and strengthened. Excepted from a major part of the recommendations, in accord with prior practice, would be the existing universities (but not necessarily new universities), cathedrals and collegiate churches, churches in general (except to the extent already subject to the Charitable Trusts Act), the British Museum, and certain similar bodies. These institutions should, however, with the consent of their trustees, enjoy the benefits of the proposed enlarged cy pres powers.

In this country, the Attorneys General themselves have taken the lead in sponsoring remedial legislation.[90] The first state to enact legislation requiring the reporting of charitable trusts was New Hampshire in 1943.[91] The Commission on Uniform Laws has approved a Uniform Supervision of Charitable Trusts Act,[92] which has been adopted in California.[93] Somewhat similar legislation has been enacted in Rhode Island,[94] Ohio,[95] South Carolina,[96] and Massachusetts.[97] Idaho has a more limited reporting requirement.[98] In New York, all charitable corporations, except religious and educational groups, are required to register with the Department of Social Welfare before commencing fund raising campaigns, and are required thereafter to file annual financial reports.[99] The New York statute so providing gives the Attorney General broad enforcement powers.[100]

The scheme of the Uniform Supervision of Charitable Trusts Act is to provide for a Register of Charities in the office of the Attorney General, and to require the filing of copies of all instruments establishing charitable trusts and the filing of periodic reports concerning the assets of the trust and the administration thereof. The Attorney General is given broad investigatory and subpoena power and is authorized to enforce compliance with the act in the courts. The act applies to all charitable-trusts power, and to property held by a charitable corporation for a particular purpose as distinguished from property held for the general purposes of the corporation. Governmental agencies, religious organiza-

90 See Bogert, "Proposed Legislation Regarding State Supervision of Charities," 52 Mich. L. Rev. 633, 641-52 (1954).
91 N.H. Laws 1943, ch. 181 (now 1 N.H. Rev. Stat. Ann. §§ 7:19-32 (1955)).
92 9C ULA 208-15 (1957).
93 Cal. Gov't Code §§ 12580-96 (made permanent legislation, with one change, by Cal. Stat. 1959, ch. 1258).
94 3 R.I. Gen. Laws Ann. §§ 18-9-1 to 18-9-15 (1956).
95 Ohio Rev. Code Ann. §§ 109.23-109.99 (Page 1953).
96 6 S.C. Code §§ 67-71 to 67-75 (Supp. 1959).
97 1 Mass. Gen. Laws Ann. c. 12, §§ 8A-81 (Supp. 1959.).
98 5 Idaho Code Ann. § 30-601 (Supp. 1959).
99 Soc. Welfare Law §§ 481-483-a. Twenty other states have similar statutes.
100 Id. § 482-c.

tions, and charitable corporations organized primarily for educational, religious, or hospital purposes are excluded from coverage. These limitations and exclusions have been criticized by some writers[101] and defended by others.[102]

It is not proposed herein to consider the relative merits of the criticisms of the traditional approach which have been made and the corrective measures which have been proposed, or to consider whether the present New York statutes on the supervision of charitable trusts and corporations are adequate. This would have gone far beyond the scope of the author's study for the Commission. But the subject has been discussed for the sake of completeness and also because it illustrates that the problem is much broader than the matter of accumulations. Estimates as to the amounts involved vary. Assets of the philanthropies have been estimated in recent years in such varying amounts as $30 billion,[103] $50 billion,[104] and $64 billion.[105] In 1953 it was estimated that there were between 60 and 100 foundations having assets of $10,000,000 or more (exclusive of colleges, universities, and religious organizations).[106] The foundations alone are said to have assets totaling $11½ billion.[107] In the light of figures such as these, it becomes apparent that the problem is too vast to be solved by a few provisos relating to accumulations.

(5) Effect of Internal Revenue Code on Accumulations for Charity

Two fairly recently enacted provisions of the United States Internal Revenue Code have an impact on accumulations by or for charitable trusts, corporations, and foundations. The first of these is section 504 (a),[108] which denies exemption from income tax to certain charitable corporations, community chests, funds, and foundations, otherwise exempt, for any taxable year if the amounts accumulated out of income

101 See, e.g., Forer, "Forgotten Funds: Suggesting Disclosure Laws for Charitable Funds," 105 U. Pa. L. Rev. 1044, 1055-57, 1060-61 (1957); Karst, "The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility," 73 Harv. L. Rev. 433, 456 (1960). The 1959 California amendment to the Uniform Act (supra note 93) makes the statute cover all charitable corporations and trustees holding property for charitable purposes over which the state or the Attorney General has enforcement or supervisory powers.

102 See, e.g., Bogert, "Proposed Legislation Regarding State Supervision of Charities," 52 Mich. L. Rev. 633, 653-54 (1954).

103 Lynn, "Legal and Economic Implications of the Emergence of Quasi-Public Wealth," 65 Yale L.J. 786, 801, n.65 (1956).

104 Hayes, "Corporate Charitable Giving," 91 Trusts & Estates 492, 494-95 (1952).

105 Report of the (N.Y.) Joint Legislative Committee on Charitable and Philanthropic Agencies and Organizations 15 (1954).

106 Final Report of the Select Committee to Investigate Foundations and Other Organizations (The Hays Report), H.R. Rep. No. 2514, 82d Cong., 2d Sess. 2 (1953). (The statistics cited to this and the three preceding footnotes are found in Vestal, "Critical Evaluation of the Charitable Trust As a Giving Device," 1957 Wash. U.L.Q. 195, 198, n.14)

107 New York Times, July 11, 1960, § 1, p. 1, col. 3.

108 26 U.S.C. § 504(a) (1959). (Similar provisions were contained in § 3814 of the Int. Rev. Code of 1939, amended by 64 Stat. 958 (1950)).

by any such organization during that year, or any prior year, and not actually paid out by the end of the year

(a) are unreasonable in amount or duration in order to carry out the charitable purpose or function of such organization; or

(b) are used to a substantial degree for other than charitable purposes or functions; or

(c) are invested in such manner as to jeopardize the carrying out of the organization's charitable purposes or functions.

These provisions do not apply to

(a) any religious organization (other than a trust);

(b) any educational organization with a regular faculty, curriculum and student body;

(c) any governmental organization;

(d) any organization operated, supervised, controlled, or principally supported by a religious organization (other than a trust); or

(e) any organization for medical or hospital care, medical education or research, or agricultural research.

Also excepted from the operation of the statute is any income derived from a testamentary trust created prior to January 1, 1951. If a testamentary trust created after that date makes accumulation of income mandatory, the provision relating to unreasonableness in amount or duration applies only to income accumulated during a taxable year of the trust beginning after the expiration of the common law perpetuities period (lives in being and twenty-one years).

The other provision is section 681,[109] which in general imposes limitations on the charitable deduction allowable in determining the income tax liability of an estate or trust. Under section 681(c), if the income accumulated for charitable purposes during the taxable year or any prior year and not actually paid out by the end of the year

(a) is unreasonable in amount or duration in order to carry out the charitable purposes; or

(b) is used to a substantial degree for other than charitable purposes; or

(c) is invested in such manner as to jeopardize the interests of the charitable beneficiaries;

then the allowance for a charitable deduction is limited to the amount actually paid out during the year and shall not exceed twenty per cent

[109] 26 U.S.C. § 681(c) (1959). (Similar provisions were contained in § 162(g) of the Int. Rev. Code of 1939, amended by 64 Stat. 954 (1950)).

of the taxable income of the trust (computed without the benefit of the charitable deduction generally allowed to a trust but with the benefit of the deduction allowed an individual).

Again there is excepted from the provision relating to reasonableness of an accumulation, any income derived from a testamentary trust created prior to January 1, 1951. If a testamentary trust created after that date makes accumulation of income mandatory, the provision concerning reasonableness applies only to income accumulated during a taxable year of the trust beginning after the expiration of the common-law perpetuities period.

A recent amendment to another section of the Code makes this exception applicable to income derived from an inter vivos trust established during the lifetime of a decedent dying before January 1, 1951, but apparently only for the limited purpose of determining whether a corporation owned in whole or in part by such a trust is a "personal holding company."[110]

The regulations under section 504 do little more than restate the provisions of the statute, but they do define the terms "income" and "accumulated income" (assimilating the latter to the accumulated earnings or profits of a corporation), and provide that in determining the reasonableness of an accumulation out of income certain types of capital gains will be disregarded.[111] The regulations under section 681(c) are similar in effect.[112]

There are some interesting rulings of the Internal Revenue Service under these sections. Thus, contributions to a charitable organization are not regarded as income in determining whether there has been an unreasonable accumulation, and distributions for charitable purposes may be shown as a reduction of current income before being charged to current contributions or prior contributed capital.[113]

The accumulation of capital gains and of a portion of annual dividend and interest income for a ten-year period in order to restore past invasion of capital which had been used for contributions to charity was held not an unreasonable accumulation.[114]

An accumulation of income for a three-year period was held not unreasonable, provided the amount permanently retained was only such as was necessary to restore prior charitable grants made from capital

110 69 Stat. 718 (1955), 26 U.S.C. 542 (1958), amending 68A Stat. 182 (1954).
111 Treas. Reg. § 1.504-1 (1958).
112 Treas. Reg. §§ 1.681(a)-1, 1.681(c)-1 (1957).
113 Rev. Rul. 58-535, 1958-2 Cum. Bull. 270.
114 Rev. Rul. 54-227, 1954-1 Cum. Bull. 291.

(constituting about one year's income) and the balance of the accumulation was distributed at the end of the three-year period.[115]

There have been several court decisions under section 504, or its predecessor, section 3814 of the 1939 Code. In *Samuel Friedland Foundation v. United States,*[116] the United States District Court for the District of New Jersey found that the foundation had the status of a charitable organization because of its ultimate purpose (to promote medical care, education, and research) and had not lost this status by reason of its financial activities and investments in stock, debentures and mortgages. The challenged accumulations came to $288,492.47 for a three-year period.[117] The court found that this was not unreasonable, applying as criteria the tests (a) whether the organization had a concrete program for the accumulation of income to be devoted to a charitable purpose, and (b) whether in the light of existing circumstances the program was a reasonable one. Here the goal was to raise $500,000 for a medical research center for Brandeis University. The foundation had started with $50,000 and could expect annual contributions of about $50,000. At the normal rate of earnings on investment its goal would be reached in from six to eight years. This was not unreasonable, said the Court:

> The retention of income by a charitable organization for six, seven or even eight years pursuant to a project to provide an established educational institution with a medical research building is certainly of equal if not greater benefit to the public than requiring the distribution in each taxable year of income received by that organization. And it follows that if the program is reasonable no amount of accumulation out of income short of the dollar goal can offend the statutory provision; in fact, the greater the accumulation the more rapidly the public benefit will accrue.[118]

In *Randall Foundation, Inc. v. Riddell,*[119] the United States Court of Appeals for the Ninth Circuit never reached the question of the reasonableness of the accumulations, holding that the nature of the "foundation's" business activities were such that it was a business, and not a charitable organization, even though its ultimate aim may have been to establish a home for underprivileged boys. The court indicated that it disagreed with the findings in the *Friedland* case on this preliminary question.[120]

In *Tell Foundation v. Wood,*[121] the United States District Court for

115 Rev. Rul. 54-137, 1954-1, Cum. Bull. 289.
116 144 F. Supp. 74 (D.N.J. 1956).
117 These figures represented dividends, interest, and capital gains (but not contributions), less operating expenses and charitable distributions.
118 144 F. Supp. 74, 93.
119 244 F.2d 803 (9th Cir. 1957).
120 Id. at 808 n.9.
121 52 Am. Fed. Tax R. 1801 (D. Ariz. 1957).

the District of Arizona held that the foundation was an exempt organization, and that for the two taxable years from July 1, 1952, to June 30, 1954, it had not accumulated its income unreasonably, had not used its accumulated income to a substantial degree for non-charitable purposes, and had not invested its income in such manner as to jeopardize carrying out its charitable purposes. The report of the case sets forth only the court's ultimate findings and it is not possible to draw any conclusions from these as to the rationale of the decision.

In *Truscott v. United States*,[122] the United States District Court for the Eastern District of Pennsylvania upheld the tax-exempt status of a foundation established to create a fund for retirement benefits for the employees of a corporation, or if this should prove impractical, for a scholarship fund for Gettysburg College. Income was to be accumulated for ten years before the fund was to commence operations. This involved an increase in the value of the assets from an unspecified amount in 1950 to $81,680 by 1957, and to an estimated figure of $107,000 by 1960 (plus a $19,000 tax refund as a result of the court's decision). If the fund had started to operate in 1950, the average monthly benefit per eligible employee would have been $15; by 1960 it would be about $60 if the accumulation was permitted. The court found that the fund carried a "social benefit," that the period of accumulation was reasonable (actually necessary) and not longer than needed, and that there was no violation of section 3814 of the Internal Revenue Code of 1939.

In *The Shiffman Foundation*,[123] a charitable organization, formed in 1948 with a capital of $1000, in 1951 purchased rental properties for $1,150,000, borrowing $1,000,000 for this purpose. During the five years following it used a substantial portion of its net income from rentals in complete retirement of its indebtedness but also made substantial contributions to charity. Thereafter it distributed substantially all its net income to charity. The Tax Court held that it was a tax-exempt organization and that its use of yearly income to retire indebtedness was not an unreasonable accumulation, or an accumulation for nonexempt purposes, within section 3814 of the 1939 Code and section 504 of the 1954 Code.

> Assuming, but not deciding, that the use of income, year by year, to pay an indebtedness incurred in acquiring income-producing property constitutes an accumulation of income, such accumulation here involved is neither unreasonable nor for substantially nonexempt purposes.[124]

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122 1 Am. Fed. Tax. R.2d 1743 (E.D. Pa. 1958).
123 32 T.C. 1073 (1959).
124 Id. at 1081.

Two cases have been found under the predecessor to section 681, which was section 162 of the 1939 Code, but both involved the statute before it was amended to make specific reference to accumulations.

In *Arthur Jordan Foundation v. Commissioner*,[125] the donor had, in 1928, established a perpetual trust, named the Jordan Foundation, for rather vaguely described charitable purposes. Until the net assets reached $5,000,000, from ten per cent to fifty per cent of the annual earnings were to be accumulated and the balance was to be distributed for the purposes of the trust. Thereafter, the entire net earnings were to be distributed, except that any losses in principal were to be replenished out of earnings. In 1948 the foundation took over and operated two music stores in Washington, D. C. The Commissioner then ruled that it had lost its tax-exempt status. The Tax Court held that it was taxable as a trust and entitled to the charitable deductions allowed by section 162, but that this included only actual distributions for charity and not the income withheld and accumulated. The Court of Appeals for the Seventh Circuit reversed, holding that the income accumulated had been "permanently set aside for the use of" charitable organizations or "used exclusively for charitable and related purposes."

> The principle which to us seems controlling in this case is the reasonable certainty that the beneficent purposes of the trust will be greatly served as the investment fund expands and reaches the goal fixed by the settlor. It may be expected that as the fund increases the income available for direct application to charitable or related purposes will increase accordingly. There can be no other reason, under the terms of the trust instrument, for adding to the fund. On the other hand, anything which retards the growth of the fund necessarily reduces the amount of the income available for direct charitable purposes. The purpose of investment is solely and exclusively to produce more income for those purposes. To subject to tax that part of the income which is retained as a part of the corpus would thus very materially impair the possibility of achieving those objectives.[126]

As mentioned above, this case was decided before section 162 of the 1939 Code was amended to include specific reference to accumulations, the only question under the statute as it then read being whether income which was accumulated rather than distributed was "permanently set aside for the use" of charitable organizations or was "used exclusively" for charitable and related purposes.

In *John Danz Charitable Trust v. Commissioner*,[127] the Court of Appeals for the Ninth Circuit, in a two-one decision, distinguished the

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[125] 210 F.2d 885 (7th Cir. 1954).
[126] Id. at 889.
[127] 231 F.2d 673 (9th Cir.), cert. denied, 352 U.S. 828 (1956), rehearing denied, 353 U.S. 951 (1957).

Jordan case on the ground that, whereas in that case the ultimate beneficiaries were all charitable organizations, in the case of the *Danz Trust* there was no assurance that the accumulated income would ultimately be so used, since the settlor had reserved the power to designate the ultimate charitable beneficiaries, and in the meantime the funds were being used for business and speculative purposes. The dissenting judge thought that the case could not be distinguished from the *Jordan* case.

Some of the background of this tax legislation, and the attitude toward it both of representatives of the foundations and of the Internal Revenue Service, may be found in the Proceedings of the New York University Fourth Biennial Conference on Charitable Foundations held in 1959,[128] but no definitive conclusions were reached. How effective these provisions will be in limiting accumulations by charitable trusts and charitable organizations cannot now be predicted. It seems reasonably clear that they will discourage accumulations beyond the common law perpetuities period, as well as any other accumulations that cannot be reasonably justified by some sound plan which promises to be of ultimate benefit to charity and which does not involve an undue amount of business operations and speculation. Whether they will have any further effect is a matter of surmise. It does seem significant that the Government has not yet been able to persuade a court to hold an accumulation "unreasonable" under these statutes. Moreover, it should be noted that the provisions have no application to religious organizations, educational institutions, hospitals, or organizations for medical or agricultural research, which are rather siguificant omissions.

(6) Common-Law Rule on Charitable Accumulations

The common-law rule on charitable accumulations can be fairly simply stated. There are no specific restrictions on the amount or duration of such accumulations, but a court of equity has jurisdiction to supervise them as to reasonableness in both these respects.[129] While this rule is recognized, in the absence of statute, in nearly all jurisdictions, there appear to be very few cases in which such accumulations have been declared unreasonable, even where intended to be of very long duration.[130]

[128] Proceedings of N.Y.U. Fourth Biennial Conference on Charitable Foundations 186-87, 233-34, 277-87, 290-91 (1959).

[129] 2 Bogert, Trusts and Trustees § 353, at 522-26 (1953); Restatement, Property § 442 (1944); 4 Scott, Trusts § 401.9, at 2886-91 (1956).

[130] The cases actually invalidating or questioning such accumulations appear to be quite old. In Hillyard v. Miller, 10 Pa. 326,336 (1849), Gibson, J., thought a perpetual accumulation for charity would be void "for it would ultimately draw into its vortex all the property in the state." Girard Trust Co. v. Russell, 179 Fed. 446 (1910); Collings v. Davis, 17 Ohio C.C. R. (n.s.) 221 (1911), aff'd, 87 Ohio St. 504, 102 N.E. 1122 (1912). Cf. City of Philadelphia v. Girard's Heirs, 45 Pa. 9 (1863). In Matter of Stevens, 164 Pa.

The tendency is for the court to uphold the provision for accumulation, stating that if at a future time it appears that an unreasonable amount has been accumulated, or the accumulation has continued for too long a time, it will take appropriate action. Thus, accumulations for charity have been upheld although directed to last 99 years,[131] or 125 years.[132]

Benjamin Franklin, who died in 1790, left £1000 in trust to the City of Boston for the purpose of making loans at interest to young married artificers to assist them in setting up in business, with the proviso that all interest was to be accumulated for 100 years, at which time he anticipated the fund would amount to £131,000, of which £100,000 was to be laid out in public works; the remaining £31,000 were to be held in the trust for the same purposes and under the same conditions for another 100 years. "At the end of the second Term, if no unfortunate accident has prevented the operation, the Sum will be Four Millions and sixty one Thousand Pounds Sterling; of which I leave one Million sixty one Thousand Pounds to the Disposition of the Inhabitants of the Town of Boston and Three Millions to the Disposition of the Government of the State, not presuming to carry my views farther."[133] This will has been before the courts many times and has been upheld. Although the supply of eligible young married artificers has dwindled to zero, Franklin's predictions as to the amount of the accumulations proved over-sanguine. In 1894, 100/131 of the principal, or $298,602.04, with interest, amounting to $329,300.38, was paid to the Boston City Treasurer, and this money plus accumulations, aggregating $435,000, together with an equal sum given by Andrew Carnegie, was used to establish the Franklin Union, now the Franklin Technical Institute.[134] The balance has continued to accumulate. In 1958 the Massachusetts Legislature authorized immediate payment to the Franklin Technical Institute of the portion distributable to the Commonwealth in 1990, provided the Supreme Court authorized termination of the trust and the making of such payment.[135] Despite this statute, the Supreme Judicial Court of Massachusetts declined to exercise its "authority in equity to terminate the trust."

> We are not convinced that his [Franklin's] charitable objectives have ceased to be in accord with the public interest or have become so unreasonable under current conditions that we should exercise our undoubted

209, 30 Atl. 243 (1894), an accumulation for an indefinite period was approved when it turned out that it had required but little time.

131 Lyme High School Ass'n v. Alling, 113 Conn. 200, 154 Atl. 439 (1931).

132 Allaun v. First & Merchants Nat'l Bank, 190 Va. 104, 56 S.E.2d 83 (1949).

133 Franklin Foundation v. Attorney General, 163 N.E.2d 662, 665 (Mass. 1960).

134 Id. at 666 n.1.

135 Mass. Stat., ch. 596, § 1 (1958).

equitable power of termination even if the loan program has ceased all usefulness.

. . . .

We also agree that Franklin did intend that the accumulation should be achieved by the device of making loans to young artificers. But we have been shown nothing to justify the suggestion that he would wish all accumulation to cease if not capable of accomplishment in that way. That the trust will not attain by the date set for termination the principal amount estimated by the testator is unimportant. We observe in the codicil an intent to provide substantial gifts to future generations in the two cities. We shall not defeat that intent by destroying the trust now as to the Commonwealth and the city of Boston.

No useful purpose would be served by analysis of the cases cited by the plaintiff. Franklin's codicil is unique.[136]

While this is perhaps an extreme case, it is a graphic illustration of the reluctance of the courts to interfere with a charitable accumulation, even one of two-centuries duration, which the legislature thought should be brought to an end, so long as some possibility exists of a charitable purpose being served thereby.

(7) Statutory Provisions on Accumulations for Charity

A few jurisdictions beside New York have statutes which deal specifically with accumulations by or for a charitable trust or corporation. Certain others have statutes which apply to accumulations generally, with no specific exemption for charity.

Arizona—The Arizona statute permits accumulation of rents and profits of real property "for the sole benefit of a literary or charitable corporation" organized under the laws of Arizona, but such accumulation must terminate "upon the expiration of 21 years from the time when it is directed to commence."[137] If the direction for the accumulation is for a longer time, it is void as to the excess.[138] There is apparently no statutory restriction on accumulation of the income of personal property.[139]

California—Under the California statute, a nonprofit corporation for charitable or eleemosynary purposes may not accumulate income for a period longer than five years, except as specially approved by the Attorney General.[140] The general California statute on accumulations permits them for the benefit of any person, object, or purpose for a period measured by lives in being and twenty-one years.[141] It would appear

136 Franklin Foundation v. Attorney General, 163 N.E.2d 662, 669 (Mass. 1960).
137 11 Ariz. Rev. Stat. Ann. § 33-348 B.3. (1956).
138 Id. § 33-238C.
139 6 American Law of Property § 25.112 (Casner ed. Supp. 1952 & 1958) (citing Michigan, Minnesota and Wisconsin cases construing substantially identical statutes).
140 Cal. Corp. Code § 10207.
141 Cal. Civ. Code § 724 (as amended by Cal. Stats. 1959, ch. 470).

from the wording that this statute applies to accumulations for a charitable purpose, although there seem to be no cases on the point.[142]

Pennsylvania—The Pennsylvania statute on accumulations provides specifically that it shall not apply to "direction or authorizations to accumulate income in a trust for any charitable purpose or purposes."[143] Although the present Pennsylvania statute, enacted in 1956, substantially revised the accumulations provision of the Wills Act of 1947, in this respect there was no change.[144]

Wisconsin—Wisconsin formerly had a statute identical with that of Arizona, but repealed it in 1957, and substituted a statute permitting accumulations for the benefit of any person or persons for such period as may be directed by the instrument passing the property.[145]

Other American Jurisdictions—A number of other states have general statutes on accumulations, which do not specifically mention charities, and it is not always clear whether they apply to accumulations for charitable purposes. The Montana statute is comparable in wording to the California statute mentioned above.[146] Presumably it applies to accumulations for a charitable purpose.[147]

On the other hand, Illinois has indicated that its statute may not apply to accumulations for charity which are subject to the control of a court of equity.[148]

The Indiana statute permits accumulations for lives in being and twenty-one years.[149] It is silent on accumulations for charity, but decisions of the Indiana courts prior to enactment of the statute, and recently reaffirmed, indicate that in any event such accumulations are subject to the control of a court of equity.[150]

The Alabama statute limits accumulations to those for a period of ten years or the minority of an infant.[151] There is a dictum that this statute applies to accumulations for charity.[152] However, the statute has been very narrowly construed so as to limit its application to trusts

142 6 American Law of Property § 25.116, at 401 (Casner ed. 1952).
143 Pa. Stat. Ann. tit. 20, § 301.6(b) (1) (Purdon Supp. 1959).
144 See Pa. Act of 1947, Apr. 24, P.L. 100, § 6(5).
145 Wis. Laws 1957, ch. 561, §§ 1 & 2.
146 Mont. Rev. Codes Ann. § 67.412 (1947). A recent amendment makes clear that an accumulation directed for a longer term is void as to the excess only. Id. § 67.413 (Supp. 1959).
147 See 6 American Law of Property § 25.116, at 401 (1952).
148 Webb v. Webb, 340 Ill. 407, 172 N.E. 730, Annot., 71 A.L.R. 404 (1930); Summers v. Chicago Title & Trust Co., 335 Ill. 564, 167 N.E. 777 (1929).
149 Ind. Ann. Stat. § 51-106 (Burns Supp. 1951 & 1960).
150 Quinn v. Peoples Trust & Sav. Co., 223 Ind. 317, 60 N.E.2d 281 (1945).
151 Ala. Code Ann. tit. 47, f146 (1940).
152 Thurlow v. Berry, 247 Ala. 631, 25 So. 2d 726 (1946).

for "accumulations only." This allows for a great many types of accumulation which would be invalid under the more typical statute.[153]

The Minnesota statute, applicable only to rents and profits of real estate, limits accumulations to those for the benefit of a minor within the period of his minority.[154] It probably does not apply to accumulations for charity, but there are no cases. The situation in South Dakota is similar to that in Minnesota.[155] The same was formerly true of North Dakota (except that the rule was also applicable to accumulations of income from personal property) but the North Dakota statute was repealed in 1959.[156]

The Nevada statute on accumulations[157] seems to apply only to spendthrift trusts. In other situations the common law apparently applies.[158]

Vermont has an unusual statute, of a type at one time more common, which limits the property holdings of a charitable corporation to $10,000,000, and provides for forfeiture of any excess to the State.[159]

England—The Thellusson Act, still in force with slight modifications, limits accumulations of income to a period not longer than (a) the life of the grantor, or (b) twenty-one years from the death of the grantor, or (c) a minority or minorities in being, or (d) the minority of a person or persons otherwise entitled to the income.[160] In practice, this statute does not apply to every case of an accumulation for charity since, while a present gift to a charity is held valid, under the rule of *Saunders v. Vautier,*[161] the charitable beneficiary may require that the trust be terminated and the entire corpus be paid over to it, thus stopping the accumulation.[162] But if the charity has only a future interest, so that it is not in a position to invoke the rule of *Saunders v Vautier,* the statute applies.[163] In an appropriate case, cy pres will be invoked to carry out the general charitable intention of the grantor.[164] It is interesting to note that the English statute applies whether the trustee is directed or merely empowered to accumulate income.[165]

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153 6 American Law of Property § 25.106 at 380 (Casner ed. 1952).
154 Minn. Stat. Ann. § 500.17(2) (1947).
155 S.D. Code § 51.0304 (1939), as amended by S.D. Laws 1955, ch. 225.
156 N.D. Laws of 1959, ch. 330, at 661.
157 Nev. Rev. Stat. §§ 166.020-166.160 (1959).
158 6 American Law of Property § 25.118 (Casner ed. 1952); 3 Simes & Smith, Law of Future Interests § 1466, at 346 (1956).
159 Vt. Stat. Ann. tit. 11, § 132 (1958).
160 Law of Property Act, 1925, 15 Geo. 5, c. 20, §§ 164-66; 20 Halsbury's Statutes of England 771-77 (2d ed. 1950).
161 4 Beav. 115, 49 Eng. Rep. 282 (Ch. 1841).
162 Wharton v. Masterman, [1895] A.C. 186 (H.L.).
163 Jefferies v. Martin, [1936] 2 All E.R. 626 (Ch.). Cf. Berry v. Geen, [1938] A.C. 575 (H.L.).
164 Re Bradwell's Will Trusts, [1952] 2 All E.R. 286 (Ch.).
165 Re Robb's Will Trusts, [1953] 1 All E.R. 920 (Ch.).

V. Recommendations of the Commission

Granted that the New York statutory provisos on charitable accumulations were obsolete, the question remained what substitute provisions should be proposed. There appeared to be two alternatives:

(a) To subject such accumulations to the same restrictions as are now applicable to accumulations generally, that is, to permit them for lives in being, periods of gestation, and twenty-one years, but no longer; or

(b) To place no specific limit on the duration or amount of such accumulations, but to provide specifically that they should be subject to judicial supervision and control.

The Commission chose the second of these alternatives. It represents the rule followed in the great majority of American jurisdictions. It parallels the position already taken by the New York courts with respect to the applicability to charities of the rule against suspension of the power of alienation or of absolute ownership.[166] It is substantially the rule now in effect, under the first proviso of each of the basic accumulations statutes,[167] in the case of gifts in trust to educational institutions.

The Commission accordingly recommended that the provisos contained in the second, third and fourth paragraphs of section 61 of the Real Property Law and section 16 of the Personal Property Law should be replaced by a provision stating that (a) a direction for an accumulation, in a trust for religious, educational, charitable or benevolent uses, is not invalid by reason of the provisions of sections 61 and 16 limiting accumulations in other cases; (b) in the absence of a direction for accumulation in the instrument creating the trust, and unless such accumulation is prohibited, expressly or by implication, by the terms of such instrument or by statute, the trustee shall be deemed authorized by such instrument to accumulate income, in accordance with the proposed amendment, to the extent he deems necessary or advisable to carry out the purposes of the trust; and (c) that any accumulation in such a trust, whether or not directed by the instrument creating the trust, shall be subject to judicial supervision and control with respect to its reasonableness, amount, and duration, and in any other respect, and the sections of the Real Property Law and the Personal Property Law with respect to jurisdiction of the Supreme Court and the Surrogate's Court

166 Matter of MacDowell, 217 N.Y. 454, 112 N.E. 177 (1916); Allen v. Stevens, 161 N.Y. 122, 55 N.E. 568 (1899); Matter of Myles, 5 Misc. 2d 163, 159 N.Y.S.2d 434 (Surr. Ct. N.Y. County 1956); Matter of Crespi, 158 Misc. 383, 285 N.Y. Supp. 780 (Surr. Ct. Kings County 1936); Matter of DeLong, 140 Misc. 92, 250 N.Y. Supp. 504 (Surr. Ct. Saratoga County 1931).

167 N.Y. Real Prop. Law § 61; N.Y. Pers. Prop. Law § 16.

and to the authority of the Attorney General in relation to gifts for charitable purposes, shall be applicable.[168]

Attention is called to the following specific features of those recommendations:

(a) The terminology "in trust" was retained. This meant, if the author's analysis as set forth above is correct, that the proposed amendment would apply to charitable trusts as such and to gifts to a charitable corporation or foundation for a specific purpose, but probably not to unrestricted gifts to charitable corporations or foundations.

(b) Discretionary accumulations would be subject to control, in the case of trusts or specific gifts, as they apparently are now.

(c) The ambiguous reference to "the regents of the university" would be deleted.

Bills incorporating these recommendations were introduced in both the Senate and Assembly.[169] The Assembly bill passed but the Senate and Assembly bills were not reported out of the Senate Judiciary Committee.

While this legislation was pending it was studied by several bar association committees. It was approved by the Committee on the Surrogates' Courts of the Association of the Bar of the City of New York, which makes the following observation:

> In view of the infinite variety of charitable trusts, the differences in their size, assets, and purposes, the present rigid limitations on accumulation of income, imposed without regard to the special circumstances of each trust, are most inappropriate. The bill is desirable in vesting the power of regulation of accumulations in the courts, which, with the aid of the Attorney General representing the beneficiaries, can permit the degree of flexibility required in each case. With this judicial supervision there should be no reason to fear that the freedom from existing limitations would give rise to abuses resulting in unreasonable accumulations.
>
> For the reasons stated, the bill is approved.[170]

Strong disapproval, however, was voiced by the Committee on the Surrogates' Court of the New York County Lawyers Association. *Inter alia,* the Committee said:

> This proposed statutory authorization is a runaway, with unlimited bounds beyond imagination. It involves questions of public policy far beyond anything envisaged in the amendments to these statutes in 1959.
>
> During the past thirty years, under the impact of the tax laws and in particular the Federal Estate Tax Law, charitable foundations and trusts

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[168] 1960 McKinney's Sess. Law News of N.Y., No. 4, P. A-128 (March 25, 1960).

[169] Sen. Intr. No. 2669, Pr. No. 2794 (1960); Assembly Intr. No. 3568, Pr. No. 3665 (1960).

[170] Ass'n Bar City of N.Y., Comm. on State Legislation, Bull. No. 5, p. 321, at 323 (1960).

> have come into existence in large and increasing numbers and amounts. They have come rapidly into control of enormous amounts of wealth. The situation calls for a restriction, rather than enlargement, of powers. A bill designed to compel the distribution of income, rather than to permit the capitalization of income, would be more appropriate.[171]

Unquestionably, the failure of these two important bar associations to agree on the wisdom of the proposed legislation contributed to its tabling by the Senate Judiciary Committee.

CONCLUSION

While it cannot be claimed that the New York statutes on accumulations are perfect, they are vastly improved over what they were. The ancient fear of accumulations, stemming from *Thellusson's case*,[172] and picturesquely expressed by Chief Justice Gibson of Pennsylvania in 1849 that a perpetual accumulation might eventually "draw into its vortex all the property in the state,"[173] have failed to materialize.[174] The narrow New York restrictions, born of this fear, have been replaced by the simple common law rule permitting accumulations for the period of perpetuities. This should give the needed flexibility for estate planning and trust administration.

Whether section 63 of the Real Property Law, discussed above at page 18, will require amendment, experience under the new statutes should tell. Admittedly, the charitable-trust situation is less satisfactory. The three provisos discussed above are archaic, complex, and confusing. But they can do not great harm, so long as it is held that the new rule permitting accumulations for the perpetuities period applies to charitable trusts. No one argues that these provisos should be retained. The real question is whether a more liberal or a stricter rule should be applied to charitable accumulations than the rule permitting accumulations for lives in being and twenty-one years. But the problem cannot be considered from the standpoint of accumulations only. There is much merit in the argument that greater controls are needed over charitable trusts, corporations, and foundations. The Nathan Report and the legislation sponsored by the Attorneys General point the way. But legislation aimed solely at accumulations, whether as part of the law of estates or as part of the income tax law, is at best a palliative, of little value in most cases, possibly harmful in a few, and at the very least deceptive in promising more than it can perform.

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171 N.Y. County Lawyers' Ass'n, Comm. on the Surrogates' Court, Report No. 289, at p. 3 (1960).
172 Thellusson v. Woodword, 11 Ves. 112, 32 Eng. Rep. 1030 (H.L. 1805).
173 Hillyard v. Miller, 10 Pa. 326, 336 (1849).
174 Simes, Public Policy and The Dead Hand 94-99 (1955).