THE ACCUMULATIONS PROVISION IN THE PROPOSED
ESTATES ACT OF 1947*

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The proposed Estates Act of 1947 is now being circulated among members of the Pennsylvania Bar by the Joint State Government Commission for the purpose of soliciting criticisms and suggestions. Among the more interesting of its provisions is section 5, which constitutes the first major attempt to revise the law of accumulations in this state since the original act was passed in 1853. In many ways it is the most interesting modern attempt to deal with this problem in any jurisdiction. Although it follows existing law in most matters of policy, the draft departs radically from the language of traditional legislation on this subject, suggests several substantial changes, and represents a serious effort to solve many of the questions that have arisen under the present act.

GENERAL PLAN OF THE SECTION

Section 5 is entitled “Income Accumulations” and is divided into three main subsections, lettered (a), (b) and (c). Subsection (a) is headed “When Valid.” The opening words prohibit accumulations generally, and this general prohibition is followed by a list of eight exceptions. Subsection (b) is headed “Disposition of Valid Accumulations” and contains four miscellaneous provisions, dealing with such matters as the use of income for the support of minors and incompetents in spite of any direction to accumulate. Subsection (c) is entitled “Disposition of Void Accumulations” and sets forth five methods of dealing with this problem, depending upon which method is possible in the particular case. The plan, on the whole, is a logical one and should contribute materially to ease of reference.

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2. For a comparative treatment of the statutes in the various states, see RESTATEMENT, PROPERTY (1944) chapter 36 (introductory note); Simes, Statutory Restrictions on the Accumulation of Income (1940) 7 U. of Chi. L. Rev. 409.

3. “Next to the New York legislation, the Pennsylvania statute in 1853 seems to have provoked most litigation.” Simes, op. cit. supra note 2, at 414.
ACCUMULATIONS PROVISION IN 1947 ESTATES ACT

Omission of Provision for Terminating Charitable Trust

It will be noticed from the outline of the proposed act given above that the scope of the present act of 1853 is covered with the exception of the puzzling proviso added in 1931 relating to the termination of trusts with charitable remainders. That proviso is part of a long story which began with the death of one Alexander Derbyshire in 1879 and ended fifty-three years later with the Pennsylvania Hospital's getting some $3,000,000 a little earlier than it might have. This amendment of 1931 does not actually deal with the law of accumulations but with the law of termination of trusts and the "special purpose" doctrine, which seems peculiarly unsuited to statutory codification. It is believed that the Commission and its Advisory Committee acted wisely in eliminating this provision from the proposed legislation. After all, the hospital got its money. If the amendment of 1931 has any further value, it should be called to the attention of the Advisory Committee before the Estates Act is submitted to the Legislature.

Consideration of the Proposed Provisions

(a) When Valid. No direction or authorization to accumulate income shall be valid except . . .

It is important to keep these words in mind when considering the various exceptions to the general rule which follow. The law of accumulations is concerned only with provisions in the trust instrument. If the trustee withholds income of his own accord without authorization in the instrument, there is a problem of whether he is committing a breach of trust, but strictly speaking there is no problem in the law of accumulations. Thus, the exceptions to the general prohibition enumerated in subsection (a) in no way affect the ordinary duties of a trustee in the absence of a special provision in the trust. To emphasize this, the wording of the preliminary section will be included in brackets before each exception is quoted below.

It will be seen that the general prohibition expressly includes "authorizations" to accumulate as well as directions. This is probably in accord with present law, but the wording should remove the doubt on the subject created by some early Supreme Court decisions indi-

5. See Biddle's Appeal, 99 Pa. 525 (1882) (the original bad decision that caused all the trouble); Derbyshire's Estate, 239 Pa. 389, 86 Atl. 878 (1913); and, Derbyshire's Estate, 16 D. & C. 200 (Pa. 1931), appeal quashed 306 Pa. 278, 159 Atl. 439 (1932).
6. See Girard's Estate, 49 D. & C. 217, 225-6 (Pa. 1944); and cases cited infra, note 12.
cating that where the trustee has discretion to distribute the income, the act of 1853 does not apply. As Mr. Foulke pointed out years ago, there was no sense in these decisions. Furthermore, there have been other cases where the statute was applied, despite the fact that discretion had been given to the trustee. There should be no question in this regard under the proposed act.

It likewise seems clear that the proposed section, like the present act, will cover cases of implied as well as express provisions for accumulation. If the construction of the trust instrument is kept separate from the problem of accumulations, this should present no difficulty. A testator, for example, might simply provide that the trustee should pay $500 a year to the life tenant with remainder over. It is first necessary to construe the will to determine whether there is an intestacy of surplus income or an implied direction to accumulate it. If the latter construction is adopted, there is an unlawful direction to accumulate just as if the testator had directed it in so many words.

(1) JUDICIOUS MANAGEMENT. [No direction or authorization to accumulate income shall be valid except for the purpose of creating a temporary reserve of a reasonable amount for
a. administration of the trust, or
b. periodic distributions in specified amounts, or
c. the needs of a beneficiary.

This exception was undoubtedly intended to be declaratory of present law. Although there was no similar provision in the old act, our courts have uniformly upheld the right of a trustee to withhold a reasonable amount of income temporarily in order to create a reserve fund against anticipated expenses chargeable to income or so-called "annuities" payable from income. Not only has this been permitted where the trust instrument so provides, but also in the absence of such provision. The proposed paragraph, included for the sake of

7. E. g., Bargar's Appeal, 100 Pa. 239 (1882).
8. FOULKE, A TREATISE ON THE RULES AGAINST PERPETUITIES, RESTRAINT ON ALIENATION AND RESTRAINT ON ENJOYMENT (1909) § 671 et seq.
9. E. g., Sharp's Estate, 155 Pa. 289, 26 Atl. 44 (1893). See discussion of these cases in FIDUCIARY REVIEW, April, 1939, p. 4.
10. Compare, for example, Deveraux's Estate, 48 D. & C. 491 (Pa. 1943) with cases cited in HUNTER, ORPHANS' COURT COMMONPLACE BOOK (1939), Accumulations, § 7 (a); see Schillo's Estate, 64 Pa. Super. 85 (1916).
11. Eberly's Estate, 110 Pa. 95, 1 Atl. 330 (1885); compare King's Estate, 210 Pa. 435, 59 Atl. 1106 (1904). See criticism by Foulke of these cases which he thinks have carried the doctrine, "beyond all proper bounds," A TREATISE ON THE RULES AGAINST PERPETUITIES, RESTRAINT ON ALIENATION AND RESTRAINT ON ENJOYMENT (1909) § 651 et seq. For other cases, see note 125 A. L. R. 629, 633 (1940).
clarity in view of the definite language of the general prohibition, will of course apply only where such accumulation is directed or authorized in the trust instrument—as where such provisions are inserted in connection with a general management clause, an "annuity" payment, or a support trust.

There is no reason to believe that the case law on this subject will be in any way affected. A problem might possibly arise, however, in a case where a reasonable reserve fund is directed to be accumulated out of income by a trust instrument which goes on to provide that when the life beneficiary dies this reserve fund should be distributed, not to the life tenant's estate, but to the remainderman. It is believed that such a provision should be unlawful, either under the Act of 1853 or under this provision.\(^{13}\) The requirement is that the reserve must be "temporary." This seems to imply that the ownership of the withheld income should in no way be affected, and that the fund should ultimately be paid over to person who was the income beneficiary at the time of the withholding, or to his estate. Otherwise there will be a capitalization of income not justified by the purpose of facilitating judicious management. By the same token, the payment of charges allocable to principal out of the fund reserved from income should not be permitted.

(2) Lifetime of the Settlor. [No direction or authorization to accumulate income shall be valid except] for a period expressly measured by the lifetime of the settlor.

Accumulation during the life of the settlor is a traditional exception to statutory prohibitions; it is found in the Thelluson Act\(^ {14}\) and in the present Pennsylvania statute. The suggested provision should settle the long unanswered question in this state, of whether an unlawful accumulation directed in an inter vivos trust should be upheld at least until the settlor dies. Suppose, for example, that a deed of trust provides that income should be accumulated for 50 years. Should the trustee be permitted to accumulate at least during the settlor's life? The better view under the wording of the Act of 1853 is probably that this is permissible.\(^ {15}\) There is, however, a Supreme Court dictum to the contrary,\(^ {16}\) and no one is quite certain of the answer. The proposed act seems clear to the effect that such a provision would be bad from the beginning. There will no doubt be those who will disagree with the suggested solution. Why should the policy of the law vary

\(^{13}\) But see Eberly's Estate, 110 Pa. 95, 1 Atl. 330 (1885).
\(^{14}\) 39 & 40 Geo. III, c. 98 (1800).
\(^{15}\) See FIDUCIARY REVIEW, Nov., 1944, p. 1, stating that this view is supported by English law; and, Kain, Limitations Upon Accumulation of Income in Pennsylvania for Non-Charitable Purposes (1933) 38 DICKINSON L. REV. 29, 53.
\(^{16}\) Carson's Appeal, 99 Pa. 325, 330 (1882).
according to what the settlor provides? There is, however, this to be said in favor of the draft as written: In a great many, if not most, cases of this type the settlor might well prefer having the provision stricken down in its entirety rather than chopped off in the middle. Furthermore, the invalidation of the whole accumulation avoids the dreadful problem of what to do with the fund accumulated during the settlor's life where the ultimate beneficiaries of the accumulated fund were to have been ascertained at some later date. A provision allowing accumulation at least during the permissible period is plausible in the case of a direction to accumulate until a beneficiary reaches an age over twenty-one (a problem discussed below), but aside from that case, it is usually anyone's guess as to whether the settlor would have wanted the accumulation during the shorter period and as to what the settlor would want done with the accumulations which result. On the whole, it is probably better to cut the Gordian knot as the present draft proposes.

(3) MINORITY. [No direction or authorization to accumulate income shall be valid except] during the minority of any beneficiary who if living at the age of twenty-one will be entitled to such accumulations and earnings thereon or to the entire income from such accumulations and earnings thereon; and a direction or authorization to accumulate income until a person reaches a designated age over twenty-one and thereafter to pay to such person, if living, such accumulations and earnings thereon or the entire income from such accumulations and earnings thereon, shall be valid during minority and shall take effect as though twenty-one had been the designated age.

The minority clause is perhaps the most interesting of the exceptions to the general prohibition enumerated in this subsection. It would change existing law on several important points and constitute an extremely liberal provision in this branch of the law of accumulations.

It will first be noted that under the proposed wording, accumulation is permissible during the minority of "any beneficiary." Under the Act of 1853 the minor must be in existence when the trust begins, although the reason for this restriction is not clear. Accumulations during minority are justified because the guardian would accumulate amounts not needed for support anyway. The same reasoning applies whether the minor was born before or after the creation of the trust. By permitting accumulations for after-born minors, the proposed act eliminates an illogical restriction in the present law. In taking advantage of this suggested relaxation of the law of accumulations, how-

ever, attorneys must be on guard to avoid a violation of the rule against perpetuities. The provisions of this section will clearly not validate gifts and restraints which violate some other rule of law.18

The second important change in existing law proposed by the draft is that it permits a gift over in case of death before reaching twenty-one. This is implicit in the words "... who if living at the age of twenty-one will be entitled to such accumulations ..." Under existing law, such a gift over would probably be unlawful; apparently the fund must be held exclusively for the minor or his estate.19 Again, however, there would seem to be no reason for such a restriction. The minor who dies before reaching twenty-one will not get the benefit of the accumulated fund anyway, so that there would seem to be no objection to allowing the fund to go to someone of testator's choosing rather than to the minor's heirs.20 Here also a possible violation of the rule against perpetuities must be guarded against, but if that rule is satisfied, the proposed section will clearly not be violated merely because the minor's enjoyment of the accumulations is contingent upon his living to attain majority.

Perhaps the most radical change proposed by this section is that an accumulation during minority is valid even when the minor will never receive the accumulated fund, provided he will receive the entire income therefrom upon reaching majority. Suppose, for example, a direction to accumulate income during the minority of A, such accumulations to be added to principal, and upon A's reaching twenty-one to pay the income (from the principal as enlarged by the accumulations) to A for life, with remainder at his death to B. Plainly such a direction would be bad under existing law because the ultimate


Under section 3 of the proposed Estates Act, the common-law rule against perpetuities is modified by making actualities rather than possibilities the test determining remoteness of vesting, but the permissible period (life in being and twenty-one years) remains the same. In drafting wills and deeds the attorney will have to take the same precautions to guard against the possibility of a violation as he now takes to avoid the certainty of a violation.

Where the right to the accumulations is indefeasibly vested in the minor within the permissible period, the rule against perpetuities, strictly speaking, will not be violated merely because the income continues to be accumulated after the permissible period has expired. However, such a provision in a deed or will might violate the less familiar rule against indestructible trusts lasting beyond a life and twenty-one years. See Simes, op. cit. supra note 2, at 410. On the whole, attorneys will be wise to limit any general clause in wills and deeds directing accumulations during minorities, to beneficiaries in existence at the death of the life in being—regardless of whether the gift of the accumulated fund is contingent upon the minor's surviving the age of twenty-one.

19. Scattergood's Estate, 28 Dist. 130 (Pa. 1918). The authorities are scarce and it is not clear how the courts should handle provisions of this sort under existing law even assuming the gift over is bad. Consider the implication of cases dealing with a period of accumulation lasting beyond minority followed by a contingent gift: Sternberg's Estate, 259 Pa. 167, 95 Atl. 404 (1915), and Neeb's Estate, 263 Pa. 197, 106 Atl. 317 (1919); compare Wright's Estate, 227 Pa. 69, 75 Atl. 1026 (1910).

20. This is in accord with Restatement, Property (1944) § 445, construing statutes requiring that the accumulation must be for the minor's benefit.
benefit of the accumulation enures to B while A merely gets the income from the fund during his life.\textsuperscript{21} Under the proposed act the provision would be valid. The suggested relaxation of the rule is probably grounded on sound policy. The thought is that the sudden payment to a twenty-one-year-old of what might be a very large sum of money out of all proportion to what he will receive in subsequent years might be more undesirable socially than tying up the accumulated fund until his death; in any event the testator should be allowed to decide. This is by no means a novel idea. Back in 1871, Justice Paxson, then a judge of Common Pleas, had this to say of the act of 1853: "Speaking for myself, it is difficult to see the wisdom of any Act which requires in a large estate, the accumulated income of a minor to be paid to him in all cases, upon his arrival at full age. There are many instances where such a thing would be injurious to him in the highest degree. The capitalization of the income, and payment to him only of the interest after majority, would often promote his best good. There would seem to be no reason of public policy demanding such a change in the right of disposing of property."\textsuperscript{22} The present commission has followed Justice Paxson's suggestion and provided that an accumulation during minority is valid if the minor will receive accumulations or the "entire income from such accumulations" when he becomes of age.

By way of summary, if the three proposed changes in existing law are considered together, it will be seen that the following provision in a will would be valid under the present draft: "To A for life, then to A's first-born child for life (A now having no children), remainder to X, a living person. But if A's first-born child shall be a minor at the time of A's death, the trustee shall accumulate the income during the child's minority and add such accumulations to principal." Under existing law the above provision would be objectionable for three reasons: the minor is not in being at testator's death; the minor's estate will get no benefit from the accumulations if he dies before reaching twenty-one; and even if the child reaches twenty-one, he will merely get the income from the accumulations instead of the accumulated fund itself. Under the proposed act, however, none of these objections could be made. This does not mean, however, that the lid will be entirely off. An accumulation during minority will still be valid only if the minor will receive some of the benefit of the accumulated fund—even though that benefit might be contingent upon his

\textsuperscript{21} Washington's Estate, 75 Pa. 102 (1874); Farnum's Estate, 191 Pa. 75, 43 Atl. 203 (1899).
\textsuperscript{22} Washington's Estate, 8 Phila. 182, 189 (Pa. 1871), aff'd, 75 Pa. 102 (1874), quoted in Eberly's Appeal, 110 Pa. 95, 97, 1 Atl. 330 (1885).
reaching majority and might be limited to income from the fund. A direction to accumulate during the minority of A and pay the accumulations to B would be equally bad under the present or the proposed act.

The last clause of the provision in the suggested act for accumulation during minority deals with the all too common case where an accumulation is directed until an age over twenty-one. Testators are wont to decide for themselves what should be a proper age of discretion, and this has raised some troublesome problems in the law of accumulations. The proposed provision is in accord with existing law in the simple case of a direction to accumulate until age thirty followed by an unconditional gift of the accumulated fund to the beneficiary; in such a case it is easy to allow the accumulation at least during minority and order the accumulations paid to the beneficiary when he becomes of age. Suppose, however, the direction is to accumulate until A reaches 30, then to pay the accumulations to A if living, but if A dies before reaching 30 to pay the accumulations to B. Under existing law, the direction would probably be objectionable even if it had been limited to minority because the accumulations might not go to A, but in any event the courts have refused to accelerate the contingent gift to age twenty-one. Under the proposed legislation, however, we have seen that the contingent gift of the accumulations is not objectionable, so that the direction is bad only because the designated age is excessive. As a result there are two questions to be answered: (1) Can the accumulation be permitted during minority? (2) Can the contingent gift of the accumulated fund be accelerated? The proposed legislation answers both questions in the affirmative. In effect, whenever a provision for accumulation is valid in all respects except the designated age, the proposed act says to the erring testator: “Although you said ‘age 30’ you meant ‘age 21.’” Thus, both the period of accumulation and the gift of the accumulated fund is given effect “as though twenty-one had been the designated age.”

(4) INCOMPETENCY. [No direction or authorization to accumulate income shall be valid except] for the exclusive benefit of a person who, in the opinion of the trustee, is incompetent to receive or judiciously use the income.

This clause has no counterpart in the act of 1853 and will change the law accordingly. There is undoubtedly a lot of de facto accumulation being practiced in cases of incompetent beneficiaries which is never objected to, but it seems fairly clear that a beneficiary who is not legally incompetent, or the guardian of one who is, could at any time

24. See note 19, supra.
compel the trustee to pay over such accumulations.\textsuperscript{25} This enforced distribution is obviously pointless where there is a guardian, who will proceed to continue the accumulation anyway, so that the only effect of the present law is that commissions must be paid to both trustee and guardian. Of course, an accumulation statute can do nothing where the testator has failed to provide for such contingencies, but the law should not stand in the way of a testator who has foreseen the difficulty.

The fact that double commissions will in many cases be avoided is not a complete justification of the present draft which permits a settlor to direct the withholding of income not only in cases of legal incompetency but also in cases where the beneficiary might be competent in the eyes of the law but not in the eyes of the trustee. One reason for this extension is a purely practical one—it will avoid the necessity of litigation in the common pleas each time the provision in the act is invoked. But beyond this, there seems to be no evil in permitting accumulation whenever the trustee believes the beneficiary is incompetent. If support trusts in general are conceded to be proper, there should be no objection to permitting accumulations in such situations. If the beneficiary were competent, he would undoubtedly save and invest income which he had no immediate use for. In a support trust, the trustee spends the beneficiary’s money for him. Should not the trustee be allowed to do what the beneficiary would do and save the income not needed? \textsuperscript{26}

The important limitation on the validity of accumulations under this clause is in the requirement that the accumulations must be for “the exclusive benefit” of the incompetent. These words, particularly when read with sub-section (b) (4), indicate that to be valid the accumulated fund must go either to the beneficiary or to his estate. Hence, at most a mere temporary withholding will be permitted under this clause.\textsuperscript{27} It might be argued that a gift over of the accumulations should be permitted on the beneficiary’s death, for the same reasons

\textsuperscript{25} Taite’s Estate, 46 D. & C. 456 (Pa. 1943); cf. Sterrett’s Estate, 300 Pa. 116, 150 Atl. 159 (1930) showing that the court will not of its own motion require distribution where no guardian appears to claim the fund.

\textsuperscript{26} Directions to accumulate in favor of an incompetent almost always refer to surplus income of a support trust, and even where this is not so by the terms of the instrument, it will be so as a matter of law under subsection (b) (3), discussed below.

\textsuperscript{27} It is sometimes said that where the ownership of the accumulated fund remains in the income beneficiary from whom it was withheld, there is properly speaking no “accumulation” at all. Cf. Mathues’s Estate, 322 Pa. 358, 360, 185 Atl. 768 (1936). It is believed that this statement, however, is not accurate. Where the ownership of withheld income is in a living person who has the present legal right to enforce its distribution, there is no accumulation within the purview of the statute—the beneficiary is in effect merely leaving his money in bank. Where, however, no one has the legal authority to demand immediate distribution of the withheld income, there is an accumulation, regardless of vested ownership, and such accumulation must come within one of the exceptions in the statute to be lawful.
discussed in connection with accumulations during minority. It is believed, however, that the limitation here is a wise one. Under the incompetency provision, the trustee must be the judge of how long the income should be withheld. This discretion can be more objectively exercised if the ultimate ownership of the fund is not at stake and the size of the corpus can in no event be swelled by capitalization.

(5) Charity. [No direction or authorization to accumulate income shall be valid except] for any charitable purpose or purposes.

This clause follows the blanket exception in favor of charities contained in the Act of 1853. Similar exceptions are found in the laws of some other states, although the Thelluson Act contains none.\(^2^8\) Considering the fascinating possibilities of long-term accumulations, it is surprising that the exemption has caused as little trouble as it has. There is indeed the case of the gentleman who attempted to pay off the entire debt of the Commonwealth of Pennsylvania with accumulations from a fund of $377.35.\(^2^9\) The court had some difficulty in finding a reason for refusing to enforce the trust, but succeeded in invalidating it for a reason wholly unrelated to the preposterousness of the settlor's scheme. No doubt the courts will continue to strike down the brain children of eccentric testators and settlors for one reason or another. It is even conceivable that an implied condition of reasonableness will be read into the statute.\(^3^0\)

Other limitations to the validity of such accumulations arise from distinctions drawn in the general law of charities. It is first necessary to establish that the purpose falls within the meaning of the word "charitable." This word is defined in section 1 of the proposed act as including "the relief of poverty, the advancement of education, the advancement of religion, the promotion of health, governmental or municipal purposes, and other purposes, the accomplishment of which is beneficial to the community."\(^3^1\) Questions also arise where a power to select beneficiaries might be so broad as to permit the selection of non-charitable objects,\(^3^2\) or where individuals might get incidental benefits from the charitable accumulation.\(^3^3\) And finally there is the

\(^{28}\) See Simes, op. cit. supra note 2, at 422.

\(^{29}\) Girard Trust Co. v. Russell, 170 Fed. 446 (C. C. A. 3d, 1910). The settlor later generously increased the fund to about $2000.

\(^{30}\) Cf. 4 Restatement, Property (1944) § 442, stating that under the common-law rule against accumulations, a charitable accumulation is "subject to judicial supervision as to its duration."

\(^{31}\) The wording is borrowed from Restatement, Trusts (1935) § 368. It appears to be in accord with liberal Pennsylvania decisions on this point.

\(^{32}\) Cf. Funk's Estate, 353 Pa. 322, 45 A. (2d) 67 (1946); Wright's Estate, 284 Pa. 334, 131 Atl. 188 (1925).

requirement that the gift to charity must be unconditional, at least at the time when the accumulation is to commence.\textsuperscript{34}

(6) **Pension or Profit Sharing Plans.** [No direction or authorization to accumulate income shall be valid except] \textit{in a bona fide trust inter vivos primarily for the benefit of business employees, their families or appointees, under a stock bonus, pension, disability or death benefit, profit-sharing, or other employee benefit plan.}

The law of accumulations, like the law of perpetuities, was aimed at schemes of a private nature which were deemed to have no particular social value. The prohibitions are framed in broad language, however, and would apply to business transactions as well, although in the latter cases there may be considerations of policy favoring the restraint and outweighing the policy against it. Recently, some concern has been shown for the fate of the currently popular pension plans under the law of perpetuities and accumulations. New York has already exempted such trusts from the general rules.\textsuperscript{35} The present clause, together with the similar exception in the perpetuity section, should eliminate the problem in this state. It will be noted that the clause is carefully framed to be broad enough to cover any bona fide business arrangement without permitting the use of an "employee" trust as a device to evade the general prohibition.

(7) **Insurance Premiums.** [No direction or authorization to accumulate income shall be valid except] \textit{in a trust consisting of, or including, a policy or policies of life, health, accident, or disability insurance, the dividends in such policy or policies may be applied in whole or in part for payment of premiums upon such policy or policies.}

If the reader is not too upset by the sudden departure from the more-or-less parallel construction of the previous clauses, it will be seen that the significance of this rather wordy provision is not measured by its length. The corresponding provision in the New York statute makes an important exception to the law of accumulations by allowing income from a funded insurance trust to be used for the payment of premiums.\textsuperscript{36} The Pennsylvania Commission has rejected such a departure from existing law—and probably with good reason. There is something to be said for the New York statute, but it cannot be doubted that a real accumulation is thereby permitted. The question is whether there is a sufficiently compelling reason to justify such an exception to the general rule. Apparently the Commission has seen none,

\textsuperscript{34} McBride's Estate, 152 Pa. 192, 25 Atl. 513 (1893).
\textsuperscript{35} CONSOL. LAWS OF N. Y. ANN. (McKinney, Supp. 1946) tit. 40, § 16; (McKinney, 1945) tit. 49, § 61.
\textsuperscript{36} Ibid.
and in place of the general New York exemption of insurance trusts, the Commission has submitted the present clause which merely permits dividends from the policy to be applied to premium payments. The insurance companies will no doubt derive little comfort from this crumb, but it might avoid inconvenience in some cases.

(8) **Apportionment Between Principal and Income.** [No direction or authorization to accumulate income shall be valid except] the following directions or authorizations shall be valid:

a. To apply to principal in whole or in part extraordinary dividends, regardless of the form in which they are paid, and rights to subscribe to stock;

b. To amortize from income premiums paid for investments which are callable or have a fixed maturity;

c. To amortize from income the waste represented by the return from a wasting asset or dividends from a wasting asset corporation;

d. To pay carrying charges on unproductive or underproductive property from income;

e. To apply to principal in whole or in part the proceeds of the conversion of unproductive or underproductive property.

In interpreting trusts which direct simply that the income shall be paid to the life tenant it is necessary for the law to determine what is income and consequently to draw a sharp dividing line through the twilight zone between principal and income. Having done so, the Pennsylvania courts somewhat reluctantly found it impossible to avoid the logical conclusion that it constitutes an unlawful accumulation for a testator to draw a different line and treat as principal that which the law had designated income. Thus, in *Mars's Estate*, 37 a direction to capitalize stock dividends was held had under the Act of 1853, because under the law at the time of the decision such dividends were income to the extent that they were earned after decedent's death. To correct this decision, the Act of 1939 38 was passed permitting the capitalization of extraordinary dividends or profits on the sale of stock. The proposed legislation goes further and permits the creator of the trust to designate what shall be treated as income and what as principal in a variety of situations. Necessarily the exception is still limited to the enumerated cases. It still will not be possible for a testator to ac-

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37. 301 Pa. 20, 151 Atl. 577 (1930).
complish a real accumulation by directing that all rents, interests, and dividends shall be treated as principal. However, the Act of 1939 will be considerably broadened, and in general a testator will be able to direct or authorize the capitalization of items in the twilight zone which the law says are income but which it might have said were principal.

The specific provisions are largely self-explanatory. It will be noted in the first place that since the adoption of the Uniform Principal and Income Act, profits from the sale of securities are principal, so that it is not necessary for this exception in the Act of 1939 to be included; the clause deals only with items which the law designates as income, because there is nothing in the law of accumulations which would prevent a testator's designating as income that which the law considers principal. The proposed provision for extraordinary dividends is a paraphrase of the Act of 1939, although under the Principal and Income Act it will be useful only in cases of extraordinary dividends paid in cash, or in stock or rights of another corporation. The suggested provision in clause b for permitting amortization of bonds purchased at a premium will enable a testator, if he so wishes, to change the rule in section 6 of the Principal and Income Act. Attention should be directed to the broadness of the language used in this clause: as phrased it will apply to callable preferred stock as well as bonds purchased at a premium.

The wasting asset provision will permit a testator to modify the sometimes harsh Pennsylvania rule concerning these investments if a depletion reserve is desired. The language is broad and should cover all types of wasting property—book royalties and patents, as well as mines and timber. It will be noted that under the wording of this clause, capitalization of such returns should be permissible only to an extent necessary to compensate for the waste. The correct percentage of returns to be capitalized will be impossible to determine with accuracy in many cases, but this necessary uncertainty should cause but little trouble. In practice, the courts will probably interfere with the direction of the settlor or the discretion of the trustee in such matters only where the resulting capitalization is plainly beyond all reason. The greater the uncertainty of what constitutes a proper

41. Sections 9 and 10 of the PRINCIPAL AND INCOME ACT, §§ 3479 and 3480. For the earlier law, see HUNTER, op. cit. supra note 40, Life Tenant, § 18. The proposed provision in the accumulation law will permit a testator or settlor to adopt the rule stated in RESTATEMENT, TRUSTS (1935) § 230, permitting a depletion reserve regardless of whether the wasting property was decedent-owned.
amortization (as in the case of book royalties, for example), the greater should be the hesitancy of the court to substitute its judgment for that of the settlor or of the trustee, as the case may be. 42

The provisions concerning unproductive real estate will be valuable to testators who wish to relieve their trustees of the horrors of apportionment. The present provisions of the Principal and Income Act on this subject 43 are designed to do justice between life tenant and remainderman, but often (particularly in cases of a few small properties in trusts yielding adequate income from other sources) the necessary calculations are more trouble than they are worth. Under the proposed provision, a testator could either adopt a rule of thumb that all proceeds of sale are principal or give his trustee discretion to allocate such proceeds as he sees fit. The provision permitting payment of carrying charges on unproductive property out of other income will also be noted. Such charges are ultimately borne by income anyway, but this clause will remove the doubt as to the propriety of the temporary accumulation that results when amounts to pay such charges are advanced from income from other sources.

(b) Disposition of Valid Accumulations

(1) During Lifetime of Settlor. Except as may be otherwise directed or authorized in a conveyance, accumulations during a period measured by the lifetime of the settlor shall be added to and form a part of the principal from which they originated.

The present sub-paragraph relating to accumulation during the settlor's lifetime is a rule of interpretation applicable to one particular type of case. A settlor might provide for accumulation (during a permissible period) and then simply direct the payment of "income" to A and on A's death the "principal" to B. In all such cases a problem of construction arises. Usually it is safe to assume that the settlor intended the accumulations to be capitalized, and this construction should be favored, except in those cases where such capitalization would result in making the otherwise valid direction unlawful. 44 Where the accumulation is for the life of the settlor, there is no restriction in subsection (a) (2) regarding what may be done with the accumulated fund, so that capitalization should be inferred in the absence of an in-

42. The problem will be the same as that faced in all trusts in jurisdictions following the Restatement rule, note 41 supra.

43. Act of May 3, 1945, No. 171, § 11, PA. STAT. ANN. (Purdon, Supp. 1945) tit. 20, § 3481. The earlier law was just about as complicated; see Hunter, op. cit. supra note 40, Life Tenant, § 11, Investments, § 13 (g).

44. Penrose's Appeal, 102 Pa. 448 (1883); White's Estate, 31 D. & C. 651 (Pa. 1938).
tent to the contrary. The above provision of the proposed act favors such a construction in this type of case.

(2) DURING MINORITY. Notwithstanding any direction or authorisation to accumulate income during the minority of a beneficiary, it shall be lawful for the court, where other means for his maintenance and education shall be insufficient, to make an adequate allowance from income for such purpose.

(3) DURING INCOMPETENCY. Notwithstanding any direction or authorization to accumulate income for the benefit of an incompetent person, it shall be lawful for the court, where other means for such incompetent's maintenance shall be insufficient, to make an adequate allowance from income for such purpose.

The above paragraph (2) incorporates the proviso in the Act 1853 relating to support of a minor, and paragraph (3) makes similar provision for the support of an incompetent in cases of accumulations permitted under (a) (4). Apart from stylistic improvements, paragraph (2) departs from the old act by omitting the words "on the application of the guardian." This should eliminate the useless procedure of having a guardian appointed in all cases and give the court clear authority to order the trustee to apply the allowance directly, if such a course is advisable in the circumstances. The effect of this provision in cases of accumulations during minority will be somewhat more startling than under existing law because (a) (3) permits capitalization of such accumulations. Hence the court in directing an allowance for support out of the income accruing during minority might be depleting the remainder that would eventually have gone to someone else. This in no way detracts, however, from the soundness of the provision; after all, the accumulation is supposed to be primarily for the benefit of the minor.

(4) UPON COMPETENCY OR DEATH. Accumulations during the incompetency of a person shall be distributed to him when he shall become competent, or to his personal representative at this death.

This clause should serve to expand the meaning of "exclusive benefit" in clause (a) (4). It might also be helpful as a rule of construction (similar to clause (b) (1)) where the trust instrument is silent on what should be done with income accumulated during incompetency.

(c) DISPOSITION OF VOID ACCUMULATIONS

(1) UNLAWFUL AUTHORIZATION. Any income authorized but not directed to be accumulated unlawfully shall be distributed as if no such accumulation had been authorized.
(2) **Unlawful Direction.** Any income directed to be accumulated unlawfully shall be distributed in the absence of an alternative valid direction in the following order of preference:

   a. To the person or persons, if any, who are entitled to the immediate enjoyment of the income from which such accumulations were directed;

   b. To the person or persons, if any, who would be entitled to the accumulations if the time fixed by the conveyance for payment of the accumulations were accelerated to the time of the accrual of the income;

   c. To the person, or proportionately to the persons, if any, who, when the income accrues, are entitled to other income from the same trust;

   d. To the person or persons, if any, entitled under the residuary clause of the conveyance;

   e. To the person or persons entitled to property undisposed of by the conveyance.

Provisions in the various accumulations statutes relating to the disposition of released income have in general given more trouble than those relating to what accumulations are lawful. In the Act of 1853, Pennsylvania followed the English Thellusson Act in providing that released income shall go to “such person or persons as would have been entitled thereto if such accumulations had not been directed.” Other states have followed the New York statute in awarding such income to the “persons presumptively entitled to the next eventual estate.” 45 Pennsylvanians can gain some comfort from the fact that New York has had even more trouble with its provisions than we have had with ours. 46 In view of the marked lack of success of both provisions, it is strange that the legislatures of the various states have continued to use the same ambiguous language even in the more recent statutes. The provision in the proposed Estates Act is at least a worthy attempt to meet the problem instead of blindly following a rule which has been tried and found wanting.

A curious thing about this branch of the law of accumulation is that it presents an almost pure problem of draftsmanship. People can

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45. See surveys of the various statutes cited note 2, supra. For a discussion of Pennsylvania decisions under the present act, see Kain, op. cit. supra note 15, at 42; Fiduciary Review, April, 1939, and Nov., 1944.

46. “Though the English type of provision for the disposition of illegal accumulations gives rise to a number of questions, the next eventual estate type such as is found in New York gives rise to many more.” Simes, op. cit. supra note 2, at 424.
usually agree on what the most sensible disposition of released income should be in a particular case in order to carry out what would have been the testator's most probable intent if he had known of the invalidity. The problem is how to frame general rules which will bring about the proper result in the various unpredictable situations that arise. The main difficulty springs from the fact that any given provision seems to work well in some cases but not in others. The Commission, through its Advisory Committee, has hit upon the scheme of stating not one but several methods of handling void accumulations, and these methods are listed in order of preference. The entire subsection is quoted above so that this general plan can be more easily comprehended.

Before considering this sub-section in detail, it will be remembered that a number of unlawful directions to accumulate will be covered not by sub-section (c) at all, but by the minority provision in (a) (3). As already noted, that clause provides that a direction to accumulate until an age over twenty-one, where the direction would have been valid if it were limited to minority, "shall take effect as though twenty-one had been the designated age." This convenient provision will take care of many troublesome cases, but all other unlawful accumulations will be subject to subsection (c).

The first sentence in this subsection provides that all unlawful authorizations to accumulate shall be ignored. This easy solution to a whole class of cases is so obvious that it might easily have been overlooked. Unlawful directions to accumulate are then approached. It is here that the principal difficulties are encountered.

The first class of cases dealt with comprises those where the unlawful direction can be ignored without upsetting other aspects of testator's plan or leaving income undisposed of. This sort of case is recognized with ease but defined with difficulty. The typical example is Maris's Estate.47 There, testator gave the entire income to his widow with remainders over. In a separate clause, it was provided that all stock dividends should be "considered as principal." This resulted in an unlawful accumulation because such dividends were partly income under the law then in force. The question therefore arose as to how the income portion of the dividends should be distributed, and it was held that it should be paid to the widow as the person under the act who "would have been entitled thereto if the accumulation had not been directed." The conclusion seems clearly correct, but it is difficult to explain why. The Pennsylvania and English provisions work well in

47. 301 Pa. 20, 151 Atl. 577 (1930), discussed supra in connection with subsection (a) (8).
this particular situation. Indeed the desirability of this result is often so compelling that the New York courts have sometimes been forced to accept it in spite of the absence of statutory authority for such a conclusion in that state.\footnote{E. g., Matter of Megru, 170 App. Div. 653, 157 N. Y. Supp. 565 (1915), aff'd, 217 N. Y. 623, 111 N. E. 1091 (1916); discussed in Note (1920) 20 Col. L. Rev. 887.} It is this type of case which will be covered by the above quoted clause, (c) (2) a, which is first in order of preference and provides that released income shall go to the “person or persons, if any, who are entitled to the immediate enjoyment of income from which such accumulations were directed.” The idea is a difficult one to express, for this solution is appropriate only in cases closely analogous to Maris’s Estate. The limitations are elusive. It is not simply a matter of having a trust instrument which makes sense if the unlawful provision is obliterated. A testator might give income to his children and then provide that the share of a wayward son shall be accumulated for his issue; in such a case the accumulation statute should not have the effect of giving a portion to the disinherited child merely because of the testator’s choice of words. The distinguishing features of cases suited to this method of distributing released income seem rather to be a primary intention that the beneficiary should enjoy the whole income followed by a provision in the nature of an afterthought to accumulate a part of it unlawfully. Whether the proposed legislation as presently drafted is adequate to convey this thought will remain to be seen. It is close to impossible to phrase a wholly satisfactory provision on this subject, and in the last analysis the success of the provision will depend on sympathetic and intelligent construction by the courts.

Unfortunately the cases are few where the unlawful direction to accumulate can simply be ignored. More often than not, there is no one “entitled to the immediate enjoyment of income from which such accumulations were directed.” The accumulation is directed for the primary purpose of making a postponed gift and the obliteration of the unlawful direction will either leave the income undisposed of or its disposition suspended. Clause a cannot apply, therefore, and such cases will be governed by clause b providing for distribution to the ultimate beneficiary of the accumulated fund. The simplest case where the method described in this clause can be used is where the ultimate right to accumulations is finally vested in an ascertained person—a direction to accumulate during the life of X and then distribute the accumulated fund to Y, a living person. Plainly in such a case nothing should be given to X, whose life was merely the measure of the accumulation period and who is not even a beneficiary by the terms of
the trust. Since clause a cannot be applied, the situation is governed by clause b and the gift to Y is simply accelerated so that the income is paid to him as it accrues. Suppose, however, that the remainder is contingent—as a direction to accumulate during the life of X, and on the death of X to distribute principal and accumulations to Y, if then living, but if Y is then dead, to Z. In such a case, clause b would be equally applicable, although its operation becomes more complex. The gift of each item of income is accelerated to the date such item accrues, and the person entitled thereto is ascertained as of that date. One quarterly dividend, payable to stockholders of record on a date when Y is alive, will be paid to Y; the next quarterly dividend, however, might go to Z if Y dies in the meantime. Clause b will also apply where the postponed gift of the accumulations is to an unascertained class—a direction to accumulate during the life of X and then distribute the accumulated fund to such of X's children as are living at his death. While X is living the income will be paid to whatever children X happens to have on the date each item of income accrues. This acceleration of contingent gifts is new to the law of accumulations in Pennsylvania.\textsuperscript{49} It would seem, however, to be the most sensible way of handling an awkward situation.

Clause b should not be construed so literally that it would include persons entitled by way of reversion. If, in the last mentioned example, X has no children at the time the income accrues, and there is no alternative gift of the accumulations in the instrument, persons presently entitled to undisposed-of property (residuary legatees, heirs at law, etc., as the case may be) should not be considered within the scope of clause b. If such a literal construction were adopted, clauses a and b would cover all possible cases, and clauses c and d would be useless.

Assuming, therefore, that reversionary interests are not to be considered under clause b, there will be cases where neither clause a nor clause b will apply. Where this is so, clause c will take effect if possible. The following would be an example of such a case: Testator directs that half the income from his estate shall be paid to X with remainder of half the principal to X's issue, and the other half of the income accumulated during the life of Y, with remainder of this half of the principal plus accumulations on Y's death to Y's issue then living. When the will takes effect, Y is living and has no issue. What should be done with the half of the income subject to the unlawful direction to accumulate? Clause a would not apply because there is no

\textsuperscript{49} See discussions of cases under subsection (a) (3) at footnote 24, and cases cited footnote 19.
present gift of this portion of the income. Neither could clause \( b \) apply because, with reversions eliminated, there would be no one in existence to take. Clause \( c \) will therefore become operative and the released income would go to \( X \) as the person entitled to other income from the same trust. Problems will no doubt arise in determining what is "the same trust" in some cases, but those would seem to be questions which can properly be left to the courts which construe the particular wills or deeds; the run-of-the-mill case should give no difficulty in this regard.

Finally, there are clauses \( d \) and \( e \) which will apply to all cases not covered by the previous clauses—as, for example, a direction to accumulate all the income of a trust during the life of \( X \) and then distribute the accumulations to \( X \)'s issue, where \( X \) has no issue at the time the income begins to accrue and there is no other income beneficiary. If the trust is not created by the residuary clause of the instrument, the released income will fall into the residue under \( d \). If there is no residuary clause, or if the void direction to accumulate is in the residuary clause, \( e \) will apply, and the released income will go back to the settlor if living, or under his will, or to his heirs at law, as the case may be. The analogy to the disposition of lapsed legacies will be noted, except that there is no provision in the present draft in favor of other residuary legatees where the void accumulation is directed in a trust consisting of part of the residuary estate.

**CONCLUSION**

An accumulations statute which would bring about perfect results in all conceivable cases is difficult to imagine, but if the proposed legislation becomes law and receives intelligent construction by the courts, it should represent a considerable improvement over the inept copy of the Thellusson Act which Pennsylvania has labored under for almost a century. It should be borne in mind, however, that the present draft of the Estates Act is not the final one. The purpose of circulating the printed copies of the proposed act is to solicit criticisms and suggestions before the act is submitted to the legislature.\(^{51}\)

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50. The term "conveyance," used in clauses \( d \) and \( e \), is defined in section 1 of the proposed Act as "an act by which it is intended to create an interest in real or personal property whether the act is intended to have inter vivos or testamentary operation."

51. The printed copies are distributed to all subscribers to the advanced reports. Communications concerning the draft can be addressed to the Research Consultant, M. Paul Smith, Esq., Norristown-Penn Trust Building, Norristown, Pa., or to any member of the Advisory Committee.