THE TERMINATION OF TRUSTS

ALVIN E. EVANS

A validly created express trust will generally be terminated according to its terms, and, unless there is some intervening policy concerned, it should not be terminated otherwise. Certain difficulties arise, however, first, where some principle or policy in conflict with the intention of the settlor appears, which a court of equity feels so impelling as to warrant a departure from the settlor's intention; secondly, where some rule of law requires the termination of a trust, unless there is an equitable principle involved preventing that result; thirdly, where a trust instrument either fails to indicate any fixed time for the termination of the trust, or where some uncontemplated event happens which affects the rights of individuals who call on a court of equity to determine the policy to be applied under the altered situation.

The English courts believe that a question of far-reaching policy is involved under the first classification in the case of spendthrift trusts, and in the case of absolute gifts to beneficiaries, where possession is denied the beneficiary for some period after the latter has reached his majority,[1] (the denial of which policy is known in this country as the *Claflin* doctrine). A similar question of policy is involved in cases where a settlor settles his own property in trust for his sole benefit, without reserving a power of revocation, and courts are called upon to determine whether such settlement is irrevocable or whether the settlor may withdraw at will from the consequences of his act. The majority of American jurisdictions have sharply parted company with the English courts in at least the first two respects —the spendthrift trust doctrine, and the so-called *Claflin* doctrine. It will be interesting to discover whether there has not been developed in this country a third doctrine somewhat parallel to these two doctrines and in conflict with the English view. It may be raised by the following question: may a settlor create a trust for his own sole benefit which is irrevocable, though he may alienate the equitable interest as under the *Claflin* doctrine, and creditors may reach it?

Under the second classification, certain rules of law may be involved which may terminate a trust regardless of the intention of the settlor, and it is believed that the occurrence of a merger is to be considered under this class; so, too, the case where one person is either trustee or one of several trustees, and, at the

[1] 28 HALSBURY, LAWS OF ENGLAND (1914) 116.

same time, cestui or one of several cestuis. Under the third class of cases it is necessary to consider the so-called tentative trust. There is no common agreement as to the exact time when the trust is created, if at all. If one is created may it be terminated in whole or in part by the settlor's own act? What bearing does the death of a settlor have upon the matter? Again, courts of equity must determine to what extent they should protect contingent interests and whether the legal conclusion involved in the rule against perpetuities, that the possibility of having issue continues as long as life itself, should be followed. Finally, the object of creating a private trust may have been accomplished or may have failed, and that where there has been an express provision made for its termination, or where no such provision has been made. Should it be terminated, and if so should the trustee make an express conveyance? The present paper contemplates a consideration of these various problems.

TRUSTS CREATED FOR SETTLOR'S SOLE BENEFIT

What is the nature of a trust created for the benefit of the settlor alone? It is well settled that his creditors can defeat it,[2] and it makes no difference whether it was intended to be spendthrift or not. When such a trust is created there is usually a provision that if the cestui should die during the continuance of the trust, the property shall be subject to disposal under his will, and, if he leaves no will, then it is to be transferred to those who would take by the statute of intestate succession.

Does such a provision create any interest in possible devisees or legatees, or in heirs or distributees? It clearly creates no interest in beneficiaries under a possible will, because no interest can vest under a will until the testator has died. It has sometimes been thought that heirs or distributees have a contingent interest. Of course the trustee would be obliged to transfer to them if there were no will, since the only other alternative would be for him to keep. Thus, the instrument creating the trust gives such heirs or distributees nothing they would not otherwise have received. But precisely what is the significance of such a provision? "A man cannot by deed *inter vivos* make a gift to his own heirs or next of kin." In *Doctor v. Hughes*[3] the settlor conveyed certain premises to a trustee on trust to pay from the rents a certain sum annually to the settlor for life, and, on his death, to convey the premises to his heirs. The intention to make a gift to one's heirs could not be more strongly shown. Judge Cardozo held that the settlor's two daughters took no

[2] Nolan v. Nolan, 218 Pa. 135, 67 Atl. 52 (1907); Menken v. Brinkley, 94 Tenn. 721, 31 S. W. 92 (1895); Mackason's Appeal, 42 Pa. 330 (1862).

[3] 225 N. Y. 305, 122 N. E. 221 (1919). *Contra:* Gray v. Union Trust Co., 171 Cal. 637, 154 Pac. 306 (1915).

interest thereunder. Their creditors could not levy on any interest therein. Heirs must take by descent. The testator had a reversion, not a remainder, and he did not by the words used convert the reversion into a remainder and give them the remainder. "A man cannot either by a conveyance at common law, by limitation of uses, or by devise, make his right heir a purchaser. . . . . ." Here the settlor merely and superfluously reserved a reversion.[4] This rule has been overlooked in Pennsylvania.[5] A different result may be reached when the word "heirs" is to be interpreted to mean "children."[6] But in *Miller v. Fleming*[7] effect was not given to such intent.

Having discovered that such a settlor-cestui can not protect himself against the claims of creditors, and also that he has created no interest in another, the question still remains: may he revoke at will if no power to revoke is expressly retained, or if the trust is expressly made irrevocable? Does such a transfer to a trustee create a contractual obligation such that the trustee has an interest in compensation to accrue, and may himself prevent a revocation? There is no authority for saying that a trust will be continued for the benefit of the trustee solely, but there is abundant authority for the statement that he alone has no such interest as will prevent a termination of the trust.[8] In several cases the trustee unsuccessfully sought to resist the termination of the trust because of his own interest. In most cases there is a conveyance to the trustee of the trust property with an agreement for compensation for services. Such an agreement would result at most in a unilateral contract, revocable at any time before the services are performed.

Assuming then that no other interest is involved than that of the cestui, may he revoke at will, with cause or without cause, whether the original purpose is accomplished or no? Many of

[4] 1 TIFFANY, REAL PROPERTY (2d ed. 1920) 470; 2 WASHBURN, REAL PROPERTY (Wurts, 6th. ed. 1902) § 1525; Miller v. Fleming, 6 Mackey 397 (D. C. 1888); Alexander v. Kermel, 81 Ky. 345 (1883); Akers v. Clark, 184 Ill. 136, 56 N. E. 296 (1900); Matter of Asch, 75 App. Div. 486, 78 N. Y. Supp. 561 (1st Dept. 1902); Robinson v. Blankinship, 116 Tenn. 394, 92 S. W. 854 (1906); Phelps v. Thompson, 119 Misc. 875, 198 N. Y. Supp. 320 (Sup. Ct. 1922); *cf.* Brown v. Renshaw, 57 Md. 67 (1881); Thompson v. Batts, 168 N. C. 333, 84 S. E. 347 (1915); Loring v. Eliot, 82 Mass. 568 (1860); In re Parsons, 45 Ch. D. 51 (1890); Doe v. Maxey, 12 East 589 (1810); Read v. Erington, Cro. Eliz. 321 (1591).

[5] Ashhurst's Appeal, 77 Pa. 464 (1875).

[6] Locke v. Southwood, 1 Myl. & Cr. 411 (1831); Pibus v. Mitford, 1 Vent. 372 (1686); Whipple v. Fairchild, 139 Mass. 262, 30 N. E. 89 (1885).

[7] *Supra* note 4.

[8] Harrar's Estate, 244 Pa. 542, 91 Atl. 503 (1914); Fidelity Trust Co. v. Gwynn, 206 Ky. 823, 268 S. W. 537 (1925); Armistead v. Hartt, 97 Va. 316, 33 S. E. 616 (1899); Brillhart v. Mish, 99 Md. 447, 58 Atl. 28 (1904); Angle v. Marshall, 55 W. Va. 671, 47 S. E. 882 (1904); Raffel v. Safe Deposit Co., 100 Md. 141, 59 Atl. 702 (1905).

the cases involve the transfer by a single woman of her property in trust for her own benefit, in anticipation of marriage, in order to prevent control of the property by her future husband. If she marries and her husband later dies, she may usually have the trust terminated.[9] This is also the English rule.[10] In Rhode Island, she may have a re-transfer before the death of her husband, since under the statutes the husband could exercise no legal control.[11] But in Pennsylvania, whether the purpose is or is not to protect the property from the control of her future husband, she cannot revoke the trust. It "would afford her the means of working her own ruin." The court will determine whether the continuance of the trust is for her best interest.[12]

In Massachusetts, also, power to revoke has been denied during the life of the husband. It was held that a voluntary settlement could be set aside only on proof of mental incapacity, mistake, fraud or undue influence.[13] Possibly the result in this case could be supported on the theory that an interest vested in possible children of the marriage, but no notice was taken of such possible interests. It appears then, that a revocation may, except in Pennsylvania and Massachusetts, be had under such circumstances. But it might be urged that here the purpose of the trust is really accomplished and that these cases do not directly bear upon the problem of whether a sole cestui may generally revoke without specific grounds other than his desire so to do.

It seems clear that he should be allowed to revoke if he was over-persuaded, and if he signed an irrevocable transfer believing it to be revocable;[14] and if he has no independent advice and the trust was created on the suggestion of the trustee. But if those elements are not present, it has been held in Pennsylvania,[15] and in Massachusetts,[16] that he cannot revoke. In *Neal v. Black*[17] the court said:

---

[9] Dodson v. Ball, 60 Pa. 492 (1869); Raffel v. Safe Deposit Co., *supra* note 8.

[10] Prideaux v. Lonsdale, 1 DeG., J. & S. 433 (1863); Beatson v. Beatson, 12 Sim. 281 (1841); Maber v. Hobbs, 2 Y. & C. Ex. 317 (1836).

[11] Nightingale v. Nightingale, 13 R. I. 113 (1880).

[12] Reese v. Ruth, 13 S. & R. 434 (Pa. 1826); Ashhurst's Appeal, *supra* note 5. But see Russell's Appeal, 75 Pa. 269 (1874).

[13] Sands v. Old Colony, 195 Mass. 575, 81 N. E. 300 (1907).

[14] Aylsworth v. Whitcomb, 12 R. I. 298 (1879); *cf.* Garnsey v. Munday, 24 N. J. Eq. 243 (1873); Smith v. Boyd, 61 N. J. Eq. 175, 47 Atl. 816 (1901); Taylor v. Buttrick, 165 Mass. 547, 43 N. E. 507 (1896); Neisler v. Pearsall, 22 R. I. 367, 48 Atl. 8 (1901); Burton v. Burton's Trustee, 198 Ky. 429, 248 S. W. 1031 (1923); Middleton v. Shelby Co. Trust Co., 21 Ky. L. Rep. 183, 51 S. W. 156 (1899); Stone v. Pratt, 25 Ill. 25 (1860).

[15] Neal v. Black, 177 Pa. 83, 35 Atl. 561 (1896); Reidy v. Small, 154 Pa. 505, 26 Atl. 602 (1893); Willard v. Integrity Trust Co., 273 Pa. 24, 116 Atl. 513 (1922); Lee's Estate, 207 Pa. 218, 56 Atl. 425 (1903).

[16] Sands v. Old Colony Trust Co., *supra* note 13.

"At first blush it would seem that one who was *compos mentis* and *sui juris*, who has voluntarily made a deed for his own benefit, and by it granted no vested right to another, should have the power to control his own affairs and revoke the power whenever he felt disposed to do so."

But it declared this was not the law, and that when a mentally inferior person, though *compos mentis*, and having sufficient mental power to make the conveyance, did convey in trust, he could not revoke it. The conveyance here was made on the advice of the trustee who was to receive a liberal compensation, had unlimited powers, and had given no security. In Massachusetts the same answer was given to the cestui as to a woman who conveyed in contemplation of marriage and wished to revoke after her husband's death. In *Sands v. Old Colony Trust Company* [18] the same court mistakenly held that an interest vested in the heirs, and gave for denying the right to revoke this reason—that the heirs had a contingent interest. It seems likely also that there was a misapplication of the *Claflin* doctrine. In support of its view six prior cases were cited in all of which, however, the result was sound because in fact others than the settlor were interested, and so none was in point. On the other hand Mr. Justice Holmes, when on the Massachusetts bench, held [19] that a similar trust "was a naked one which the beneficiary could terminate as a matter of right." It was also held [20] that, "the trust being created by herself, and she being the cestui que trust, might terminate the trust at her pleasure." It is clear that a resulting trust may be terminated at the will of the cestui, when the cestui has paid the price and taken title in the name of another.[21] In New York, such a sole cestui may revoke under a statutory provision which allows, under proper circumstances, a revocation on the written consent of all concerned.[22] The statute, however, was intended to apply to cases where the settlor was a different person and not the cestui, and the case might very well have been so decided without reference to the statute.

Finally, several courts have held that such a trust may be revoked at will either with or without cause, and whether the original purposes were accomplished or not. These cases are not to be confused with those which follow the *Claflin* doctrine.

---

[17] *Supra* note 15.

[18] *Supra* note 13.

[19] Gannon v. Ruffin, 151 Mass. 204, 24 N. E. 37 (1890); *cf.* Underwood v. Boston Five Cents Bank, 141 Mass. 305, 4 N. E. 822 (1886); Pillow v. Wade, 31 Ark. 678 (1877).

[20] Farrelly v. Ladd, *supra* note 9.

[21] Kronson v. Lipschitz, 68 N. J. Eq. 367, 60 Atl. 819 (1904); *cf.* Schlesinger v. Mallard, 70 Cal. 326, 11 Pac. 728 (1886); Carlisle Co. v. Norris, 200 Ky. 338, 254 S. W. 1044 (1923).

[22] Phelps v. Thompson, *supra* note 4.

It may be that a third person who creates the trust should have the power of postponing the vesting in possession of the cestui's interest. By what right or power shall anyone prevent the settlor-cestui from making the fullest use of what is his own?

In a recent Kentucky case [23] the court held that such a beneficiary had the power to revoke without assigning any reason, and without the consent of the trustee. Earlier contrary decisions were expressly overruled which had required a sufficient reason to be shown before a termination of the trust would be ordered. Likewise, in Maryland, a few years ago, a far-reaching opinion was handed down which may be regarded as going further and giving the rationale of such result.[24] *A*, the life tenant of certain lands, conveyed his interest to *T* in trust for his own benefit because of the condition of his health. Later the remaindermen petitioned for a partition of the land, having procured *A's* consent thereto. The trustee objected, and the trust instrument expressly provided that the trust should be irrevocable. The court held in substance that the legal control of the trustee was equivalent to a *revocable power* to manage and control the property, and, as it was not coupled with an interest, it was revocable at will in spite of the provision against revocability. Precisely the same result was reached in West Virginia about the same time in a case involving essentially the same parties, but different property.[25] That the settlor-sole beneficiary may have a reconveyance is well settled in England.[26]

The same principle was applied in a recent inheritance tax case.[27] *H* had made a will giving his property to certain beneficiaries. On being advised of an increase in the inheritance tax rate, soon to be effective under a statute already passed, he conveyed the property described in the will to a trustee, to be held for the purposes of his will, the interest to be paid to himself for life. In an action by the State Comptroller to recover the inheritance tax upon the property so conveyed in trust, it was held that this settlor-cestui *had full power to recall the title from the trustee at any time inasmuch as no one else than himself was interested in the trust estate.* Since he could cancel the trust at will, the only final disposition he had made was by will, and the property was subject to the inheritance tax. Here, again, the court in effect held that the trustee had merely a revocable power.

---

[23] Fidelity Trust Co. v. Gwynn, *supra* note 8.

[24] Brillhart v. Mish, *supra* note 8.

[25] Angle v. Marshall, *supra* note 8.

[26] Prideaux v. Lonsdale, *supra* note 10; Hastings v. Orde, 11 Sim. 205 (1840); Beatson v. Beatson, *supra* note 10.

[27] In re Miller's Estate, 43 Nev. 12, 177 Pac. 409, 185 Pac. 565 (1919).

THE CLAFLIN DOCTRINE

Where a settlor settles property in trust for his own benefit solely, it is believed that he should have the power to terminate the trust at will, and that the weight of authority is in accord with this view.

Does it make a difference if a third person creates the trust and postpones according to his own notions of propriety, the enjoyment of the corpus? Of course if no trustee were named, no trust would be created, and there would be no valid postponement of the vesting of the legal interest.[28] This raises the problem involved in the so-called *Claflin* doctrine.[29] This doctrine is assumed to be stated with substantial accuracy somewhat as follows: a settlor may institute a trust for the benefit of another person, giving such cestui the entire equitable interest in the trust res, but may postpone the transfer of the legal interest to the beneficiary according to his own notions of propriety, during the life of the beneficiary. A court of equity will not in such case decree the transfer of the legal title contrary to the expressed desire of the settlor.

The English rule seems clearly to be that when a trust is established by a third person for the benefit of a sole cestui, and the enjoyment of the corpus is merely postponed, the cestui if *sui juris* may have the trust terminated.[30] The same rule applies when the beneficiary is a charity,[31] and to the case where the beneficiary is a mere annuitant, for he may have the value of the annuity, since it would be idle to direct the purchase of an annuity which the beneficiary could sell at once.[32] The English courts then deny the power of a settlor to give the entire equitable interest to a cestui, who is *sui juris*, and also to postpone the enjoyment of the corpus in possession. The principle would seem to be the same whether the postponement were for the life of the beneficiary or for a term of years.

A similar rule was followed in Michigan, though the trust was active, inasmuch as there was no means of preventing the bene-

[28] Estate of Ogden, 78 Cal. App. 412, 248 Pac. 680 (1926); see (1926) 36 YALE LAW JOURNAL 284.

[29] Claflin v. Claflin, 149 Mass. 18, 20 N. E. 454 (1889). For the question of this indistructability of trusts and the application of the Rule against Perpetuities, see KALES, FUTURE INTERESTS (2d ed. 1923) §§ 658-661.

[30] Saunders v. Vautier, 4 Beavan 115 (1841); Supple v. Suffolk Sav. Bank, 198 Mass. 393, 84 N. E. 432 (1908); see (1925) 38 HARV. L. REV. 838; (1925) 9 MINN. L. REV. 562.

[31] Wharton v. Masterman [1895] A. C. 186.

[32] Stokes v. Cheek, 28 Beavan 620 (1860); Parker v. Cobe, 208 Mass. 260, 94 N. E. 476 (1911); Matter of Cole, 174 App. Div. 534, 161 N. Y. Supp. 120 (2d Dept. 1916). This result would not obtain where there was a contingent gift over. In re Dempster [1915] 1 Ch. 795; see Scott, *Control of Property by the Dead* (1917) 65 U. PA. L. REV. 527, 632, 647-650.

ficiary from alienating his entire interest, thus defeating the purpose of the settlor.[33] In two early cases, Massachusetts seems to have held the same way. Thus, in *Smith v. Harrington*,[34] the court said:

"The principle is that when property is given. . . . . to certain persons . . . . . to be used for their benefit in such a way that no one else can have an interest in it, they thereby become in effect the absolute owners of it, and may exercise all the rights belonging to that relation."

Again, in *Sears v. Choate*,[35] the trustee was to pay the cestui a sum of money on the latter reaching his majority, then an annuity in varying amounts for life, but there was no gift over of the corpus. The equitable remainder therefore vested in the equitable life tenant by intestate succession. The court held that since the cestui could alienate his interest, and his creditors could reach the property, there was no sufficient reason why the trust should not terminate. In *Black v. Bailey* [36] a similar trust was terminated, the reason assigned being not that given by the English and some American courts, but because the expense of maintenance was proportionately too large. Whether there is one cestui or several would seem to make no difference, provided they are all *sui juris* and consent. In California it has been held that, if the beneficiaries are all *sui juris* and join in the request, the trust should be terminated;[37] as also in Virginia and in Maine.[38] But in these latter cases there was no clearly specified period of postponement.

Suppose the beneficiary for life or for years should acquire the remainder either by purchase or by descent; would that make a difference? There are five situations: (a) the equitable life beneficiary acquires the legal remainder;[39] (b) the equitable life

[33] Bennett v. Chapin, 77 Mich. 526, 43 N. W. 893 (1889); *cf.* also Turnage v. Green, 55 N. C. 63 (1854); Huber v. Donoghue, 49 N. J. Eq. 125, 23 Atl. 495 (1892); Camden Safe Deposit & Trust Co. v. Guerin, 89 N. J. Eq. 556, 105 Atl. 189 (1918); Sanford v. Lackland, 21 Fed. Cas. 358 (C. C. 8th, 1871) (where the beneficiary became bankrupt and the trustee was required to pay the corpus over to his trustee in bankruptcy); Peugnet v. Berthold, 183 Mo. 61, 81 S. W. 874 (1904); Rector v. Dalby, 98 Mo. App. 189, 71 S. W. 1078 (1903).

[34] Smith v. Harrington, 4 Allen 566 (Mass. 1862).

[35] 146 Mass. 395, 15 N. E. 786 (1888).

[36] 142 Ark. 201, 218 S. W. 210 (1920).

[37] Eakle v. Ingram, 142 Cal. 15, 75 Pac. 566 (1904). *Accord:* Carney v. Byron, 19 R. I. 283, 36 Atl. 5 (1895).

[38] Armistead v. Hartt, *supra* note 8; Paine v. Forsaith, 86 Me. 357, 30 Atl. 11 (1894); *cf.* Cleveland v. Hampden Sav. Bank, 182 Mass. 110, 65 N. E. 27 (1902); *cf.* also Brown v. Owsley, 198 Ky. 344, 248 S. W. 889 (1923); see also Reel v. Hansboro Bank, 52 N. D. 182, 201 N. W. 861 (1924).

[39] Ormsby v. Dumesnil, 91 Ky. 601, 16 S. W. 459 (1891); Inches v. Hill, 106 Mass. 575 (1871); Taylor v. Executors of Huber, 13 Ohio St. 288

tenant surrenders to the legal remainderman;[40] (c) the equitable life tenant and the legal remainderman convey to a third person;[41] (d) the trustee is or becomes one of several cestuis or the cestui is or becomes one of several trustees;[42] (e) the equitable life tenant acquires the absolute equitable remainder.[43]

In these situations it is frequently said that the trust will be terminated because there is a merger, but that is clearly not an accurate use of the term. In the first situation, unless the trustee

---

(1862); Simmons v. Northwestern Trust Co., 136 Minn. 357, 162 N. W. 450 (1917); Bowlin v. Citizens Bank & Trust Co., 131 Ark. 97, 198 S. W. 288 (1917); Mendenhall v. Hampton, 151 Pa. 214, 25 Atl. 44 (1892); Langley v. Conlan, 212 Mass. 135, 98 N. E. 1064 (1912); In re Radcliffe [1892] 1 Ch. 227; Wills v. Cooper, 25 N. J. L. 137 (1855); Peugnet v. Berthold, *supra* note 33; Thom v. Thom, 95 Va. 413, 28 S. E. 583 (1897); Smith v. Smith, 70 Mo. App. 448 (1897); Asche v. Asche, 113 N. Y. 232, 21 N. E. 70 (1889); Matter of Barber, 36 Misc. 433, 73 N. Y. Supp. 749 (Sur. 1901); Connolly v. Conolly, 122 App. Div. 492, 107 N. Y. Supp. 185 (2d Dept. 1907); Matter of Bloodgood, 184 App. Div. 798, 172 N. Y. Supp. 509 (3d Dept. 1918); Shower's Estate, 211 Pa. 297, 60 Atl. 789 (1905); Knight's Estate, 235 Pa. 149, 83 Atl. 709 (1912); Jourolman v. Massengill, 86 Tenn. 81, 5 S. W. 719 (1887); Martin v. Pine, 79 Hun 426, 29 N. Y. Supp. 995 (Sup. Ct. 1894); Hadley v. Hadley, 147 Ind. 423, 46 N. E. 823 (1897); Brock v. Conkwright, 179 Ky. 555, 200 S. W. 962 (1918); Barbour v. Weld, 201 Mass. 513, 87 N. E. 909 (1909); Stone Petitioner, 138 Mass. 476 (1885); Culbertson's Appeal, 76 Pa. 145 (1874); Hildreth v. Eliot, 8 Pick. 293 (Mass. 1829); Bowditch v. Andrew, 8 Allen 339 (Mass. 1864); Price's Estate, 260 Pa. 376, 103 Atl. 893 (1918); Sears v. Choate, *supra* note 35; Nicklas v. Parker, 71 N. J. Eq. 777, 61 Atl. 267, 71 Atl. 1135 (1907); Bradstreet v. Kinsella, 76 Mo. 63 (1882); Hayward v. Tacoma Bank, 88 Wash. 542, 153 Pac. 352 (1915).

[40] Stafford's Estate, 258 Pa. 595, 102 Atl. 222 (1917); Brophy v. Lawler, 107 Ill. 284 (1883); Bronson v. Thompson, 77 Conn. 214, 58 Atl. 692 (1904); Wenzel v. Powder, 100 Md. 36, 59 Atl. 194 (1904).

[41] Brooks v. Davis, 82 N. J. Eq. 118, 88 Atl. 178 (1913); Brillhart v. Mish, *supra* note 8; Lee v. Oates, 171 N. C. 717, 88 S. E. 889 (1916); Smith v. Moore, 142 N. C. 277, 55 S. E. 275 (1906); Ives v. Harris, 7 R. I. 413 (1863).

[42] Woodward v. James, 115 N. Y. 346, 22 N. E. 150 (1889); Haendle v. Stewart, 84 App. Div. 274, 82 N. Y. Supp. 823 (1st Dept. 1903); Irving v. Irving, 21 Misc. 743, 47 N. Y. Supp. 1052 (Sup. Ct. 1897); Rogers v. Rogers, 111 N. Y. 228, 18 N. E. 636 (1888); Rankine v. Metzger, 69 App. Div. 264, 74 N. Y. Supp. 649 (1st Dept. 1902); Losey v. Stanley, 147 N. Y. 560, 42 N. E. 8 (1895); Swisher v. Swisher, 157 Iowa 55, 137 N. W. 1076 (1912); Spengler v. Kuhn, 212 Ill. 186, 72 N. E. 214 (1904); Burbach v. Burbach, 217 Ill. 547, 75 N. E. 519 (1905); Hagan v. Varney, 147 Ill. 281, 35 N. E. 219 (1893); Summers v. Higley, 191 Ill. 193, 60 N. E. 969 (1901); People v. Donohue, 70 Hun 317, 24 N. Y. Supp. 437 (Sup. Ct. 1893); Price's Estate, *supra* note 39; Maher v. Maher, 207 Ky. 360, 269 S. W. 287 (1924); Gibson v. Gibson, 280 Mo. 519, 219 S. W. 561 (1920); Miller v. Rosenberger, 144 Mo. 292, 46 S. W. 167 (1898); Story v. Palmer, 46 N. J. Eq. 1, 18 Atl. 363 (1889); In re Dewey's Estate, 45 Utah 98, 143 Pac. 124 (1914); Robertson v. de Brulatour, 111 App. Div. 882, 98 N. Y. Supp. 15 (1st Dept. 1906).

[43] Sears v. Choate, *supra* note 35.

joins, a legal remainder does not coalesce with the equitable life estate. In the fourth one there is no merger where there are either more cestuis than trustees, or more trustees than cestuis, because the cestuis, as such, have individual interests, but the interests of the trustees are joint. In the last situation, it should make no difference whether the cestuis' interest was absolute in the original creation, or whether it became absolute later. So far as calling for the legal title is concerned, there is no problem of merger.

The fact of merger is not the real reason. Where the life cestui has alienated his interest, either to the remainderman, or to a third person, the real reason for terminating the trust is that the object, the protection of the life cestui, can no longer be accomplished, and there exists no further reason for the separation of the legal and equitable titles. In *Bronson v. Thompson* [44] where the legal remainderman acquired the equitable interest, it was said that no merger would arise without the consent of the court. In *Ives v. Harris* [45] the beneficiary of an equitable fee conveyed to another who was allowed to terminate the trust.

Where the equitable life tenant acquires the legal remainder, as well as where he acquires the equitable remainder, it is not quite so clear that the original object of the trust can no longer be accomplished. In general, however, the same result is reached,[46] except when the trust is spendthrift.[47] If the purpose was the protection of the legal remainderman, of course that reason no longer remains.[48] Frequently a partition is called for where the equitable life tenant acquires only a partial interest in the remainder.[49] One reason for the general result may be that this situation is often called a merger, and further, it resembles the other types of cases. Not all courts, however, permit the trust to be terminated, even though the trust was not spendthrift.[50]

If the original trust purpose can no longer be accomplished, it is within the competency of a court of chancery to terminate the same, and a constructive trust arises for the benefit of the settlor or his heirs, as a rule, where there was no consideration

---

[44] *Supra* note 40.

[45] *Supra* note 41.

[46] By Statute in New York. *Cf.* Peugnet v. Berthold, *supra* note 33.

[47] Bowlin v. Citizens Bank & Trust Co., *supra* note 39; Mason v. Rhode Island Hospital Trust Co., 78 Conn. 81, 61 Atl. 57 (1905); Losey v. Stanley, *supra* note 42.

[48] Sharpless' Estate, *supra* note 39.

[49] Inches v. Hill, *supra* note 39; In re Radcliffe, *supra* note 39; Wills v. Cooper, *supra* note 39; Bowditch v. Andrew, *supra* note 39; Smith v. Smith, *supra* note 39. *Contra:* Asche v. Asche, *supra* note 39.

[50] Knight's Estate, *supra* note 39; Price's Estate, *supra* note 39; Martin v. Pine, *supra* note 39; Hildreth v. Eliot, *supra* note 39.

paid by the trustee.[51] It may be desirable to modify and retain the trust. In one case a power of sale not given by the trust instrument was created by the court when the object of the trust, the provision of the cestui, could not otherwise be accomplished. The land, the subject matter of the trust, was almost valueless for rental purposes, but had large value if it could be subdivided and sold for residential purposes.[52]

Generally the court will not control the discretion of a trustee;[53] but in *Viall v. Rhode Island Hosp. Trust Co.*,[54] where the testatrix gave discretion to the trustee to transfer the trust property to the cestui if in the judgment of the former the cestui became competent to manage the property successfully, it was held that the trustee should be compelled, contrary to his will, to terminate the trust by transferring the property to the cestui. The evidence showed that the latter was sober and thrifty and profitably occupied his time.[55]

The so-called *Claflin* case,[56] however, undoubtedly represents

---

[51] Hartopp's Case, Cro. Eliz. 243 (1591); Salusbury v. Denton, 3 K. & J. 529 (1857); In re Great Berlin Steamboat Co., 26 Ch. D. 616 (1884); SCOTT, CASES ON TRUSTS (1919) 357-366, nn.

[52] Cary v. Cary, 309 Ill. 330, 141 N. E. 156 (1923); *cf.* Knorr v. Millard, 52 Mich. 542, 18 N. W. 349 (1884); Marsh v. Reed, 184 Ill. 263, 56 N. E. 306 (1900) (to permit trustee to lease for longer time than authorized by settlor; large loss if not done; hotel building); Gavin v. Curtin, 171 Ill. 640, 49 N. E. 523 (1898) (semble); Denegre v. Walker, 214 Ill. 113, 73 N. E. 409 (1905); Roberts v. Roberts, 259 Ill. 115, 102 N. E. 239 (1913); Johns v. Montgomery, 265 Ill. 21, 106 N. E. 497 (1914); see Scott, *Education and the Dead Hand* (1921) 34 HARV. L. REV. 1; In re New [1901] 2 Ch. 534 (trustees of stocks without power to sell were granted authority to take part in a reorganization scheme and exchange for stocks in the reorganized companies); *cf.* Hale v. Hale, 146 Ill. 227, 33 N. E. 858 (1893) (where equity authorized a sale of land because it was of little value for rental beyond taxes and assessments).

[53] See Foley v. Hastings, 139 Atl. 305 (Conn. 1927).

[54] 45 R. I. 432; 123 Atl. 570 (1924).

[55] *Cf.* Barbour v. Cummings, 26 R. I. 201, 58 Atl. 660 (1904) (trustee with discretion as to when and how much of income he shall pay cestui, required to account and disclose the investments made).

[56] Claflin v. Claflin, *supra* note 29; Watson v. Watson, 223 Mass. 425, 111 N. E. 904 (1916); Stier v. Nashville Trust Co., 158 Fed. 601 (C. C. A. 6th, 1908); Gunn v. Brown, 63 Md. 96 (1885); Fairfax v. Brown, 60 Md. 50 (1883); Carpenter v. Carpenter's Trustee, 119 Ky. 582, 84 S. W. 737 (1905); Stewart's Estate, 253 Pa. 277, 98 Atl. 569 (1916); Lanius v. Fletcher, 100 Tex. 550, 101 S. W. 1076 (1907); Matter of Billett, 106 Misc. 229, 174 N. Y. Supp. 438 (Sur. 1919); Shallcross' Estate, 200 Pa. 122, 49 Atl. 936 (1901); Shelton v. King, 229 U. S. 90, 33 Sup. Ct. 686 (1913); Tierney v. Fitzpatrick, 122 App. Div. 623, 107 N. Y. Supp. 527 (1st Dept. 1907); Walso v. Latterner, 140 Minn. 455, 168 N. W. 353 (1918); Gerrish v. New Bedford Inst., 128 Mass. 159 (1880); Vines v. Vines, 143 Tenn. 517, 226 S. W. 1039 (1921); Young v. Snow, 167 Mass. 287, 45 N. E. 686 (1897); *cf.* In re Fair's Estate, 103 Cal. 342, 37 Pac. 406 (1894); Wagner

the weight of American opinion. The court believes that the settlor's purpose should be carried out. He wishes to protect the cestui against his own extravagance. But suppose the equitable interest is assignable (thus differing from a spendthrift trust), and the cestui has assigned. It would seem now that the trust should terminate because the object can no longer be accomplished, and there is no purpose in maintaining a trust as mere machinery. Massachusetts still holds that such assignment does not prevent the postponement. Neither does the fact that his creditors may seize upon the cestui's interest affect the result in the court's opinion.[57] Yet some courts, while following the rule of the *Claflin* case generally, allow a termination of the trust under special circumstances, though the purpose is not accomplished and has not failed; as where the trust is maintained at too high a proportionate cost,[58] or the cestui makes out a meritorious case for the possession of the corpus at once.[59] This later came to be regarded as the rationale of the decision in *Sears v. Choate,* distinguishing it from the *Claflin* case. Some courts will not permit the termination of a trust in any case where that would conflict with the settlor's intent.[60]

It is submitted that an unfortunate view prevents the termination of a trust where an equitable fee is granted and the beneficiary calls for the legal fee, if it does not appear that the purpose of the trust was to protect the estate of a married woman.[61]

THE SPENDTHRIFT TRUST

The doctrine of the spendthrift trust may be defined somewhat as follows: a settlor may establish a trust for the benefit of another person and by the use of proper words may insure that such cestui shall have the benefit of the income of the trust res for life or any shorter period. The interest of the cestui is not liable to be taken for his debts, and probably cannot be alienated by him. In most states the doctrine does not apply to equitable fees in land, nor to absolute equitable interests in personalty. This paper is not concerned primarily with the doctrine as a whole, but with only certain features of it or situations that look like it, and with the question of whether the trust in these other situations may be terminated.

It is a well established rule that a spendthrift trust, created

v. Wagner, 244 Ill. 101, 91 N. E. 66 (1910). But *cf.* Eakle v. Ingram, *supra* note 37; Estate of Yates, 170 Cal. 254, 149 Pac. 555 (1915); De Ladson v. Crawford, 93 Conn. 402, 106 Atl. 326 (1919).

[57] Young v. Snow, *supra* note 56.

[58] Black v. Bailey, 142 Ark. 201, 218 S. W. 210 (1920).

[59] Bennett v. Nashville Trust Co., 127 Tenn. 126, 153 S. W. 840 (1913).

[60] Stewart's Estate, *supra* note 56; Matter of Billett, *supra* note 56.

[61] Gunn v. Brown, *supra* note 56; Martin v. Pine, *supra* note 39; *cf.* Asche v. Asche, *supra* note 39.

by the settlor for the settlor's own benefit, is ineffective as against the claim of creditors.[62] In *Egbert v. De Solms*,[63] where the husband and wife created a trust for their own benefit for life and gave the corpus over to their children, it was held that the trust was ineffective except as to the remainder to the children, which vested in the children. In *McIlvaine v. Smith*[64] it was held that while such a trust was invalid, yet levy of execution in legal proceedings could not be had, for it was not liable to common law execution. In *Bank of Commerce v. Chambers*[65] the wife had created a trust to pay the income to her husband for life free from the claims of his creditors. Such trust without more would have been valid, since the spendthrift trust rule prevails in Missouri, but in order for the husband to avail himself of this equitable interest created by his wife's will, he was obliged to surrender his right of curtesy in her land. It was held that he thereby became a purchaser of his interest in the spendthrift trust, and therefore the situation was similar to the case where one creates a spendthrift trust for his own benefit and that the property so received is liable to the claims of creditors. Similarly, in *McColgan v. Magee*,[66] the settlor had given property on a spendthrift trust for the benefit of his four sons with a provision, however, that they might terminate this trust by mutual agreement. The sons by agreement, terminated this trust, but as a part of the agreement a similar trust was created of the share of one of them, *A*. It was held, therefore, that since *A* paid a consideration for his interest in this new trust, the said trust was invalid. The gift was not from the brothers, and they gave up nothing of interest to themselves, but merely made his contingent right a vested one. In New York it has been held that the statute, forbidding the disposing by the cestui of his interest in earnings and profits from land does not apply in cases where a trust is created by the settlor for his own benefit.[67]

However much a settlor may intend to create a trust, if he does not separate the beneficial from the legal interests, no spendthrift trust can be created, as for example, in *Hahn v.*

[62] Mackason's Appeal, 42 Pa. 330 (1862); Petty v. Moores Brook Sanitarium, 110 Va. 815, 67 S. E. 355 (1910); Ghormley v. Smith, 139 Pa. 584, 21 Atl. 135 (1891); Jackson v. Von Zedlitz, 136 Mass. 342 (1884); Simonin's Estate, 260 Pa. 395, 103 Atl. 927 (1918); Warner v. Rice, 66 Md. 436, 8 Atl. 84 (1887); Nolan v. Nolan, *supra* note 2; Hackley v. Littell, 150 Mich. 106, 113 N. W. 787 (1907); Mason v. Rhode Island Hospital Trust Co., *supra* note 47.

[63] 218 Pa. 207, 67 Atl. 212 (1907).

[64] 42 Mo. 45 (1867).

[65] 96 Mo. 439, 10 S. W. 38 (1888).

[66] 172 Cal. 182, 155 Pac. 995 (1916).

[67] Schenck v. Barnes, 156 N. Y. 316, 50 N. E. 967 (1898) and cases there cited.

Hutchinson,[68] where the settlor gave her property to her husband in trust. The husband, however, was given the privilege of using as much of the income as he desired, and it was not to be liable for his debts. The remainder was to go over to her children. No trust having been created, and since he was the holder of the legal title for life, his interest is liable for the payment of his debts.[69]

The idea of spendthrift trust has taken a very firm hold in this country. To such an extent is this true that in many cases spendthrift trusts have been created by the court rather than by the settlor. That is to say, the court has found an intention on the part of the settlor to create a spendthrift trust where there were no earmarks of the same, such as were at one time thought to be necessary.[70] But it was held that support out of a particular fund made the interest inalienable, though a mere trust for support does not create a spendthrift trust. In Pennsylvania it has been considered that the fact that there was no gift over after the so-called spendthrift trust for life is immaterial.[71] In *Stambaugh's Estate*[72] a spendthrift trust was held to have been created, though there was little indication of an intention to create such a trust. In *Kreb's Estate*[73] the settlor ordered the trustee to pay one of his children sufficient to meet his wants, and the court held that "the creation of a trust, whether temporary or continuous, is entirely consistent with the devise of an absolute interest." In this case the trust consisted both of realty and of personalty. It has been sometimes asserted that a trust in England may even be valid though the only active duty is to stand between the cestui and his creditors.[74]

In New York, by statute, if there is a direction to apply the rents and profits to the use of a cestui, the trust is necessarily

[68] 159 Pa. 133, 28 Atl. 167 (1893).

[69] See also Goe's Estate, 146 Pa. 431, 23 Atl. 383 (1892); Ritter's Estate, 148 Pa. 577, 24 Atl. 120 (1892); Tilton v. Davidson, 98 Me. 55, 56 Atl. 215 (1903).

[70] Hartley v. Unknown Heirs, 281 Ill. 321, 117 N. E. 995 (1917); *cf.* Filkins v. Severn, 127 Iowa 738, 104 N. W. 346 (1905); Mason v. Rhode Island Hospital Trust Co., *supra* note 47; Shower's Estate, *supra* note 39 (1905); *cf.* (1926) 35 YALE LAW JOURNAL 767. *Contra:* Henson v. Wright, 88 Tenn. 501, 12 S. W. 1035 (1890); Bronson v. Thompson, *supra* note 40; Wenzel v. Powder, *supra* note 40. For a discussion of the statutory provision in Connecticut, see Foley v. Hastings, *supra* note 53. A spendthrift trust is illegal in Rhode Island. See Petition of Smyth, 139 Atl. 651 (R. I. 1927).

[71] Shower's Estate, *supra* note 39; Minnich's Estate, 206 Pa. 405, 55 Atl. 1067 (1903).

[72] 135 Pa. 585, 19 Atl. 1058 (1890). But see Thompson v. Zurich State Bank, 260 Pac. 658 (Kan. 1927).

[73] 184 Pa. 222, 39 Atl. 66 (1898).

[74] See Jourolman v. Massengill, *supra* note 39.

spendthrift, since the beneficiary cannot, on account of the statute, assign his interest. It is also provided that where the gift is for support, a creditor can get the surplus beyond what may be necessary for the support.[75]

It is considered in Pennsylvania that the gift of net income from property does not create a fee estate, although there is no gift over; that in order that the gift of income (that is to say, rents and profits on land or interest from funds) may create a fee where there is no gift over, the gift must be of the gross income.[76] This court also lays down the rule as to how it may be determined whether a given trust is a spendthrift trust or not. The evidence need not come from the instrument creating the trust, but the court may direct its attention to the circumstances arising at the time the will was made; consequently, when a trust is created for a son, since the evidence shows the son is a drunkard and improvident, a spendthrift trust will be held to have been intended. The court also seems to hold that, if we are to assume an equitable fee is created in the cestui, then the alienation of an equitable fee may be restrained. Even though a cestui of a spendthrift trust becomes the heir to the remainder, the trust may not be terminated.[77]

In Georgia the fact that there is a remainder over after a life estate will not prevent the termination of a spendthrift trust created for the life of one who is *sui juris* although, under certin circumstances, it is held that a spendthrift trust may be valid.[78] Where a settlor creates a spendthrift trust for his son for life, remainder in trust for the son's children for life, and these same children become entitled to the remainder, the trust may be terminated because the spendthrift trust was for the son only, and the trust for the children was not regarded as a spendthrift trust, and therefore the purpose was accomplished.[79]

THE PURPOSE OF THE TRUST IS ACCOMPLISHED OR THE OBJECT HAS FAILED*

If a trust of land becomes passive there is the general rule that it is terminated by the Statute of Uses, or, if the trust be such that there is no applicable statute, it may still be terminated.[80] But dry trusts do not constitute all those which are

*Resulting trusts are in the main beyond the purview of this section, as are also charitable trusts.

[75] Bull v. Odell, 19 App. Div. 605, 46 N. Y. Supp. 306 (2d Dept. 1897); see COSTIGAN, CASES ON TRUSTS (1925) 457, 458 nn.

[76] Schuldt v. Reading Trust Co., 270 Pa. 360, 113 Atl. 545 (1921).

[77] Bennett v. Chapin, *supra* note 33.

[78] DeVaughn v. Hays, 140 Ga. 208, 78 S. E. 844 (1913).

[79] Angell v. Angell, 28 R. I. 592, 68 Atl. 583 (1908).

[80] Moll v. Gardner, 214 Ill. 248, 73 N. E. 442 (1905); *cf.* Behringer's Estate, 265 Pa. 111, 108 Atl. 414 (1919); McFall v. Kirkpatrick, 236 Ill.

held to be terminable when the purpose has been accomplished.[81]

In the case of a trust established by a third person for the benefit of a married woman, to prevent the husband from acquiring interest in, or control over, the property conveyed, if the husband dies or the spouses are divorced the trust may be terminated as the purpose of it has been accomplished even though the trustee has active duties to perform.[82] This is particularly true in those cases where the husband himself has been made the trustee.

There are other types of cases where the trust is terminated, contrary to the terms of the instrument creating it, because the purpose has been accomplished.[83] Thus, in *Coltman v. Moore*,[84] the testator created a trust, the properties to be held by the trustee for twenty years for the purpose of raising an annuity for his widow, remainder to his children; but if at the end of twenty years no child nor the issue of a child was alive, the remainder was given to the District of Columbia for the purpose of establishing a trust for the benefit of destitute and respectable females. The gift over was invalid, and as the trust was being maintained at a disproportionate expense, it was terminated in conflict with the settlor's instructions. In *Re Packer's Estate*[85] the trust to continue for twenty-one years was terminated before the period expired. In *Donaldson v.*

281, 86 N. E. 139 (1908); Miller v. Cramer, 48 S. C. 282, 26 S. E. 657 (1897); Allen v. Allen's Trustee, 141 Ky. 689, 133 S. W. 543 (1911); see Hooper v. Felgner, 80 Md. 262 (1894). For a peculiar situation where the trust could not be terminated although the purpose had either been accomplished, or could no longer be accomplished, see Russian Reinsurance Co. v. Stoddard, 240 N. Y. 149, 147 N. E. 703 (1925); (1925) 39 HARV. L. REV. 127.

[81] Roberts v. Moseley, 51 Mo. 282 (1873).

[82] Simmons v. Northwestern Trust Co., *supra* note 39; In re Estate of Cornils, 167 Iowa 196, 149 N. W. 65 (1914); Hastings v. Orde, 11 Sim. 205 (1840); McNeer v. Patrick, 93 Neb. 746, 142 N. W. 283 (1913); Wilbert's Estate, 166 Pa. 113, 30 Atl. 1022 (1895); Miller v. Simonton, 5 S. C. 20 (1873); Megargee v. Naglee, 64 Pa. 216 (1870); Cary v. Slead, 220 Ill. 508, 77 N. E. 234 (1906); Parker v. Converse, 5 Gray 336 (Mass. 1855); Dodson v. Ball, *supra* note 9; Mitchell v. Mitchell, 35 Miss. 108 (1858).

[83] Toner v. Collins, 67 Iowa 369, 25 N. W. 287 (1885); Baker v. McAden, 118 N. C. 740, 24 S. E. 531 (1896); Angell v. Angell, *supra* note 79; *cf.* Williams v. Thacher, 186 Mass. 293, 71 N. E. 567 (1904); Brooks v. Davis, *supra* note 41.

[84] 1 MacArthur 197 (D. C. 1873); *cf.* Hadley v. Hadley, *supra* note 39.

[85] 246 Pa. 97, 92 Atl. 65 (1914) (the trust to continue for twenty-one years was terminated before the period expired); *cf.* Fourth & Central Trust Co. v. Henderson Lithographing Co., 21 Ohio App. 257, 153 N. E. 125 (1926); Simmons v. Northwestern Trust Co., *supra* note 39; Stafford's Estate, *supra* note 40; see also Brillhart v. Mish, *supra* note 8; Angle v. Marshall, *supra* note 8 (trust established by the cestui to continue for his life, but held terminable at his will).

Allen[86] the testator gave both productive and unproductive property in trust for management and sale, with discretion in the trustee as to the time of sale. The unproductive property was held a long time and there was but slight increase in the value of it. The court held that this active trust should be terminated, since the carrying charge far exceeded the benefits accruing from continuing the trust. In *Webster v. Bush*[87] the unexpressed reason for creating the trust by will was the fact that the beneficiary was mentally incompetent and the court ordered a termination of it on oral proof that that reason no longer existed. In *Tilton v. Davidson*[88] the settlor gave all his property in trust for the benefit of his two daughters, his only heirs, paying them the income for life and giving them the power to dispose of the corpus by will. It was not earmarked as a spendthrift trust, though there was no doubt that the settlor intended to prevent them from impairing the corpus; there was no gift over. The trust was terminated in spite of this intent. The mere fear of the court that the beneficiary would not use the funds wisely does not seem sufficient to deny the termination of the trust.[89]

So, where a trust is created for the widow of testator and she elects to take what the law will give her, rather than under the will, the trust may now be terminated.[90] An active trust, created for the support of the testator's children, may be terminated when they leave home and marry.[91] The trustee is not concerned in the question personally whether or not the trust should be terminated.[92] So, where land is held in trust for purposes of a cemetery, and never is used in that way, or such is later abandoned, the trust may be terminated.[93]

Leaving aside for the moment the broader question whether

---

[86] 182 Mo. 626, 81 S. W. 1151 (1904); Fox v. Fox, 250 Ill. 384, 95 N. E. 498 (1911) (semble).

[87] 19 Ky. L. Rep. 565, 39 S. W. 411 (1897). This case as to the introduction of extrinsic evidence was overruled in Carpenter v. Carpenter's Trustee, *supra* note 56.

[88] *Supra* note 69, citing Sears v. Choate, *supra* note 35.

[89] *Contra:* Baughman's Estate, 281 Pa. 23, 126 Atl. 58 (1924). But the court admits that the fact that the trustee has active duties is not conclusive where beneficiaries are *sui juris* and all consent.

[90] Woodburn's Estate, 151 Pa. 586, 25 Atl. 145 (1892); *cf.* Harrar's Estate, *supra* note 8.

[91] Easton v. Demuth, 179 Mo. App. 722, 162 S. W. 294 (1913); *cf.* Bowditch v. Andrew, *supra* note 39; Harlow v. Weld, 104 Atl. 832 (R. I. 1918).

[92] Tucker v. Grundy, 83 Ky. 540 (1886).

[93] Carlisle Co. v. Norris, 200 Ky. 338, 254 S. W. 1044 (1923); Schlesinger v. Mallard, *supra* note 21; See Barbour v. Weld, *supra* note 39 (stock conveyed to trustee by shareholders to enable him to negotiate a sale of other stocks; trustee failed in this purpose but misused his power; held, stockholders may have trust terminated and title to the stock restored).

or not a trust should be terminated whenever the beneficiaries are all *sui juris*, though the trust is active, if they all join in seeking that result, still there are situations where the settlor has a right to say that the trust shall continue until certain purposes are accomplished.

Thus, a trust created for the sole and separate use and benefit of a married woman should not be terminated while the husband is living;[94] nor one created to preserve contingent interests;[95] nor one where minors are the beneficiaries, even though the trustee and the cestuis consent;[96] nor where property has been placed in trust for sale, the proceeds to be used for a certain charitable purpose, should the trust be terminated, until it is clear that the object cannot be accomplished;[97] nor one where some, but not all, of the beneficiaries have died;[98] nor one where the trustee pays the income to the cestui with an absolute discretion to pay him the principal or a part thereof.[99] In *Owen v. Gilchrist*[100] a Missouri corporation conveyed its property to a trustee in order to avoid the law preventing a corporation from holding the property under certain circumstances. The trust was active and the trustee was given discretion as to the sale of the property. Thereafter a majority of the cestuis requested him to transfer the property to a new trustee, which he refused to do. They brought an action to terminate the trust. It was held that the trust should not be terminated so long as it was active and the object was unaccomplished, and there was a possibility of its being carried out. Some states permit the property to be held in trust for the benefit of majors for a period of years, when an absolute vesting of the legal title in the beneficiaries is provided after the period has elapsed.[101] But this problem is discussed *infra*.

If a trust is not spendthrift, and is given for the life of the beneficiary only, and there is no gift over of the corpus, and if, further, the life beneficiary takes the corpus as heir or distribu-

[94] Wilbert's Estate, *supra* note 82; Robbins v. Smith, 72 Ohio St. 1, 73 N. E. 1051 (1905); Buch's Estate, 278 Pa. 185, 122 Atl. 239 (1923).

[95] Field's Estate, 266 Pa. 474, 109 Atl. 677 (1920); Denis' Estate, 201 Pa. 616, 51 Atl. 335 (1902); In re Fair's Estate, *supra* note 56.

[96] Hill v. Hill, 49 Okla. 424, 152 Pac. 1122 (1915) (statute forbids the transfer of land held in trust except in accordance with the trust instrument, making the transfer void).

[97] Spence v. Widney, 5 Cal. Unrep. Cas. 516, 46 Pac. 463 (1896). Under these circumstances the fact that the trust was created by a conveyance inter vivos and the settlor has died, does not change the rule.

[98] Lyle v. Burke, 40 Mich. 499 (1879).

[99] Russell v. Hartley, 83 Conn. 654, 78 Atl. 320 (1910); see Thompson v. Zurich State Bank, *supra* note 72.

[100] 304 Mo. 330, 263 S. W. 423 (1924). See also Newport Trust Co. v. Newton, 139 Atl. 793 (R. I. 1928).

[101] Rhoads v. Rhoads, 43 Ill. 239 (1867); Armstrong v. Barber, 239 Ill. 389, 88 N. E. 246 (1909).

tee, such beneficiary may call for the legal title even in Pennsylvania, though the duties of the trustee may be active.[102] This is the English view.[103] But usually the Pennsylvania courts will find the trust to be spendthrift.[104] The same problem arose in Massachusetts where the life beneficiary of the trust (there being no gift over of the corpus) was one of the two heirs. The cestui purchased the other's share in the remainder and mortgaged the premises. It was held that the mortgagee acquired a valid legal interest. This case however is complicated by the fact that on failure of the trustee named by the settlor to qualify, but after the mortgage was made, the beneficiary was appointed trustee and a merger occurred.[105] Pennsylvania makes a nice distinction between the gift of the gross rent or income, and of the net rent or income,[106] which means substantially that if the trust is active it will not be terminated, thus contradicting the view expressed above. So also in Tennessee, the active duties of the trustee prevented a termination of the trust, though the cestui was sole heir, the court having found sufficient ear-marks to show an intent to create a spendthrift trust.[107]

A private trust may well be terminated on the death of the trustee, particularly when large discretionary powers of a personal nature are thrown upon the trustee. It is then asserted that the discretion of the individual trustee was stipulated for, and on his death another will not be appointed.[108] The disclaimer by a trustee should have no effect upon the beneficiary's

---

[102] Wood's Estate, 261 Pa. 480, 104 Atl. 673 (1918); *cf.* Tilton v. Davidson, *supra* note 69; Connolly v. Connolly, *supra* note 39; Turnage v. Greene, *supra* note 33.

[103] Gosling v. Gosling, Johns. V. C. 265 (1859).

[104] Shower's Estate, *supra* note 39; Knight's Estate, *supra* note 39.

[105] Langley v. Conlan, *supra* note 39.

[106] Schuldt v. Reading Trust Co., *supra* note 76; Knight's Estate, *supra* note 39; In re Minnich's Estate, *supra* note 71.

[107] Jourolman v. Massengill, *supra* note 39 (opinion by Justice Lurton). The case overruled prior Tennessee decisions, denying validity to spendthrift trusts.

[108] Russell v. Hartley, *supra* note 99; Brock v. Conkwright, *supra* note 39; Mitchell v. Mitchell, 35 Miss. 108 (1858); Baker v. McAden, *supra* note 83; Shoemaker's Appeal, 91 Pa. 134 (1878). For the case where a trust is charitable and the settlor has imposed large discretion upon the trustee but the latter dies before the discretion is exercised, see Thompson's Estate, 282 Pa. 30, 127 Atl. 446 (1925). In Fidelity Trust Co. v. Alexander, 243 Fed. 162 (C. C. A. 3d, 1917) the doctrine was probably improperly applied. The trustee repudiated the trust without notice to the *cestuis* and the property was distributed under his will. The statute of limitations was held to run in favor of his executor. It does not appear that the settlor intended the trust to terminate with the death of the trustee. *Cf.* Slevin v. Brown, 32 Mo. 176 (1862). But *cf.* Cary v. Cary, *supra* note 52.

interest, nor cause a termination of the trust where one has actually been created.[109]

In general, where a trust is terminable at the request of a single cestui, it should also be terminable at the request of several, though carrying out the petition requires a conveyance in parcels. It was Lord Eldon's view that a trustee could not be compelled to convey the trust property by other descriptions than those by which the conveyance was made to himself; that is to say, he was not under a duty to convey in parcels.[110] This view was followed substantially in an Illinois case,[111] where the court said that an unpaid vendor need not convey in separate parcels, and to different persons, premises he had contracted to transfer to the vendee. The reason in this particular case probably was that, though the unpaid vendor had forfeited his right to receive the purchase money, yet it was felt that he owed the strict duty to convey only, and his duty was measured strictly by his agreement. There is a similar declaration by the Texas court with respect to conveying in parcels.[112] But here the trust was for the benefit of the children of *A*, and some only of the interests were vested, the others being still contingent. It is intimated, in *Taylor v. Grange*,[113] that the dictum of Lord Eldon did not later prevail in England for it is there said that the equitable owner is entitled to call for partition if he is in a position to ask for the legal estate, but the parition should be refused where the granting of it would prevent the carrying out of the purposes of the trust, as where the trustees are to work certain quarries, the subject matter of the trust. These active duties prevented a partition among the beneficiaries. Where the income of a trust is payable for the benefit of *X* and his family, *X* does not have a separable interest, though the trust may not be spendthrift.[114] If the trust is spendthrift, one of the cestuis cannot have a partition.[115] If property is given to trustees, who at the same time are three of the five cestuis, and they are required to sell the same, they cannot have a partition prior to the sale.[116]

Under ordinary circumstances, there can be no great hardship in requiring a trustee to convey to several assignees in severalty, as the costs are always paid by the cestui. Not infrequently the

[109] Tucker v. Grundy, *supra* note 92; SCOTT, *op. cit. supra* note 51, at 246; Mallott v. Wilson [1903] 2 Ch. 494; *cf.* Kronson v. Lipschitz, *supra* note 21.

[110] Goodson v. Ellison, 3 Russ. 583 (1827).

[111] Stone v. Pratt, *supra* note 14.

[112] Dial v. Dial, 21 Tex. 529 (1858).

[113] 15 Ch. D. 165 (1880).

[114] Petty v. Moores Brook Sanitarium, *supra* note 62.

[115] Gibson v. Gibson, *supra* note 42.

[116] Burbach v. Burbach, *supra* note 42.

trustee petitions to be allowed to convey in parcels.[117] A petition for partition is maintainable even though the purpose of a trust has not been accomplished, when it is shown that such purpose is no longer possible of accomplishment. In *Williams v. Thacher*,[118] where the trust property consisted of a mansion house, as well as other property held in trust for the benefit of several persons, the property was all partitioned except the mansion house. But generally there can be no partition prior to the time provided in the trust instrument, except in those jurisdictions which permit the cestuis to call for the legal title when they are all *sui juris* and consent.

CONTINGENT EQUITABLE INTERESTS

Just as there may be legal contingent remainders, so there may be equitable contingent interests.[119] In *Cary v. Cary* [120] the gift was in trust for the benefit of *A* for life, then the legal title to the heirs of *A*. It was held that the four living sons sufficiently represented all possible contingent interests, at least for the purpose of petitioning for the appointment of a new trustee. Even though there may be contingent interests, the settlor may have the conveyance set aside, where the trust was not intelligently made, without independent advice, or there was mistake or fraud in its execution.[121] But voluntary settlements are enforced where they are intelligently made.[122]

Suppose a settlor settles property in trust for the benefit of

---

[117] Welch v. Episcopal Theological School, 189 Mass. 108, 75 N. E. 139 (1905); *cf.* Henson v. Wright, 88 Tenn. 501, 12 S. W. 1035 (1890); Ives v. Harris, 7 R. I. 413 (1863).

[118] 186 Mass. 293, 71 N. E. 567 (1904).

[119] Folk v. Hughes, 100 S. C. 220, 84 S. E. 713 (1915); SCOTT, *op. cit. supra* note 109, at 267; Petre v. Espinasse, 2 M. & K. 496 (1834); Bill v. Cureton, 2 M. & K. 503 (1835); King v. York Trust Co., 278 Pa. 141, 122 Atl. 227 (1923); Smith v. Boyd, *supra* note 14; Russell's Appeal, *supra* note 12; Taylor v. Buttrick, *supra* note 14; Stone v. Pratt, *supra* note 14; Greene v. Aborn, 10 R. I. 10 (1871); Johnson v. Provident Trust Co., 280 Pa. 255, 124 Atl. 436 (1924); Field's Estate, *supra* note 95; Stewart's Estate, *supra* note 56; Brown v. Owsley, *supra* note 38; Whipple v. Fairchild, *supra* note 6; Maher v. Maher, *supra* note 42; Gibson v. Gibson, *supra* note 42; Cary v. Cary, *supra* note 52; Allen v. Allen, *supra* note 80; Estate of Washburn, 11 Cal. App. 735, 106 Pac. 415 (1909); Hildreth v. Eliot, *supra* note 39; Nace v. Boyer, 30 Pa. 99 (1858); In re Fair's Estate, *supra* note 56. But *cf.* Taft v. Decker, 182 Mass. 106, 65 N. E. 507 (1902); Miller v. Douglass, 192 Wis. 486, 213 N. W. 320 (1927).

[120] *Supra* note 52.

[121] Garnsey v. Munday, *supra* note 14; Huguenin v. Baseley, 14 Ves. Jr. 273 (1807); *cf.* Wallace v. Industrial Trust Co., 29 R. I. 550, 73 Atl. 25 (1909).

[122] Ellison v. Ellison, 6 Ves. Jr. 656 (1802); Neisler v. Pearsall, *supra* note 14; Bill v. Cureton, *supra* note 119; Toker v. Toker, 3 DeG., J. & S. 487 (1863); Barnard v. Gantz, 140 N. Y. 249, 35 N. E. 430 (1893).

himself and his wife for life, remainder in trust for the children of the marriage. Assume further that there are now no children of the marriage, and the wife has reached an age at and beyond which women do not normally bear children, and the settlor and his wife wish to have the trust terminated. May they succeed? Further, may medical testimony be introduced to show that because of an operation or for physical ailment or for other reasons, including that of age, the wife cannot bear children and thus avoid the rule of *Folk v. Hughes*,[123] and have the trust terminated? In *Richards v. Safe Deposit & Trust Co.*[124] the wife was fifty-three years old, but it was held that such evidence was inadmissable.

But the English rule in equity is different. In the case of *In re White*[125] a wife was presumed to be past the period of child-bearing, her one child having been born twenty-four years before. A long line of English chancery cases have expressed the same view, and allowed the trust to be divested, or a possible contingent interest to be cut off, in cases where the ages vary from forty-nine to seventy. Perhaps the earliest case is *Long v. Hodges*,[126] where the age was nearly seventy.

It is submitted that there is no sufficient justification for a court of equity to follow for centuries the rule of the strict law, and that good policy calls for the termination of such trusts under these circumstances. There is no reason why the law

---

[123] *Supra* note 14.

[124] 97 Md. 608, 55 Atl. 384 (1903); see Fletcher v. Los Angeles Trust Bank, 182 Cal. 177, 187 Pac. 425 (1920); Allen v. Allen's Trustee, *supra* note 80; May v. Bank of Hardinsburg, 150 Ky. 136, 150 S. W. 12 (1912) (age seventy; case in equity; court thinks rule may be due to the indelicacy of the acts to which an inquiry about sterility might lead); Rand v. Smith, 153 Ky. 516, 155 S. W. 1134 (1913) (age sixty-three, equity); Quigley's Trustee v. Quigley, 161 Ky. 85, 170 S. W. 523 (1914) (equity); Brown v. Owsley, *supra* note 38 (wife sixty years old); List v. Rodney, 83 Pa. 483 (1877) (age seventy-five, law); In re Dougan, 139 Ga. 351, 77 S. E. 158 (1913) (age fifty-six, physician's testimony excluded); Garner v. Dowling, 58 Tenn. 48 (1872) (equity); Bowlin v. Rhode Island Trust Co., 31 R. I. 289, 76 Atl. 348 (1910); Hill v. Spencer, 196 Ill. 65, 63 N. E. 614 (1902) (bill to construe a deed); Flora v. Anderson, 67 Fed. 182 (C. C. 6th, 1895); State v. Lash, 16 N. J. L. 380 (1838). For the English authorities see LITTLETON § 34; Co. LITT. § 28; 2 BL. COM. *125; Jee v. Audley, 1 Cox 324 (1787). This is the rule at law.

[125] [1901] 1 Ch. 570.

[126] Jac. 585 (1822); see Lyddon v. Ellison, 19 Beavan 565 (1854) (age fifty-six, spinster); Davidson v. Kimpton, 18 Ch. D. 213 (1881) (age fifty-four, spinster); In re Millner's Estate, L. R. 14 Eq. 245 (1872) (lady forty-nine married and husband still living but she had never had a child); In re Widdow's Trusts, L. R. 11 Eq. 408 (1871) (widows, ages fifty-five and fifty-three); Haynes v. Haynes, 35 L. J. Eq. 303 (1866) (spinster, age fifty-three). The same rule was thought not applicable in Croxton v. May, 9 Ch. D. 388 (1878) where lady was fifty-four but had lived with her husband only the last three years. *Cf.* In re Hocking [1898] 2 Ch. 567.

should not subserve the interests of those who call for the legal title.

The interests may not be contingent if the rule in Shelley's case is applicable, and it may be applicable to equitable estates.[127] So, where a trust is created to pay income to *A* and her sons *B* and *C* for life, and after their decease to their heirs, an equitable fee is created.[128] It does not apply where the gift to life tenant consists of the net rent.[129]

Where husband and wife conveyed their land to *T* for benefit of the husband and wife for their lives and the life of the survivor, with power of appointment in the husband among their issue, and, if no issue, then as the husband should appoint by will, and if no will, to his own right heirs, the trustee reconveyed to the husband, and this discharged the trust. So, when husband and wife subsequently conveyed to *L*, and *L* contracted with *D* to sell the same to him, specific performance was decreed against *D*, since the husband had an equitable fee prior to the reconveyance by *T* and the trust was discharged by the reconveyance (under order of court). The power in the husband to appoint was likewise destroyed.[130]

Suppose *S* conveys to *T* for benefit of *X* for life, and *T* is to convey to *X's* appointee by will, and if no will, to *X's* heirs. X conveys the equitable fee to *C*, and the latter appoints the remainder by will to plaintiff, who sues *C* in ejectment. Ejectment will not lie, since plaintiff does not have the legal title,[131] and the duty to convey is an active duty, and trust continues until it is performed.

The rule does not apply where legal title is given to a trustee for the benefit of *A* for life, and on his death legal title to *A's* heirs.[132] The same point is made in *Eshbach's Estate*,[133] and the mere receiving and paying over does not make a trust active. Some discretion is required to make a trust active.[134] So, when *S* declared himself trustee for his son *A* for life, but *S* was to enjoy the income for his own life, remainder to the heirs of *A*,

---

[127] Warner v. Sprigg, 62 Md. 14 (1884).

[128] Megaree v. Naglee, *supra* note 82; Eaton v. Tillinghast, 4 R. I. 276 (1856); Wilson v. Harrold, 288 Ill. 388, 123 N. E. 563 (1919); Menken v. Brinkley, *supra* note 2; McFall v. Kirkpatrick, 236 Ill. 281, 86 N. E. 139 (1908); KALES, *op. cit. supra* note 29, § 429; Brown v. Renshaw, *supra* note 4; Armour v. Murray, 74 N. J. L. 351, 68 Atl. 164 (1907); see (1924) 18 ILL. L. REV. 253.

[129] Deniston v. Deniston, 263 Pa. 224, 106 Atl. 200 (1919).

[130] Brown v. Renshaw, *supra* note 4.

[131] McFall v. Kirkpatrick, *supra* note 128.

[132] Hartley v. Unknown Heirs, *supra* note 70 (court gratuitously makes this a spendthrift trust and holds active duties end with death of *A*).

[133] 197 Pa. 153, 46 Atl. 905 (1900).

[134] McKinney's Estate, 260 Pa. 123, 103 Atl. 590 (1918); Stewart's Estate, *supra* note 56.

and *A* predeceased *S*, it was held that the interest of the heirs of *A* was legal, but *A's* life estate was equitable, and so the rule did not apply.[135]

THE TRUSTEE AS CESTUI

No trust is created where the same person is named as both trustee and cestui, be the intention ever so clear.[136] This is really not a merger at all, as it is sometimes called, because the legal and equitable interests have never been separated. (Although some courts hold that a trust exists where the sole trustee is also sole cestui for his own life, remainder over at his death).[137] It makes no difference that the settlor has earmarked the trust as spendthrift.[138] If the trustee is a nephew, and also one of the cestuis, and the will contains an additional provision that the residue is to be distributed between testator's nephews, he cannot distribute a share of the residue to himself.[139] If *T* is made trustee, and is to have a given proportion of the trust income for his life, residue to be paid to others, it is held as to his portion that no trust was created.[140]

---

[135] Little v. Wilcox, 119 Pa. 439, 13 Atl. 468 (1888); *cf.* Cary v. Cary, *supra* note 52; Kreb's Estate, 184 Pa. 222, 39 Atl. 66 (1898); Moore's Estate, 198 Pa. 611, 48 Atl. 884 (1901).

[136] Greene v. Greene, 125 N. Y. 506, 26 N. E. 739 (1891); Tuck v. Knapp, 42 Misc. 140, 85 N. Y. Supp. 1001 (Sup. Ct. 1903); Rose v. Hatch, 125 N. Y. 427, 26 N. E. 467 (1891); Odom v. Morgan, 177 N. C. 367, 99 S. E. 195 (1919); Board of Directors v. Lowrance, 126 S. C. 89, 119 S. E. 383 (1923); Butler v. Godley, 12 N. C. 94 (1826); Shope v. Unknown Claimants, 174 Iowa 662, 156 N. W. 850 (1916); Hahn v. Hutchinson, 159 Pa. 133, 28 Atl. 167 (1893); Goe's Estate, *supra* note 69; Ritter's Estate, *supra* note 69; Fox's Estate, 264 Pa. 478, 107 Atl. 863 (1919); Axtell v. Coons, 82 Fla. 158, 89 So. 419 (1921); Wilson v. Harrold, *supra* note 128; Thompson v. Adams, 205 Ill. 552, 69 N. E. 1 (1903); Schaefer v. Schaefer, 141 Ill. 337, 31 N. E. 136 (1892); Dick v. Ricker, 222 Ill. 413, 78 N. E. 823 (1906); Tilton v. Davidson, *supra* note 102; Nellis v. Rickard, 133 Cal. 617, 66 Pac. 32 (1901); *cf.* Bull v. Odell, *supra* note 75.

[137] Sherlock v. Thompson, 167 Iowa 1, 148 N. W. 1035 (1914); Henderson v. Hill, 77 Tenn. 25 (1882).

[138] Fox's Estate, *supra* note 136.

[139] In re Dewey's Estate, *supra* note 42; see Ann. Cas. 1918A 475, annotation.

[140] Woodward v. James, *supra* note 42; Swisher v. Swisher, *supra* note 42; Tuck v. Knapp, *supra* note 136; Sherlock v. Thompson, *supra* note 137; (1920) 33 HARV. L. REV. 324; *cf.* Burbach v. Burbach, *supra* note 116; Fox's Estate, *supra* note 136. *Contra:* Henderson v. Hill, *supra* note 137. In Hagan v. Varney, *supra* note 42, *T* was named trustee for her own benefit for life, subject however to a charge for the support of her children. The court finds that a trust was created because the obligation was imposed on *B* and her heirs to convey the corpus on her death to her children. The question was discussed as to how a grantee on her death could convey to her heirs, no provision having been made for a power exercisable by will. The court said: "The instant the fact is recognized that a trust was imposed not in Mrs. Varney alone, but also on her heirs, all practical

Generally, where the so-called trustee takes the income for life and there is a gift over of the corpus, there is no trust, as the so-called trustee takes a legal life estate and the remainderman gets a legal remainder.[141] California seems to hold that a trust is created,[142] although there would be the same result if no trust had been created, and there seemed to be no object to be subserved by a trust which would not be achieved at law. It is frequently held, especially in New York, that if the cestui is named a co-trustee with another, and the other fails to qualify but the cestui does qualify; or if the original trustee fails to qualify or dies, and the cestui is thereafter named as trustee, a valid trust was once created and will be continued. That is to say, the court will not correct the settlor's own error in failing properly to create a trust, but if a merger arises not due to the settlor's error, the court will prevent the merger from having effect.[143] But the court will not permit such a cestui-trustee alone to exercise a power of sale.[144] It is frequently held that, where a trustee is only one of several cestuis, and the proportion which goes to each cestui is not fixed, there is no merger as to the trustee's share.[145] In *Miller v. Rosenberger*[146] a plot of ground had been conveyed to certain trustees to be used for the benefit of an unincorporated town, so that the trustees were also some of the beneficiaries, but no merger arose.

MERGER

There are various situations where the whole legal estate and the entire equitable interest come together in the same person and the trust is accordingly extinguished by a merger.[147] So

difficulty disappears." It is submitted that it is difficult for one to be sole trustee for life for one's sole benefit though the income may be subject to a charge. *Cf.* Irving v. Irving, *supra* note 42; Maher v. Maher, *supra* note 119.

[141] Schaefer v. Schaefer, *supra* note 136; Rose v. Hatch, *supra* note 136; *cf.* Fox's Estate, *supra* note 136.

[142] Nellis v. Rickard, *supra* note 136.

[143] Haendle v. Stewart, *supra* note 42; Rogers v. Rogers, *supra* note 42; Losey v. Stanley, *supra* note 42; Spengler v. Kuhn, *supra* note 42; People v. Donohue, *supra* note 42; Robertson v. de Brulatour, *supra* note 42; *cf.* Rankine v. Metzger, *supra* note 42.

[144] Irving v. Irving, *supra* note 42.

[145] Summers v. Higley, *supra* note 42; Story v. Palmer, *supra* note 42.

[146] *Supra* note 42.

[147] Conceivably there may be a merger of the equitable with the legal interests in the following types of cases: (a) The trustee conveys to the cestui. (b) The cestui releases to the trustee. (c) The trustee becomes cestui or the cestui becomes trustee. (d) The trustee and the cestui convey to a third person. Beatson v. Beatson, *supra* note 10; Henson v. Wright, *supra* note 117. (e) The cestui has power to convey the legal estate and conveys it together with his equitable interest to a third person. (f) The

if the sole trustee conveys to the sole cestui, or if the sole cestui inherits the legal fee, the trust is terminated,[148] except where the trust is spendthrift, or the cestui's interest is inalienable by statute. If the trust is spendthrift, equity will prevent a merger,[149] and sometimes such transfer is held void though there are no earmarks of a spendthrift trust.[150]

Similarly, if the cestui releases to the trustee, there is a merger.[151] Thus, in *Cunningham v. Bright*,[152] *S* purchased certain lands for development purposes and gratuitously declared himself trustee of it for four others. The latter conveyed to *S* their interests, and the land was thereafter held to be subject to attachment for the debts of *S*. There is the same result when the trustee inherits the equitable interest.[153] Similarly, there is a merger where the trust is a resulting trust,[154] save that several cases seem to hold that the release by the cestui does not come within the ninth section of the Statute of Frauds, and may be oral.[155]

---

trustee of a leasehold surrenders to the reversioner. SCOTT, *op. cit. supra* note 109, at 637n.; Estate of Yates, 170 Cal. 254, 149 Pac. 555 (1915). (g) Trustee of a term marries the woman reversioner and has a freehold in *auter droit*. (h) Obligor releases to obligee requiring latter to be trustee of the obligation for a third person. (i) The trustee dies leaving no heirs and the lord comes in in the *post* and paramount to the trust by escheat. (j) The trustee *ex parte paterna* acquires the equitable title *ex parte materna* or *vice versa*. (k) The equitable life tenant conveys to the legal remainderman. (l) The equitable life tenant acquires the legal remainder by purchase or by descent. (m) The equitable life tenant and the legal remainderman convey to a third person.

[148] In re Selous [1901] 1 Ch. 921; Brooks v. Davis, 82 N. J. Eq. 118, 88 Atl. 178 (1913); Cunningham v. Bright, 228 Mass. 385, 117 N. E. 909 (1917); (1919) 29 YALE LAW JOURNAL 97; Ormsby v. Dumesnil, *supra* note 39; Brown v. Renshaw, *supra* note 4; Miller v. Simonton, *supra* note 82; Smith v. Moore, 142 N. C. 277, 55 S. E. 275 (1906); Taft v. Decker, *supra* note 119; Partridge v. Clary, 228 Mass. 290, 117 N. E. 332 (1917); Ivory v. Burns, 56 Pa. 300 (1867); Brock v. Conkwright, *supra* note 39; Bradstreet v. Kinsella, *supra* note 39; *cf.* Wills v. Cooper, *supra* note 39; Cooper v. Cooper, 5 N. J. Eq. 9 (1845); Langley v. Sneyd, 1 Sim & S. 45 (1822); Danforth v. City of Oshkosh, 119 Wis. 262, 97 N. W. 258 (1903).

[149] Rife v. Geyer, 59 Pa. 393 (1868); Hartley v. Unknown Heirs, *supra* note 70.

[150] Maher v. Maher, *supra* note 42; Gibson v. Gibson, *supra* note 42.

[151] Newman v. Newman, 28 Ch. D. 674 (1885); Phipps v. Lovegrove, L. R. 16 Eq. 80 (1873); Browne v. Savage, 4 Drew. 635 (1859).

[152] *Supra* note 149; *cf.* (1919) 29 YALE LAW JOURNAL 97; Healey v. Alston, 25 Miss. 190 (1852).

[153] Ivory v. Burns, *supra* note 149; Pedrajas v. Bloomfield Trust Co., 109 Atl. 18 (N. J. 1927).

[154] Owings v. Owings, 3 Ind. 142 (1851); Vines v. Vines, 143 Tenn. 517, 226 S. W. 1039 (1921).

[155] See Matthews v. Thompson, 186 Mass. 14, 71 N. E. 93 (1904); and cases cited in SCOTT, *op. cit. supra* note 109, at 205-6. But by express statutory provision in New York the release must be in writing. Nestell

In *Gray v. Beard*[156] the grantor conveyed his lands to *T* on account of his fear of blackmail. He required a written retransfer which was not recorded. Thereafter he declared a trust in favor of various persons in the same lands, but later repurchased their claims and took releases. In order to straighten out the record title, he executed another conveyance to *T*, transferring the same premises and dated it back beyond the date of the declaration of trusts. The grantor died and *T* now claims that this conveyance is a release of the grantor's equitable interest, and that his record legal title merges under this conveyance with the equitable interest. But a court of equity prevented a merger.

Intimation of what the result is when the trustee becomes cestui, or one of several cestuis, and when the cestui becomes one of several trustees, has already been indicated. It is believed that it is important in all these cases from the standpoint of formal merger, to inquire whether the situation dealt with by the court was the one created by the settlor, or whether the commingled or contradictory interests arose later by inheritance or conveyance.

Likewise when the trustee and cestui convey to a third person, or when the cestui has power to pass the legal title, and executes the power and at the same time releases his equitable interest, a merger arises.[157] If the trustee of a leasehold estate should surrender to the reversioner, there would be a merger, the effect of which equity in a proper case will prevent by making the reversioner a constructive trustee.[158] It is not so clear whether at common law a merger arises when the trustee of a term marries the reversioner (a woman), so that the former now has a freehold estate in *auter droit*.[159]

It seems clear enough that an obligor cannot be trustee of his own debt for the benefit of another, though some English cases for practical reasons have held the obligor as trustee.[160] But where such release is made to the obligor, with the intent of making him a trustee, it seems clear that the resulting ex-

---

v. Hart, 202 N. Y. 280, 95 N. E. 703 (1911). In Pennsylvania it is held that the ninth section of the Statute of Frauds applies to the surrender of the interest of the cestui to the trustee where a resulting trust is involved. Hatcher v. Hatcher, 264 Pa. 105, 107 Atl. 660 (1919).

[156] 66 Or. 59, 133 Pac. 791 (1913).

[157] Beatson v. Beatson, *supra* note 10; Henson v. Wright, *supra* note 117; Bradstreet v. Kinsella, *supra* note 39; Lemen v. McComas, 63 Md. 153 (1885).

[158] Saunders v. Bournford, Finch 424 (1679).

[159] Thorn v. Newman, 3 Swanst. 603 (1673).

[160] Moore v. Darton, 4 DeG. & Sm. 517 (1851).

tinguishment in the nature of a merger, should be prevented in equity.[161]

Although equitable interests, as against the bare legal title, have been of growing importance, and the tendency has been to give effect to the former at the expense of the latter, as if the cestui were the real owner, yet courts have shown no yielding to this tendency in the case of ancestral estates, when the legal estate is derived *ex parte paterna* and the equitable interest comes *ex parte materna*, or vice versa. In this situation the two interests merge, and the heir who derives his claim from the legal title holder always prevails.[162]

There seems to be no merger at common law when the trustee dies without heirs, and the legal estate escheats to the lord. The latter comes in the *post*, and by title paramount to the trust, and the equitable interest ceases to exist. Likewise, when the equitable life tenant surrenders to the legal remainderman, or where the latter releases to the former, or where both convey to a third person there is, properly speaking, no merger. The intervening legal estate of the trustee prevents a coalescence. When, under these situations the trust is held terminable, it would seem to be because the trust purpose can no longer be fulfilled.

TERMINATION BY THE SETTLOR: THE TENTATIVE TRUST: DEATH OF SETTLOR

If *S* deposits money in a savings bank in his own name as trustee for *A*, and later dies with the passbook in his own possession without withdrawing the deposit, does *A* get the money? Assuming that there is no further evidence either way, New York says, and it has been made statutory there now, that this is a tentative trust which becomes irrevocable at the death of *S*, but only then. New Jersey says that the tentative trust theory conflicts with the Wills Act, and Massachusetts says it may be a trust, but if nothing more appears, the trust is not made out.

It has been said that the decision in the case of *Matter of Totten*[163] was excellent as a piece of legislation, but deplorable as a matter of law, in that it violates fundamental principles. It does seem to be entirely desirable that such a practice should be recognized, whether by statute or by the courts, but is there

---

[161] Anon., 2 Free. Ch. 52 (1680).

[162] Goodright v. Wells, 2 Doug. 771 (1781); Selby v. Alston, 3 Ves. Jr. 339 (1797); Burgess v. Wheate, 1 Bl. Wm. 123 (1759); In re Douglas, 28 Ch. D. 327 (1884); Langley v. Sneyd, *supra* note 149; Wade v. Paget, 1 Cox 74 (1784); Nicholson v. Halsey, 1 Johns. Ch. 417 (N. Y. 1815); Shephard v. Taylor, 15 R. I. 204 (1885).

[163] 179 N. Y. 112, 71 N. E. 748 (1904).

any logical basis upon which such a result can rest apart from statute?

To the present writer it would seem that when *S* makes a deposit in trust for *A*, this is an unequivocal declaration; not a promise of a future gift nor even of a present gift, but a conveyance without transmutation by *S* to *A* under the doctrine of *Ex parte Pye*.[164] This is not the whole of the story, for the custom calls not merely for a present transfer of the equitable title, but also for the power in *S* to revoke such a transfer, either in whole or in part, as to interest accumulations or principal or both. Is it possible, consistently with generally recognized principles, to transfer the title and retain power to recall it, without a written reservation of such power?[165]

We have seen that when the trust purpose is accomplished, it may be terminated. It is no objection to the existence of a valid trust that the settlor reserves power to revoke it. It is also seen that where the settlor creates a trust for his own benefit, without giving an interest to any other person, the tendency is to hold that he may revoke the trust at will, though not so if others are interested. What is really peculiar then, about the savings bank trust, is that though another person is interested, still the settlor may revoke it. There is no sufficient reason why a practice may not be recognized in such cases which contemplates a general power of revocation, and which has the same potency as an express reservation of power. It is clearly a solution which meets the needs of many persons, and if the desire of *S* cannot be carried out, there should be good reason for failure to allow *S* his own way.

It would seem clear, however, that if the trust is in fact tentative, and title does not pass finally till death, as in New York, then the objection raised by the New Jersey courts is sound, the transfer is testamentary.[166] Massachusetts[167] rates such a transaction along with the gratuitous assignment of choses in action, and requires something further to be done to prove the intent of *S* to create a trust, and compares this with *Cook v. Lum*[168] and *Stevenson v. Earl*.[169] But to require the delivery of

[164] 18 Ves. Jr. 140 (1811). For a somewhat contrary view see Bogert, *Creation of Trusts by Means of Bank Deposits* (1915) 1 CORN. L. Q. 159, particularly note 86; see also BOGERT, TRUSTS (1921) § 27.

[165] See Wagner v. Wagner, 244 Ill. 101, 91 N. E. 66 (1910).

[166] Booe v. Vinson, 104 Ark. 439, 149 S. W. 524 (1912).

[167] Will of Hamburger, 185 Wis. 270, 201 N. W. 267 (1924); (1925) 38 HARV. L. Rev. 838; Sanford v. Lackland, *supra* note 33; DeLadson v. Crawford, *supra* note 56; Huston v. Dodge, 111 Me. 246, 88 Atl. 888 (1913); Reel v. Hansboro State Bank, *supra* note 38; Magrath v. Morehead, L. R. 12 Eq. 491 (1871); Boynton v. Gale, 194 Mass. 320, 80 N. E. 448 (1907); *cf.* Matter of Billett, *supra* note 56.

[168] 55 N. J. L. 373, 26 Atl. 803 (1893) (an attempt to assign a chose in

the pass book is to require a completed gift, and not a trust. *A* is then in the same position he would have been in if the deposit were in the name of *S* only. It has also been held that if *S* deposits in the name of *A* only, and keeps the book, still the gift is complete. But a gift of the legal interest in the tentative trust cases is not intended, and, except in Massachusetts, it is not generally held that notice to the cestui is necessary to complete the trust.[170]

Under the Massachusetts view, "*S* in trust for *A*" is ambiguous standing alone. *S* may have deposited his own funds in this manner because he already had as large an account in his own name as the bank's by-laws permit; or there may be many other reasons for such form of deposit. As a consequence, evidence is admissible to show *quo animo* the deposit was made. This seems to the writer as objectionable in its way as the New York view. How is the form of the deposit equivocal? Why should his secret and contrary intent, if any, control the statement so written at his special request? The form is certainly less equivocal than that in *ex parte Pye*, and exactly equivalent to the written statement, "I hold this property in trust for *A*." [171] The only equivocal thing has to do with the question whether a power of revocation was or was not intended to be reserved. New York will not permit evidence of oral declarations to explain the form, and this seems sound. In all these cases, if the settlor having established a valid trust, does not put an end to it by his own act prior to his death, the latter event will make it possible for the cestui to call for the corpus of the estate.

DUTY OF THE TRUSTEE TO CONVEY

After the death of the life beneficiary, the trustee being given the duty at that time to sell and distribute the proceeds, a conveyance would be necessary in order to pass a good title.[172] But in *Lee v. Oates*,[173] where the trustee had died, it was held that

action without a deed and without the delivery of any document which represented the chose).

[169] 65 N. J. Eq. 721, 55 Atl. 1091 (1893) (direction of depositor to depositee to pay all sums left standing in former's name at his death to his widow).

[170] But *cf.* DeLadson v. Crawford, *supra* note 56.

[171] Camden Safe Deposit & Trust Co. v. Guerin, *supra* note 33.

[172] Armour v. Murray, *supra* note 128; see Allen v. Merrill, 223 Mich. 467, 194 N. W. 131 (1923); (1924) 33 YALE LAW JOURNAL 331 and cases there cited. According to Nave v. Bailey, 160 N. E. 605 (Ill. 1928) a conveyance by the beneficiary of a trust operates in equity on a trust estate the same as it would in law on a legal estate.

[173] *Supra* note 41; *cf.* Coughlin v. Deago, 53 Ga. 250 (1874); Sheaff's Estate, 231 Pa. 251, 80 Atl. 361 (1911); Harris v. Cornell, 80 Ill. 54 (1875) (where debts of bankrupt are outlawed and the purposes of the assignment are accomplished, the assignee loses title and former bankrupt is reinvested with legal title). Compare the case where a mortgagee has

a deed signed by the equitable life tenant and legal remainderman could pass a good title, and a contract to purchase the trust premises was specifically enforceable. In *Bennett v. Bennett*,[174] where title to slaves was put in a trustee for the benefit of the settlor's daughter and her children, the title was not divested from the trustee by death of the daughter. The children could not recover in detinue, because the Statute of Uses did not apply to personalty. But if the trust is established for a person and his heirs, and is not intended to continue longer than the life of such person, then a conveyance is not required. Thus, in *Bradstreet v. Kinsella*,[175] it was held that a direction by the will of the cestui to convey was ineffective, but the property in this case passed under the residuary clause of her will.

Some courts make a distinction between a trust for use and a trust to convey, holding that if the former becomes passive, the Statute executes it, but in the latter case the Statute cannot execute it.[176] In *Brillhart v. Mish*,[177] and in *Angle v. Mar-*

---

been paid but has not released the mortgage. Barrett v. Hinckley, 124 Ill. 32, 14 N. E. 863 (1888).

[174] 217 Ill. 434, 75 N. E. 339 (1905). *Accord:* Slevin v. Brown, *supra* note 108 (a chattel real conveyed on a dry trust). But *cf.* Underwood v. Boston Five Cents Bank, *supra* note 19 (administrator of cestui allowed to sue at law for proceeds of deposit in bank held on a dry trust created by the beneficiary).

[175] *Supra* note 39; Hooper v. Felgner, *supra* note 80. *Accord:* Comby v. McMichael, 19 Ala. 747 (1851) (where it was held that on death of life tenant the trust came to an end and the proper remedy for the receiver of the property was detinue rather than a bill in equity); Caughlin v. Seago, 53 Ga. 250 (1874) (trust terminated on death of trustee and cestui without a conveyance became vested with legal title); Shoemaker's Appeal, 91 Pa. 134 (1879); Moll v. Gardner, *supra* note 80; Smith v. Moore, 142 N. C. 277, 55 S. E. 275 (1906); McNab v. Young, 81 Ill. 11 (1875); Rush v. Lewis, 21 Pa. 72 (1853); Fairfax v. Brown, 60 Md. 50 (1883); Reuling v. Reuling, 137 Ky. 637, 126 S. W. 151 (1910); Smith v. Harrington, *supra* note 34; Roberts v. Moseley, 51 Mo. 282 (1873); Mitchell v. Mitchell, *supra* note 108; Kronson v. Lipschitz, *supra* note 21 (semble); Bellinger v. Shafer, 2 Sandf. Ch. 324 (N. Y. 1845) (trust to continue until female beneficiary reached the age of twenty-one or married, then to terminate). In Deering v. Pierce, 149 App. Div. 10, 133 N. Y. Supp. 582 (1st Dept. 1912) an action at law against the trustees would not lie prior to an accounting. *Cf.* Snodgrass v. Snodgrass, 185 Ala. 155, 64 So. 594 (1914). In Hemphill's Estate, 180 Pa. 87, 36 Atl. 409 (1897) the court points out that a trust is passive where all trustee does is to receive funds and pay them over, since he is a mere conduit and the trust operates automatically without the use of discretion on his part. See also Eshbach's Estate, 197 Pa. 153, 46 Atl. 905 (1900); Schuldt v. Reading Trust Co., *supra* note 76; Knight's Estate, *supra* note 39.

[176] Phillips v. Vermeule, 88 N. J. Eq. 500, 102 Atl. 695 (1917) (court observes that the difference between the two situations is evanescent); McFall v. Kirkpatrick, *supra* 128. In Blake v. O'Neal, 63 W. Va. 483, 61 S. E. 410 (1908) the Statute of Uses was not in force, hence the trustee of a passive trust continues to hold the legal title. According to Nave v.

shall,[178] it does not appear whether it was regarded as necessary for the trustee to convey legal title which was a matter of record, though his interest as a trustee was regarded as a power and revocable.

In some cases it is held that legal title passes to the beneficiary when the trust becomes passive;[179] but in order to remove the cloud on the latter's title equity will require a conveyance by the trustee.[180] It is sometimes asserted that the rule, that legal title is in the beneficiary without a transfer by the trustee, applies only where the trust appears, from the instrument creating it, to be passive, and not to cases when the nature of the trust is to be determined from circumstances dehors such instrument.[181] After a long period of time has elapsed, a transfer of the property held under a dry trust will be presumed.[182] A trust for the benefit of a married woman was not executed by the Statute of Uses, but as soon as she should become discovert, the use was executed and she could transfer the legal title.[183]

CONCLUSION

However much we may object to the theory, spendthrift trusts are firmly established. In spite of its inconsistencies, that the cestui may alienate his equitable interest, and creditors may reach it by a bill in equity, the *Claflin* doctrine continues to win new adherents. It is believed, however, that just as courts have distinguished between spendthrift trusts created by third

---

Bailey, *supra* note 172, if the statute executes a use at all it does so at the time the use is created only.

[177] *Supra* note 8.

[178] *Supra* note 8.

[179] By statute in California. See also Allen v. Allen, *supra* note 80. In Hinds v. Hinds, 140 Atl. 189 (Me. 1928), where the trust became passive, it was held that the cestui was entitled to a conveyance, but it was also held that a conveyance by the cestui passed the legal title and that a deed from the trustee was unnecessary to remove a cloud on the title, if and when the court's decree was recorded.

[180] Rothschild v. Dickinson, 169 Mich. 200, 134 N. W. 1035 (1912); Ringrose v. Gleadall, 17 Cal. App. 664, 121 Pac. 407 (1912); Reuling v. Reuling, *supra* note 175; Schlessinger v. Mallard, *supra* note 21 (semble); *cf.* Behringer's Estate, 265 Pa. 111, 108 Atl. 414 (1919) (trustee of dry trust not made a party was not permitted to appeal from a decree of the court ordering a sale of the land held in trust); Buch's Estate, *supra* note 94; (semble). The later Illinois cases seem to require a transfer by the trustee. Moll v. Gardner, *supra* note 80; Kirkland v. Cox, 94 Ill. 400 (1880). The trustee cannot object to the termination of a dry trust. Armistead v. Hartt, *supra* note 8; see Hinds v. Hinds, *supra* note 179.

[181] Obermiller v. Wylie, 36 Fed. 641 (C. C. 6th, 1888).

[182] Miller v. Cramer, 48 S. C. 282, 26 S. E. 657 (1897); Moll v. Gardner, *supra* note 80; Blake v. O'Neal, *supra* note 176.

[183] NcNeer v. Patrick, 93 Neb. 746, 142 N. W. 283 (1913) and cases there cited.

persons and those created by the settlor, so they should distinguish between trusts established by a third person for the benefit of a sole cestui, the presupposition of the *Claflin* doctrine, and those instituted by the cestui for his own sole benefit. The latter trust should be freely terminable without rhyme or reason where the beneficiary is *sui juris*. It is the failure to note the distinction as to the identity of the settlor that leads courts to reach the same result in the latter two types of cases. Of course, the settlor-cestui may alienate his equitable interest though at a heavy sacrifice, and creditors may reach it. The attendant loss furnishes a most serious objection to the view that such a trust is irrevocable by the cestui. The writer suggests that there is a policy of the law utterly opposed to the proposition that a man can settle property on himself solely, and put it beyond his own reach.

The writer believes that the so-called tentative trust is sound in theory even without a statute, and that it meets a business need. The trust is created at the moment of making the deposit. The law of commercial paper was developed through the custom of merchants. The law does not, or should not, reach a point where it may not be modified by commercial practice, and such practice gives warrant for the revocation of the tentative trust where no such power is expressly reserved. On the other hand, courts of equity in particular ought not to stand overlong on outworn formulas, as is done in the protection of a class of conceivable contingent interests above described.

It is desirable to distinguish between a merger proper, where the equitable and legal interests in property once separated come together in one person, and the case where originally the same person is named both trustee and cestui. In the former situation equity may prevent a merger in a proper case. It seems evident also that, in the case of ancestral estates, too much reverence continues to be paid to the form, and too little to the substance. In any event a private trust should terminate when its purpose is accomplished, or the object has failed. The power of chancery to modify, or even terminate, a private trust contrary to the expressed intent of the settlor, where an unexpected situation has arisen, should be exercised when the equitable grounds are clear.