A SUGGESTED CONSTRUCTION OF THE INDIANA STATUTES AGAINST ACCUMULATIONS

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Despite the frequent remarks[1] of the English judges to the effect that the Thellusson Act[2] was badly drawn and difficult of construction, in 1945 Indiana adopted for its fourth statute against accumulations[3] a virtual paraphrase of the English Act.[4] The Legislature evidently believed, and with some

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1. Lord Chancellor Brougham, in Shaw v. Rhodes, 1 My. & Cr. 135, 141, 40 Eng. Rep. 328, 330 (Ch. 1836), said: ". . . [The act] has hardly ever been discussed in Courts either of law or equity, without the Judge having occasion to observe upon the inartificial, and, in several respects, ill-defined language in which its provisions are expressed." Ellis v. Maxwell, 3 Beav. 587, 596, 49 Eng. Rep. 231, 234 (Ch. 1841): "The difficulty of attributing a distinct and efficient meaning to all the words of this Act has frequently been acknowledged." *See* Gertman v. Burdick, 123 F.2d 924, 928 (D. C. Cir. 1941): "The [Thellusson] Act is not entirely a happy one."

2. 39 & 40 GEO. III, c.98 (1800) (also known as Lord Loughborough's Act). ". . . no person or persons shall, after the passing of this act, by any deed or deeds, surrender or surrenders, will, codicil, or otherwise howsoever, settle or dispose of any real or personal property, so and in such manner that the rents, issues, profits, or produce thereof, shall be wholly or partially accumulated for any longer term than the life or lives of any such grantor or grantors, settlor or settlors or the term of twenty-one years from the death of any such grantor, settlor, devisor or testator, or during the minority or respective minorities of any person or persons who shall be living, or in *ventre sa mere* at the time of the death of such grantor, devisor, or testator, or during the minority or respective minorities only of any person or persons who, under the uses or trusts of the deed, surrender, will, or other assurances, directing such accumulations, would, for the time being, if of full age, be entitled unto the rents, issues, and profits, or the interest, dividends, or annual produce, so directed to be accumulated; and in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits, and produce of such property so directed to be accumulated, shall, so long as the same shall be directed to be accumulated contrary to the provisions of this act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed. . . ." Reenacted in the Law of Property Act, 1925, 15 GEO. V, c.20, §§164-6.

3. The first statute was enacted prior to 1852 [2 IND. REV. STAT. 1852, §2, c.9, p. 245; IND. STAT. ANN. (Burns 1926) § 12172]. It appeared in the Revised Statutes of 1843, Art. 1, c.31, p. 575, and may antedate that time. It applied only to personal property and prohibited accumulations except "during the minority of the persons for whose benefit it is intended." The accumulation was also required to "terminate at the expiration of their minority."

The second statute enacted in 1941 (Ind. Acts 1941, c.218) also applied only to accumulations of the proceeds of personal property and prohibited accumulations except for the benefit of minors. However, such accumulations might endure until the minor reached the age of thirty.

The third statute (Ind. Acts 1943, c.92) permitted accumulations which would endure for lives in being, and made no restrictions upon the purpose of the accumulation.

4. IND. STAT. ANN. (Burns Supp. 1945) §51-106. "No person may by any instrument or otherwise settle or dispose of any property in such manner that the income thereof shall, save as provided in section 3 [§51-107], be wholly or partially accumulated for any longer period than one of the following, namely:

(a) the life of the grantor or settlor, or
(b) a term of twenty-one [21] years from the effective date of the instrument, or

justification, that the resolved uncertainties of the English act were less to be feared than the unsuspected ambiguities of a new statute.

I. Selection of the Statutory Period

The present Indiana statute prohibits accumulations for any longer than:

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

It is obvious from the language used in the Indiana act, and in the Thellusson Act, that the periods listed are each exclusive. The periods cannot be combined to sustain an accumulation which could not be sustained under one of them alone.[5] Therefore, the primary problem presented by both acts concerns the method of determining which of the statutory periods is to be applied in judging the validity of any particular accumulation. The selection of a standard must necessarily be made after the conveyance directing or resulting in an accumulation has been construed, and it is clear that in England the meaning of the conveyance is determined without reference to the accumulations statute.[6] Re *Errington* well expresses this principle:

> One must find out what was the intention of the testator or settlor, and must do that as if the Thellusson Act had never been passed. Having arrived at the intention as a question of construction, you must then bring in the paramount authority of the Legislature to see how far that intention can be supported. . . .[7]

The search for the appropriate statutory period under the English act has precipitated a number of judicial statements which are of doubtful helpfulness in discovering which period is proper in a particular case.

Kekewich, J., in *Re Errington,* explained the process of choice in the following language:

> The Legislature has left me at large to apply one or other of those periods whichever will fit the case. What it has said according to the cases about which there is no doubt is, that you cannot apply more

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(c) a term of twenty-one [21] years from the death of the grantor, settlor, or testator; or
(d) ten [10] years beyond the minority of a beneficiary in being on the effective date of the instrument for the benefit of such minor."

5. Wilson v. Wilson, 1 Sim. (N.S.) 288, 61 Eng. Rep. 111 (Ch. 1851).

6. Shaw v. Rhodes, 1 My. & Cr. 135, 40 Eng. Rep. 328 (Ch. 1836). But cf. *In re* Talbot's Will, 170 Misc. 138, 9 N.Y.S.2d 806 (Surr. Ct. Orange Co. 1939), 52 Harv. L. Rev. 1369, where the court relied upon the presumed intention of the testator not to direct an invalid accumulation.

7. 76 L.T.R. (N.S.) 616, 617 (Ch. 1897).

> than one, and that you must choose that one which fits the case. You are not to choose the one which will give the longest period of accumulations, you are not to choose the one which you may suppose would best effectuate the intention, but you are to take the one that actually fits the intention as declared.[8]

The court was considering an inter vivos marriage settlement in which the settlor directed an accumulation of income from certain policies of life insurance upon third persons until the policies should fall due. The settlor died prior to the policies falling due and, upon the death of the insured, the trustees of the fund applied to the court for determination of the end of the period of accumulation. The court said that the period could be either that measured by the life of the settlor, or that measured by a term of twenty-one years from the death of the settlor.[9] The settlor could not have intended that the accumulation take place from his death, because, since the insured might have died before the settlor, there would be a possible interval during which the trustees would not know what to do with the fund in hand. Although they could invest it, there was no direction as to disposition of the income. Accordingly, the court held that the statutory period of the life of the settlor best fitted the disposition which the testator had made.

A second English case illustrating the difficulty of selecting a period under the Thellusson Act is *Jagger v. Jagger*.[10] The settlor as part of an inter vivos trust agreement directed that during his life, his wife's life, and the life of the survivor the income from the trust res be applied for the support of his wife and children. The surplus was to accumulate and upon the death of the survivor it was to be applied, with the principal, in trust for all the children who should reach the age of twenty-one years. The settlor died before his wife, leaving minor children surviving him. The court held the accumulation was valid for the period of the life of the grantor. The period of twenty-one years from the death of the grantor could not apply because the accumulation was to begin from the date of the settlement. The period of the minority of persons living at the time of the grantor's death could not apply, even though there were infant children living at the date of the deed and at the grantor's death. This period, said the court, applied only where the accumulation was to *begin* from the date of the grantor's death, ". . . and to say that the accumulation may begin at the date of the settlement, whilst the grantor is living, and continue during his lifetime and afterwards during the minorities of the children, is, in effect, to contend that the Act is cumulative. . . ."[11] Nor could the period of minority of persons who would, if of full age, be entitled

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8. *Id.* at 617.
9. The English statute does not, as does the Indiana statute, sustain an accumulation for a period of twenty-one years from the date of the instrument.
10. 49 L.T.R. (N.S.) 667 (Ch. 1884).
11. *Id.* at 669.

to the accumulated income be the appropriate measure, because the children were not absolutely entitled to the fund. It might be drawn on for support of the mother; and only the *surplus* was to accumulate.

The rule to be adduced from these few cases, which expressly consider the problem of selecting a statutory period, has been stated in the following language:

> The English statute lists four possible periods. Since only one is permitted, the question may be asked: Which period do we apply in a given case? This question is particularly difficult when a part of the accumulation is admittedly illegal and it is a matter of determining how much is valid. It has been said that the determination of the appropriate period under the English act is a matter of construction; and it would seem that such *appropriateness* is determined as of the time the instrument takes effect.[12]

It may be doubted, however, whether this conclusion is entirely helpful or free from ambiguity.[13] No irrevocable choice of a period must, or in some cases, can be made as of the time the instrument takes effect. It may be possible at that time to state that if fact situation A develops the accumulation may be sustained under a specified period, and if fact situation B develops the accumulation may be sustained under another specified period. The English courts have tended to examine the deed or will, and if the accumulation could be sustained at the time of examination under any of the statutory periods, and also could have been sustained under the same provision since the *beginning* of the accumulation, that period is applied and the accumulation held valid. For example, in *M'Donald v. Bryce*,[14] the testator left property in trust for the use of R upon his reaching the age of twenty-one; in default of that to the male issue of P reaching the age of twenty-one; and in default of that over to A, B and C in equal shares. R was a minor at the testator's death, and the direction for accumulation was in substance to accumulate during the minority of R. In fact, however, R died before reaching the age of twenty-one and after the death of the testator. The court held that the accumulation was valid for twenty-one years from the testator's death. At the time the instrument took effect, at the testator's death, there was a minor in being; and the accumulation directed exactly fitted he third period of the English statute—it was an accumulation during the minority of a person in being at the death of the testator. This did not prevent the court at a later date from applying the period of the statute permitting accumulations for

12. Simes, *Statutory Restrictions on the Accumulation of Income*, 7 U. OF CHI. L. REV. 409, 415 (1940).

13. Cf. *In re* Cattell (1907), 1 Ch. 567.

14. 2 Keen 276, 48 Eng. Rep. 634 (Ch. 1838).

twenty-one years after the testator's death, when the premature death of the minor rendered the minority provision inappropriate.[15]

Although the English judges have not expressly so stated, in every instance they seem to have applied the statutory period which would sustain the accumulation for the longest time.[16] This has most frequently resulted in application of the second period of the English statute: twenty-one years from the death of the settlor or testator. The twenty-one year period has been applied where the direction was to accumulate until a minor reached a certain age in excess of twenty-one years;[17] where the direction was to accumulate until persons not yet in being reached a certain age;[18] where the direction was to accumulate for a flat period of years;[19] where the direction was to accumulate until a named sum had been amassed;[20] and where the direction was to accumulate during

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15. It may be said that the testator directed three contingent accumulations and that each, from the testator's death, was measured by a different period, but this does not solve the problem. At different times different statutory periods were appropriate to justify a single continuing accumulation. To the same effect is Jones v. Maggs, 9 Hare 605, 68 Eng. Rep. 654 (Ch. 1852).

16. An apparently contrary result has been reached in Illinois, which has a statute similar to the Thellusson Act. In Wills v. Southwell, 334 Ill. 448, 166 N.E. 70 (1929), a testator directed accumulations for the benefit of each of his children until each child reached the age of forty. At the testator's death, three of his children were adult and would reach age forty within twenty-one years of the testator's death. The fourth child was seventeen years old at her father's death, and she would not reach forty within twenty-one years. The court indicated that the accumulation would be good only until the fourth child reached twenty-one. Had the court applied the twenty-one year period rather than the minority period, the accumulation could have been sustained for seventeen additional years—until the last child reached thirty-eight. The court gives no reason for its conclusion. It might be explained on the ground that the Illinois statute [ILL. REV. STAT., c. 30, §153 (1947)], unlike the Thellusson Act and the Indiana statute, is so worded as to require application of the shortest permissible period.

17. Jones v. Maggs, 9 Hare 605, 68 Eng. Rep. 654 (Ch. 1852); M'Donald v. Bryce, 2 Keen 276, 48 Eng. Rep. 634 (Ch. 1838); Shaw v. Rhodes, 1 My. & Cr. 135, 40 Eng. Rep. 328 (Ch. 1836); Crawley v. Crawley, 7 Sim. 427, 58 Eng. Rep. 901 (Ch. 1835). A similar result has been reached in an unreported Indiana case. In Madeline Shields Powell v. Indiana Trust Company, #24261, decided by the Morgan Circuit Court on May 26, 1950, the court considered a testamentary trust providing for an accumulation until the youngest of the testator's children reached the age of 30. At the testator's death the youngest child was eleven years of age, and the accumulation could therefore endure only for 19 years. It was held valid under clause (c) of the statute permitting an accumulation for 21 years from the testator's death. The accumulation also would extend 1 year less than 10 years beyond the minority of a minor in being on the effective date of the instrument, but it was not exclusively for the benefit of the minor, remainder interests being given to the testator's grandchildren. The court correctly declined to apply clause (d) of the statute for the purpose of invalidating an accumulation which could be sustained under clause (c).

18. Edwards v. Tuck, 3 De G. M. & G. 40, 43 Eng. Rep. 17 (Ch. 1853); Ellis v. Maxwell, 3 Beav. 587, 49 Eng. Rep. 231 (Ch. 1841); Haley v. Bannister, 4 Madd. 275, 56 Eng. Rep. 707 (Ch. 1820); Longdon v. Simson, 12 Ves. Jun. 295, 33 Eng. Rep. 113 (Ch. 1806).

19. Nettleton v. Stephenson, 3 De G. & Sm. 366, 64 Eng. Rep. 518 (Ch. 1849); cf. *In re* Hawkins (1916), 2 Ch. 570.

20. Oddie v. Brown, 4 De G. & J. 179, 45 Eng. Rep. 70 (Ch. 1859).

the life or lives of a named person or persons.[21] The fact that the accumulation was for the benefit of a minor has not resulted in termination of the accumulation at the end of the minority when it could be sustained for a longer period under the twenty-one year provision.[22]

Because the Thellusson Act, unlike the Indiana statute, omits as a permissible period for accumulation a term of twenty-one years from the effective date of the instrument, and permits accumulation only for a term of twenty-one years from the death of the settlor, it has been necessary for the English courts in inter vivos conveyances to limit the period of accumulation to the life of the settlor, although that life might turn out to be less than twenty-one years.[23] Thus, in *In the Matter of Lady Rosslyn's Trust,* the settlor had created an inter vivos trust to accumulate the income for the joint lives of James and Jane and to pay the income from the principal and accumulations to Jane for life, and on Jane's death to hold the proceeds of the accumulation in trust for Charlotte after she reached the age of twenty-one. The conveyance was made in 1817; the settlor died in 1826; James died in 1847; and Jane died in 1848. Charlotte had reached the age of twenty-one in 1819. The court indicated that the accumulation ". . . ought to be held to be good for so much of the joint lives as expired during [the settlor's] life; and that it ought to be held void for remander."[24] This holding resulted in the accumulation lasting for a period of nine years, until the settlor's death. In a similar case, application of the Indiana statute should result in the accumulation being sustained for a minimum period of twenty-one years from the effective date of the instrument, and if the settlor lived for a longer period, then until her death.

It may be concluded that the Thellusson Act does not strike down any accumulation which, since its beginning, could have been supported under any one of the statutory periods; and that of two periods, otherwise equally appropriate, the one which will sustain the accumulation for the longer time will be applied. There is no reason to believe that these conclusions are not equally applicable to the Indiana statute.

21. *Re* Blake, 156 L.T.R. (N.S.) 231 (C.A. 1937); *In re* Walpole, 102 L. J. 209 (Ch. 1932); *In re* Pope (1901), 1 Ch. 64; Weatherall v. Thornburgh, 8 Ch. D. 261 (Ch. 1878); Burt v. Sturt, 10 Hare 415, 68 Eng. Rep. 989 (Ch. 1853); Attorney-General v. Poulden, 3 Hare 555, 67 Eng. Rep. 501 (Ch. 1844); O'Neill v. Lucas, 2 Keen 313, 48 Eng. Rep. 649 (Ch. 1838); Griffiths v. Vere, 9 Ves. Jun. 127, 32 Eng. Rep. 550 (Ch. 1803).

22. Shaw v. Rhodes, 1 My. & Cr. 135, 40 Eng. Rep. 328 (Ch. 1836); Crawley v. Crawley, 7 Sim. 427, 58 Eng. Rep. 901 (Ch. 1835).

23. *Re* Errington, 76 L.T.R. (N.S.) 616 (Ch. 1897); Jagger v. Jagger, 49 L.T.R. (N.S.) 667 (Ch. 1884).

24. 16 Sim. 391, 60 Eng. Rep. 925 (Ch. 1848).

II. Other Problems of Construction

A. Accumulations for the Benefit of a Minor

There seems to be no serious problem in the construction of Subsections (a), (b), and (c) of the Indiana statute.[25] Subsection (d), however, raises a difficult problem of interpretation. This subsection permits accumulations for ten years beyond the minority of a beneficiary in being on the effective date of the instrument made for the benefit of that minor. This period will permit the longest accumulation possible under the statute for a testamentary disposition—during a minority (which might be one day less than twenty-one years) and ten additional years.[26]

In order to qualify for this longer period, however, an accumulation must be "for the benefit of such minor." These words are not found in the Thellusson Act,[27] but they have been read into the Pennsylvania statute against accumulations,[28] and there is an express provision to the same effect in the New York statute.[29] The New York courts have construed this provision to mean that the accumulation must be *solely* for the benefit of the minor;[30] this construction would seem to be a reasonable and logical interpretation of the language used. The consequence is that an accumulation which is not solely for the benefit of a minor is, in New York and Pennsylvania, bad in its entirely since it is the *purpose* rather than the duration of the accumulation which is objectionable. Therefore, in those states, there is no hope of sustaining that part of an accumulation which is for the benefit of a minor, while invalidating the direction that the accumulated income be paid ultimately to persons other than the minor.[31]

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25. See note 4 *supra*. In calculating the period of twenty-one years from the death of the testator the day of the testator's death is excluded from the term of twenty-one years. Hence, income received on the twenty-first anniversary of the testator's death properly may be accumulated. Cf. Gorst v. Lowndes, 11 Sim. 434, 59 Eng. Rep. 940 (Ch. 1841). By analogy it would seem that income received on the twenty-first anniversary of an inter vivos conveyance could be accumulated properly.

26. An inter vivos conveyance with an accumulation during the life of the grantor would, under subsection (a), endure a longer time if the settlor lived longer than thirty-one years after the conveyance.

27. The equivalent provisions of the Thellusson Act provides for accumulation "during the minority . . . of any person . . . who . . . would, for the time being, if of full age, be entitled unto . . . [the income] . . . so directed to be accumulated."

28. Pa. Stat. Ann. (Purdon, 1930) tit. 20, §3251, *In re* Wright's Estate, 227 Pa. 69, 75 Atl. 1026, 1028 (1910).

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

30. Barbour v. DeForest, 95 N. Y. 13 (1884); Pray v. Hegeman, 92 N. Y. 508 (1883).

31. In contrast, under the Indiana statute, an accumulation, directed for the period specified in subsection (d), might fail because it was not for the benefit of a minor. However, since the Indiana statute has several periods containing no restrictions as to the purpose of the accumulation, the directed accumulation could be saved in part under one of the other subsections of the statute: for example, the subsection permitting accumulations for twenty-one years from the testator's death. See note 17 *supra* for an unreported Indiana decision so holding.

An additional requirement, endorsed in dictum in the New York cases, is less defensible, *viz.*, that this provision of the statute requires that the proceeds of an accumulation be paid over to the beneficiary absolutely at the end of the accumulation.[32] Thus, in In re *Byers' Will,* the court considered an instrument providing in part for accumulation of income during a minority. The accumulated income was to be added to the capital and held in continued trust to pay the income to the former minor until he reached age thirty, at which time he was to receive the accumulation. The provision for accumulation was invalid for reasons with which we are not here concerned, but the court remarked that "The failure to provide . . . for the distribution of accumulated income . . . when each child reaches his or her majority, is likewise offensive."[33] The conclusion seems unsound. The accumulation was for the benefit of the minor and it was solely for his benefit—he had complete equitable ownership. The express provisions of the statute were satisfied. It may be that as owner of the entire equitable interest the beneficiary should be entitled to terminate the trust and disregard the fetters delaying his enjoyment, but his right to do so, on which the courts of England and the United States are in disagreement,[34] is a problem of the law of trusts, which must be resolved without reference to the statute against accumulations, since the problem can and does arise in cases where no accumulation is involved.[35]

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32. In Pray v. Hegeman, 92 N. Y. 508, 516 (1883), the court remarked: ". . . we think, that when the period of accumulation ceases, the accumulated fund shall then be released from further restraint and paid over to the person for whose benefit the accumulation was authorized." In both the *Hegeman* case and *Barbour v. DeForest* the proceeds of the accumulation ultimately went to persons other than the minor. The accumulations were clearly bad since they were not solely for the benefit of the minor; and the above remark, therefore, was not essential to the decision. Similar statements made in reliance upon *Pray v. Hegeman* appear in other New York decisions. *See, e.g.,* Tweddell v. New York Life Ins. & Trust Co., 82 Hun. 602, 31 N. Y. S. 764, 766 (Sup. Ct. 1st Dep't 1894); *In re* Ziegler, 82 Misc. 10, 143 N. Y. S. 682, 684 (Surr. Ct. N. Y. Co. 1913). It is believed that most of these decisions, like *Pray v. Hegeman,* can be explained on the ground that the accumulation is bad because it is not for the sole benefit of the minor. In the *Tweddell* case the accumulations were given to the children of the minor upon her death. The person ultimately benefited by the accumulation was not the minor and the accumulation was necessarily bad. In the *Ziegler* case the court found an intention on the part of the testator to direct distribution of the accumulation at the end of the minority, and in any event there was a gift over of the corpus on the death of the minor under forty. If the accumulations went with the corpus they were not solely for the benefit of the minor and the disposition was therefore in violation of the statute.

33. 17 N. Y. S.2d 704, 705 (Surr. Ct. West. 1940).

34. Saunders v. Vautier, 4 Beav. 115, 49 Eng. Rep. 282 (Ch. 1841), holds that upon reaching his majority the owner of an indefeasible equitable interest is entitled to immediate enjoyment of the property despite the grantor's intention to delay his enjoyment. *See* Warner v. Keiser, 93 Ind. App. 547, 570, 177 N. E. 369, 377 (1931). *Contra:* Claflin v. Claflin, 149 Mass. 19, 20 N. E. 454 (1889). See 54 HARV. L. REV. 839 (1941).

35. See note 34 *supra.*

B. Disposition of Proceeds of a Valid Accumulation not for the Benefit of a Minor

Although the New York rule, requiring payment over to a minor in order to qualify as being for the "benefit of a minor," seems illogical, and its adoption by the courts of Indiana in the construction of the Indiana statute would be unfortunate, there is authority upon which its adoption might be rationalized. The possibility that it might be adopted raises a more important question. Should the statute against accumulations be construed to require *immediate* distribution of the funds accumulated to a person in being at the end of the permissible period of accumulation, or should the statute be construed as allowing accumulated funds to be disposed of as other property within the limits permitted by the rule against perpetuities?

The Indiana statute contains no positive direction requiring distribution of the proceeds of a valid accumulation, nor does it contain any express prohibition against the retention of such proceeds in continued trust. The absence of any express provision is to be considered in light of the fact that the common law had no objection to a provision directing that the proceeds of an accumulation be held in trust for persons to be determined long after the accumulation had ceased.[36]

If immediate distribution of the proceeds of an accumulation is required, therefore, it must be because not to do so would amount to a continued and forbidden "accumulation." Is there a continued accumulation when the proceeds of an accumulation are held in continued trust or disposed of other than by outright gift to persons in being when the permissible period ends?

First, a number of cases indicate that the word "accumulation" connotes a continuing accretion and that the mere holding of a past accretion, with dissipation of the current income, does not constitute a continuing accumulation.[37] For example, in In re *Pope,* Farwell, J., stated that accumulation meant "The growth of a sum of money by the *continuous* addition of the interest to the principal" [emphasis added],[38] and the Appellate Court of Indiana, in construing the 1852 statute against accumulations,[39] remarked that the word "accumulation" implies ". . . a withholding and using of the income for the purpose of creating an increased and constantly increasing fund for distribution at a future time."[40]

Secondly, English courts have repeatedly assumed that a provision directing that the proceeds of an accumulation be held in continued trust was unob-

36. Shannon v. Irving Trust Co., 275 N. Y. 95, 9 N. E.2d 792 (1937)..

37. See Note, 160 A.L.R. 439 (1946). "According to the ordinary definition, 'accumulation of income' means the adding of interest or income to principal or corpus."

38. [1901] 1 Ch. 64, 69, 70.

39. Ind. Acts 1852, c.9; Ind. Stat. Ann. (Burns 1926) §12172.

40. Swain v. Bowers, 91 Ind. App. 307, 324, 158 N. E. 598, 604 (1927).

jectionable. This is illustrated by In re *Hawkins*,[41] which involved a will leaving funds in trust. Income therefrom was to be applied as necessary for the support of B for life, and the surplus was to accumulate for a period of twenty-one years. At the end of the twenty-one years, the surplus thereafter accruing was to become a part of the residue of the testator's estate. The residuary gift was also in trust, with a life estate and remainders. At the end of the twenty-one year period the surplus income from B's trust began to be paid to the trustees of the residuary trust. The court was required to decide whether these sums went into the residuary trust as principal or as income payable immediately to the life beneficiaries of that trust. The court held that it went to the life tenants of the residuary trust as income; because *if* it were treated as principal of that trust, there would be an indirect accumulation beyond the permitted period.[42]

The important aspect of the case is that it seems to have been assumed by the court and by all parties that the accumulations which had been added to the principal of B's trust during the twenty-one year period did not have to be distributed. Instead, they could, with propriety, be retained in the trust and the income therefrom used to support B, any surplus being paid over to the residuary trustees. The court expressly noted it was deciding the disposition of the income from prior valid accumulations.[43] There could have been no income from the prior accumulations unless, as the testator clearly intended, they were held in continued trust after the accumulation had ceased.

The case of Re *Parry* gives more explicit recognition to the propriety of holding the proceeds of an accumulation in trust after the expiration of the permissible period of accumulation.[44] There a testator left funds in trust to pay annuities to six named persons and to accumulate the surplus income.

41. [1916] 2 Ch. 570.

42. If income from trust 1 is paid into trust 2 as capital, there is, of course, an accumulation as effective as if the income were retained and added to the capital of the first trust. Strangely, this was not immediately apparent to the English courts and prior to the Hawkins opinion such dispositions were held proper. Cf. *In re* Pope, [1901] 1 Ch. 64; O'Neill v. Lucas, 2 Keen 313, 48 Eng. Rep. 649 (Ch. 1838); Crawley v. Crawley, 7 Sim. 427, 58 Eng. Rep. 901 (Ch. 1835). The only American authority discovered which involved such a disposition is *In re* Byer's Will, 17 N. Y. S.2d 704 (Surr. Ct. West. 1940).

43. Cf. *In re* Garsido, [1919] 1 Ch. 132. A testamentary trust directed payment of an annuity to B for life. Upon his death the property was to fall into the testator's residuary estate, which was also held in trust. At the death of B it appeared that the income of his trust had not been exhausted and that there was an accumulation aggregating £12,000. Part of this sum had been accumulated legitimately within twenty-one years of the testator's death. The remainder had been accumulated in violation of the statute. The £12,000 went into the residuary trust and, as the *Hawkins* case, the court was required to decide whether it went to the life tenant or was to be held in trust for the remaindermen. It was held that the proper accumulation, that which accrued within the permissible twenty-one year period, became a part of the capital of the residuary trust. But accumulations after the legitimate period could not be added to the capital of the residuary trust without infringing the Thellusson Act. This was an express recognition of the propriety of holding in continued trust the proceeds of a valid accumulation.

44. 60 L.T.R. (N.S.) 489 (Ch. 1889).

Upon the death of the survivor of the annuitants there was a gift over to X. Some of the annuitants died. The property was far in excess of that required to provide payment of the remaining annuities. X therefore asked for immediate payment to him of the accumulations. The court, in holding that he was not entitled, proceeded on this rationale: The accumulation was good for a period of twenty-one years from the testator's death. At the end of that time the surplus income thereafter accruing would devolve by intestacy. If the accumulations during the twenty-one year period were paid out, the fund producing income would be diminished to the detriment of the next of kin. If the proceeds of the accumulation had to be paid out at the end of the accumulation, the next of kin could never receive the income from them. The court's reasoning, therefore, was founded upon the proposition that the proceeds of a valid accumulation could, and if the testator so directed *must,* be held in continued trust after the accumulation had ceased.[45]

These authorities,[46] and the absence of any contrary authority,[47] justify the statement that the Thellusson Act does not require distribution of the proceeds of an accumulation at the end of the permissible period of accumulation. Since the Indiana statute was presumably enacted with knowledge of these precedents, it should be construed to permit a testator or settlor to make

45. A similar explanation might be given for the decision in Harbin v. Masterman, L. R. 12 Eq. 559 (1871). Cf. *In re* Walpole, 102 L. J. 209 (Ch. 1932) where property was left in trust to accumulate the income during the lifetime of B. The fund and its accumulations after the death of B were to be held in trust to pay the income to X. The directed accumulation was good only for twenty-one years from the death of the testatrix. After twenty-one years the income passed as intestate property. The court had to decide whether the income arising from the accumulated income from real estate held in trust, went to the heir or the next of kin. The problem could not have arisen had not the proceeds of an accumulation been held in trust after the accumulation ceased.

46. Cf. *In re* Hodson's Settlement, 108 L. J. 200 (Ch. 1939); Weatherall v. Thornburgh, 8 Ch. D. 261 (1878). The consistent failure of the courts to consider the disposition of the proceeds of so much of an accumulation as is valid, reflects an assumption that the proceeds of a valid accumulation may with propriety follow the fund which produced them. Cf. Mathews v. Keble, L. R. 4 Eq. 467 (1867); Burt v. Sturt, 10 Hare 415, 68 Eng. Rep. 989 (Ch. 1853); Edwards v. Tuck, 3 De G. M. & G. 40, 43 Eng. Rep. 17 (Ch. 1853); Jones v. Maggs, 9 Hare 605, 68 Eng. Rep. 654 (Ch. 1852); Gorst v. Lowndes, 11 Sim. 434, 59 Eng. Rep. 940 (Ch. 1841); Eyre v. Marsden, 2 Keen 564, 48 Eng. Rep. 744 (Ch. 1838).

47. There is secondary authority with a contrary inference. Simes, *supra* note 12, at 418, poses the hypothetical case of an accumulation during the minority of X with a direction to add the accumulations to the principal which is to be held in trust to pay the income to X for life and upon his death to his estate. Simes states: "The accumulations during X minority are valid. The difficulty is that at the end of his minority they are capitalized and not released. It is generally held that this constitutes an illegal accumulation, even though interest is not compounded beyond the permissible period." As authority he cites *In re* Kirby's Estate, 227 Pa. 69, 75 Atl. 1026 (1910); Barbour v. DeForest, 95 N. Y. 13 (1884); and Pray v. Hegeman, 92 N. Y. 508 (1883). In all three of these cases, the accumulation was bad because it was not solely for the benefit of a minor; the remarks regarding payment over at the end of the accumulation were obiter dicta. Also cited are *In re* Hawkins, [1916] 2 Ch. 570; *In re* Garside, [1919] 1 Ch. 132. But, as has been previously suggested these cases really provide authority for the propriety of holding the proceeds of a valid accumulation in continued trust.

any disposition of the proceeds of an accumlation which does not violate the rules against remoteness. It should not be construed to interdict future interests in the proceeds of an accumulation,[48] unless the accumulation is for the benefit of a minor, and even then, future interests solely for the benefit of a minor should not be objectionable.[49]

C. Disposition of Income Subject to a Void Direction for Accumulation

An additional problem of construction is posed by statutory provisions for the disposition of income subject to a void direction for accumulation. The Indiana statute, the Thellusson Act, the Pennsylvania and the Illinois statutes contain substantially identical provisions, in the following tenor:

> . . . in every case where any accumulation shall be directed otherwise than [as aforesaid, such] direction shall be [null and] void . . . and the [income, rents, issues, interests, profits and produce] of such property directed to be accumulated . . . shall go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed.[50]

Since the Thellusson Act antedates the others, an examination of English cases will aid in construction of this language. Lord Langdale said that it did not appear that the statute was to operate to alter any disposition made by the testator, except his direction to accumulate.[51] All the other directions of the will as to the time of payment, substitution, or any contingencies were to take effect according to the true construction of the will *unaltered* by the effect of the statute. In *Green v. Gascoyne* the testator directed an accumulation during the lives of his wife and sister and the survivor of them. The accumulation was good for twenty-one years after the testator's death, but no longer. The income after the twenty-one year period was disposed of as in intestacy. The court explained this result by saying:

> Although the trust for accumulation is cut down and reduced to a limited period, the whole of the rest of the will remains in point of disposition, in point of the meaning, effect and true interpretation

48. In Madeline Shields Powell v. Indiana Trust Company ,described in note 17 *supra,* the court expressly held that the retention of the proceeds of a valid accumulation in continued trust beyond the period of permissible accumulation did not constitute a continuing accumulation and was not in violation of the statute. The proceeds of the accumulation were ultimately to be distributed to remaindermen not in being on the death of the testator. The court held that this was not objectionable under the statute.

49. Decision of this question was not required in the *Powell* case, #24261, decided by Morgan Circuit Court May 26, 1950, and no other Indiana decision considering the problem has been discovered.

50. There are immaterial variations in phraseology of the text in brackets in the various acts. Ill. Rev. Stat., c.30, §155 (1908) (without later amendments) : Ind. Stat. Ann. (Burns Supp. 1945) §51-108; Pa. Stat. Ann. (Purdon, 1930) tit.20, §3251; Thellusson Act, 1800, 39 & 40 Geo. III, c.98.

51. Elborne v. Goode, 14 Sim. 165, 175, 60 Eng. Rep. 320, 324 (Ch. 1844).

> of its language, precisely as if there had been no such operation performed by the statute. . . . The result is that there is a hiatus between the period when the accumulation ceases by law and the period when the accumulation is directed to cease by the will; there is nothing in the will to catch the rents which arise during that hiatus; and those rents accordingly belong to the heir at law.[52]

It is thus clear under the Thellusson Act that the persons who "would have been entitled thereto if such accumulation had not been directed" were the next of kin or heirs, if the will made no other effective disposition of the property; or if the will contained an effective residuary clause, the residuary legatees were those who would have taken had the accumulation not been directed.[53]

In a few instances the English courts have recognized that elimination of a void direction to accumulate may benefit someone other than the next of kin or the residuary legatee.[54] Thus, in *Coombe v. Hughes*[55] there was a gift of an equitable life estate which was qualified by a subsequent direction to accumulate. The court said that the moment the Thellusson Act interferred, by directing that the accumulations beyond twenty-one years should be null and void, the excess had to be struck out of the will. The gift remained unaffected. The excess did not fall into the residue or go to the next of kin, but remained part of the legacy out of which it was intended to be carved.[56]

Of the state statutes,[57] that of Pennsylvania has been given a construction consistent with that of the Thellusson Act if the decisions of an heretical

52. 4 De G. J. & S. 565, 570, 572, 46 Eng. Rep. 1038, 1040, 1041 (Ch. 1865).

53. See GRAY, THE RULE AGAINST PERPETUITIES §704 (4th ed. 1942) and cases cited. Ordinarily there would be no acceleration of subsequent gifts to avoid an intestacy with respect to the liberated income. See Weatherall v. Thornburgh, 8 Ch. D. 261, 271, 272 (Ch. 1878); Elborne v. Goode, 14 Sim. 165, 176, 60 Eng. Rep. 320, 324 (Ch. 1845).

54. These deviations from the usual result have been variously expressed. LEWIN, TRUSTS 93 (1888) says that if an estate is devised, subject to a void direction to accumulate, in such terms that the void accumulation, if valid, would have been construed a mere charge, the accumulation will, like any other charge which fails, sink for the benefit of the devisee. Compare the statement in Gray, *op. cit. supra* note 53, at §707, that when there is a present gift to one for life, with remainder over, and a void provision for accumulation, the released income goes to the life tenant during his life.

55. 34 Beav. 127, 55 Eng. Rep. 582 (Ch. 1865).

56. Similarly, in Trickey v. Trickey, 3 My. & K. 560, 565, 40 Eng. Rep. 213, 215 (Ch. 1832), the life tenant received the proceeds of an invalid accumulation. The case is cited by Gray (see note 54 *supra*) as an instance in which the proceeds of a valid accumulation did not go to the residuary legatee or the next of kin. Lewin (see note 54 *supra*) believes the life tenant took because she was also the testator's heiress at law. The opinion merely states that she took because she was "the person who would have been entitled if such accumulation had not been directed."

57. While the Illinois statute has been before the courts, the decisions involving it contain no useful information as to the meaning of the statutory language. See Booth v. Krug, 368 Ill. 487, 14 N. E.2d 645 (1938); Northern Trust Co. v. Blake, 291 Ill. App. 605, 9 N. E.2d 347 (1937); Webb v. Webb, 340 Ill. 407, 172 N. E. 730 (1930); Wills v. Southwell, 334 Ill. 448, 166 N. E. 70 (1929).

interlude are ignored.[58] The present law of Pennsylvania is represented by *Weinmann's Estate.*[59] There the testatrix left funds in trust to accumulate until her grandson reached the age of forty. The income from the augumented fund was then to be paid to the grandson for life, and on his death the fund was to be distributed among his children. If there were no children, the fund was to pass as a part of the testatrix's residuary estate. The accumulation was invalid altogether, and the court held that the liberated income went to the testatrix's next of kin. The grandson was held not to be the person entitled had no accumulation been directed. Later Pennsylvania cases have made it clear that the persons entitled to the excess where the accumulation is declared void are the residuary legatees if there is an effective residuary clause,[60] or the next of kin if there is no operative residuary clause.[61]

However, where there is in terms a gift of an entire equitable interest subject to an invalid direction for accumulation, the proceeds of the invalid accumulation may accrue to the benefit of the owner of the equitable estate. Thus, in In re *Maris' Estate*[62] the testator left the residue of his estate in trust to pay the income to his wife for life and upon her death over. The will directed that all stock dividends be treated by the trustees as principal. This provision was void as an accumulation because of an express provision of the Pennsylvania statute.[63] The court held that such dividends went to the wife by virtue of the gift to her of the whole net income of the property. The case is the Pennsylvania counterpart of the English doctrine of *Combe v. Hughes.*[64]

Therefore, when the Indiana statute was enacted the words "persons who would have been entitled thereto if such accumulation had not been directed" had a well established meaning. They entitled the next of kin if there were no effective residuary clause; they entitled the residuary legatees if there were an effective residuary gift; and in rare instances they entitled the owner of an equitable interest from which the void accumulation was attempted to be carved.

The fact that the meaning of this language was well established compli-

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58. The heresy born in Washington's Estate, 75 Pa. 102 (1874), and given stature in *In re* Farnum's Estate, 191 Pa. 75, 43 Atl. 203 (1899), indicated that an invalid direction to accumulate during the minority of an annuitant required the proceeds of the invalid accumulation to be paid to the annuitant. This would be proper only if the annuitant were also the testator's next of kin, a circumstance not discussed by the court.

59. 223 Pa. 508, 72 Atl. 806 (1909).

60. *In re* Lowe's Estate, 326 Pa. 375, 192 Atl. 405 (1937) ; *In re* Wright's Estate, 227 Pa. 69, 75 Atl. 1026 (1910).

61. *In re* Thistle's Estate, 263 Pa. 60, 106 Atl. 94 (1919) ; *In re* Roney's Estate, 277 Pa. 127, 75 Atl. 1061 (1910).

62. 301 Pa. 20, 151 Atl.. 577 (1930).

63. PA. STAT. ANN. (Purdon 1930) tit.20, §3251. The Indiana statute has an express provision to the contrary. IND. STAT. ANN. (Burns Supp. 1945) §51-107(b).

64. See discussion p. 53 *supra.*

cates the problem created by the inclusion in the Indiana act of an additional provision not appearing in the Thellusson Act, or the Pennsylvania or Illinois statutes. That provision reads:

> If by reason of a disposition in the creating instrument subject to a condition precedent it is impossible to determine what person or persons would have been entitled to the income had no accumulation contrary to the provisions of this act . . . been directed, such income so directed to be accumulated shall go to those persons who would have been entitled thereto had no such disposition subject to a condition precedent been made.[65]

It is obvious that under the English and Pennsylvania statutes the persons who would take if the accumulation had not been directed would always be determinable. If there were an effective residuary gift, the residuary legatees would be ascertainable. If they were not, the income would go as in intestacy;[66] and the next of kin would be ascertainable, or, if there were none, the sovereign would be entitled.[67] Thus, the condition referred to in the Indiana statute could never arise. It would never be ". . . impossible to determine what . . . persons would have been entitled . . . had no accumulation . . . been directed. . . ."

This paradox can be explained if it be assumed that the Legislature intended the statute to read "such persons as would have been entitled thereto *by the terms of the will*."[68] If that construction be adopted, then cases may arise in which it will be "impossible to determine what persons would have been entitled" *under the will*, and the added provision of the Indiana statute will then become operative to throw the accumulation to the next of kin. The provision was undoubtedly intended to insure this result which is achieved in England and Pennsylvania without such explicit statutory assistance.

A case will illustrate the situation intended to be reached by the Indiana statute. In *Elborne v. Goode*,[69] there was a testamentary trust to pay annuities to named annuitants and to accumulate the surplus income. There was a residuary gift to the issue of the testator's nephews and nieces living upon the death of the survivor of the named annuitants. The accumulation was bad after the lapse of twenty-one years, but the residuary gift did not effectively dispose of the liberated income because the legatees were incapable of being

65. IND. STAT. ANN. (Burns Supp. 1945) §51-108(a).

66. *In re* Roney's Estate, 277 Pa. 127, 75 Atl. 1061 (1910); Grim's Appeal, 109 Pa. 391, 1 Atl. 212 (1885); Elborne v. Goode, 14 Sim. 165, 60 Eng. Rep. 320 (Ch. 1844).

67. Harbin v. Masterman, L. R. 12 Eq. 559 (1871).

68. Insofar as the courts of England and Pennsylvania are concerned, the reading in of such words will be of academic interest only. It is immaterial whether the next of kin are entitled by virtue of the dispositive provisions of the statute against accumulations or by virtue of the laws relating to the disposition of property in intestacy. If the accumulations statute does not cover the case, the property is left undisposed of, and the laws of inheritance necessarily dictate its disposition.

69. 14 Sim. 165, 60 Eng. Rep. 320 (Ch. 1844).

determined until the death of the last annuitant, and that had not occurred. The court, therefore, held that the next of kin were entitled, being the persons entitled had the direction for accumulation not been made.[70]

The same result would be reached under the Indiana statute, but by two steps. First, the persons entitled after the lapse of the accumulation would be the residuary legatees. Second, because of a condition precedent it would be impossible to determine the persons entitled to the residuary gift. Therefore, the gift should be disregarded and the next of kin be entitled as the persons "who would be entitled had no such disposition subject to a condition precedent been made."

It is a reasonable conclusion that the unique provision in the Indiana statute was not intended to result, and does not result, in a disposition of the proceeds of a void accumulation different from that achieved under the Thellusson Act or the Pennsylvania statute.

III. Miscellaneous Drafting Problems

The advent of the marital deduction and the frequent tax advantage of an accumulating trust[71] make it likely that the provisions of the Indiana accumulation statute will be used. In some instances estate and income tax advantages can be obtained by the use of a testamentary trust which will not qualify for a marital deduction and which permits accumulation of income, coupled with a second trust which does qualify for the marital deduction and which permits invasion of principal. The accumulations in one trust offset the invasions of principal in the other. The invasions reduce the widow's estate tax, and the accumulations incur no estate tax on the death of the widow.

It is, therefore, appropriate to consider what pitfalls in this statute await the draftsman of instruments providing for accumulations. A number of dangers have been expressly anticipated and avoided. Directions for accumulations of income for the "upkeep, repair, or proper management" of the trust estate are validated.[72] Provisions that stock dividends and stock rights are to be treated as capital will not result in an unlawful accumulation.[73] Any provision for a sinking or reserve fund is unobjectionable.[74]

Although the statute makes no reference to capital gains, retention of such gains as capital of a trust should not amount to an unlawful accumulation, in view of the Indiana rule adopted prior to the statute that, in the absence of

70. A like result has been reached in Pennsylvania. See note 66 *supra*.

71. Since the income of the trust is not distributable and therefore not taxable to any beneficiary under §165, I.R.C., it is taxed to the trustee. The trust may thus be used to accumulate income in a lower bracket than is available to the ultimate beneficiary.

72. Ind. Stat. Ann. (Burns Supp. 1945) §51-107(a).

73. *Id.* at §51-107(b).

74. *Id.* at §51-107(c). This language is general and it may be anticipated that there will be litigation to determine what accumulations denominated "sinking fund" will fall within its shelter.

an express direction in the will, such increments are for trust purposes principal rather than income.[75] Nor should directions which provide that increment arising from the purchase of bonds at a discount be treated as principal be held a violation of the statute.[76]

Directions that particular receipts, which are income in judicial contemplation, be treated as principal may result in a violation of the statute. Thus a direction that mineral royalties be treated as principal has been held invalid as an illegal accumulation.[77]

Discretionary powers in trustees to allocate items to the principal in their uncontrolled discretion involve potential violations of the statute. Such powers, in the absence of an accumulations problem, are generally held to be valid;[78] and the Court of Appeals of New York has held that such a provision does not result in the type of accumulation intended to be stricken by the statute against accumulations.[79] Violation of the statute against accumulations may also be avoided by construing trustees' powers to determine what is income and what principal as limited to allocations permissible under it. In other words, the courts ordinarily will not presume that the trustees are empowered to do an unlawful act.[80]

The inclusion of any clause nullifying provisions inconsistent with the accumulations statute is unlikely to be any easier of application or any more effective than the provisions of the statute itself, but it may avoid suits for construction. The statutory approval of accumulations for a gross period of twenty-one years will save almost every provision for that length of time. Hence it is only in long-term trusts that the problem becomes acute.

An accumulation measured by the minority of an unborn person cannot be good in its entirety. And the validity of a provision for an accumulation for the benefit of a minor in being to continue beyond minority and beyond twenty-one years from the death of the testator, coupled with a direction that

75. Luery v. Addington, 76 N. E.2d 673 (Ind. 1948); Powell v. Madison Safe Deposit & Trust Co., 208 Ind. 432, 196 N. E. 324 (1935).

76. 2 Scott, Trusts §240.2 (1939) recognizes the propriety of this practice. Presumably no recognized trust practice with respect to allocation between income and principal should constitute a violation of the statute. A contrary argument was made and rejected in the *Powell* case, note 17 *supra*.

77. Minnesota Loan & Trust Co. v. Douglas (*In re* Pettit's Estate), 135 Minn. 413, 161 N. W. 158 (1917).

78. Sears v. Childs, 309 Mass. 337, 35 N. E.2d 663 (1941); Dumaine v. Dumaine, 301 Mass. 214, 16 N. E.2d 625 (1938). See 2 Scott, Trusts §233.5 (1939).

79. Equitable Trust Co. v. Prentice, 250 N. Y. 1, 164 N. E. 723 (1928), 29 Col. L. Rev. 843 (1929).

80. *In re* Talbot's Will, 170 Misc, 138, 9 N. Y. S.2d 806 (Surr. Ct. Orange Co. 1939), 52 Harv. L. Rev. 1369. But see the contrary interpretation of the same will in Colt v. Duggan, 25 F. Supp. 268 (S. D. N. Y., 1938). In the *Powell* case, note 17 *supra*, the court held that such a discretionary power, unlimited on its face, related only to doubtful items, the accumulation of which would not constitute an unlawful accumulation. To the extent the power purported to go further than this it would merely be invalidated by the statute.

the proceeds of the accumulation be held in continued trust to pay the income to the minor and the principal upon his death to his estate, is undetermined. The latter disposition should be good, but until the Indiana courts have ruled upon it, such a settlement is probably an invitation to litigation.