CHAPTER 5

Trusts

SPENDTHRIFT TRUSTS

In many states a restraint on the alienation of the right of a beneficiary to receive the income under a trust created by a person other than the beneficiary himself is valid and in some states it is held that a restraint on the alienation of the beneficiary’s interest in the principal is effective. Trusts in which the interest of the beneficiary

1 Scott, Trusts, sec. 152.1. The following is a summary of Scott’s survey of spendthrift trusts in the various jurisdictions (through 1951). These jurisdictions recognize spendthrift trusts although no statute so provides: Ark., Colo., D. C., Fla., Me., Md., Mass., Miss., Mo., Neb., N. J., Pa., Tex., Hawaii, S. C., and Vt. There are dicta upholding spendthrift trusts in Iowa and Oregon. In several states there are statutes having a common origin in the legislation of New York in which it is provided that the right of a beneficiary of an express trust to receive the income cannot be transferred by him; and it is provided that the surplus beyond the sum which may be necessary for the education and support of the beneficiary shall be liable to the claims of creditors: Mich., Minn., Mont., N. Y. In a few states there is legislation based on the California statute, in which it is provided that the settlor may impose a restraint on the voluntary assignment by a beneficiary of his right to the income; creditors are allowed to reach the income in excess of what may be necessary for the education and support of the beneficiary: Cal., N. D., S. D. The statutes of two states provide that the beneficiary cannot assign his right to the income unless the right to do so is conferred by the terms of the trust: Ind., Kan. There are statutes in a number of states which provide that a proceeding may be maintained to reach the interest of a beneficiary under a trust “except when such trust has been created by, or the fund so held in trust has proceeded from, some person other than the debtor himself”: Ill., N. H., N. J., Tenn., Wash. In several other states there are statutes which permit spendthrift trusts to a limited extent: Ala., Ariz., Conn., Del., Ga., La., N. C., Nev., Okla., Va., W. Va.

2 Scott, Trusts, sec. 153.2, 153.3. Antone v. Snodgrass, 244 Ala. 501, 14 So. 2d 506 (1943); Coughran v. First Nat. Bank, 10 Cal. App. 2d 153, 64 P. 2d 1013 (1937); Snyder v. O’Connor, 102 Colo. 567, 81 P. 2d 773 (1938); Medwedeff v. Fisher, 179 Md. 192, 17 A. 2d 141 (1941); In re Manley Estate, 112 Vt. 314, 24 A. 2d 357 (1942). The Restatement takes the view,
cannot be assigned by him or reached by his creditors are known as "spendthrift trusts." The recognition of spendthrift trusts is in a sense an anomaly, for disabling restraints on legal estates are generally held invalid. Probably the real reason why the courts have recognized spendthrift trusts lies in the fact that any trust is likely to impair alienability to some extent. Hence an express prohibition against alienation of the beneficial interest does not add materially to the restriction on alienability caused by the trust itself. However, the judicial explanation has usually been one of pure logic, that a donor of property ought to be able to dispose of his property as suits himself, provided that he does not violate any principle of public policy. The courts have not felt there is anything anti-social in the spendthrift trust.

The process of reasoning by which the courts have justified the spendthrift trust has generally caused them to overlook the dubiousness of the policy of permitting the settlor to create a trust in which the beneficiary's interest is free from the claims of creditors, regardless of the beneficiary's needs or the size of the income. Can such an immunity from involuntary alienation be taken away? In *Brearley School v. Ward*, the New York Court of Appeals held that a life

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5 A. Bogert, *Trusts*, sec. 222.
7 201 N. Y. 358, 94 N. E. 1001 (1911). The theory of the dissenting opinion in the court below was that the beneficiary of a trust fund whose income therefrom is wholly exempt from execution at the time of the creation of the trust has a constitutional right which prohibits the legislature from
beneficiary was not deprived of property without due process by a statutory amendment whereby the income from the trust was subjected to a judgment lien of a creditor. Several factors present in the case, however, relatively simplified the problem of the court in arriving at this conclusion. The trust was created by will; thus the impediment of supposed making any part of such income applicable to the payment of his debts. The Court of Appeals said this theory was tenable only upon the assumption that the state had entered into a contract with the *cestui que trust* to that effect, because there certainly was no such contract between the creator of the trust and the trustee. The trustee merely undertook to pay over the income as directed, provided the law of the land permitted him to do so. But the legislature did not enter into any contract with its citizens, nor did it offer to contract with them. The statute was enacted in the exercise of the plenary power of the state to regulate the tenure of real and personal property within its borders. The provision that the income of a trust fund may not be taken to satisfy the debts of the beneficiary is no inherent or necessary part of the trust. The exemption of the homestead of a debtor can be repealed. Why not the exemption of the income from a trust? "... a party has no vested right in a defense to a contract which he has actually made and which he is under a moral obligation to perform, though the law at the time makes such contract void. There is recognized in every civilized country the obligation of a man to pay his debts if he has property out of which they can be satisfied, and the failure to do so is moral dishonesty. No one has a moral right to be dishonest." (201 N.Y. 358, 372, 94 N.E. 1001, 1006.) To sustain the position of the beneficiary that the amendment could not be applied as to trusts already in existence, said the court, it would be necessary to hold not only that he had a vested right to hold the income of the trust exempt from the claims of his creditors prior to the enactment of the law, but that he had a vested right to incur such debts as he might see fit in the future with a similar exemption. Such a result, the court considered, was rather too startling to be contemplated with equanimity.

Gray, J., thought that to apply the statute retroactively deprived the beneficiary of property without due process. The right to receive income is a valuable property interest. Before the amendment, this right was subject only to the right of creditors to reach the surplus beyond what was necessary for the beneficiary's support. If the legislature can validly change the statute so as, arbitrarily, to direct the application of ten per cent of the income to the claim of a creditor, it could as competently direct the application of any percentage, even of the whole.

See King v. Irving, 103 App. Div. 420, 92 N.Y.S. 1094 (1st Dept. 1905) wherein doubt is expressed that the amendment could be applied where a trust had been created by will previous to the date of the amendment. The court said that the testator had a right to direct that a certain income should be paid to the beneficiary and that it was difficult to see how the legislature had power to direct payment in a different way.
contract rights was eliminated. There was no spendthrift provision in the will. The exemption was simply part of the Real Property Law as it stood at the time the trust was created. The case, therefore, seemed to the court to be governed by the well-established rule that a debtor can have no vested interest in an exemption statute. The third factor was that the change was not far reaching. Even before the amendment, the beneficiary could be compelled to apply all of the trust income which was not necessary for his education and support to the payment of debts. The amendment merely measured the quantum which was to go for the payment of debts by a different standard.

A California case holds, without discussion of the point, that a statute cannot make the interest of a beneficiary of an existing spendthrift trust subject to the reach of creditors. In *State v. Caldwell*, a Tennessee decision involving an *inter vivos* rather than a testamentary trust, it was determined that there would be a violation of the due process clause of the Fourteenth Amendment, as well as a violation of the contracts clause, in the application to an existing trust of a statute whereby it was provided that the interest of a beneficiary under a spendthrift trust could be subjected to the judgment claims of the state of Tennessee. It was con-

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8 That a will cannot be deemed a contract within the meaning of the contracts clause of the federal Constitution was settled in Cochran v. Van Surlay, 20 Wend. 365 (N. Y. 1838).

9 Under N. Y. Real Property Law, sec. 98, only the surplus of rents and profits, beyond the sum necessary for the education and support of the beneficiary is liable to the claims of his creditors. Laws 1908, c. 148, provided *inter alia* that income from trust funds due or owing to a judgment debtor to the amount of $12 or more per week is subject to execution, not to exceed ten per cent.

10 *Seymour v. McAvoy*, 121 Cal. 438, 53 Pac. 946 (1898).

11 181 Tenn. 74, 178 S. W. 2d 624 (1944).

12 Tenn. Code 1932, sec. 10353 provided: "To subject trust property; exception.—The creditor whose execution has been returned unsatisfied, in whole or in part, may file a bill in chancery against the defendant in the execution, and any other person or corporation, to compel the discovery of any property, including stocks, choses in action, or money due to such defendant, or held
tended by the state that the right of the beneficiary to have his interest free from the claims of creditors arose entirely out of statute\textsuperscript{13} and not out of the provisions of the trust instrument and that this exemption privilege could unquestionably be taken away by the state. However, the court was of the opinion that spendthrift trusts had been recognized by judicial decision in Tennessee prior to the enactment of the statute referred to by the state as an exemption statute and that the statute and decision constituted a rule of property which was not at all an exemption for poor debtors.

"We are therefore constrained to hold that these defendants having acquired a title and interest in property by virtue of judicial decisions, grounded on public policy, supplemented by legislative declaration, and declared to be a rule of property, such title and interest must necessarily be adjudged a vested estate and beyond the reach of the Legislature. It is as much a vested estate as if there had been a conveyance to them of an estate in fee simple. The fact that it was inalienable and free from the claims of creditors would not alter the case."\textsuperscript{14} 

The court in the \textit{Caldwell} case referred to \textit{Brearley School v. Ward} but distinguished that decision from the situation under consideration in that here the instrument contained a

in trust for him, except when the trust has been created by, or the property so held has proceeded from, some person other than the defendant himself, and the trust is declared by will duly recorded or deed duly registered." (Acts 1832, c. 11, sec. 1.) Pub. Acts 1943, c. 108, sec. 1, amended sec. 10353 by adding: "Provided, however, that where the State of Tennessee shall be such judgment creditor, whether the debt be created before or after the effective date of this Act and whether or not the trust for the benefit of the debtor shall have been declared prior to or subsequent to the effective date of this Act, the Chancery Court shall have jurisdiction to subject such property to the satisfaction of the claims of the State of Tennessee despite the fact that the trust has been created or the property so held has proceeded from some person other than the defendant himself and the trust declared by will duly recorded or deed duly registered."

\textsuperscript{13} Tenn. Code 1932, sec. 10353; Acts 1832, c. 11, sec. 1, \textit{supra} note 12.

\textsuperscript{14} 181 Tenn. 74, 82, 178 S. W. 2d 624, 637.
provision against alienation (which was not so in Brearley) and that the exemption arose not only by virtue of a statute (as in Brearley) but also by sanction of the common law. It is submitted, nevertheless, that these are distinctions without difference. The spendthrift provision is in effect a kind of exemption whether its source is in statute or in the common law. The law says to the testator or settlor: If you insert a provision in the trust instrument that the interest of the beneficiary shall be exempt from the creditor’s reach, then his interest shall be exempt from creditor’s claims. Now, there may be persuasive reasons why the law should permit the creation of spendthrift trusts. Incompetent and inexperienced beneficiaries often need this sort of protection. However, this is a matter to be addressed to the discretion of the legislature. Certainly, it cannot be said that opinion is

15 So far as the legislature’s power to abolish the spendthrift provision is concerned, the provision can properly be classified only as an exemption—an immunity from attachment by creditors. I do not wish to imply that there may not be instances where it would be inappropriate to treat the spendthrift provision as a mere personal exemption. For certain purposes, a spendthrift provision may be more appropriately treated as a restraint on alienation than as an exemption. For example, in a jurisdiction where the laws permit a person to set up a trust in which the beneficial interest is voluntarily alienable but cannot be reached by creditors, suppose the beneficiary of such a trust becomes bankrupt. The Federal Bankruptcy Act provides that the bankrupt shall be allowed the exemptions prescribed by the state law. 11 U. S. C. A. sec. 24. On the other hand, the Act also provides that the trustee in bankruptcy shall be vested with the title of the bankrupt to all property which the bankrupt could by any means have transferred. 11 U. S. C. A. sec. 100 (a) (5). If the spendthrift provision in this example is classified as a personal exemption, the interest of the beneficiary will not pass to the trustee. It has been held, however, that the interest does pass to the trustee. Young v. Handwork, 179 F. 2d 70 (7th Cir. 1950), cert. den. and reh. den. Handwork v. Young, 339 U. S. 949 (1950). The court held that it was not obliged to follow the state court decisions to the effect that such an interest does not pass to the trustee. “And to construe this section [of the state statute] so as to prevent such interest from passing to the trustee in bankruptcy while the state recognizes it as alienable property would present a serious challenge to the validity of the state provision. At any rate, such a construction places the state provision in direct conflict with the bankruptcy provision which Congress in the exercise of its paramount power has enacted.” (179 F. 2d 70, 79.)

unanimously in favor of permitting the creation of spendthrift trusts. The *Caldwell* decision appears to contradict the prevailing view that no one has a vested interest in an exemption. The court called the immunity from attachment “a rule of property,” but this is a mere play on words.

When the statute removes the restraint on the power of the beneficiary of a spendthrift trust to make a voluntary transfer (as distinguished from the involuntary transfers considered above), the beneficiary is scarcely likely to complain, but the court may find that the statute as applied to an existing trust invades a constitutional privilege of the settlor or testator to dispose of his property on such terms as he saw fit. In *In re Borsch's Estate*, the Pennsylvania Supreme Court declared that a statute, under which the

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17 The classic denunciation of spendthrift trusts was written by John Chipman Gray. Gray, *Restraints on Alienation*, Preface VII (2d ed. 1895). Gray believed that everyone should pay his debts. One of the worst results of spendthrift trusts, he thought, was the encouragement they give to a plutocracy. The pros and cons of spendthrift trusts are discussed, in Bogert, *Trusts*, sec. 222.


The testator, who died twenty-four years before the enactment of the statute, devised his real estate to trustees subject to spendthrift provisions as to income. The life tenant, pursuant to the statute, delivered a release to the trustees, wherein she sought to renounce her life interest in the trusts thus terminating them and vesting a fee-simple absolute in her son, the remainderman.


Sec. 1 of the Act of 1945 provided: “... any interest in, to, or over, real or personal property, or the income therefrom, held or owned outright, or in trust, or in any other manner which is reserved or given to any person by deed, will or otherwise howsoever, and irrespective of any limitation of such power or interest by virtue of any restriction in the nature of a so-called spendthrift trust provision, or similar provision, may be released or disclaimed, either with or without consideration, by written instrument signed by the person possessing the power or the interest and delivered as hereinafter provided.” Sec. 2 contained the limitation that no power or interest, subject to a spendthrift trust provision, or similar provision, could be released or disclaimed except in favor of a remainderman.

The Act of 1943 was prompted by a change in the federal tax laws by the Revenue Act of 1942, making property over which a decedent has at the time
beneficiary of a spendthrift trust was authorized to release his interest in favor of a remainderman, was unconstitutional when applied retroactively as it violated the right of the testator by whose will the trust was created to dispose of his property.\textsuperscript{20}

The Court declared that from 1838 to 1945, the decisions of the court had firmly established that the right of the testator or deceased donor to have his spendthrift provisions enforced is a “right of property.”

“When prior to the act, a beneficiary of income subject to spendthrift trust provisions accepted the gift, this Court consistently held that the beneficiary could not thereafter terminate the trust by releasing, renouncing and disclaiming his interest. The basis for this doctrine rested upon the ancient maxim: Cujus est dare, ejus est disponere: the bestower of a gift has the right to regulate its disposal. Spendthrift trusts are sustained not because of the law’s concern for the donee, but because the testator or donor possessed an individual right of property in the execution of the trust. To permit a termination by agreement or release would be an invasion of the donor’s property right.”\textsuperscript{21}

“The testator has no interest in the property after his death, which is subject to constitutional protection.” True, there are no pockets in shrouds. The Constitution, however, is not protecting present ownership of a property of a deceased. What it does protect is the property right possessed of his death a power of appointment includable in his gross estate for computation of federal estate taxes. Int. Rev. Code, sec. 811 (f) (Sec. 403a, Rev. Act of 1942). This tax liability makes a complete or partial release or disclaimer of a power of appointment or other property interest often desirable. The purpose of the Act of 1943 was to establish an orderly method by which releases and disclaimers could be evidenced. The federal tax law was amended in 1951 to limit its import to general powers. See supra Ch. 4 note 256.

\textsuperscript{20} Pa. Const., Art. I, sec. 9, providing that a man cannot be “deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land.”

\textsuperscript{21} In re Borsch’s Estate, 362 Pa. 581, 586, 67 A. 2d 119, 121.
by the testator or donor, to have enforced the limitations and restrictions affixed to the gift." 22

True, in the absence of statute, once a beneficiary under a spendthrift trust has accepted, he cannot terminate the trust by releasing his interest since that would violate the donor's directions.23 But this general principle should not be used to overturn a statute. In spite of the insistence of the Pennsylvania court that the law's concern is with the donor, it would seem that it is rather the beneficiary's interests which are to be considered.24 As stated before, the donor has no natural right to create spendthrift trusts; if he may do so, it is because the law permits him this privilege. At any rate, the Pennsylvania statute did not impair the testator's jus disponendi. The beneficiary took cum onere. The situation in the Borsch case was analogous to the acceleration of a remainder by a widow's renunciation of the will. The statute provided that the release must be in favor of the remainderman; his interest was accordingly accelerated.

While the court's position in respect to the constitutional rights of the donor would have been dubious even if the donor had been alive when the decision was rendered, the position is astounding when it is considered that the donor was dead. Of course, the wishes of the dead are honored so far as the law permits them to be. When the legislature changes the law, the courts listen sympathetically to the claims of the living and extend the arm of the judiciary to protect their interests, but ordinarily the courts are quite

24 See Costigan, "Those Protective Trusts Which Are Miscalled 'Spendthrift Trusts' Reexamined," 22 Calif. L. Rev. 471, 483 (1934) taking the view that the needs of the beneficiary should be the primary justification for such a dispositive scheme.
unmoved by claims that the rights of the dead have been invaded. 25

It is interesting to note that an inferior Pennsylvania court saw no unconstitutional impairment of a testator's rights in the application of a statute to an existing trust, although the testator's rights were necessarily modified thereby. 26 The statute provides that an attachment may be issued against an interest in a spendthrift trust to satisfy a decree or judgment against the beneficiary for the support of his wife and children.

TERMINATION OF TRUSTS

Closely related to the problem at issue in the retroactive application of the Pennsylvania Spendthrift Statute is the question whether statutes authorizing the termination of trusts can be applied to existing trusts. If the termination will result in the involuntary extinguishment of future interests the statute probably cannot be so applied. However, if the effect of the termination is merely to convert the equitable future interests to legal future interests and the possessory tenant is not invested with any greater power over the disposal of the principal than was the trustee, there would seem to be no violation of due process in applying the statute, and no impairment of a contract obligation (assuming that a contract in the constitutional sense subsists between the remaindermen and the trustee). Likewise, the beneficiary with the present right to income or principal cannot be heard to complain of unconstitutional deprivation of property if

25 Chapter 3 supra p. 96 et seq.

Purdon's Pa. Stat. Ann., Tit. 20, sec. 301.12 provides: "Income of a trust subject to spendthrift or similar provisions shall nevertheless be liable for the support of anyone whom the income beneficiary shall be under a legal duty to support."
the effect of the statute is to invest him with the legal title to the property in which he had previously only a beneficial interest. On the other hand, if his right to income is destroyed and the principal distributed among the remaindersmen, he will be deprived of property without due process.

Ordinarily, the terms of the trust fix the period of its duration, and it will not be terminated until the expiration of that period. Termination of the trust before the time fixed is usually allowed only under certain conditions, such as where the accomplishment of the trust becomes impossible or illegal or the continuance of the trust will substantially impair the accomplishment of the purposes of the trust. Even if all of the beneficiaries are desirous of terminating the trust, the courts are unwilling to allow it if such termination would run counter to the intention of the settlor in creating the trust. The judicial rationalization is that the wishes of the settlor must control unless they run contrary to some public policy. From this it may well be gathered that the settlor who is still living at the time of the attempted application of a statute which permits the termination of the trust against his wishes, would be in a good position to assert constitutional rights. But it is difficult to see how a settlor who is deceased at the time the statute becomes effective can be said to have any constitutional rights. Nor is it reasonable to presume that a testator-donor can have any rights after his death, unless it be said, as in the Borsch case, that the termination of the trust would entail an impairment of

27 3 Scott, Trusts, sec. 329A.
28 When such circumstances obtain, the trust may be terminated prior to the time fixed for termination even though all of the beneficiaries do not consent. The settlor or his successor in interest may have the trust rescinded where the creation of the trust was induced by fraud, duress, or mistake. Where the trust is created inter vivos the settlor may retain a power of revocation. If he does not reserve expressly or by implication a power of revocation, and the failure to reserve the power is not due to mistake or fraud, he cannot revoke without the consent of the beneficiaries. 3 Scott, Trusts, sec. 329A.
29 3 Scott, Trusts, sec. 337.
the testator's right while living to dispose of his property as he saw fit, but such reasoning is entirely fanciful.

There remains to be considered whether the trustee has such an interest in the res that the termination of the trust would deprive him of property without due process or invade some other constitutional right. In 1893 and 1897, statutes were enacted in New York which permitted the beneficiary of income from a trust, who is entitled to the remainder, to release his interest in the income thereby causing a termination of the trust. In Metcalfe v. Union Trust Co. the life beneficiary of a trust created in 1892, who had acquired the interests of the persons entitled to the res after her death, requested that the defendant trustee pay to her the trust funds. The court held that the statute in question was not intended to have a retroactive effect. But it was strongly asserted by several of the judges that the statute would not have been unconstitutional if given retroactive effect; that it would not have impaired the obligation of contracts; and

30 N.Y. Laws 1893, c. 452. Laws 1897, c. 417, § 3 provided: "... Whenever a beneficiary in a trust for the receipt of the income of personal property is entitled to a remainder in the whole or a part of the principal fund so held in trust, subject to his beneficial estate for a life or lives, or a shorter term, he may release his interest in such income, and thereupon the estate of the trustee shall cease in that part of such principal fund to which such beneficiary has become entitled in remainder, and such trust estate merges in such remainder." This statute took the place of Laws 1893, c. 452, which provided that a "person beneficially interested in the whole or any part of the income of any trust heretofore or hereafter created for receipt of the rents and profits of lands or the income of personal property," who "shall have heretofore become or may hereafter be or become entitled" to the remainder in a trust fund, can release to himself all his interest in the income of the trust estate and, thereafter, the estate of the trustee is to cease and determine. The words "to any trust heretofore or hereafter created" were omitted from the 1897 statute. Laws 1897, c. 417, was repealed by Laws 1903, c. 88.

31 181 N.Y. 39, 73 N. E. 498 (1905).

It is to be noted that the Metcalfe case is the converse of Borsch's Estate, 362 Pa. 581, 67 A. 2d 119 (1949) supra note 18. In the former, the life beneficiary acquired the remainder and sought to bring about a merger of life interest and remainder and an extinguishment of the trust. In the latter, the life beneficiary sought to extinguish the life estate by what in effect amounted to an acceleration of the remainders.
that the constitutional guaranty against the deprivation of one's property without due process of law has no application to the case of the trustee because he has no property in the ordinary sense of that word. 32

“Property,” said Judge Gray, 32 Gray, J., whose opinion was concurred in by O'Brien, J. A similar view was expressed by Cullen, C. J. Bartlett, J., thought that the res was property in the hands of the trustee and that the legislature could not deprive him of it. He was also of the opinion that the testator had a constitutional right that the legal title should remain in the trustee for the period of time necessary to carry out the terms of the trust. Vance, J., concurred with Bartlett, J. The other three judges expressed no views on the constitutional issue.

The inferior courts were in disagreement as to whether the statutes could be given retroactive effect. In In re Heinze's Estate, 20 Misc. Rep. 371, 46 N. Y. S. 247, 248 (1897) it was said: "It is contended in behalf of the trustee that its effect is to permit the taking of property without due process of law. This contention cannot be sustained. The trustee has no beneficial interest whatsoever in the fund except the right to receive compensation for services rendered by way of commissions. If the constitutional provision cited has any application whatever, it would apply to the rights of the parties having a beneficial property interest in the fund. The legislative enactment in question does not deprive such owners of any right of property or ownership in the fund without their consent. The owners in remainder have made an absolute assignment of their interest in the fund to the life beneficiary. The right of property of the cestui que trust to receive the income during her life has been changed by a compliance with the terms of the statute to an absolute ownership of the fund. So far from depriving her of property, the effect of the statute and proceedings thereunder has been to confer upon her additional rights of property.”

In Oviatt v. Hopkins, 20 App. Div. 168, 46 N. Y. S. 959 (4th Dept. 1897) it was held that when the defendant trustee entered upon the execution of his trust, he became invested with the legal title to the trust estate, and so long as the trust thus created continued, the beneficiary's interest therein did not extend beyond the right to enforce the execution of the trust. Prior to the attempted modification of the rule by legislative enactment, an express trust could not be terminated or dissolved until the expiration of the time, or the fulfillment of the purpose, for which it was created, except in case of unforeseen exigencies which rendered the execution of a trust impossible or impracticable, in which case a court of equity might decree a dissolution. Hence it was declared that if the statute were applied to the trust in question, the trustee would be deprived of property without due process of law (N. Y. Const., Art. I, sec. 6). Since the legal title vested in the trustee, it thereby became property in his hands.

In Newcomb v. Newcomb, 33 Misc. Rep. 191, 68 N. Y. S. 430 (1900), the court held that it was constrained to follow Oviatt v. Hopkins, even though the court recognized that in spite of the peculiar provisions of the New York statutes as to the estate vested in the trustee, there is no property right in him in the true sense of the term.

The peculiar statutory provision alluded to in Newcomb v. Newcomb is N. Y. Real Prop. Law, sec. 100 which declares that “the legal estate” is vested
"suggests some unrestricted, or exclusive, right to that which has been created or acquired." A trustee exercises certain powers for the sole benefit of the cestui que trust. He has no beneficial interest and can be removed whenever, in the judgment of a court of equity, it becomes necessary. This is an exercise of the inherent power of the court and is independent of the instrument of appointment.

"Although the legal estate is in the trustee, he but possesses a naked right, which is to be exercised, not for his own benefit, but for that of another. His estate is commensurate with the trust duties imposed upon him, and it ceases when they are performed, or when they are at an end. The whole beneficial proprietorship, or interest, is in the cestui que trust, for whom he holds the estate and who has the right to enforce the performance of the trust." 33

In *Brearley School v. Ward* 34 the New York Court of Appeals held that a contract relation does not exist between the trustee and the creator of the trust where the trust was created by will. If the trust had been created by an *inter vivos* transfer and the settlor had still been alive, possibly the New York Court would have permitted the trustee the protection of the contracts clause on behalf of the settlor. The Louisiana Supreme Court, on the other hand, concluded that a devise to a trustee for the use of designated persons for life creates a relationship between the trustee and the testator that is a contractual one within the meaning of the famous case of *Trustees of Dartmouth College v. Woodward*, 35 and being a contractual relationship within the meaning of that

in the trustee. This statute is quoted *infra* note 50. Professor Richard B. Powell of the Columbia Law School testified before the House of Lords, in a case involving the application of the English income tax law to the income of a New York trust, that under this statute the cestui of a trust has no interest in the trust property or its income as property, but merely a chose in action. *Archer-Shee v. Garland*, [1931] A. C. 212.

34 *201 N. Y. 358, 94 N. E. 1001 (1911) supra note 7.*
35 *1 N. H. 111, rev'd 4 Wheat. 518 (U. S. 1819).*
case, the trustee, upon accepting the trust, acquires substan-
tial rights of which he cannot be divested by a repeal of the
law authorizing the creation of the trust. Private trusts
were not recognized in Louisiana until the act of 1920, which
authorized them but which provided that the duration
of a trust shall be limited to ten years after the death of the
donor, except when the beneficiary is a minor at the time of
the death of the donor, in which case it shall not exceed ten
years after the minor has attained majority. The 1920 act
was repealed in 1935, and beneficiaries of trusts created
under the 1920 act were declared to be entitled to a full
accounting and immediate delivery of any property held by
trustees appointed under the authority of that act. It was
the repeal statute which occasioned the pronouncement of the
Louisiana court. The exact situation is quite unlikely to be
repeated in any other state, for it is inconceivable that the
legislatures of the states with the common-law tradition
would ever attempt to abolish trusts as such. The Louisiana
decision is significant, however, because it expresses a point
of view opposite to that of the Metcalfe case. The Louisiana
court presupposed a contractual relationship out of the pro-
visions of the act of 1920 which showed that the trustee was
not a free agent. He could not, of his own volition, termi-
nate a trust created under the act, nor could he resign his
trusteeship except with the written consent of all the bene-

36 Succession of Manning, 185 La. 894, 171 So. 68 (1936). Accord,
Hagerty v. Clement, 195 La. 230, 196 So. 330 (1940); Succession of Forstner,
186 La. 577, 173 So. 111 (1937).
The use of the private trust device has again been made possible to a
limited degree by the Trust Estates Act of 1938. La. Acts 1938, No. 81;
La. Rev. Stat. 1950, Tit. 9, secs. 1791-2212. This statute is based upon the
general common law of express, private trusts in the United States as stated
in the American Law Institute's Restatement of the Law of Trusts, as modified
and supplemented by the Uniform Trusts Act, the Uniform Principal and
Income Act, and the proposed Uniform Spendthrift Trusts Act. Stubbs,
"Louisiana Trusts for the Louisiana Lawyer," 1 La. L. Rev. 774, 777 (1939).
ficiaries or their legal representatives, or by order of the court after due notification, and for good cause shown.

In the respects enumerated by the court, the position of a trustee under the statute was not materially different from that of a trustee in common-law states. In the absence of express grant of such power to the trustee, either by the settlor or by statute, the trustee has no power to modify the terms of the trust or to end it. The trustee can resign only with the permission of a proper court, in accordance with the terms of the trust or with the consent of all the beneficiaries who are sui juris.

THE TRUSTEE AS HAVING A VESTED INTEREST

Does the trustee have a property interest in the *res* of the trust which will enable him successfully to assail a retroactive statute on the ground that it deprives him of constitutional rights where the beneficiaries, remaindermen, and all other interested persons do not object to the statute? The better view is that he does not have such property interest. The trustee has a bare legal title to enable him to carry out the purposes of the trust. His interest is the right to receive compensation while the trust lasts. If those who have the beneficial property do not object to the application of the statute, it seems absurd to treat the trustee as if he were the owner of an absolute title.

In nonconstitutional cases the courts certainly do not treat the trustee as absolute owner. His creditors cannot satisfy their claims from the trust property. He cannot use the land for his own purposes. His function is to tend to the

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40 1 Scott, *Trusts*, sec. 106.
42 1a Bogert, *Trusts*, sec. 146.
trust property and apply its revenues as provided in the trust instrument. It is true that he may convey title to a bona fide purchaser for value and thus extinguish the interests of the beneficiaries, but this result is reached not on the supposition that the trustee is owner but that it is commercially expedient to protect the third person who relies upon the appearance of ownership. When the sole trustee dies, the legal title may pass to his heirs or personal representatives but they are not entitled to administer the trust, merely holding title to the property pending the appointment of a new trustee by the court. The trustee can be removed for proper cause by the court which has supervision over the administration of trusts.

This does not mean that the trustee ought never to be allowed to invoke the protection of the property guarantees of the state and federal Constitutions. If the trustee is also one of the beneficiaries, he may protect his beneficial interest. If the case concerns a statute whose application would deprive the beneficiaries or remaindermen unconstitutionally of their interests, it would be appropriate, and might well be the duty, of the trustee as representative of the trust estate to demand the protection of the Constitution. Here, although ostensibly he may be protecting his interest in the res, he is really defending the interests of the beneficial owners. Or, the case may be one in which the trustee is threatened with removal without cause on account of some unjustifiable statute. Now it is possible that he may invoke in his own name a due process clause, or even the contracts clause where he was named trustee in an inter vivos transfer.

44 4 Bogert, Trusts, sec. 961.
45 1 Scott, Trusts, sec. 130.
46 1 Scott, Trusts, sec. 104.
47 1 Scott, Trusts, sec. 107.
48 See Brown v. Hummel, 6 Pa. 86 (1847). The trustees of a public trust were removed from office by special statute without cause.
Yet even here, if there is an unconstitutional invasion of interests it is not in the trustee’s being deprived of the legal title to the res, but in the loss of privileges and emoluments which the trusteeship carries with it.49

Statutes in a number of jurisdictions declare that the whole estate or interest in real property held in trust is vested in the trustee and that the beneficiary takes no estate or interest therein.50 This would seem to be a legislative adoption of the in personam theory. It would appear to make the beneficiary’s interest merely a power to obtain a decree against the trustee to enforce the trust. Where such a provision obtains, the effect may conceivably be to induce the court to hold that the trustee has a constitutionally protected interest, as such, in the real property which constitutes the res of the trust. Professor Richard B. Powell of the Columbia Law School testified before the House of Lords, in a case involving the application of the English income tax law to the income of a New York trust, that under the New York statute the cestui of a trust has no interest in the trust property or its income as property, but merely a chose in action.51

49 It would seem to be clear that, except possibly where the trustee is removed unjustifiably and without cause, the due process clause does not guarantee to the trustee the continued right to compensation. Certainly so far as trust law is concerned, a trustee has no vested right to compensation. He is subject at all times to being removed by the court for cause. 3 Bogert, Trusts, sec. 527. Where a trust is terminated by a court, it is the duty of the trustee to obey the terms of the decree. 4 Bogert, Trusts, sec. 1003. On the other hand, the trustee may in some instances have, as against the settlor, a contract right to compensation which would have constitutional protection.


The New York statute, N. Y. Real Prop. Law, sec. 100, reads: “Except as otherwise prescribed in this chapter, an express trust, valid as such in its creation, shall vest in the trustee the legal estate, subject only to the execution of the trust, and the beneficiary shall not take any legal estate or interest in the property, but may enforce the performance of the trust.”

However, this statute was in effect when the *Metcalfe* case was decided and, even so, part of the court was firmly convinced that there would have been no deprivation of property without due process or impairment of the obligation of contract in the retroactive application of a statute permitting a termination of the trust.\(^{52}\) This view seems correct. In spite of the apparent effect of a statute declaring the whole interest to be in the trustee, it would appear that the purpose is to restrict the beneficiary's power to deal with the trust property rather than to invest the trustee with a vested property interest in the *res* which he would not have had in the absence of the statute.\(^{53}\)

A trustee is not an officer of the court as is an administrator or executor, but nevertheless his management of the trust property is subject to control and supervision by the court.\(^{54}\) He is subject to the statutes which the legislature may from time to time pass regulating the mode of administering the trusteeship. It has been held that a statute which requires trustees to make annual reports to the court does not violate any constitutional rights of a trustee who became vested with the title prior to the enactment of the statute.\(^{55}\)

Obviously, the trustee of a dry legal trust (who holds his title merely because the rightful claimant has failed to take the necessary judicial steps to acquire it) has no substantial interest in the land or other thing. Such a situation may occur when a trust has been completely fulfilled and nothing

\(^{52}\) The divergent views of the inferior New York courts prior to the decision in the Metcalfe case are discussed *supra* note 32.

\(^{53}\) See the comments of Judge Gray in the Metcalfe case, *supra* p. 261.

In most of the jurisdictions having this type of statute, it is recognized that the beneficiary does have some kind of estate or interest in the property. 1a Bogert, *Trusts*, sec. 184.

\(^{54}\) See generally, 2 Scott, *Trusts*, Chapter 7.

\(^{55}\) McManus v. Park, 287 Mo. 109, 229 S. W. 211 (1920) (Held: Does not violate the provision in the Missouri Constitution prohibiting restrospective laws because it is purely remedial); Greenamyre's Estate, 133 Neb. 693, 276 N. W. 686 (1937).
remains but the conveyance of the title to the beneficiaries, or when title has been acquired under circumstances where equity imposes a duty to hold the title for another. A statute which declares title to be transferred to and vested in the one who previously had the power to compel such transfer by an application to the proper tribunal is not unconstitutional on the ground that it invades any rights of the trustee. 56

Likewise, where the sole trustee of an active trust dies and title passes under the common law to his heirs, they hold as bare trustees pending the appointment of a new trustee by the court 57 and have no vested interest in the premises. Consequently, the heirs can claim no deprivation of constitutional rights if the legislature divests them of legal title. 58

STATUTES WHICH AUTHORIZE THE SALE, MORTGAGE, OR LEASING OF TRUST PROPERTY

Courts of equity have sometimes authorized trustees to depart from the stipulations of the settlor, and even to act contrary to his expressed wishes, where exigencies have arisen which made departure from the directions of the settlor necessary to the carrying out of the purpose of the trust. 59 It is assumed that the settlor would have assented to the departure in preference to a frustration of the purpose of the trust. 59

56 Trustees of Presbytery of Jersey City v. Trustees of the First Presbyterian Church of Weehawken, 80 N. J. L. 572, 78 Atl. 207 (Sup. Ct. 1910).
57 1 Scott, Trusts, sec. 104.
58 Reformed Protestant Dutch Church v. Mott, 7 Paige 77 (N. Y. 1838).
59 Marsh v. Reed, 184 Ill. 263, 56 N. E. 306 (1900). The settlor expressly provided in the will which set up the trusts that the trustees should not execute leases of the premises to run for periods exceeding ten years. It subsequently developed that rentals to be derived from such short term leases were inadequate to carry out the purposes of the trusts, but that ample income could be derived from the premises if the trustees might execute ninety-nine year leases. Held: Trustees could execute ninety-nine year leases.
lands when lapse of time or changes as to the condition of the property have made it prudent and beneficial to alienate the lands. The same power exists in the legislature. In instances where a sale of the trust lands would promote the interests of all parties concerned, and beneficiaries and remaindermen do not object, statutes authorizing sale are valid when applied to existing trusts. The purchaser takes free of the trust. The power to authorize a sale certainly includes the power to authorize the execution of a mortgage or the execution of a lease.

The question might well be asked whether there can really be any serious doubt as to the constitutionality of a statute which retroactively authorizes a sale, mortgage, or lease if the settlor is dead (as is usual when the problem arises) and there is no dissent on the part of beneficiaries and remaindermen. The courts have not speculated at this point about possible rights of the deceased. The cases sustaining such retroactive legislation where the beneficiaries and remaindermen have assented are almost devoid of discussion. The assumption is simply made that the legislature is doing what the settlor would have done or would have authorized if he had anticipated that the necessity would arise.

Restrictions in the trust instrument against sale, mortgaging, or leasing do not prevent the trustee's taking advantage

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60 Stanley v. Colt, 72 U. S. 119 (1866); 2 Scott, Trusts, sec. 190.4; 3 Bogert, Trusts, sec. 741.
64 See Freeman's Estate, 181 Pa. 405, 37 Atl. 591 (1897).
of a statute authorizing any of those acts, provided that the limitations do not create a condition upon the happening of which the estate is to be forfeited. Indeed, the only reason why the trustee would need to take advantage of the statute would be on account of some supposed defect of power resulting from a limitation expressed or implied in the trust instrument.

It cannot be safely assumed, however, that in every instance the courts will sustain retroactive legislation authorizing sales, mortgages, or leases, merely because the remaindermen and beneficiaries do not object. In the more recent cases where such legislation has been sustained, necessity was shown, the trustees acted under court supervision, and the proceeds were devoted to trust purposes and held subject to the same conditions as the original res. Out of respect for stability of property interests, the courts would be unlikely to permit an unnecessary or merely capricious sale, or the

65 Stanley v. Colt, 72 U. S. 119 (1866) (restriction against sale); Russell v. Russell, 109 Conn. 187, 145 Atl. 648 (1929) (language of will indicated that the testator did not intend that any further encumbrances be placed on property).


Stanley v. Colt, 72 U. S. 119 (1866): Buildings old and dilapidated and earning only small income. Tenants would not rebuild because trust instrument contained restriction that no lease in excess of thirty years could be executed. Cestui could not rebuild. Trustees desired to sell.


In re Van Horne, 18 R. I. 389, 28 Atl. 341 (1893): House and lot devised to church for parsonage became unsuitable for this purpose because of change in neighborhood. Trustees desired to sell and use money to acquire parsonage in a more suitable neighborhood.

In the early Pennsylvania cases cited supra notes 61 and 62, the reason for the sale seems to have been more a matter of expediency than of necessity. The sales were authorized by special statutes. So common was this sort of legislation that the courts hesitated to strike it down for fear of the effect on titles. Norris v. Clymer, 2 Pa. 277 (1845). See Chapter 3, note 244, and Chapter 4, note 77 supra.
encumbrancing of the trust land with mortgages and long term leases unless this were reasonably expedient.

The legislature cannot deprive the beneficiary of his interest involuntarily by authorizing a sale of the land and application of the proceeds to other purposes. The validity of legislation authorizing the sale of land in which there are future interests, is discussed elsewhere.

**STATUTES DESIGNED TO PROTECT BONA FIDE ALIENEES OF THE TRUST RES**

The legislature may apply as to existing trusts, reasonable legislation designed to protect third persons who deal with the trust res although the effect of such legislation may somewhat detrimentally affect the right of the beneficiary to redress misconduct of the trustee. It has been held that where the grantee of the trustee continues to have the burden of showing that he is a *bona fide* purchaser for value, a statute is valid which provides that the grantor shall be presumed to be the owner in fee if the deed by which he holds title desig-

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68 General Board of State Hospitals for the Insane v. Robertson, 115 Va. 527, 79 S. E. 1064 (1913). Land was devised to the trustees of the state hospital for the use of the inmates. Subsequently, by two acts of legislation the trustees were authorized to sell the lands in question and to use the proceeds for the purposes of an epileptic colony. Held: The proposed diversion would deprive inmates of property without due process.

But see Freeman’s Estate, 181 Pa. 405, 37 Atl. 591 (1897). The trust was created some two years after the enactment of a statute which authorized the court to decree a sale where property is held in trust and “one or more persons required to consent . . . unreasonably withhold consent.” Act of 1853, P. L. 503. The will provided that no sale of any part of the real estate held in trust should be made without the consent in writing of the several cestuis. The trustees desired to make a long term lease (which the court considered to amount to a sale). Held: Statute does not unconstitutionally divest estates of parties *sui juris* of their property without their consent. It is a regulation merely of joint rights where the joint owners cannot agree in the control and disposition of the property. It defeats or interferes with the individual rights or property no differently and no further than does any other mode of changing their rights to severalty or of regulating the management until that is done. Furthermore, added the court, the settlor was an experienced lawyer and knew that the powers of leasing and selling which he gave to the trustee could be supplemented by the court.

69 Chapter 4, p. 163.
nates him merely as "trustee" and no beneficiary is named or indicated. 70

The Illinois Torrens Act requires that when an instrument is filed in the registrar's office for the purpose of effecting a transfer of an interest in registered lands, and it shall appear that such transfer is upon trust, the registrar shall, unless such instrument expressly directs to the contrary, note in the certificate the words "in trust." When such land is thereafter to be transferred, it is provided that the registrar shall not issue a new certificate nor register title except in pursuance of the order of some court, or upon the written opinion of two examiners that such transfer is in accordance with the true intent and meaning of the trust. The registration is declared to be conclusive in favor of the grantee and of those claiming under him in good faith and for a valuable consideration that such transfer is in accordance with the true intent and meaning of the trust. 71 In People ex rel. Deneen v. Simon, 72 the Illinois Supreme Court stated that the statute did no more than to change the law as to notice and to abrogate the rule in equity requiring the purchaser of trust property to see to the application of the purchase money, both of which alterations of the law are well within the legislative capacity. It might be added that even in the absence of statute, the modern position of the courts is that the buyer is under no duty to inquire as to the purpose to which the proceeds are to be applied or to act as a surety to the cestui que trust that the terms of the trust will be adhered to. 73


72 176 Ill. 165, 52 N. E. 910 (1898).

73 3 Bogert, Trusts, sec. 747.