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Some Aspects of Trust Accumulations in New York

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NOTES AND COMMENT

Some Aspects of Trust Accumulations in New York

In 1894 the New York Court of Appeals settled the rule that a trust of real property to pay a specified annuity each year to the beneficiary was valid as within the spirit, if not the letter, of the statute permitting trusts.[1] Since that time it has become popular among those who wish to provide for the support of another after death, but lack faith in the business ability of the beneficiary, to create a trust of either real or personal property from which a stated annuity is to be paid each year. Usually the provision for the payment of the specified sums is the objective primarily in the settlor's mind and the possibility of income greater than the stated annuity is given little or no consideration in drafting the trust instrument. It is not surprising, therefore, to discover many cases in which there has been no specific provision made for the disposition of surplus income. The general catch-all provisions frequently employed usually fail to conform to the requirements of the statutes relating to the creation of trusts.

In creating the trust from which the annuity is to be derived the settlor usually attempts to set aside a fund, the income from which will approximately equal the desired annuity. To establish a trust yielding the exact amount of the desired yearly annuity is an impossibility as a practical matter. It is not uncommon, therefore, to find that the corpus of the trust yields an income not only sufficient but greater than the stated annuity. The attempts either by direction in the trust instrument or by action on the part of the trustee to accumulate these surplus amounts and add them to the corpus to pass to the remaindermen or to hold the surplus amounts as a reserve against unforeseen contingencies that might reduce the trust income at a future date have given the courts frequent opportunity to consider the nature of this surplus income and statutory limitations on its disposition. It is also interesting to note that a similar problem arises in discretionary trusts where the trustee is given discretion as to the amount to be applied to the use of the cestui. This latter type of trust will be considered later in this note.

If the trust instrument contains a provision giving the surplus income each year to third parties there is no problem for the trustee is bound by such a direction. Where, however, the trustee is instructed to accumulate the surplus income there arises a question

[1] Cochrane v. Schell, 140 N. Y. 516, 35 N. E. 971 (1894).

concerning the legality of the direction to accumulate. Under the New York statutes an accumulation is permitted only during the minorities of persons for whose benefit the accumulation is made, except in the case of certain charitable institutions not important here.[2] Where a valid direction to accumulate is made the fund, since it does not become a part of the corpus of the trust during the process of accumulation, will not pass with the corpus to the remainderman. Should the beneficiary of the accumulation die before distribution is to be made the amounts accumulated will become a part of the estate of the beneficiary because the ownership of the amounts accumulated vests immediately in the beneficiary although the possession and enjoyment is deferred.[3] If the provision for accumulation expressly directs that the amounts accumulated will be added to the corpus of the trust and pass to the remainderman such a provision will be void in spite of the fact that the accumulation is directed only during the minority of the cestui que trust.[4] It is obvious that in such cases the accumulation is not made for the benefit of the person whose minority measures the period of accumulation. In *Pray v. Hegeman*[5] the trust provided for payment of a specific annuity during the minority of the life beneficiary with a direction to accumulate any surplus income and add it to the corpus of the trust. On reaching majority the beneficiary was to be entitled to the entire income from the trust including that from the capitalized accumulations. It was argued that where the beneficiary during whose minority an accumulation was directed would benefit from the capitalization of the accumulated amounts by the receipt of an increased income after reaching majority such accumulation was for the benefit of the person whose minority measured the period of accumulation and, therefore, did not violate the statute. It was held, however, that the statute requires that the accumulation must be made for the *sole* benefit of the minor and in spite of an increased income after majority the accumulation could not be considered as made for his *sole* benefit since the ultimate remainderman of the corpus of the trust would also profit by the capitalization of the accumulated amounts.

It is clear, therefore, that a direction to accumulate during the minority of the cestui will be void if coupled with a direction to capitalize the amounts accumulated, unless, of course, the corpus of the trust will pass to the cestui upon reaching majority.[6] If the cestui be an adult at the commencement of the trust it is obvious that there

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[2] N. Y. REAL PROP. LAW § 61; N. Y. PERS. PROP. LAW § 16.

[3] Smith v. Parsons, 146 N. Y. 116, 40 N. E. 736 (1895); *see* Morris v. Morris, 272 N. Y. 110, 120, 5 N. E. 2d 56, 60 (1936); Matter of Ziegler, 82 Misc. 10, 14, 143 N. Y. Supp. 682, 684 (Surr. Ct. 1913).

[4] Pray v. Hegeman, 92 N. Y. 508 (1883); *cf.* Barbour v. DeForest, 95 N. Y. 13 (1884).

[5] 92 N. Y. 508 (1883).

[6] Matter of Gordon, 181 Misc. 536, 40 N. Y. S. 2d 888 (Surr. Ct. 1943); Matter of Sewell, 127 Misc. 202, 216 N. Y. Supp. 331 (Surr. Ct. 1926); Matter of Ellen King, 121 Misc. 298, 200 N. Y. Supp. 829 (Surr. Ct. 1923).

is no period during which the accumulation could be made since "The statute does not permit an accumulation of the rents and profits of land, or the income of personal property for the benefit of adults for any period of time, however short."[7]

In many cases the trust instrument contains no provision for the disposition of surplus income. While there are conflicting authorities elsewhere[8] the rule in New York is well settled that where there is nothing to indicate a contrary disposition of surplus income the law will imply a direction to accumulate.[9] Such implied direction, however, is as much within the prohibition of the statute as those expressly made and to be given effect must meet the same conditions.[10] Thus where the implied direction to accumulate would be for the benefit of a remainderman other than a minor or where it would be for a period not measured by a minority the implied direction will be void.[11] It follows that if a trust be created from which an annuity is to be paid and no disposition is made of the surplus income the implied direction is void where the remainder is to pass to one other than the annuitant. Where the annuitant is also the remainderman of the trust, it is probable, however, that if he is a minor at the creation of the trust and the trust is to continue beyond his majority the implied direction to accumulate would be effective until he reached his majority, whereupon he would be entitled to the accumulated amounts whether or not, by the terms of the instrument, he was entitled to the corpus of the trust at that time.[12]

A problem frequently arises where the corpus of the trust is so constituted that the income fluctuates greatly from year to year so that there may be an income greatly in excess of that required for the annuity in one year, while the next year there may be a deficit.[13]

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[7] *See* Pray v. Hegeman, 92 N. Y. 508, 515 (1883).

[8] New Haven Bank v. Hubinger, 117 Conn. 417, 167 Atl. 914 (1933); Sandford v. Blake, 45 N. J. Eq. 248, 17 Atl. 812 (1889) (no direction implied); Perry v. Brown, 34 R. I. 203, 83 Atl. 8 (1912) (direction implied). See Note, 157 A. L. R. 668, 673 (1945).

[9] Cochrane v. Schell, 140 N. Y. 516, 35 N. E. 971 (1894); Gilman v. Reddington, 24 N. Y. 9 (1861); Matter of Hoyt, 116 App. Div. 217, 101 N. Y. Supp. 557 (1st Dep't 1906).

[10] Phelps' Executor v. Pond, 23 N. Y. 69 (1861).

[11] N. Y. REAL PROP. LAW § 61; N. Y. PERS. PROP. LAW § 16.

[12] Kilpatrick v. Johnson, 15 N. Y. 322 (1857); Matter of Gordon, 181 Misc. 536, 40 N. Y. S. 2d 888 (Surr. Ct. 1943); Matter of Ellen King, 121 Misc. 298, 200 N. Y. Supp. 829 (Surr. Ct. 1923).

[13] This situation is well illustrated by Spencer v. Spencer, 38 App. Div. 403, 56 N. Y. Supp. 460 (2d Dep't 1899). The settlor in that case provided for the payment of a specific annuity to his wife. For five or six years the income was not only sufficient to pay the annuity but also great enough to create an annual surplus of approximately $5,000. For two years thereafter, however, the net income was insufficient to pay the widow's annuity. In subsequent years when the income again increased over that necessary to pay the annuity, the wife sued to recover the deficiencies and to require the trustee to set aside a fund to insure the payment of the entire annuity in future years. The widow was permitted to recover the deficiencies of past years but the court refused

In such situations it would accomplish the primary intent of the testator more fully if the trustee were permitted to retain the surplus income from a good year as a fund against possible future deficiencies. The objection raised is, of course, that such retention, as a fund against possible future deficiencies, would constitute an invalid accumulation. The courts have found such a retention to be in contravention of the statute[14] although they have permitted the cestui to recover past deficiencies out of subsequent surplus earnings where the intent of the testator was interpreted as giving the cestui an amount equal to the multiple of the yearly annuity by the number of years the trust is in operation.[15] To permit the retention of a fund against future deficiencies where the annuitant is an adult would render that portion of the income from the trust unemployable and would therefore constitute an accumulation during a period not necessarily measured by the minority permitted by the statute. Until a deficit occurred or the trust was terminated the income would be immobilized. Under any other view where the trust was terminated any amount remaining in the hands of the trustee would pass to the remainderman which would in effect permit an accumulation not for the benefit of the person whose minority measured the period of accumulation. Even if the cestui were a minor, if the deficit occurred prior to termination, the accumulation under the contrary view, although made for the benefit of the minor-cestui, would not necessarily be measured by his minority. The statute itself is sufficiently comprehensive in terms to justify the inclusion of the situation under discussion and in view of the underlying statutory policy of avoiding the unduly prolonged immobilization of capital, the statute should be applied to cover the situation.

The rule prohibiting such accumulations against future deficiencies does not apply to the retention of funds by the trustee to pay foreseeable expenses, bound to arise although not currently due.[16]

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to permit the trustee to retain any part of the surplus income for the purpose of making good any deficiency which might thereafter arise. In refusing to permit the retention the court stated, "The learned counsel for the widow contends that the principle of the cases cited, that the surplus of one year can be applied to the deficiency of a preceding year, logically requires or justfies the retenton of such surplus as security against deficiencies that may occur in the future. If the right to retain the surplus depends solely on the will of the testator, we are not prepared to deny the correctness of this proposition, at least within limits. But we are here met with the statutory law of this state on the subject of accumulations. All directions for accumulations of rents and profits of real property are void, except during the minority of an infant and for his benefit."

[14] Spencer v. Spencer, 38 App. Div. 403, 56 N. Y. Supp. 460 (2d Dep't 1899); Grant v. Grant, 3 Redf. 283 (N. Y. 1878); *see* Phelps' Executor v. Pond, 23 N. Y. 69, 82 (1861).

[15] Spencer v. Spencer, 38 App. Div. 403, 56 N. Y. Supp. 460 (2d Dep't 1899).

[16] *See* Spencer v. Spencer, 38 App. Div. 403, 410, 56 N. Y. Supp. 460, 463 (2d Dep't 1899). "We assume that there is a limit beyond which the doctrine forbidding accumulations cannot be carried. We do not suppose that the very

Such expenses, however, are administrative expenses and rightly should be deducted from the gross income of the trust before computing the net income and so as a practical matter do not constitute the retention of funds out of earned income. The courts have often spoken of the reasonableness of the fund retained by the trustee and it must be remembered that the reference in such cases is to a fund to pay the expenses of administration, such as rents, repairs, taxes, etc., and not a fund to protect the cestui against a possible diminution of income.

The objection that retention of a part of the income as a fund against future deficiencies constitutes an accumulation, while accepted by the courts, and while valid, is not the logical reason for refusing to permit the trustee to retain funds for that purpose. Where the settlor has provided for the disposition of the surplus income there can be no fund retained to guard against future deficiencies and as a protection to the annuitant since it would violate the express direction of the settlor for the disposition of the income. Where there has been no express disposition of the surplus income the law implies a direction to accumulate, which will be given effect so far as valid, and any excess accumulation will be disposed of as provided by the statute.[17] It is clear, therefore, that out of the yearly earnings there will be no amount remaining out of which a fund to pay future deficiencies could be accumulated either because the settlor has expressly disposed of the entire income for that year or because the law, in the absence of express provision on the part of the settlor, has made disposition of the entire income. The only possible situation, therefore, in which the question could arise as to whether or not the retention of a fund against future deficiencies would constitute an invalid accumulation would be where the settlor has made express provision for such a fund. Even in such cases the courts have found the direction void,[18] and have not considered the question of the reason-

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day income is received it must be paid over to, or distributed among, the beneficiaries, and that no amount can be retained for any time, however short, with which to pay a charge certain to accrue in the immediate future. In this city taxes are payable toward the end of the year and they always equal a large portion of the rent of real estate. Any prudent trustee would retain a certain part of the income received during the early portion of the year to meet the charge that was sure to come at its end. The same is true of repairs; the cost of a repair which it was reasonably certain would become necessary in a short time might well be apportioned over some period of time as depreciation of the property, and a fund might be accumulated to defray the cost when it would be incurred. Some discretion must be left to the trustee in such matters, and his action, fairly taken in good faith in the retention of rents for the purposes indicated, would not be held to create accumulations against the statute"; *accord,* Cochrane v. Schell, 140 N. Y. 516, 35 N. E. 971 (1894); Eberley's Appeal, 110 Pa. 95, 1 Atl. 330 (1885); *In re* Mathues' Estate, 322 Pa. 358, 185 Atl. 768 (1936); Tucker v. Binenstock, 310 Pa. 254, 165 Atl. 247 (1933).

[17] N. Y. REAL PROP. LAW § 63.

[18] Grant v. Grant, 3 Redf. 283 (N. Y. 1878).

ableness of the amounts retained. The validity or invalidity of a provision in the trust instrument is to be determined from the terms of the instrument and not from the result of the administration of the trust. If the retention of a fund of $100,000 as a safeguard against possible deficiencies is void, so too will the retention of a fund of $1.00 be void if made in accordance with the same direction. While there is language in some of the cases which might lead one on a hasty reading to believe that even where express provision has been made for an accumulation the courts will permit the trustee to retain funds as a matter of judicious administration of the trust,[19] a careful examination will disclose that the direction is controlled by the provisions of the statute and provision for future deficiencies no matter how provident such arrangements might be in fact, will be permitted only so long as it complies with the provisions of law. The question of the reasonableness of the amount retained is only considered in cases where funds are retained to defer the expenses of administration and not in cases where it is retained as a protection for the cestui.

Very often the settlor will lodge in the trustee discretion as to the amount, the time or the manner of disposition of the income of the trust without specifying any exact amount to be given the cestui. The situations arising under the trusts in which the trustee has discretion as to the amount to be applied for the benefit of the cestui are similar to those in which a specific amount is named by the settlor. If there is an express provision disposing of the income not paid out by the trustee such provision is binding. If there is a provision ordering the trustee to accumulate any surplus and add it to the principal such direction is void unless the accumulation is made during the minority of the cestui and the corpus pass to him upon reaching majority.[20]

Thus where there is a clear discretion given the trustee as to amount when that amount is once determined the surplus income must be distributed as though the amount applied by the trustee was an annuity specified by the settlor. Although the duty to accumulate is contingent since the existence of a surplus depends upon the discretion of the trustee it is, none the less, within the statute and to be valid must satisfy the requirements as to the period of accumulation and the persons benefited.[21]

As in the case involving a trust to pay an annuity, it frequently appears in discretionary trusts that the possibility of surplus income

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[19] Cochrane v. Schell, 140 N. Y. 516, 35 N. E. 971 (1894); Hill v. Guaranty Trust Co., 163 App. Div. 374, 148 N. Y. Supp. 601 (1st Dep't 1914); Matter of Bavier. No. 1, 164 App. Div. 358, 149 N. Y. Supp. 728 (1st Dep't 1914).

[20] Hawthorne v. Smith, 273 N. Y. 291, 7 N. E. 2d 139 (1937); Morris v. Morris, 272 N. Y. 110, 5 N. E. 2d 56 (1936); Barbour v. DeForest, 95 N. Y. 13 (1884).

[21] Barbour v. DeForest, 95 N. Y. 13 (1884); Kilpatrick v. Johnson, 15 N. Y. 322 (1857).

is completely ignored. In the absence of the expression of a contrary intention where the settlor intends to lodge discretion in his trustee as to the *amount* of income to be applied then it necessarily clothes the trustee with authority to accumulate the residue which authority must also conform to the statute to be valid.[22] It would follow from this rule that where the cestui is an adult and discretion as to amount is given the trustee the amounts not applied in any one year for the benefit of the cestui would pass under the statute to those presumptively entitled to the next eventual estate.[23] Or if the cestui were a minor, the surplus income could be accumulated only if the corpus were to pass to that minor. Even in such case, however, the implied direction could be exercised only until the cestui reached majority.[24] This rule prevents the accumulation of funds which will not necessarily pass to the person whose minority measures the period of accumulation and fulfills the policy underlying the statutory restrictions. The income from the trust is disposed of as received and no fund can be retained as a protection for the primary beneficiary.

The statute thus forces the hand of the trustee in cases where he is given discretion as to amount. He cannot lay aside a fund from which he could draw in the future should the needs of the cestui require an amount greater than the income in any one year. The harshness of this result has not escaped the courts. They have come to examine closely the language of the trust instrument and are slow to find that the settlor intended to benefit the ultimate remainderman at the expense of the primary beneficiary of the trust. Therefore, to permit a finding that the settlor intended to give the trustee discretion as to the amount to be applied such intention must be clearly expressed.[25]

The importance of the type of discretion given the trustee appears to have escaped many draftsmen of trust instruments. Indeed, the courts themselves have not, in many cases, clearly expressed the distinction between a discretion as to amount, and discretion as to the time and manner of application, although they have often made it the controlling factor in determining the validity of accumulations or the disposition of surplus income.[26] The importance of this distinction is as fundamental as the policy underlying the restriction of accumulations or the entire statutory scheme regulating perpetuities.

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[22] Matter of Hoyt, 116 App. Div. 217, 101 N. Y. Supp. 557 (1st Dep't 1906).

[23] N. Y. REAL PROP. LAW § 63.

[24] Matter of Gordon, 181 Misc. 536, 40 N. Y. S. 2d 888 (Surr. Ct. 1943); Matter of Ellen King, 121 Misc. 298, 200 N. Y. Supp. 829 (Surr. Ct. 1923).

[25] An illegal disposition of property by will is not presumed. DuBois v. Ray, 35 N. Y. 162 (1866); Hopkins v. Kent, 145 N. Y. 363, 40 N. E. 4 (1895); Matter of Hoyt, 116 App. Div. 217, 101 N. Y. Supp. 557 (1st Dep't 1906).

[26] Bloodgood v. Lewis, 209 N. Y. 95, 102 N. E. 610 (1913), *reversing* 146 App. Div. 86, 130 N. Y. Supp. 621 (1st Dep't 1911). The testator gave each of his children one-fourth of the income from a trust created by the will. One of the daughters, Mary, was incompetent at the time the will was made and

The corpus of a trust remains subject to the provisions of the trust until its termination. The income before accrual is inalienable by statute [27] although once accrued may be disposed of. Such restraint upon the power of alienation is permitted to satisfy the reasonable desires of persons who wish to provide support or maintenance for others without subjecting the funds allotted to such a purpose to the risk of dissipation at the hands of the very objects of their bounty. The purpose to be accomplished in such a case outweighs the importance of the social and economic policy which demands that property remain free from unreasonable restraints and burdens. A trust to accumulate goes one step further than the ordinary trust and permits the income from a fund to be fettered with restrictions and restraints upon its alienation even after the income has been collected by the trustee. Consequently, the restraint imposed by an accumulation is greater than the restraint imposed by an ordinary trust and the law has permitted an accumulation only in those cases where the age of the beneficiary prevents him from managing his own affairs.[28] Thus the underlying policy of the statute restricting the periods and beneficiaries of accumulations must first be satisfied before the will or intent of the settlor can be given effect.

Where the trustee is given discretion as to the amount of the income to be applied to the cestui and no disposition of surplus income is made, we have seen that the law implies a direction to accumulate.[29] The implied direction, of necessity, will require a capitalization of the accumulated amounts since these sums will pass with the corpus of the trust to the remainderman.[30] Thus a portion of the income of the trust will, at the discretion of the trustee, become part of the corpus

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the testator provided that her share was to be paid to Rosetta, another daughter, who was to apply the income to Mary's use. Later the testator executed a codicil to the will modifying the original will by providing that the trustees should pay to Mary such sums, as in their discretion were necessary for her care and support. The Appellate Division held that the codicil gave the trustees discretion as to the *amount* to be received by Mary; that any surplus income not applied to her use would be accumulated. Since the accumulation did not fall within the statute the surplus income would pass to the persons presumptively entitled to the next eventual estate. The Court of Appeals reversed this decision holding that the gift to Mary was absolute, qualified only as to the manner of payment. The intent of the testator was to give his daughter the entire income and he did not intend, by the codicil, to vest in the trustees absolute discretion as to the amount of income she was to receive. "It did not empower the trustees to determine, in their discretion, what her share of the residue income should be or how much was bequeathed to her. It empowered them, rather, to determine, in their discretion, how much of the one-fourth equal part bequeathed to her would be expended for her benefit, and made them custodians and conservators of the unexpended balance . . . ." Thus the presence or absence of an implied direction to accumulate depended solely on the intent of the testator as to the type of discretion given the trustees.

[27] N. Y. REAL PROP. LAW § 103.

[28] N. Y. REAL PROP. LAW § 61.

[29] See note 20 *supra.*

[30] Barbour v. DeForest, 95 N. Y. 13 (1884).

not to be conveyed until the terms of the trust so direct. The income thus disposed of becomes fettered with restraints upon its alienation and unless the termination of the trust is so designed as to bring the accumulation within the terms of the statute, the accumulation is void.

Such an objection, however, is not presented where the discretion given the trustee is a mere discretion as to the time and manner of application of the income.[31] That is, where the intent and direction of the settlor is that the cestui receive the entire income from the trust with the trustee determining how and when the cestui will spend the income. In this case the income vests immediately in the cestui and at any moment can be applied to his use. The sole restraint imposed rests in the discretion of the trustee whose will is substituted for that of the cestui's. There is no restraint imposed upon the expenditure of the income.

Technically there is no accumulation where the trustee has a mere discretion as to the method of disposition. The entire income is disposed of by the trust instrument and no part can be added to the corpus. Nor are the persons presumptively entitled to the next eventual estate entitled to any portion of the income.[32] Where the cestui dies before the entire income has been applied to his use the sums remaining in the hands of the trustee pass to the cestui's estate. Any amount may be retained by the trustee subject only to the control of the court in instances of abuse of discretion. Neither the amount nor the length of time are important considerations in determining the power of the trustee to withhold a portion of the income. The sole question to be considered in cases where such action on the part of the trustee is questioned is the intent of the testator or settlor. If his intention was to give the cestui the entire income subject to the discretion of the trustee as to the time and manner of disposition of the income there can be no question of the validity of an accumulation since the trust in such cases neither expressly nor impliedly provides for an accumulation.[33]

In *Hill v. Guaranty Trust Company*[34] the fact that virtually the entire income of a trust had for many years remained in the hands of the trustee who had been able to expend only a limited amount of the income due to the incarceration of the cestui, first in a prison and then in an insane asylum, was held of no importance since the income as received vested in the cestui and only the time and manner of dis-

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[31] Bloodgood v. Lewis, 209 N. Y. 95, 102 N. E. 610 (1913), *reversing* 146 App. Div. 86, 130 N. Y. Supp. 621 (1st Dep't 1911); Hill v. Guaranty Trust Co., 163 App. Div. 374, 148 N. Y. Supp. 601 (1st Dep't 1914); Hendricks v. Hendricks, 3 App. Div. 604, 38 N. Y. Supp. 402 (1st Dep't 1896).

[32] Hill v. Guaranty Trust Co., 163 App. Div. 374, 148 N. Y. Supp. 601 (1st Dep't 1914).

[33] Curtis v. Curtis, 184 App. Div. 274, 171 N. Y. Supp. 510 (1st Dep't 1918); Matter of Bavier. No. 1, 164 App. Div. 358, 149 N. Y. Supp. 728 (1st Dep't 1914) *semble;* Hendricks v. Hendricks, 3 App. Div. 604, 38 N. Y. Supp. 402 (1st Dep't 1896).

[34] 163 App. Div. 374, 148 N. Y. Supp. 601 (1st Dep't 1914).

position were left to the trustee. The entire sum retained by the trustees passed to the estate of the cestui and the remainderman had no interest in any of these sums.

The courts have made great efforts to give effect to the primary intent of the settlor and in most cases have determined that the only discretion given was as to time and manner of disposition. In *Matter of Hoyt*[35] the testator created a trust empowering the trustees to apply the entire income to the use of his daughter but also empowering them to accumulate any income, in their discretion, not needed by the daughter and to capitalize such amounts accumulated. The direction to accumulate was held void and stricken from the will. The court then gave effect to the provisions remaining in the will and held the daughter entitled to the entire income, laying down the rule that ". . . where the direction for an accumulation is void, and there is some other and legal disposition of the rents and profits, the statute does not apply; . . . in such case the direction for accumulation should be eliminated from the will."[36]

Similarly in *Curtis v. Curtis*[37] where the settlor lodged discretion in the trustees and provided that on the death of the cestui the remainder and all sums *accumulated* by the trustees should pass to the remainderman named, the courts held that there was no intention to accumulate. The entire income as received passed to the cestui and the only discretion given the trustees was as to time and manner. The use of the word *accumulation* was merely an erroneous choice of words by the settlor in an effort to designate the funds which might remain in the hands of the trustees upon the death of the cestui. Since the income as earned became the property of the cestui during her life the effort made by the settlor to dispose of such amounts received upon the death of the cestui was given no effect.[38] It was no longer his property to dispose of.

It is clear from these decisions that where the courts initially construe the discretion lodged in the trustees as a discretion as to time and manner an attempt by the settlor also to provide for an accumulation of a portion of the income will be stricken from the will and effect given solely to the primary intention of the settlor. Since the court determines first that the entire income is given the cestui the direction disposing of any remaining portion is mere surplusage. The settlor makes a gift of such income to the cestui and cannot, by a further provision in the will, control the disposition upon the death of the cestui of such income as was already earned.

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[35] Matter of Hoyt, 116 App. Div. 217, 101 N. Y. Supp. 557 (1st Dep't 1906).

[36] *Accord,* Hawthorne v. Smith, 273 N. Y. 291, 7 N. E. 2d 139 (1937); Morris v. Morris, 272 N. Y. 110, 5 N. E. 2d 56 (1936); *see* Cochrane v. Schell, 140 N. Y. 516, 35 N. E. 971 (1894).

[37] 184 App. Div. 274, 171 N. Y. Supp. 510 (1st Dep't 1918).

[38] *Cf.* Hawthorne v. Smith, 273 N. Y. 291, 7 N. E. 2d 139 (1937).

While these latter cases present situations where income from a trust can be validly retained by the trustee for long periods of time, the general statutory prohibitions against accumulations remain in full vigor. The policy behind the statutes must always be considered. Whether an annuity be specified or the amount be discretionary, the trustee will be prohibited from tying up income either by way of capitalization or by the creation of reserve funds. The fact that the accumulations arise incident to the administration of the trust and are in no way connected with the main purpose of the trust will not save them from the stigma of illegality. The language of the statute is broad and will be broadly construed by the courts to give full effect to the statutory policy.

GEORGE F. MASON, JR.

NEW YORK CIVIL PRACTICE ACT; SECTION 235, 1946 VERSION —DOES IT ENLARGE COURT'S JURISDICTION?

The concept of jurisdiction is an inherent part of the judicial process. One view that might be taken of jurisdiction as existent in American jurisprudence is that it is a limitation upon the power of the court, imposed by the individual. As the residuary of all power, he guaranteed to himself reasonable notice of complaint and opportunity to defend, and required that the summoning judicial tribunal should have authoritative power over the person of a defendant, or over the property or *res* toward which the litigation is directed. Such guarantee is perpetuated by the due process requirement in the Federal Constitution.[1]

Justice Holmes, speaking in *McDonald v. Mabee*,[2] notes that the "foundation of jurisdiction is physical power."[3] Violent body arrest, however, is rarely resorted to today for the acquisition of jurisdiction over the person of the defendant. It is sufficient for the acquisition of jurisdiction that the defendant is within the physical borders of the state when served.

But there is a more refined power that exists in a political sovereignty over its citizens, residents and domiciliaries. It is a power that survives a temporary inability to reduce a defendant to bodily custody. It is a power in the state, and a duty in the person, explicable and justifiable in view of the privileges afforded the person by virtue of his status in the state. Upon satisfactory notice of suit,

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[1] U. S. CONST. AMENDS. V, XIV.
[2] 243 U. S. 90, 61 L. ed. 608 (1917).
[3] *Id.* at 91.