UNIFORM PRINCIPAL AND INCOME ACT, § 5: CONSTITUTIONALITY OF ITS RETROACTIVE APPLICATION

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I. INTRODUCTION

The allocation of stock dividends received by a trustee to either income or corpus has been a recurring problem perplexing the courts for many years. The competing principles, designated as the Pennsylvania,[1] Massachusetts,[2] and Kentucky[3] rules have each gained judicial recognition,[4] but not all problems created by the declaration of stock dividends have been solved.[5]

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1. See Jones Estate, 377 Pa. 473, 105 A.2d 353 (1954); Earp's Appeal, 28 Pa. 368 (1857). See also 3 Scott, Trusts § 236.3 (2d ed. 1956).

2. See Minot v. Paine, 99 Mass. 101 (1868). See also 3 Scott, op. cit. supra note 1.

3. See Laurent v. Randolf, 306 Ky. 134, 206 S.W.2d 480 (1947) (liquidation dividend of corporation belonged to life tenant). The Kentucky rule had little support and is of no prominence at the present time.

4. The following cases illustrate the Pennsylvania rule: In the Matter of Estate of Duffill, 180 Cal. 748, 183 Pac. 337 (1919); Estate of Heard, 107 Cal. App. 2d 225, 236 P.2d 810 (1951); Kalbach v. Clark, 133 Iowa 215, 110 N.W. 599 (1907); Northern Central Dividend Cases, 126 Md. 16, 94 Atl. 338 (1915); Goodwin v. McGaughy, 108 Minn. 248, 122 N.W. 6 (1909); Simpson v. Millsaps, 80 Miss. 239, 31 So. 912 (1902); Day v. Faulks, 79 N.J. Eq. 66, 81 Atl. 354 (Ch. 1911), aff'd, 81 N.J. Eq. 173, 88 Atl. 384 (Ct. Err. & App. 1912); In the Matter of Osborne, 209 N.Y. 450, 103 N.E. 723 (1913); Pritchett v. Nashville Trust Co., 96 Tenn. 472, 36 S.W. 1064 (1896); In re Heaton's Estate, 89 Vt. 550, 96 Atl. 21 (1915); Will of Jenkins, 199 Wis. 131, 225 N.W. 733 (1929). The following cases illustrate the Massachusetts rule: American Sec. & Trust Co. v. Frost, 117 F.2d 283 (D.C. Cir. 1940), cert. denied, 312 U.S. 707 (1941); First Nat'l Bank of Tuskaloosa v. Hill, 241 Ala. 606, 4 So. 2d 170 (1941); Citizens & So. Nat'l Bank v. Fleming, 181 Ga. 116, 181 S.E. 768 (1935); Burns v. Hines, 298 Ill. App. 563, 19 N.E.2d 382 (1939); Powell v. Madison Safe Deposit & Trust Co., 208 Ind. 432, 196 N.E. 324 (1935); Thatcher v. Thatcher, 117 Me. 331, 104 Atl. 515 (1918); In re Joy's Estate, 247 Mich. 418, 225 N.W. 878 (1929); Hayes v. St. Louis Union Trust Co., 317 Mo. 1028, 298 S.W. 91 (1927); United States Trust Co. v. Cowin, 121 Neb. 427, 237 N.W. 284 (1931); Lamb v. Lehmann, 110 Ohio St. 59, 143 N.E. 276 (1924); Stipe v. First Nat'l Bank, 208 Ore. 251, 301 P.2d 175 (1956); Rhode Island Hosp. Trust Co. v. Tucker, 51 R.I. 507, 155 Atl. 661 (1931); Kirby v. Western Sur. Co., 68 S.D. 612, 5 N.W.2d 405 (1942); Bergin v. Bergin, 315 S.W.2d 943 (Tex. 1958); Kaufman v. Charlottesville Woolen Mills, 93 Va. 673, 25 S.E. 1003 (1896); Security Trust Co. v. Rammelsburg, 82 W. Va. 701, 97 S.E. 122 (1918).

The Pennsylvania rule would allocate the dividends according to the time when the income beneficiary's interest was created and the time when the earnings were accumulated. Stock dividends representing earnings accumulated prior to the creation of the life interest would belong wholly to corpus; those representing earnings accumulated subsequent to the creation of the life interest would belong to income; those representing earnings accumulated during both periods of time would be apportioned between corpus and income.

Under the Massachusetts rule, all stock dividends would be deemed to belong to corpus. This rule was ultimately incorporated into the Uniform Principal and Income Act,[6] which has been widely adopted,[7] and which has been useful in doing away with almost impossible accounting tasks inherent in the Pennsylvania doctrine. It was promulgated to curb expensive and multitudinous calculations and litigation as regards the trusts to which it can be made applicable. However, the question has arisen concerning the trusts to which it may be applied.

Many trusts in existence today, which include corporate stock as part or all of the corpus, were created prior to the adoption of the Uniform Act. Corporations whose stock is so held have subsequently declared various types of stock distributions which required judicial classification and allocation.[8] Would it be possible to eliminate the double problem by a retroactive application of a statute allocating such stock distributions?

Two cases have dealt with the constitutional validity of the

5. See Niles, Fosdick, Cunningham & Chaos, Ways Out of Apportionment Dilemma, 98 Trusts & Estates 924 (1959); Comment, 32 N.Y.U.L. Rev. 878 (1957).

6. Uniform Principal and Income Act § 5.

7. Ala. Code Ann. tit. 58, §§ 75-87 (1960); Ariz. Code Ann. §§ 14-1081 to 14-1096 (1956); Colo. Rev. Stat. Ann. §§ 57-4-1 to 57-4-16 (Supp. 1957); Conn. Gen. Stat. Ann. §§ 45-110 to 45-119 (1958); Fla. Stat. Ann. §§ 690.01-690.15 (1944); Kan. Gen. Stat. Ann. §§ 58-901 to 58-913 (Supp. 1959); Ky. Rev. Stat. §§ 386.190-386.340 (1960); La. Rev. Stat. Ann. §§ 9:1792, 9:2091-9:2101 (1950); Md. Ann. Code art. 75B, §§ 1-10 (1957); N.M. Stat. Ann. §§ 33-5-1 to 33-5-17 (Supp. 1959); N.C. Gen. Stat. §§ 37-1 to 37-15 (1950); Okla. Stat. Ann. tit. 60, §§ 175.26-175.36 (1949); Pa. Stat. Ann. tit. 20, §§ 3470.1-3470.15 (Purdon Supp. 1959); Tenn. Code Ann. §§ 35-701 to 35-715 (Supp. 1960); Tex. Rev. Civ. Stat. Ann. art. 7425b-4, 7425b-26 to 7425b-36 (Vernon 1960); Utah Code Ann. §§ 22-3-1 to 22-3-15 (1953); Vt. Stat. Ann. tit. 14, §§ 3301-3313 (1959); Va. Code Ann. §§ 55-253 to 55-268 (1959); W. Va. Code Ann. §§ 3581(6)-3581(22) (1955); Wis. Stat. Ann. § 231.40(1)-(12) (Supp. 1960).

8. For the distinction between a stock dividend and a stock split see, e.g., In the Matter of Fosdick, 4 N.Y.2d 646, 152 N.E.2d 228 (1958) (stock dividend); Cunningham Estate, 395 Pa. 1, 149 A.2d 72 (1959) (stock split, therefore, no apportionment; seemingly a retreat from Crawford Estate, 362 Pa. 458, 67 A.2d 124 [1949] and its holding of nonapplicability of the Uniform Act).

application of the retroactive provision of the Uniform Principal and Income Act, and have reached contrary conclusions. *Crawford Estate*[9] declared unconstitutional the Pennsylvania version of the statute permitting retroactivity on the ground that the life beneficiary's interest was vested and to apply the statutory rule would deprive the beneficiary of his property without due process.[10] Therefore, the Pennsylvania rule, judicially adopted and abrogated by the statute, would still be applicable to trusts in existence prior to the passage of the Act. On the other hand, *Will of Allis*[11] concluded that the life beneficiary did not have such a property right that the legislature or the court could not affect by adopting new rules of allocation. Basically then, the nature of the property right of the income beneficiary will be determinative of its susceptibility to subsequent modification.

II. Retroactive Legislation

Prohibition of retrospective lawmaking is not new. Its development in ancient Greek times, through the Roman law and into the common law system is well documented.[12] Even in the absence of express provision in the United States Constitution, it was early held that legislation affecting prior rights or duties already created was repugnant to the basic jurisprudential system.[13] Justice Story defined a retroactive law as follows:

> Upon principle, every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective; . . . .[14]

The many cases striking down retrospective legislation relied principally upon either the general rule of law,[15] not contained in the federal constitution, or upon some provision of a state constitution if

9. 362 Pa. 458, 67 A.2d 124 (1949). See also Pew Trust, 362 Pa. 468, 67 A.2d 129 (1949).

10 U. S. Const. amend. XIV, § 1.

11. 6 Wis. 2d 1, 94 N.W.2d 226 (1959).

12. See Smead, The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence, 20 Minn. L. Rev. 775 (1936).

13. Inhabitants of Goshen v. Inhabitants of Stonington, 4 Conn. 209 (1822); Benson v. Mayor of N. Y., 10 Barb. 223 (N. Y. 1850). See Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810). See also I Blackstone, Commentaries 46 (1847); Dwarris, Statutes 162 (Potter ed. 1885); Story, Constitution, §§ 1398, 1399 (5th ed. 1891).

14. Society for the Propagation of the Gospel v. Wheeler, 22 Fed. Cas. 756, 767 (No. 13156) (C.C.N.H. 1814).

15. See Scurlock, Retroactive Legislation Affecting Interests in Land 9-18 (1953).

there was one to be applied.[16] However, resort was had to the fourteenth amendment shortly after its adoption and the due process clause supplied the basis of many holdings.[17] The general principle evolved from this clause is that "vested rights may not be impaired." This would promote simple application if the words had a set meaning, but the key terms "vested rights" are not such words.

> One's first impulse on undertaking to discuss retroactive laws and vested rights is to define a vested right. But when it appears, as soon happens, that this is impossible, one decides to fix the attention upon retroactive laws and leave the matter of definition to follow rather than precede the discussion, assuming for the purpose that a right is vested when it is immune to destruction, and that it is not vested when it is liable to destruction, by retroactive legislation.[18]

Put another way, "vested rights" is a label affixed after analysis of the facts in controversy and forms part of the conclusion reached rather than being the means of determination. The controversy will concern specifically the nature of the interest affected by the legislation, for that classification will be determinative of the constitutional question. The lack of uniformity of conclusion regarding the nature of the interest illustrates the difficulties of application of the term "vested rights" and, as will be seen, each new factual situation can raise again the same problems previously handled in other settings. Retrospective legislation has affected other types of property interests but the results have not always been consistent. To round out the present discussion, there follows a brief examination of these other interests and then a more detailed exposition of problems inherent in trust administration.

III. Particular Property Interests

Acquisition of Title by Adverse Possession

Once the statutory period has run and the other requisites for adverse possession are met, it has been held unconstitutional for the legislature to lengthen the period of limitations so as to permit a prior owner to eject the one in possession.[19] This is well settled although the typical statute does not in words convey or vest title, but merely bars the owner's action. However, the courts have found

16. Ibid.

17. "At present the due process clause of the Fourteenth Amendment is the favored resort against legislative excesses and has greatly overshadowed the Bill of Rights of the state constitutions as a protection against deprivation of property." Scurlock, op. cit. supra note 15, at 12.

18. Smith, Retroactive Laws and Vested Rights, 5 Texas L. Rev. 231 (1927).

19. Stewart v. Keyes, 295 U.S. 403 (1934); Campbell v. Holt, 115 U.S. 620 (1885).

the loss of title to be part and parcel of the policy of the statute and when all statutory requirements are met, title vests in the one holding adversely.

Interestingly enough, limitations statutes involving non-property actions are not subject to the same prohibition.[20] Apparently, there is no vested right in a defense to a contract or tort action based on the running of the statute so that a statute lengthening the time within which suit may be brought, made applicable to existing but previously barred claims, will be upheld. There is, however, some contrary authority applying the due process clause to these situations, which would prevent retroactive application of the statutes from prohibiting the assertion of an existing defense.[21]

It would not be accurate to say that there is a vested interest in the existing statute of limitations. Prior to the running of the limitations period, the legislature may take any action concerning the statute regardless of the expectations of interested parties.[22] The period may be shortened, but not so as immediately to bar a claim of the owner.[23] He would have to be given a reasonable period within which to assert his right not yet barred.

Therefore, as regards title acquired by adverse possession, once the statutory conditions have been met, the rights of the parties have become fixed and the possessor has a present interest. Until the claim is barred, however, the possessor has an expectancy subject to modification by the legislature. Moreover, the owner's present interest may be changed contrary to his expectations as long as he is given an opportunity to assert his claim. The policy of the legislature is met in that some certainty will be given to land titles and property will not be held inalienable too long (as expressed by statute); on the other hand, modifications and changes to meet new policy considerations as appear appropriate to the lawmaking body will not be hampered by unnecessary limitations and restrictions.

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20. Chase Sec. Corp. v. Donaldson, 325 U.S. 304 (1945); Campbell v. Holt, supra note 19; Mulligan v. Hilton, 305 Mass. 5, 24 N.E.2d 676 (1940); Gallewski v. H. Hentz & Co., 301 N.Y. 164, 93 N.E.2d 620 (1950).

21. See, e.g., Board of Educ. v. Blodgett, 155 Ill. 441, 40 N.E. 1025 (1895); State v. Standard Oil Co., 5 N.J. 281, 74 A.2d 565 (1950); Ireland v. MacKintosh, 22 Utah 296, 61 Pac. 901 (1900).

22. Paragould v. Lawson, 88 Ark. 478, 115 S.W. 379 (1908); Billings v. Hall, 7 Cal. 1 (1857); Cox v. Berry, 13 Ga. 306 (1853); Keith v. Keith, 26 Kan. 26 (1881); Lambert v. Slingerland, 25 Minn. 457 (1879); Cole v. Van Ostrand, 131 Wis. 454, 110 N.W. 884 (1907).

23. Atchafalaya Land Co. v. F. B. Williams Cypress Co., 258 U.S. 190 (1922). See Annots., 49 A.L.R. 1264 (1927), 120 A.L.R. 758 (1939).

Estate Jure Uxoris

Prior to the Married Women's Property Acts,[24] the husband had a life estate in the property of the wife belonging to her at or subsequent to the time of the marriage.[25] The acts, stripping the husband of this estate, created conflicts of opinion regarding the constitutionality of their retrospective operation. Such acts were held unconstitutional when applied to existing marriages and property already acquired by the wife,[26] but properly applicable to property acquired subsequent to the statute.[27]

Curtesy

The estate *jure uxoris* terminated at the death of the wife, but if issue were born alive of the marriage, the husband had an estate of curtesy initiate which became consummate at the death of the wife. The courts have held that the rights incident to the estate of curtesy initiate could not be violated by the Married Women's Acts under the due process clause of the federal and state constitutions.[28] The vested right of the husband, however, did not come into being until marriage, birth of issue, actual seizin of the wife, and her death, so that the absence of any one requirement at the time of the promulgation of the statute made the act applicable as of that date.[29]

There was difference of opinion and result regarding the statutory abolition of curtesy consummate where curtesy initiate had already attached. Some states, such as New Jersey, considered the statutes unconstitutional if applied retroactively.[30] Apparently, the right of the husband was considered vested as of the time of the birth of issue.

Other states give validity to enactments cutting off rights of

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24. See 3 Vernier, American Family Laws 171-85 (1935).

25. 2 Tiffany, Real Property § 484 (3d ed. 1939).

26. See, e.g., Buchanan v. Lee, 69 Ind. 117 (1879); Holmes v. Holmes, 4 Barb. 295 (N.Y. 1848).

27. Conn v. White, 189 Ky. 185, 224 S.W. 764 (1920); Sleight v. Read, 18 Barb. 159 (N.Y. 1854); Taft v. Cannon, 34 Atl. 148 (R.I. 1896); Alexander v. Alexander, 85 Va. 353, 7 S.E. 335 (1888). See Scurlock, Retroactive Legislation Affecting Interests in Land 279 (1953).

28. Junction R.R. v. Harris, 9 Ind. 184 (1857); White v. White, 5 Barb. 474 (N.Y. 1849). See Scurlock, op. cit. supra note 27, at 280-81.

29. Allen v. Hanks, 136 U.S. 300 (1889).

30. E.g., Jackson v. Jackson, 144 Ill. 274, 33 N.E. 51 (1893); Mitchell v. Violett, 104 Ky. 77, 47 S.W. 195 (1898); Anastasia v. Anastasia, 138 N.J. Eq. 260, 47 A.2d 879 (Ch. 1946); Walker v. Bennett, 107 N.J. Eq. 151, 152 Atl. 9 (Ch. 1930).

curtesy consummate on the theory that the Married Women's Acts have so affected curtesy initiate as to leave only a mere expectancy similar to dower.[31]

Dower

The only protection accorded dower has been after the husband's death, at which time the right is vested and may not be divested statutorily.[32] However, inchoate dower has been susceptible to partial or total destruction, even as regards property acquired by the husband prior to the enactment.[33] Why distinctions were made between the husband's interests (estate *jure uxoris* and curtesy) and those of the wife is not clear.

> But in comparison with the husband, the wife has indeed been treated shabbily by the courts. Few courts have felt the necessity for examining into the reason why curtesy and the estate *jure uxoris* were frequently deemed to be "vested rights" while dower was, and is, treated as a mere encumbrance on the husband's power of alienation whenever the wife seeks to assert constitutional rights in her marital estate.[34]

Statutory Marital Rights

With the abolition of curtesy and dower, a statutory distributive share was decreed to each spouse.[35] This interest in property belonging to one spouse at the other's death may be changed prior to death by the legislature; "it is not probable that the courts would recognize any kind of vested interest in the continued existence of such statute."[36] However, if the interest attaches to any property belonging to the deceased spouse during the marriage, a present

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31. McNeer v. McNeer, 142 Ill. 388, 32 N.E. 681 (1892); Hill v. Chambers, 30 Mich. 422 (1874); Duncan v. Duncan, 324 Mo. 167, 23 S.W.2d 91 (1929); Moninger v. Ritner, 104 Pa. 298 (1883); Day v. Burgess, 139 Tenn. 559, 202 S.W. 911 (1918).

32. Swartz v. Andrews, 137 Iowa 261, 114 N.W. 888 (1908); McAllister v. Dexter & P. R.R., 106 Me. 371, 76 Atl. 891 (1910); Talbot v. Talbot, 14 R.I. 57 (1882).

33. See Randall v. Krieger, 90 U.S. (23 Wall.) 137 (1874); Fletcher v. Felker, 97 F. Supp. 755 (W.D. Ark. 1951); Boyd v. Harrison, 36 Ala. 533 (1860); Adams v. Adams, 147 Fla. 267, 2 So. 2d 855 (1941); Steinhagen v. Trull, 320 Ill. 382, 151 N.E. 250 (1926); May v. Fletcher, 40 Ind. 575 (1872); Sturdevant v. Norris, 30 Iowa 65 (1870); Buffington v. Grosvenor, 46 Kan. 730, 27 Pac. 137 (1891); Magee v. Young, 40 Miss. 164 (1866); In re Lawrence, 1 Redf. Surr. 310 (N.Y. 1848); Ruby v. Ruby, 112 W. Va. 62, 163 S.E. 717 (1932); Bennett v. Harris, 51 Wis. 251, 8 N.W. 222 (1881); cf. Russell v. Rumsey, 35 Ill. 362 (1864); In re Alexander, 53 N.J. Eq. 96, 30 Atl. 817 (Ch. 1894).

34. Scurlock, Retroactive Legislation Affecting Interests in Land 293 (1953).

35. See 2 Powell, Real Property §§ 217, 218 (1950).

36. Scurlock, op. cit. supra note 34, at 296.

interest is created. There is no power of disposition over it, but the marital right may effectively restrain its alienation by the owning spouse. The expectancy created is similar to inchoate dower. These interests should be subject to legislative modification before becoming vested, that is, prior to the death of the owning spouse; and the cases indicate that the statutorily created rights are to be treated in the same manner as common law dower, with resultant power in the legislature to change or abolish the interest.[37]

Conclusions

From the foregoing, it is apparent that the doctrine prohibiting the "impairment of vested rights" has received different treatment throughout a wide range of property interests and that even within the same classification, courts may reach different conclusions. Each interest has been separately examined with little or no reference to others closely allied to it. In each case, the conflict involved a clash between a general policy enunciated by the legislature and individual interests in particular property. The resultant efficacy or invalidity given the statute was dependent upon categorization of the right, whether or not vested in the constitutional sense, but as mentioned earlier, this categorization simply reflects the conclusion reached, and not the means used to reach it.

Turning to various problems that can arise in the administration of a trust, it is apparent that retroactive legislation has not only been attempted, but on the whole, it has been held properly enacted.

IV. Trust Administration

The rules regarding allocation properly come within the general area of trust administration. Historically, these rules were developed for administration purposes. The Pennsylvania rule was based on impartiality of treatment between income and corpus beneficiaries, but its complexity caused it to be discarded in favor of the Massachusetts rule which, admittedly, is one of convenience.[38] Just as other rules concerned with trust administration can be changed judicially or statutorily with retroactive application, these allocation rules should likewise be recognized as subject to change without the necessity of inquiry into "vested" or "expectancy" rights.

37. See, e.g., Adams v. Adams, 147 Fla. 267, 2 So. 2d 855 (1941); Hamblin v. Marchant, 104 Kan. 689, 180 Pac. 811 (1919); Griswold v. McGee, 102 Minn. 114, 112 N.W. 1020, aff'd, 102 Minn. 235, 113 N.W. 382 (1907); Lane v. St. Louis Trust Co., 356 Mo. 76, 201 S.W.2d 288 (1947); Scaife v. McKee, 298 Pa. 33, 148 Atl. 37 (1929); Ruby v. Ruby, 112 W. Va. 62, 168 S.E. 717 (1932); cf. O'Kelley v. Williams, 84 N.C. 241 (1881).

38. See Dunham, A Trustee's Dilemma As to Principal and Income, 26 U. Chi. L. Rev. 405, 408 (1959).

A. Rules of Trust Administration Other Than Those of Allocation

Trust Investments

One illustration of an aspect of trust administration subject to change is that of proper or improper investments. If a trustee makes an improper investment which later becomes a proper one, he will not be surcharged if no loss has been incurred in the interim period.[39] If, on the other hand, the investments were proper when made, but subsequently became improper, the trustee is under a duty to dispose of those securities.[40] The statutes relating to legal investments are subject to constant change and serve to regulate the powers of the trustee in his administration of the trust estate as of the effective date of the new law, rather than the law as it existed at the time of the creation of the trust.[41]

Compensation

Another example clearly falling within administration is that of the trustee's compensation. Almost all states have statutes providing for such compensation.[42] Where compensation is fixed by statute, the amount thereof will depend upon the law as it stands at the time compensation is awarded and not at the time of the testator's death.[43]

It is interesting to note that Pennsylvania has held it to be a violation of the fourteenth amendment to apply such a statute retroactively.[44] At least a measure of consistency has been achieved by the similar results reached in this determination and in the *Crawford* case, although in both cases, it is submitted, the court was in error.

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39. Humphries v. Manhattan Savings Bank & Trust Co., 174 Tenn. 17, 122 S.W.2d 446 (1938). See also 3 Scott, Trusts § 230.5 (2d ed. 1956); In the Matter of Crawford, 207 Misc. 145, 136 N.Y.S.2d 716 (Surr. Ct. 1955); Geldmacher v. City of New York, 175 Misc. 788, 25 N.Y.S.2d 380 (N.Y.C. City Ct. 1940).

40. See 3 Scott, Trusts § 231 (2d ed. 1956).

41. Mechanicks Nat'l Bank v. Brady, 100 N.H. 469, 129 A.2d 857 (1957); Fidelity Union Trust Co. v. Price, 11 N.J. 90, 93 A.2d 321 (1952); In the Matter of Jackson, 282 App. Div. 690, 122 N.Y.S.2d 550 (1953); In re Flynn's Estate, 205 Okla. 311, 237 P.2d 903 (1951); Brown Estate, 85 Pa. D.&C. 452 (Orphans' Ct. Del. County. 1953); Goodridge v. National Bank of Commerce 200 Va. 511, 106 S.E.2d 598 (1959); Will of Yates, 259 Wis. 263, 48 N.W.2d 601 (1951).

42. See 3 Scott, Trusts § 242 (2d ed. 1956).

43. In re Donovan's Estate, 266 Mich. 362, 253 N.W. 552 (1934); Phraner v. Stone, 137 N.J. Eq. 284, 44 A.2d 504 (Ch. 1945); Petition of Tuckerman, 60 N.Y. S.2d 734 (Sup. Ct. 1945).

44. Williamson Estate, 368 Pa. 343, 82 A.2d 49 (1951).

Supervision of the Court

The terms of the Oklahoma Trust Act,[45] relating to supervision and control of the court over trust agreements were held applicable to trusts created and in existence prior to the effective date of the statute.[46] It expressly provided coverage to "All other wills and trust agreements . . . in so far as such terms do not impair the obligation of contract or deprive persons of property without due process of law under the Constitution of the State of Oklahoma or the United States of America."[47] Methods of procedure or change of remedy are subject to reasonable legislative action without violating due process concepts.[48] There is no vested right in any manner of procedure so as to deprive the state from adopting, in its judgment, the best mode adaptable to the interests sought to be protected.[49]

Spendthrift Trusts

Although this is not an administration problem, it is interesting to note that there is a conflict regarding the constitutionality of retroactive statutes removing restraints on alienation of the beneficiary's interest under a spendthrift trust. *Brearley School v. Ward*[50] upheld the validity of a statute which permitted a judgment creditor to reach ten percent of the income from a testamentary trust created prior to enactment of the statute. However, in *State v. Caldwell*,[51] and in *Borsch Estate*,[52] statutes were held unconstitutional which permitted voluntary or involuntary alienation of spendthrift trusts created prior to adoption of the statutes. The Pennsylvania court said, *"To permit a termination by agreement or release would be an invasion of the donor's property right."*[53]

As Professor Scott states:

> [I]t is difficult to see how there is anything unconstitutional in giving the beneficiary a privilege which he did not have when the trust was created. No one is deprived of any interest in property. It is difficult to accept the view that the deceased testator who created the trust is deprived of anything.

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45. Okla. Stat. Ann. tit. 60, § 175.53 (1949).

46. Swanson v. Bates, 202 Okla. 128, 211 P.2d 781 (1949).

47. Okla. Stat. Ann. tit. 60, § 175.53 (1949).

48. Swanson v. Bates, 170 F.2d 648 (10th Cir. 1948); Swanson v. Bates, 202 Okla. 128, 211 P.2d 781 (1949).

49. Ibid.

50. 201 N.Y. 358, 94 N.E. 1001 (1911).

51. 181 Tenn. 74, 178 S.W.2d 624 (1944).

52. 362 Pa. 581, 67 A.2d 119 (1949).

53. Id. at 586, 67 A.2d at 121.

> There are other situations in which courts have had no difficulty in applying to trusts statutory provisions enacted after the creation of the trust.[54]

Mortgage Salvage Operations

More analogous, perhaps, to the immediate problem would be those questions of allocation arising under trusts where the res consisted of mortgages in default. The rights of life beneficiary and remainderman conflict where such non-income-producing property is sold by the trustee and he holds the proceeds for distribution. The one case construing a statute[55] allocating the proceeds as to subsequent and *prior* trusts held its retrospective application constitutional.[56] Both the New York court and the Supreme Court of the United States refused to classify the remainderman's interest as "vested," holding that prior law had been in a state of flux and subject to change by either the court or the legislature.

Prior to the statute, it was discretionary with the trustee to order payments to the income beneficiary during the salvage period from surplus income,[57] but there was much hesitancy to act because of the possibility of being surcharged if overpayment was made.[58] As a result, no income was disbursed during this period. The statute sought to correct this situation by allotting up to three percent of the face value of the mortgage to the life beneficiary out of the net income earned during the salvage period, without the threat of surcharge.

As Mr. Justice Jackson stated:

> What appears really to have been taken from the remainderman is his right to question the equity of the rule in his individual circumstances, a right which he had while it was a rule of the court.[59]

Regarding the law of trusts generally, and especially applicable to the instant discussion, is Jackson's specific direction that administration problems must be met by legislation reflecting current conditions, and not be hamstrung by older rules inconsistent with later developments.

> The whole cluster of vexatious problems arising from uses and trusts, mortmain, the rule against perpetuities, the testa-

54. 2 Scott, Trusts 1055 (2d ed. 1956).

55. N.Y. Pers. Prop. Law § 17-c.

56. In the Matter of Estate of West, 289 N.Y. 423, 46 N.E.2d 501 (1943), aff'd sub nom. Demorest v. City Bank Farmers Trust Co., 321 U.S. 36 (1944).

57. In the Matter of the Will of Chapal, 269 N.Y. 464, 199 N.E. 762 (1936).

58. In the Matter of Estate of West, 175 Misc. 1044, 26 N.Y.S.2d 622 (Surr. Ct. 1941).

59. Demorest v. City Bank Farmers Trust Co., 321 U.S. 36, 46-47 (1944).

> mentary directions for accumulations or for suspensions of the power of alienation, is one whose history admonishes against unnecessary rigidity. The state may extend the testamentary privilege on terms which permit tying up of property in trust for possibly longer periods. But the state on creation of such a trust does not lose power to devise new and reasonable directions to the trustee to meet new conditions arising during its administration, such as the depression presented to trusts holding mortgages.[60]

B. Rules of Allocation Among Trust Beneficiaries

There may be rules of allocation in existence, judicially or statutorily created, at the time of the creation of the trust interests which rules are subsequently changed for one reason or another. May the new rules be applied to the existing interests? In *Franklin v. Margay Oil Corp.*,[61] a negative conclusion was reached because, as the court held, the new rule of apportionment increasing income and reducing corpus, if applied to existing trusts, would deprive the remaindermen of property without due process of law.

In this area, while the law is far from settled, it has become increasingly important to examine closely the rights of the respective parties. By their nature, trusts are administered over a long period of time during which business conditions and practices are liable to undergo vast changes. Many trusts in existence today were created in the 1920's, at a time when the present day difficulties of distinguishing between principal and income did not exist. The use of the stock dividend and stock split[63] in recent years has focused attention on this problem of definition,[62] but unless the solutions offered can be applied to existing trusts, they will have no effect in assisting trust administration until quite some time in the future.[63]

The previously discussed *Crawford Estate* case is in point.[64] Testator directed that all stock dividends should be part of the corpus of the trust which took effect on his death in 1935. The trustee received stock dividends from three companies, whose stock formed part of the corpus. When the trust was created, the Pennsylvania rule of apportionment was the judicially declared law.[65] In 1945, the state

60. Id. at 48.

61. 194 Okla. 519, 153 P.2d 486 (1944).

62. See, e.g., Matter of Bingham, 7 N.Y.2d 1, 163 N.E.2d 301 (1959); Cunningham Estate, 395 Pa. 1, 149 A.2d 72 (1959).

63. The only trusts to which new rules of apportionment could be applied would be those becoming effective subsequent to the adoption of the new rules. All other trusts, in existence at the time of the promulgation of the apportionment rules, would be subject only to pre-existing law.

64. 362 Pa. 458, 67 A.2d 124 (1949).

65. Nirdlinger's Estate, 290 Pa. 457, 139 Atl. 200 (1927); Earp's Appeal, 28 Pa. 368 (1857).

legislature adopted the Massachusetts rule by promulgating the Uniform Principal and Income Act.[66] The issue before the court was whether the judicial rule created a vested property right in the income beneficiary, in which case the retroactive provision of the Uniform Act[67] would be unconstitutional, or as contended by the remaindermen, the Pennsylvania rule gave the life tenant a contingent, inchoate right, a mere expectancy subject to legislative modification. The court held that the life tenant's interest was vested.

> A gift of an equitable life estate in *"income"* is a grant of *a vested property interest.* The Leglislature may not thereafter qualify or extinguish it. Where part of the trust corpus consisted of corporate stock, this Court possessed the power, in the absence of then existing Legislative enactment, to *define and measure* what constituted or was included in the term "income." In so defining and measuring such "income," we decided what cash or property passed to the life tenant and at what time. Such "income" thus defined became a *vested* property interest.[68]

As for the argument that there is no vested right in a rule of law, the court concluded that:

> This is true, *except where such rule of law has established a vested property interest.* Where a decision of the Supreme Court of Pennsylvania declares an interest to be vested, no retroactive statutory enactment can modify or extinguish it.[69]

Because the stock dividends constituted income, the settlor's direction awarding them to corpus was void as violative of the statute against accumulations.[70]

Precisely why the property interest of the life tenant is vested is not made clear. It does not appear to be any more substantial or definite than inchoate dower. There may or may not be declarations of stock dividends by the corporations during the existence of the life tenancy and the very presence of income available for distribution is purely speculative. Whether or not any rule of apportionment has greater merit than another is irrelevant, except that the policy declared by the legislature should prevail where it does not take away property belonging to one rightfully entitled thereto. It cannot and should not be said that there is a right to this income before distribution which is not subject to change by supervening, overriding policy considerations. The policy making determination is for the court or legislature. By the same token, if the court itself decided

66. Pa. Stat. Ann. tit. 20, §§ 3470.1-3470.15 (Purdon Supp. 1959).

67. Pa. Stat. Ann. tit. 20, §§ 3471-3485, repealed by Pa. Stat. Ann. tit. 20 §§ 3470.1-3470.15 (Purdon Supp. 1959).

68. Crawford Estate, 362 Pa. 458, 463, 67 A.2d 124, 127 (1949).

69. Id. at 467, 67 A.2d at 129.

70. Pa. Stat. Ann. tit. 20, §§ 301.6, 301.7 (Purdon 1950).

to abandon the Pennsylvania rule and adopt the Massachusetts rule, in the absence of statute, it too could and should be applied to existing trusts. In *Farmers Bank & Capital Trust Co. v. Hulette,*[71] it was argued that the entire cash amount payable in a corporate liquidation should go to the life tenant, as had been previously decreed by the Kentucky Court of Appeals.[72] A subsequent case,[73] however, adopted the Massachusetts rule regarding stock dividends and awarded them to the remaindermen. At the time of testatrix' death, Kentucky followed the rule awarding to the life tenant cash distributions resulting from liquidation.

> This rule was clearly wrong, and we believe the life tenants' counsel in this case recognizes that it was wrong, at least to the extent that it gave all of the liquidating distribution to the life tenant. It must be borne in mind that we are interpreting the rights of parties as of today. Their rights must be governed by what we consider as current sound principles of law. In the absence of any provisions in the will which could lead to a different interpretation, we must presume the testatrix intended any legal difficulties of construction arising under her will to be solved according to the prevailing legal principles applicable to changed conditions.[74]

The court continued, on this vital point:

> It is a general principle that the overruling of a former decision is retrospective in operation. . . . [W]e are confronted with a question of construction of the will which arose only upon the dissolution of the corporation. We are asked to construe the word "income" as it related to the acts of the corporation in 1954. To say that the lifeless hand of . . . [testatrix] should bind us to a legal concept of "income", as it existed in her lifetime, in other lawsuits is asking too much. The function of courts in seeking justice in the light of changing times and concepts would largely be stultified if the legal effect of words used in a will in one generation should create a vested right in that construction with respect to other wills and other parties.[75]

The same reasoning should apply with equal vigor to a change statutorily created. It is the concept embodied within the word "income" which gives rise to the present and past controversies. This concept is one with which both courts and legislatures may deal in the interests of formulating sound and fair principles of law.

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71. 293 S.W.2d 458 (Ky. 1956).

72. Laurent v. Randolph, 306 Ky. 134, 206 S.W.2d 480 (1947).

73. Bowles v. Stilley's Ex'r, 267 S.W.2d 707 (Ky. Ct. App. 1954).

74. Farmers Bank & Capital Trust Co. v. Hulette, 293 S.W.2d 458, 462 (Ky. 1956).

75. Id. at 462-63.

The use of the word in an instrument may have a completely different meaning and application when interpreted in later years because of changed conditions. The changes may be social or economic in nature; they may spring from policy considerations embodied within legislative enactments or from the business world evidenced by generally accepted practices of corporate entities. If the changing concepts of such a matter as income is or could be contemplated by a settlor or testator, with all of its ramifications, he can be specific in the declaration of his intention and his wishes will be given effect. In the absence of such particularity, it is necessary for judicial or statutory interpretation to govern, and this should be done in the light of conditions existing at the later period of time. Whether or not stock dividends, liquidation dividends, or stock splits would arise in the future in connection with corporations whose stock forms part of the corpus of a trust, probably was never considered by the settlor; if it was so considered, he could have made his desires known with the use of specific, directive language. Where there is no expression of intent, and the matter is left to judicial or legislative control, it is difficult to see where or how any vested property right is created in favor of life tenants or remaindermen in property not in existence and not even contemplated. The most recent case raising the same issue is *Will of Allis*,[76] decided by the Supreme Court of Wisconsin, wherein the trustee petitioned for instructions for the allocation, either to principal or income, of a stock dividend the trustee had received.

Wisconsin had adopted the Uniform Principal and Income Act[77] which purported to apply to trusts in existence at the date of its passage[78] and, as in *Crawford Estate*,[79] the constitutional question of retroactivity was faced squarely by the court.

In 1911, the Wisconsin court accepted the Pennsylvania rule of allocation[80] and this had been followed during the ensuing years in a number of cases.[81] Finding that both the court itself and the legislature could effectively change the rule and apply the change to existing trusts, the court concluded that:

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76. 6 Wis. 2d 1, 94 N.W.2d 226 (1959).

77. Wis. Stat. Ann. § 231.40(1)-(12) (Supp. 1960).

78. Wis. Stat. Ann. § 231.40(12) (Supp. 1960).

79. 362 Pa. 458, 67 A.2d 124 (1949).

80. Soehnlein v. Soehnlein, 146 Wis. 330, 131 N.W. 739 (1911).

81. E.g., Estate of Boyle, 235 Wis. 591, 294 N.W. 29 (1940); Estate of Paddock, 213 Wis. 409, 251 N.W. 229 (1933); Estate of Matthews, 210 Wis. 109, 245 N.W. 122 (1933); Will of Jenkins, 199 Wis. 131, 225 N.W. 733 (1929); Estate of Merrill, 193 Wis. 84, 213 N.W. 641 (1927); Miller v. Payne, 150 Wis. 354, 136 N.W. 811 (1912).

> It is fundamental that the life beneficiary possessed no vested property right in the earnings of a corporation, shares of whose stock constituted part of the portfolio of investments of the trust at the time of the enactment of the Wisconsin Uniform Principal and Income Act, prior to a declaration of a dividend by the board of directors payable therefrom. . . . We consider it to be equally clear that she also has no vested property right in the rule with respect to the allocation of corporate stock dividends, which had been established by the court decision and was in effect at the time of the death of the testatrix. Therefore, it is our considered judgment that the legislature could change such rule with respect to any stock dividends subsequently declared without violating the due process clause of the Fourteenth amendment.[82]

In recent years, trustees and courts have been confronted with complex corporate activities as they have affected trust administration.[83] The trusts involved became effective many years before the adoption of the Uniform Act, which did not include, in many states, a provision giving it retroactive effect. However, in each of these cases, the trust corpus was made up of stock of corporations that later engaged various methods of stock distribution.

> As long ago as 1915 it was said that the questions as to whether stock dividends are to be treated as income . . . or as corpus . . . "has perplexed the courts of both this country and England for a century". . . . The passage of time has not served to eliminate or lessen the difficulties.[84]

In New York, at one time or another, all three rules were in effect.[85] The Restatement of Trusts originally embodied the Massachusetts rule.[86] The rule of apportionment has been in such a state of flux

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82. Will of Allis, 6 Wis. 2d 1, 11-12, 94 N.W. 2d 226, 232 (1959).

83. See, e.g., Matter of Fosdick, 4 N.Y.2d 646, 152 N.E.2d 228, 176 N.Y.S.2d 976 (1958); Matter of Bingham, 7 N.Y.2d 1, 163 N.E. 2d 301 (1959); Cunningham Estate, 395 Pa. 1, 149 A.2d 72 (1959); Will of Allis, 6 Wis. 2d 1, 94 N.W.2d 226 (1959). See also Cohan, Pandora's Box Revisited, 98 Trusts & Estates 655 (1959); Cohan, Observations on Cunningham and Harvey: Apportionments Revisited, 140 The Legal Intelligencer 1 (Jan. 23, 1959); Niles, Fosdick, Cunningham & Chaos, Ways Out of Apportionment Dilemma, 98 Trusts & Estates 924 (1959); Address by Tenney, Stock Splits—The Trustee's Dilemma, Meeting of Banking Law Section, New York State Bar Association, January 29, 1959.

84. Matter of Bingham, 7 N.Y.2d 1, 14, 163 N.E.2d, 301, 307 (1959) (dissenting opinion).

85. Before 1913, the Kentucky rule controlled: Matter of Kernochan, 104 N.Y. 618, 11 N.E. 149 (1887). In 1913, the Pennsylvania rule was adopted: Matter of Osborne, 209 N.Y. 450, 103 N.E. 723 (1913). In 1926, the Massachusetts rule was adopted by the legislature: N.Y. Pers. Prop. Law § 17-a.

86. Restatement, Trusts § 236(b) (1935). However the 1948 supplement contains a revision of § 236(b) in view of the trend of the courts and,

throughout this country,[87] that it would even be possible to conclude on this basis alone, that the beneficiary's rights are not vested. As was mentioned earlier, whether or not a property right is vested will determine the constitutionality of legislation affecting it; yet, it is the *final* conclusion itself from which will spring the classification of the property right. Assuming that there are grounds for declaring the rights to undeclared income as contingent or expectant rather than as vested, the first and foremost inquiry is whether there is a need to apply the new law to the existing relationship.

The main purpose behind the adoption of the Uniform Act and its provisions governing apportionment of stock dividends, was to ease and make more efficient trust administration.[88] Needless litigation certainly subserves the settlor's desire in the distribution of his property. It is an unfortunate waste for any part of his estate to be so diverted, especially to clarify situations not within the range of his or his draftsman's contemplation. True, the Pennsylvania rule gave a definition of "income" as used in trust instruments, but in the eyes of the legislatures (and courts) this definition did not serve the purpose for which it was developed. Certainty of meaning was apparent, but vexatious litigation was required for its application. In New York, within the past two or three years, many trusts were before the courts just on the issue of apportionment[89] although the definition of "income" had been settled at an early date.[90]

With these problems in mind, and to end the controversies previously required to preserve the estate, the Uniform Act was promulgated. Adopting the Massachusetts rule of apportionment, it gave certainty of meaning along with ease of application. It may be that not all will agree this rule is just and proper as compared with the others because it is more arbitrary and less in accord with strict accounting principles. However, the benefits derived from its very arbitrariness, coupled with the always open opportunity for the settlor expressly

reversing itself, the American Law Institute embodied therein the Massachusetts rule. Restatement, Trusts § 236(b) (Supp. 1948).

87. As previously noted, one rule of apportionment was adopted in Kentucky which bore the name of that state and was then abrogated in favor of the Massachusetts rule. The same development occurred in Pennsylvania. Wisconsin and New York also changed rules. See also notes 6 and 7, supra.

88. Uniform Principal and Income Act, Commissioners' Prefatory Note, 9B U.L.A. 366 (1957).

89. See Matter of Bingham, 7 N.Y.2d 1, 14, 163 N.E.2d 301, 307 (1959); Matter of Fosdick, 4 N.Y.2d 646, 152 N.E.2d 288, 176 N.Y.S.2d 976 (1958); In the Matter of Blake, 14 Misc. 2d 169, 177 N.Y.S.2d 255 (Surr. Ct. 1958); In the Matter of the Will of Lage, 14 Misc. 2d 1043, 180 N.Y.S.2d 791 (Surr. Ct. 1958); In re Estate of Leask, 15 Misc. 2d 545, 182 N.Y.S.2d 510 (Surr. Ct. 1958); In re Tealdi's Trust, 16 Misc. 2d 685, 182 N.Y.S.2d 68 (Sup. Ct. 1958).

90. See notes 80, 81 and 85 supra.

to state otherwise, surely override the waste, complications and almost impossible results inherent in the other rules, especially when dealing with clouded corporate maneuvers.

As previously pointed out, it may very well be considered, through the many changes brought about by the courts and legislatures, that the rule of apportionment in any given jurisdiction has been in a constant state of flux. Therefore, there was no rule so firmly established that could create vested rights in property[91] and there could be no vested right in the rule of law.[92]

The beneficiary's interest should not be held to have become so firmly entrenched as to present constitutional problems until such time as there is, in fact, *income*. Until the corporation has declared a distribution of income to its stockholders, there is nothing in existence to support the beneficiary's claim. Up to that time, the courts and legislatures should not be powerless to meet the changed conditions of whatever nature by reevaluating existing legal doctrines. Just as in the cases of inchoate dower as it existed under the common law,[93] or of the present day statutory interest given a spouse,[94] until the conditions are met such as death of one spouse combined with ownership of property, the expectant right remains subject to the whim of the lawmakers. The same should hold true regarding the legal relationship under discussion and, as one of the conditions precedent to the vesting of a property interest is the existence of the subject matter, i.e., income available for distribution, the income beneficiary's right is a mere expectancy until the condition is met. Not only should the Pennsylvania rule be abolished, as all seem to agree,[95] but the better, more practical Uniform Act rule should be permitted retroactive application.

The Uniform Act is presently under consideration for revision with particular emphasis being placed upon its application, which, if it is to have the intended beneficial effect, must be to all trusts, both subsequently and previously created. Section 2(2) of the First Tentative Draft of the Uniform Revised Principal and Income Act provides:

> This Act applies to the administration of all estates and trusts whenever created as to any receipt or expense which occurs after the effective date of this act. . . .

Properly considered as a rule of trust administration, allocation of corporate distributions between income and corpus beneficiaries

91. In the Matter of Estate of West, 289 N.Y. 423, 46 N.E.2d 501 (1943), aff'd sub nom. Demorest v. City Bank Farmers Trust Co., 321 U.S. 36 (1944).
92. Ibid.
93. See text at notes 32-34 supra.
94. See text at notes 35-37 supra.
95. See, e.g., notes 6 and 7 supra.

should be made in accordance with the statute existing at the time the distribution is made. To refer back to the law as it existed when the trust was created, will necessarily make ineffective all attempts to add certainty in administration and to take into account the inter-relationships of other areas of human endeavor with these legal concepts pertaining to trust administration.

V. Conclusion

At the outset, the relationship of the vested rights theory to the due process clause of the constitution was shown to be the focal issue of the present discussion. Yet the end reached in construing a particular statute under this constitutional attack depends only on whether this label should attach. That conclusion in turn seems to center around other concepts, including fairness, practicality and changing conditions. The label itself represents the conclusion and not the reasoning. In the area of apportionment of stock distributions between income and corpus beneficiaries, the elements of fairness, practicality and changing conditions dictate that freedom be given to the lawmaking bodies to promulgate rules applicable to existing trusts. Their efficacy will be found wanting if limited in application to future trusts only, for at that time, other theories of distribution may be more just, due to changes in corporate action. The view reached in *Crawford Estate* is too narrow and unrealistic for proper trust administration, while that of *Will of Allis* best serves the objective needs of all the parties concerned, including that of the courts.

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WASHINGTON UNIVERSITY
LAW QUARTERLY

Member, National Conference of Law Reviews

Volume 1960 December, 1960 Number 4

Edited by the Undergraduates of Washington University School of Law, St. Louis.
Published in February, April, June, and December at
Washington University, St. Louis, Mo.

Subscription Price $4.00; Per Single Copy $1.25. A subscriber desiring to discontinue his subscription should send notice to that effect. In the absence of such notice, the subscription will be continued.