

THE SCHOOL OF LAW

The Samuel Breckenridge Prize Awards for notes appearing in Volume XIX of the *Law Review* have been announced by the prize committee consisting of George W. Simpkins, Earl Susman and Fred A. Eppenberger. The prizes for the best note appearing in each of the four issues were awarded to: Herman Goralnik for his note in the December, 1933 issue, *Securities as Subjects of Interstate Commerce*; Harry Willmer Jones for his note in the February, 1934 issue, *The Interest Required of a Petitioner for Receivership in Missouri*; Sidney J. Murphy for his note in the April, 1934 issue, *The Extent of the Right of a Public Utility to Refuse Service*; Louis Clayton Larrabee for her note in the June 1934 issue, *Publication as a Relinquishment of the Common Law Right in Literary Property*. Mr. Murphy won the additional prize for the best note of the entire group.

Notes

SOME ASPECTS OF DISCRETIONARY TRUSTS

Under this title it is proposed to confine the discussion to situations in which the trustee has been given a discretion as to the quantum of income or principal he may pay over to the beneficiary. Such discretions vary in degree; in general three classes may be distinguished. (1) The most common category comprises discretionary powers expressly qualified and subordinated to some purpose of the settlor; such would include a discretion to pay such sums as the trustee deems fit "for the comfortable support" of the cestui;¹ for "support and maintenance";² for suitable education;³ for necessary medical expenses;⁴ or to convey the principal "when he deems cestui able to manage it."⁵ At times the

¹ In re Walters (1924) 278 Pa. 421, 123 Atl. 408; Cecil's Trustee v. Robertson & Bro. (Ky. 1907) 105 S. W. 926; Ratliff's Ex'ers v. Commonwealth (1907) 139 Ky. 533, 101 S. W. 978.

² Morris v. Daiker (1929) 35 Ohio App. 394, 172 N. E. 540; Coker v. Coker (1922) 208 Ala. 354, 94 So. 566; Taylor v. Harwell (1880) 65 Ala. 1; Gardner v. O'Loughlin (1912) 76 N. H. 481, 84 Atl. 935; Bronson v. Strause (1889) 57 Conn. 147, 17 Atl. 699; Smith v. Wildman (1870) 37 Conn. 384; Louisville Tobacco Warehouse Co. v. Thompson (1916) 172 Ky. 350, 189 S. W. 245; Manning v. Sheehan (1911) 133 N. Y. Supp. 1006; Brooks v. Reynolds (C. C. A. 6, 1893) 59 F. 923; Osborne v. Gordon (1893) 86 Wis. 92, 56 N. W. 334.

³ Morris v. Daiker, supra note 2; In re Reith's Estate (1904) 144 Cal. 314, 77 Pac. 942; Mackenzie v. Los Angeles Trust Co. (1918) 39 Cal. App. 247, 178 Pac. 557.

⁴ French v. Calkins (1911) 252 Ill. 243, 96 N. E. 877.

⁵ Meek v. Briggs (1893) 87 Iowa 610, 54 N. W. 456; Morris v. Daiker supra note 2; Bacon v. Bacon (1882) 55 Vt. 243.

trustee is not only given a discretion as to the quantum to be paid over, but may also choose among several persons or purposes designated by the trust instrument.⁶ The expressed guide often becomes tenuously vague; as in the case of a discretion to pay over principal if the trustee should "deem it to the interest" of the cestui;⁷ or to pay so much as considered "needful";⁸ or to use a fund "entirely as they deem best for her."⁹ (2) Such borderline situations adumbrate and are not easily distinguishable from the second group in which no express boundaries are set up for the trustee's guidance. This class stands midway between the qualified and the so-called absolute discretions. In a leading case the trustee was directed to pay income to the cestui "in such proportions and in such manner as she (the trustee) herself may decide."¹⁰ The distinction between this and the preceding group is rendered perilously slight by the fact that in most cases the guiding purpose of the settler can be gleaned from the "four corners" if not from the letter of the instrument. (3) The third classification embraces the discretions variously known as pure, unqualified, absolute or uncontrollable. In such cases the terms of the trust instrument appear to free the trustee from any interference with the exercise of his discretion:—to use for the well-being of the cestui "without any restrictions whatever";¹¹ "discretion shall not in any manner be interfered with by any court";¹² "sole and uncontrolled discretion without being liable for the exercise of such discretion";¹³ "such payments to be at all times at the sole and absolute discretion of the said trustee";¹⁴ are typical phrases.¹⁵ It should be noted that these dispensing

⁶ *Hall v. Williams* (1876) 120 Mass. 344 (to use income "in such way and ways as shall be most likely to make the same enure and be beneficial to such recipient's husband, wife or - - - children, or otherwise beneficial to such recipient in the way of his or her education, or advancement, or support, exercising in all such cases - - - the judgment that would be expected from a good father."); *Hamilton v. Drago* (1926) 241 N. Y. 401, 150 N. E. 496; *Andrews v. Tuttle* (1914) 45 Utah 98, 143 Pac. 124.

⁷ *Huntington v. Jones* (1899) 72 Conn. 45, 43 Atl. 564; *In re Clark* (1915) 174 Iowa 449, 154 N. W. 759; *Roosevelt v. Roosevelt* (1875) 6 Hun 31; *In re Naglee's Estate* (1866) 52 Pa. 154; and see *Watling v. Watling* (C. C. A. 6, 1928) 27 F. 2nd. 193.

⁸ *Rackeman v. Wood* (1909) 203 Mass. 501, 89 N. E. 1037.

⁹ *Rinker's Adm'r. v. Simpson* (1932) 159 Va. 612, 166 S. E. 546; see also *Jones v. Jones* (1894) 30 N. Y. Supp. 177.

¹⁰ *Carter v. Young* (1927) 193 N. C. 678, 137 S. E. 875.

¹¹ *Kiffner v. Kiffner* (1919) 185 Iowa 1064, 171 N. W. 590.

¹² *Raymond v. Tiffany* (1908) 112 N. Y. Supp. 252.

¹³ *Hamilton v. Drago* (1926) 241 N. Y. 401, 150 N. E. 496.

¹⁴ *Keyser v. Mitchell* (1871) 67 Pa. 473.

¹⁵ For others see *In re Neil* (1890) 62 L. T. (N. S.) 649; *Angell v. Angell* (1908) 28 R. I. 592, 68 Atl. 583; *Cromwell v. Converse* (Conn. 1928) 143 Atl. 416; *Keating v. Keating* (1917) 182 Iowa 1056, 165 N. W. 74; *Mitchell v. Choctaw Bank* (1914) 107 Miss. 314, 65 So. 278 (to control "as if it were his own, absolutely, in fee simple, without any order of any

clauses are frequently appended to the qualified discretions discussed under group one; so that we may be presented with an instrument which in one paragraph lays down standards and in the next attempts to free the trustee from legal compulsion to act in accordance with these standards.

There is a surprising dearth of material purporting to deal with the discretionary trust per se. Too often has it been discussed merely as a branch of the orthodox spendthrift trust.¹⁶ This assimilation is the more dangerous because it contains germs of truth; for neither in the discretionary nor in the spendthrift trust can the cestui alienate his income before it is paid to him; but the reason for this in the case of the discretionary trust is that the amount to be paid over, if any, is indeterminate, and hence the cestui has no title to any definite funds until the trustee has exercised his discretion and made an allotment; whereas in the conventional spendthrift trust the trustee has no such discretion, but must pay over definite sums, and the inalienability results from an express provision by the settlor that the income shall not be assigned or attached by creditors until it reaches the cestui's hands. There is a tendency, especially in the mind of the courts, to identify and confuse these separable concepts beyond the demands of necessity or logic. One result of this confusion has been, as will appear later, an inadequate treatment of the cestui's creditor; for the problems placed before him by an award of discretion to his debtor's trustee are different from those created by a mere provision against alienability. Separate treatment of the discretionary trust is needed to make this and other distinctions clear.

THE RIGHTS OF THE BENEFICIARY

The focal point of the rights of a beneficiary of a discretionary trust is his power to invoke the aid of equity to control the trustee in the exercise of his discretion; for until such discretion has been exercised he possesses no property in any of the trust funds.

At the outset we are met by an ubiquitous dictum that it is possible to create a discretion which is absolute and uncontrollable by any court.¹⁷ It is notable, however, that these dicta usually emanate from cases in which the creditor of the beneficiary is the party plaintiff; and few cases can be found in which the issue was squarely presented by the beneficiary himself. On the contrary, the doctrine is opposed by the great weight of author-

court."); and consult *Stein v. Safe Deposit Co.* (1915) 127 Md. 206, 96 Atl. 349.

¹⁶ See *Griswold, Reaching the Interest of the Beneficiary of a Spendthrift Trust* (1929) 43 Harv. L. Rev. 63.

¹⁷ *Keyser v. Mitchell* (1871) 67 Pa. 473; *In re Neil* (1890) 62 L. T. (N. S.) 649; *Robertson v. Hatfield* (1913) 240 Pa. 476, 87 Atl. 853; and see *Haydel v. Hurck* (1880) 72 Mo. 253, overruling same case (1878) 5 Mo. App. 267.

ity. Two reasons are given. Most courts avow a rule of interpretation and declare a reluctance ever to read an intent on the part of the settlor to give his trustee so sovereign a *carte blanche*.¹⁸ Such an interpretation, however, becomes obviously factitious in the face of express terms to the contrary. A broader and more fundamental basis for the rule is found by courts which declare an uncontrolled discretion impossible as an attempt to oust equity of its jurisdiction over trusts.¹⁹ Both policy and logic would seem to accord with this reasoning.

Upon what ground will a discretion be controlled? It may be broadly stated that in all cases the burden of proof rests upon the cestui to show an "abuse" of discretion.²⁰ Obviously it is impossible to subject to rigid categories the multifarious situations in which "abuse" is found.²¹ Each case depends upon its own peculiar facts. Certain general classifications can be indicated. (1) Clearest proof of abuse results from a showing of "bad faith," or an improper or dishonest motive. Absolute dishonesty need not be shown. A gross failure to provide sufficient "support" has been characterized as dishonest,²² especially if the trustee has profited thereby.²³ To favor one beneficiary over another for personal reasons has been held "bad faith."²⁴ On the other hand, where the trustee is empowered to convey the corpus should he deem the cestui capable of managing it, his failure to convey is not necessarily regarded as in "bad faith" merely because his children will profit as remaindermen should the cestui die without issue.²⁵ (2) Judicial interference to redress an "un-

¹⁸ *Coker v. Coker* (1922) 208 Ala. 354, 94 So. 566; *Angell v. Angell* (1908) 28 R. I. 592, 68 Atl. 583; *McDonald v. McDonald* (1890) 92 Ala. 537, 9 So. 195.

¹⁹ *In re Clark* (1915) 174 Iowa 449, 154 N. W. 759; *Keating v. Keating* (1917) 182 Iowa 1056, 165 N. W. 74; *Butler v. Badger* (1914) 123 Minn. 99, 150 N. W. 233; 2 *Perry on Trusts* (7th ed. 1929) secs. 510 and 511a.

²⁰ *In re Cowen's Estate* (1933) 265 N. Y. Supp. 40 ("Trustees have no affirmative burden"); *Leverett v. Barnwell* (1913) 214 Mass. 105, 101 N. E. 75 ("clear proof").

²¹ See *Restatement of Trusts* (Am. L. Inst. 1932) Sec. 181 (d) for suggested criteria: "(1) the extent of the discretion intended to be conferred upon the trustee by the terms of the trust; (2) the purpose of the trust; (3) the nature of the power; (4) the existence or non-existence, the definiteness or indefiniteness, of an external standard by which the reasonableness of the trustee's conduct can be judged; (5) the motives of the trustee in exercising or refraining from exercising the power; (6) the existence or non-existence of an interest in the trustee conflicting with that of the beneficiaries."

²² *Callister v. Fassitt* (1900) 163 N. Y. 281, 57 N. E. 490.

²³ *McDonald v. McDonald* (1891) 92 Ala. 537, 9 So. 195.

²⁴ *Jones v. Jones* (1894) 30 N. Y. Supp. 177 (Trustee disapproved of marriage of disfavored cestui.).

²⁵ *Turnure v. Turnure* (1918) 89 N. J. Eq. 197, at 200, 104 Atl. 293, at 295; *In re Cowen's Estate* (1933) 265 N. Y. Supp. 40. Where, however, the trustee is instructed to divide among a class to which he himself belongs, he cannot distribute any portion to himself unless the settlor has expressly permitted this. *Andrews v. Tuttle* (1914) 45 Utah 98, 143 Pac. 124.

reasonable or arbitrary" abuse of discretion includes a heterogeneous assortment of cases which defies any reduction to rules. It is under the aegis of this phrase that the courts assert their most frequent control over the trustee. "Reasonable" is to be understood "in view of the nature and amount of the income, the time when it becomes available to the trustee for the purposes of distribution, and the circumstances of the beneficiaries."²⁰ Such definitions, however, add little; each case merits an individual consideration.²⁷ By a reasonable implication the needs of the beneficiary have been held to include those of his family.^{27a} (3) The intervention of equity will also be justified by a total failure to exercise the given discretion.²⁸ The trustee need not, however, make a separate exercise of his discretion every time he pays over; the fact that a trustee in all subsequent payments through a period of years had never varied the amount decided upon for the first payment has been held not to constitute evidence of a failure to exercise his discretion.²⁹ (4) It has been stated as a separate rule that a discretion will not be permitted to be exercised in such a manner as to controvert the purpose of

²⁰ *Angell v. Angell* (1908) 28 R. I. 592, at p. 598, 68 Atl. 583, at p. 586; and consult note 21.

²⁷ *Eaton v. Loveren* (1924) 81 N. H. 275, 125 Atl. 433, 35 A. L. R. 1034 (The trustee must consider "the amount of money at his disposal, their (cestuis') present as well as their probable future needs, their health and capacity to help themselves, and then do what the ordinary man would do under similar circumstances."); *Gardner v. O'Loughlin* (1912) 76 N. H. 481, 84 Atl. 935; *Colton v. Colton* (1888) 127 U. S. 300 at p. 321; *Leverett v. Barnwell* (1913) 214 Mass. 105, 101 N. E. 75; *Manning v. Sheehan* (1911) 133 N. Y. Supp. 1006; *In re Hilton* (1916) 160 N. Y. Supp. 55; *In re Van Zandt's Will* (1931) 247 N. Y. Supp. 441; *In re Reith's Estate* (1904) 144 Cal. 314, 77 Pac. 942; *Russell v. Hartley* (1910) 83 Conn. 654, 78 Atl. 320; *Keating v. Keating* (1917) 182 Iowa 1056, 165 N. W. 74; *Cecil's Trustee v. Robertson & Bro.* (Ky. 1907) 105 S. W. 926; *Marshall's Trustee v. Rash* (1888) 87 Ky. 116, 7 S. W. 879; *Read v. Patterson* (1888) 44 N. J. Eq. 211, 14 Atl. 490. There is a conflict as to whether the trustee can favor one beneficiary over another; holding this an arbitrary violation of the testator's implied intent that members of a class should be favored equally, *Jones v. Jones* (1894) 30 N. Y. Supp. 177; contra, sustaining such distinction if reasonably supported by a substantial difference in the circumstances of the cestuis, *Stephenson v. Norris* (1906) 128 Wis. 242, 107 N. W. 343; and see *Trout v. Pratt* (1907) 106 Va. 431, 56 S. E. 165.

^{27a} There is conflict as to whether the divorced wife of the cestui can compel payment of her alimony out of the trust fund. If she is regarded as no longer belonging to the family she is held a mere creditor and denied remedy. *Eaton v. Loveren*, supra note 27; *Kiffner v. Kiffner* (1919) 185 Iowa 1064, 171 N. W. 590. Contra, treated as still a member of the family, *England v. England* (1922) 223 Ill. App. 549; and see dictum in *Wetmore v. Wetmore* (1896) 149 N. Y. 520, 44 N. E. 169. But the cestui's child, although in the custody of its divorced mother, remains "in the family." *Eaton v. Eaton* (1926) 82 N. H. 216, 132 Atl. 10. Consult local statutes.

²⁸ *Coker v. Coker* (1922) 208 Ala. 354, 94 So. 566; *Andrews v. Tuttle* (1914) 45 Utah 98, 143 Pac. 124; *Wilson v. Turner* (1883) 22 Ch. D. 521.

²⁹ *Cromwell v. Converse* (Conn. 1928) 143 Atl. 416.

the settlor.³⁰ It is submitted that this is merely a statement of a basic principle which underlies the tests outlined above; for "the trustees are always under compulsion to carry out the testator's main purpose as disclosed by the will, and their discretion always must be subservient thereto;"³¹ the rules of reasonableness, good faith and diligent exercise of discretion are always guided by the settlor's purpose.

Some authority has been advanced for the proposition that in the cases either of an "unguided" or of an "absolute" discretion equity cannot correct an unreasonable exercise and can only intervene in case of "bad faith." The reason presented is that the settlor has expressly unfettered the trustee's actions, or has laid down no standard of reasonableness.³² Although this rule appears to have obtained in England, the majority of the American authorities do not sustain it.³³ The American decisions appear better founded; for, as has been seen, in almost all cases the purpose of the settlor can be ascertained from the "four corners" of the trust instrument, and the intent that there be a reasonable compliance with his desires can be interpreted to be impliedly present.³⁴ Furthermore, the power to compel a reasonable execution of the trustee's discretion is always inherent in a court of equity and cannot be nullified by a private fiat.³⁵ It is possible that in actual practice the courts may be less ready to find abuse of an "absolute" discretion than in cases where an expressed standard is squarely before their eyes. The difference, however, is of degree only, and not of kind. It thus appears that the three varieties of discretionary trusts receive essentially similar treatment. This conclusion finds support not only in the dicta but also in the actual results attained in the reported cases. Separate classification is descriptively interesting, but not necessary.

Some confusion exists as to the proper decrees by which equity can enforce its corrective supervision over abuse of discretion. Three types of control may be utilized. (1) The court in less

* *Murphy v. Delano* (1901) 95 Me. 229, 49 Atl. 1053.

¹ *Plummer v. Brown* (Roberts) (1916) 315 Mo. 627, at 659, 287 S. W. 316, at 327.

² *Tabor v. Brooks* (1878) 10 Ch. D. 273; *Gisborne v. Gisborne* (1877) 2 App. Cas. 300; and see dictum in *Town of Sharon v. Simons* (1857) 30 Vt. 458; and see dictum in *Watling v. Watling* (C. C. A. 6, 1928) 27 F (2d) 193, at 195 "Court ought not to overrule the trustee's discretion, except upon the clearest of proof, that is, proof that it has not exercised a good faith discretion." But as a matter of fact the court seems to imply that "reasonable" would be a necessary ingredient of "good faith"—"honest and well intentioned discretion."

³ *Keating v. Keating* (1917) 182 Iowa 1056, 165 N. W. 74; *Rinker's Adm'r. v. Simpson* (1933) 159 Va. 612, 166 S. E. 546; *Angell v. Angell* (1908) 28 R. I. 592, 68 Atl. 583; *In re Naglee's Estate* (1866) 52 Pa. 154 (Disregard incorrect head note!)

⁴ In this connection consult notes 18 and 31.

⁵ Consult note 19.

flagrant cases may content itself with ordering the trustee to exercise his discretion in a proper manner, with the caveat that in the event of his failure to do so the court will exercise the power itself;³⁶ for it is preferred not to usurp the trustee's discretion any farther than absolutely necessary. In their solicitude over the inviolability of discretion, however, the courts have sometimes gone far toward creating a doctrine of "untouchability"; and it has been said that the court may discharge a trustee for unreasonable refusal to act, but cannot itself order him to pay a definitely ascertained sum, or act in his place.³⁷ (2) The majority view does not wait upon this technicality, but permits the court, when its attention is called to an abuse, to determine the precise sum which is reasonable, to order the trustee to pay over this amount, and, if necessary, to execute the power itself.³⁸

A court of chancery will not permit the plain ends and purposes of a discretionary trust to be defeated by the arbitrary exercise of their discretion by trustees, even though to prevent it the court must substitute its discretion for that of the trustee's.^{38a}

(3) Where the abuse is of suitable gravity the trustee is removed. This measure usually, though not necessarily, is reserved to cases involving "bad faith," refusal to act, or total perversion of the trust.³⁹

³⁶ *Manning v. Sheehan* (1911) 133 N. Y. Supp. 1006 (here "no culpable failure to exercise discretion in a reasonable manner." The trustee merely doubted his powers.) Such a mild remedy, of course, may be extended to more serious abuses if the court desires. See *Carter v. Young* (1927) 193 N. C. 678, 137 S. E. 875.

³⁷ *Eaton v. Eaton* (1926) 82 N. H. 216, 132 Atl. 10.

³⁸ *Edward v. Edward* (1925) 117 Kan. 458, 232 Pac. 240 (ordered trustee to pay \$150 per month); *Watling v. Watling* (C. C. A. 6, 1928) 27 F. (2d) 193; *Callister v. Fassitt* (1900) 163 N. Y. 281, 57 N. E. 490 (Court set precise sum for trustee to pay); *Gardner v. O'Loughlin* (1912) 76 N. H. 481, 84 Atl. 935 (same); *McDonald v. McDonald* (1891) 92 Ala. 537, 9 So. 195 (same); *In re Harrar's Estate* (1914) 244 Pa. 542, 91 Atl. 503; *Coker v. Coker* (1922) 208 Ala. 354, 94 So. 566 (case of "perversion and abandonment of trust"; court administered trust itself); *Andrews v. Tuttle* (1914) 45 Utah 98, 143 Pac. 124 (Court itself divided among the cestuis); *Jones v. Jones* (1894) 30 N. Y. Supp. 177 (Court can remove trustee or compel him to pay definitely ascertained sums).

^{38a} *Rinker's Adm'r. v. Simpson* (1932) 159 Va. 612 at 622, 166 S. E. 546, at 550.

³⁹ *Martin v. McCune* (1925) 318 Ill. 585, 149 N. E. 489; *Keating v. Keating* (1917) 182 Iowa 1056, 165 N. W. 74 (The trustee had continually maintained and acted on the assumption that his discretion was "absolute." The trust instrument, indeed, had expressly exempted him from "any order of court." The court not only declared him subject to its jurisdiction but removed him because (for one reason) his claim of absolute discretion was a "denial of the trust"—a far journey from the theory of "uncontrollable discretion"!).

No rigid rules constrain the use of these decrees; the courts in applying remedies maintain a fluidity of treatment suited to the variety of the individual problems presented.

THE RIGHTS OF THE CREDITOR OF THE BENEFICIARY

It is premised that the creditor of the beneficiary can have no greater right against the trust funds than has the beneficiary himself.⁴⁰ In light of the general principle that "Equity allows the creditor to avail himself of the interest of the cestui"⁴¹ it might be expected that the remedies available to the cestui would be available likewise to his creditor. Since the cestui ordinarily has no title to the trust funds until the trustee has exercised his discretion to pay over, obviously his creditor's lien can attach no earlier; but since the cestui can compel his trustee to exercise a reasonable discretion in making payments, it would seem on principle that, where the trustee has arbitrarily refused to make payments and the cestui as a result has contracted necessary debts, the creditor should be able to secure a court order compelling the trustee to discharge such debts. Where dealing with the creditor, however, the majority of the cases evince a complete reversal of policy. It is here that dicta supporting the uncontrollability of discretion abound. In few of the cases is the question of abuse of discretion raised. In most the courts content themselves with repeating that since the cestui cannot force the discretion of the trustee a fortiore his creditor cannot.⁴² It is expressly said, "The trustee's control, discretion and power of disposition cannot be regulated or directed at the suit of creditors."⁴³ The clue to this attitude may be found in an early leading case on the subject of discretionary trusts:

To subject the income to execution at the suit of a creditor would - - - utterly defeat the intent of the testator in creating it. *We cannot but regard this form of trust to be as effectual in guarding a trust and its income against the prodigality of its beneficiary as would be a positive exclusion of creditors in the will of the testator.*⁴⁴

* Hall v. Williams (1876) 120 Mass. 344; and consult cases cited infra, note 42.

⁴⁰ Huntington v. Jones (1899) 72 Conn. 45 at p. 50, 43 Atl. 564 at p. 566 (Under the facts in this case the court found the trustees had been given no discretion as to income, but had a duty to pay over all; the case thus is not directly in point as a discretionary trust.)

⁴¹ Keyser v. Mitchell (1871) 67 Pa. 473; Brooks v. Reynolds (C. C. A. 6, 1893) 59 F. 923; Parker v. Carpenter (1915) 77 N. H. 453, 92 Atl. 955; Raymond v. Tiffany (1908) 112 N. Y. Supp. 252; Meyers v. Russell (1908) 112 N. Y. Supp. 520; Louisville Tobacco Warehouse Co. v. Thompson (1916) 172 Ky. 350, 189 S. W. 245.

⁴² Everitt v. Haskins (1918) 102 Kan. 546; 171 Pac. 632 at 633.

⁴³ Keyser v. Mitchell (1871) 67 Pa. 473, at p. 477.

So far as the creditor is concerned these trusts are interpreted as spendthrift trusts. No express provision against alienation is necessary; the very form of the trust is deemed indicative of the settlor's intent, which the courts zealously seek to protect.⁴⁵ In doing so they make a blunt denial of remedy to the creditor. In thus identifying the discretionary with the spendthrift trust the courts fail to recognize that they are placing on the creditor of the cestui of the discretionary trust a far greater burden than that borne by the creditor of the pure spendthrift. For in the latter case the creditor at least can depend upon the cestui's obtaining definite payments in accord with the provisions of the trust instrument, and can seek these in his debtor's hands when paid over; whereas in the case of a discretionary trust he must stand powerless against the trustee's refusal to disburse to the beneficiary. Irrespective of the wisdom of encouraging spendthrift trusts it may be questioned whether such an absolute submission to the rules governing spendthrift trusts is either necessary or in all cases actually in furtherance of the intent of the settlor; for it is likely that the donor desired to exempt the fund from extravagances rather than from reasonable debts contracted as a result of an arbitrary withholding of payments on the part of the trustee. In the early case of *Pole v. Pietsch*⁴⁶ this issue was squarely faced. The trustees had been directed to "use so much of the income as they in their discretion should think proper for the education and support" of the cestui; the proofs showed that the cestui had passed his last months in sickness and want; the trustees had paid over a mere fraction of the available income. The doctor who had attended the cestui sued to collect for his services from the accumulated trust fund. The court in allowing recovery held that the trustee's discretion had not been "fairly and reasonably" exercised; that, had the cestui himself applied, the court would have compelled the trustee to pay the bill; hence that the trustee would be ordered to pay at the suit of the cestui's creditor.

It would seem that this treatment offers a logical and workable solution to our problem. The intent of the settlor to preserve the trust fund from extravagances is fully protected; for the creditor can recover no more than the amounts which the cestui could have forced the trustee in the exercise of a reasonable discretion to pay over; obviously the court will interpret reasonable in light of the intent evinced by the trust instrument. Furthermore the creditor is given a direct remedy; and, since the courts do not hesitate to direct certain bills to be paid on the

⁴⁵ *Meek v. Briggs* (1893) 87 Iowa 616, 54 N. W. 456; *Mitchell v. Choctaw Bank* (1914) 107 Miss. 314, 65 So. 278; *Everitt v. Haskins*, supra note 43; *Hall v. Williams*, supra note 40.

⁴⁶ (1883) 61 Md. 570.

suit of the cestui,⁴⁷ there should be no objection on principle to the creditor's being able to tap the resources of the trust without needless circuity of action. This view obtains some adherents; it is deserving of more.⁴⁸

Another line of decisions, arising in jurisdictions in which restraints on alienation of trust funds are disfavored, seeks to pierce the barrier of the discretionary trust through a scrutiny of the time at which the cestui obtains a property interest in the payments. In the leading English case of *In re Neil*⁴⁹ the income was to be paid as the trustee "in uncontrolled discretion think fit"; the cestui mortgaged his future income; the debt became due, and the creditor notified the trustee, who, however, continued to pay to the cestui. It was held that, although the payments were discretionary, there came an infinitesimal moment immediately before actual payment when in the "irrevocable determination" of the trustee the money belonged to the beneficiary and the creditor's rights attached. At this moment the trustee had notice of the assignment to the plaintiff, and, since in spite of this he paid over to the cestui, he was held personally liable to the plaintiff for this misapplication of the funds.

The more recent case of *Hamilton v. Drago*⁵⁰ commits the New York courts to a similar view. Under a statute permitting a creditor to secure an execution against ten percent of any trust income "due and owing" the cestui, the plaintiff sought to attach future income to be paid over by a trustee possessed of "sole and uncontrollable discretion." Recognizing the power of the trustee to vary or withhold his awards the court, in holding for the plaintiff, said:

if it (the discretion) is exercised in favor of the (cestui), then there is due him the whole or such part of the income as the trustee may allot to him. After such allotment he

⁴⁷ *Rinker's Adm'r. v. Simpson* (1932) 159 Va. 612, 166 S. E. 546; *Manning v. Sheehan* (1911) 133 N. Y. Supp. 1006; *Gardner v. O'Loughlin* (1912) 76 N. H. 481, 84 Atl. 935.

⁴⁸ *Cecil's Trustee v. Robertson & Bro.* (Ky. 1907) 105 S. W. 926 (The Kentucky courts do not enforce restraints on alienation of trust incomes. The creditor here, therefore, had only to deal with the discretionary aspects of the trust, without the added problem of spendthrift implications.). See also *Marshall's Trustee v. Rash* (1888) 87 Ky. 116, 7 S. W. 879; *In re Walters* (1924) 278 Pa. 421, 123 Atl. 408 (Here the State, which was supporting a lunatic cestui, recovered expenses from the trustee who had unreasonably refused to exercise his discretion to support the cestui.); *Morris v. Daiker* (1929) 35 Ohio App. 394, 172 N. E. 540 (dictum).

⁴⁹ (1890) 62 L. T. (N. S.) 649; see also *In re Coleman* (1888) 39 Ch. 443; *Lord v. Bunn* (1843) 2 Y. & C. C. C. 98, 63 Eng. Rep. 43.

⁵⁰ (1926) 241 N. Y. 401, 150 N. E. 496. The case does not cite any authorities; its genesis apparently is similar to that of *Pallas Athene*. See also the dissenting opinion in *Kiffner v. Kiffner* (1919) 185 Iowa 1064, at 1067, 171 N. W. 590, at 591.

may compel its payment. *At least for some appreciable time, however brief, the award must precede the delivery of the income he is to receive, and during that time the execution attaches.*

The solution attempted by these courts has at least the virtue of enabling the creditor to attach the fund before it reaches the hands of the cestui; where proper notice is served the trustee cannot pay it over to the beneficiary without rendering himself liable to the creditor for such a misapplication. Considered as a complete remedy, however, the rule is not without defects. Under the New York statute permitting only ten percent of the allotment to be attached the presence of an execution is not likely to deter the trustee from making payments; but in a jurisdiction which completely abolishes spendthrift restraints on alienation, the trustee will be likely to be deterred from making payments which automatically may belong in their entirety to the creditor;⁵¹ nor will the cestui care to force the discretion of the trustee in such a case. The creditor thus is left without any active or satisfactory remedy and must wait upon the action of the trustee or the beneficiary. An additional flaw has been found in the reasoning that there may be a time before the handing over of the funds when the title has vested in the cestui; it has been pointed out that this would involve permitting the cestui to recover from the trustee money allotted to him but not paid over, whereas the established law permits the trustee to change his mind at any time before actual payment.⁵² This difficulty, however, may be solved by the consideration that the only conclusive proof that the trustee has made an "irrevocable determination" consists in the fact that he actually *did* pay over; hence the "split second" doctrine probably will of necessity be confined to situations like the present. The chief difficulty is, as mentioned above, one of practicality.

It thus would appear that from one aspect the rule of *Pole v. Pietsch* presents the more fundamental solution to the problem; for, under it, the creditor need not wait for the cestui to act, but is given an active remedy against a trustee who has unreasonably refused to advance funds to the cestui. This rule, of course, does not cover the situation where the trustee has always made reasonable payments, and whose discretion, therefore, cannot be forced by either cestui or creditor. This is not a defect in jurisdictions which enforce the settlor's intent to keep the trust fund free from prodigality; for so long as the cestui himself has received proper disbursements the purpose of the trust instrument is fulfilled, and no further solicitude need be paid to the

⁵¹ Comment, 26 Col. L. Rev. 776.

⁵² *Supra* note 51.

creditor, who can wait and attach the funds in the hands of the cestui. But in a forum which favors the rights of the creditor above the desire of the settlor to restrict alienation, and which accordingly wishes to give the creditor a lien on the funds before they reach the cestui, it would be well to supplement the remedy provided by *Pole v. Pietsch* with that of *Hamilton v. Drago*. Where these remedies thus are used in conjunction the creditor will be protected in both contingencies:—under the “split second” rule he can attach the sum about to be paid over, and, under the doctrine of *Pole v. Pietsch*, in the event that the trustee should fail properly to exercise his discretion, he can go to court to force reasonable payments to satisfy his claim.

These are not perfect solvents of the problem. Taking into account the complex and often diametrically conflicting factors of the settlor's intent, the public policy of the jurisdiction, the discretion of the trustee, the claim of the cestui to present support and the claim of the creditor for a debt perhaps incurred long before the creation of the trust, these two remedies, even though used in conjunction, appear woefully incomplete. More subtle and adequate methods may in time be devised. Meanwhile these tools, however blunt, have been fashioned by the courts and lie at hand; much can be done with these to extricate the creditor from his present unsatisfactory position.

CHRISTIAN B. PEPPER '35.

THE ENFORCEMENT OF MINIMUM WAGE PROVISIONS UNDER THE NIRA

With the enactment of the NIRA there arose a great deal of speculation as to how effective its provisions would be and the extent to which the courts would enforce them. The purpose of the Act as stated in the Declaration of Policy is to eliminate unfair competitive practices, reduce and relieve unemployment, improve the standards of labor, and otherwise rehabilitate industry.¹ According to Senator Wagner the National Industrial Recovery Act has as its single objective the wide-spread and permanent reemployment of workers at wages sufficient to secure comfort and decent living. Business may not compete by reducing wages, by sweating labor, or by resorting to unfair practices.² The purpose of this discussion is to show the extent to which the courts have enforced minimum wage provisions under the NIRA.

The NIRA itself provides for several methods of enforcing the

¹ 48 Stat. L. 196, 15 U. S. C. Sec. 701.

² Hearings before Senate Committee on Finance, May 22 to June 1, 1933, p. 1.