TERMINATION OF TRUSTS

Act. Statutes authorizing recapitalizations generally condition the consummation of these plans upon the consent of a majority or more of each class of stockholders affected by the change. Without complete knowledge on the part of the shareholders of the changes to be effectuated by the plan, however, their consent is fictional. It may be that complete disclosure of many current plans of recapitalization would make it difficult to obtain the requisite consents from those stockholders to whom it was brought home that the plan adversely affected their interests. The threat of careful scrutiny of the vital features of recapitalization plans at the initial stages when proxies are solicited should have at least this one consequence: it should help force the draftsmen of these plans to strive to evaluate fairly in the readjustment the interests of all stockholders whose approval they are compelled by law to secure.

TERMINATION OF TRUSTS

The substantially reduced financial condition in which many trustors and beneficiaries have found themselves as a result of the recent depression has led to many attempts to reach funds placed in trust. Failure to include a power of revocation in the terms of the trust instrument has materially hampered many of these attempts, and even where such a power has been reserved, difficulties often arise in connection with the manner of its execution. It will be the purpose of this Comment to examine the body of law which governs the termination of trusts, with particular emphasis on the arguments and methods employed in the endeavor to bring about a termination. Attacks on a trust as being invalid in its creation on such grounds as fraud, undue influence, violation of the Rule against Perpetuities, or noncompliance with the formalities of a deed or will, as well as those problems which occasionally arise at the natural expiration of the trust term with respect to distribution of the corpus, surchargeability of the trustee, etc., will not be treated here. Since the doctrines controlling termination generally apply to any valid existing trust, the following discussion will treat inter vivos and testamentary trusts indiscriminately unless otherwise specified.

A trust may be expressly revocable, expressly irrevocable, or may be silent with respect to revocation. Since those trusts in the last group are generally considered irrevocable, they will be treated with expressly irrevocable trusts in the second section of this Comment. The first section will deal with the problems arising in the exercise of a reserved power of revocation.

TRUSTS CONTAINING A POWER OF REVOCATION

It is well established that the reservation of a power of revocation in a trust deed does not invalidate the deed nor render it testamentary in charac-

1. 4 Bogert, Trusts and Trustees (1935) § 993; Restatement, Trusts (1935) § 330.
The chief problems therefore concern the interpretation and exercise of the power. An expressly revocable trust specifying no manner of revocation may be revoked in any manner which shows the clear and definite purpose of the settlor to revoke. But it is usual to provide in the instrument that it may be revoked by following a specified procedure, which, with minor variants, ordinarily contemplates a written instrument, signed and acknowledged by the settlor and delivered to the trustee. Where this is done, most courts will require a strict compliance with the terms of the power. Thus, where the trustor reserved a power to revoke by will, an inter vivos revocation was held to be ineffective. And where a revocation was to be by a written instrument signed, sealed, witnessed, and acknowledged by the settlor and two co-trustees, failure of the second co-trustee to join in the instrument until after the death of the settlor rendered the attempted revocation inoperative. The harshness of this rule has been mitigated in some jurisdictions by requiring only substantial compliance with the prescribed manner of exercising the revocation.

A deviation from the usual provisions concerning the method of revocation set forth above may require an interpretation of the clause to ascertain whether any power to revoke existed, or may result in divesting the court of power to review the attempted revocation. Thus, the trust may be one to continue for the benefit of A during his life, the trustee being empowered in his discretion to pay the principal to A if he becomes competent to manage property. Ordinarily the courts are reluctant to interfere with a trustee's decision under such a provision because the trustee, in whom the trustor may have placed special reliance, is usually in a better position to judge


4. Dickerson's Appeal, 115 Pa. 198, 8 Atl. 64 (1887); 4 Bogert, op. cit. supra note 1, § 996; Restatement, Trusts (1935) § 330, Comment j; Perry, op. cit. supra note 2, §§ 104, 920 b.


whether or not the condition has been fulfilled. Consequently, only gross abuse of the trustee's discretion is reviewable.9

TRUSTS CONTAINING NO POWER OF REVOCATION

By far the greatest number of cases dealing with termination concern trusts in which the settlor has failed to reserve a power of revocation. Each attempt to terminate such a trust presents a struggle between two conflicting sets of doctrines. On the one hand there is the broad general rule, venerable by force of constant reiteration and honored even in the breach, that a trust, irrevocable in its creation, will be enforced until it expires by its own terms.10 On the other hand, there are certain flatly contradictory rules, usually stated in the form of exceptions, which are crystallizations of recurring situations in which it has been thought that principles of equity dictated a holding contrary to the general rule. The general rule and some, if not all, of the exceptions, though irreconcilable in effect, are recognized and applied in each jurisdiction. The success of the applicant seeking a termination will therefore hinge largely on his ability to groove the facts of the particular case within one of the exceptional doctrines.

It will be the purpose of this section to consider the more widely adopted exceptions to the general rule, including termination on the theory that power to revoke was omitted from the trust instrument by mistake, that the purpose of the trust has been accomplished or can no longer be carried out, and on the ground of merger, consent, and statutory provision. While these doctrines are fairly well defined in vacuo, many cases involve more than one, and some cases may fall in the twilight zone between two or more.

Power to Revoke Omitted by Mistake. Where no power of revocation was actually included in the trust instrument, there may arise a presumption that such a power was omitted by mistake, which, if unrebutted, will justify termination.11 The operative facts necessary to create such a presumption, as

10. Typical statements of this view are to be found in Stoehr v. Miller, 236 Fed. 414 (C.C.A. 2d, 1923); Boyd v. United States, 34 F. (2d) 483 (D. Conn. 1929); Dunn v. Dunn, 219 Iowa 349, 258 N. W. 695 (1935); Sands v. Old Colony Trust Co., 195 Mass. 575, 81 N. E. 300 (1907); Anderson v. Love, 169 Miss. 219, 153 So. 359 (1934); Cuthbert v. Chauvet, 136 N. Y. 326, 32 N. E. 1038 (1893); O'Brien v. Holden, 104 Vt. 338, 160 Atl. 192 (1932); RESTATEMENT, TRUSTS (1935) §330, Comment b; Perry, op. cit. supra note 2, §104; 4 BOGER, op. cit. supra note 1, §101.
11. 4 BOGER, op. cit. supra note 1, §993; RESTATEMENT, TRUSTS (1935) §332; Perry, op. cit. supra note 2, §104. Contra: Peck v. City Trust Co., 104 Vt. 20, 156 Atl. 403 (1931); Sands v. Old Colony Trust Co., 195 Mass. 575, 81 N. E. 300 (1907); see Toker v. Toker, 3 deG. J. & S. 487, 491 (Ch. 1853). A trust instrument may be reformed in equity for mistake in its execution on the same grounds as any other deed. RESTATEMENT, TRUSTS (1935) §333. The doctrine under consideration, while probably
well as the probative force to which it is entitled, are matters which are treated differently in the several jurisdictions, and even within the same jurisdiction. The Rhode Island courts early recognized the doctrine in its extreme form by holding that absence of a power of revocation in a trust instrument is prima facie evidence of mistake in not including such a power. In New Jersey, a more moderate view has been adopted, the rule being applied to permit termination only where the settlor seeks to revoke, and then only to the extent that the trust has not been acted on in good faith and if the parties may be placed in statu quo. The soundest method of treating this doctrine finds expression in the recent Delaware case of Du Pont v. Du Pont. It was there held that the absence of a power of revocation did not constitute prima facie evidence of mistake, but that it would bar application of the parol evidence rule, so that the court could examine the extrinsic circumstances to discover what intent, if any, the settlor may have had with respect to revocation at the time of execution of the trust instrument, and then extend appropriate relief.

*Purposes of Trust Accomplished.* A rule commonly recognized in many jurisdictions is that a trust will be terminated where its purpose has been accomplished or obviated, regardless of the term fixed in the creative instrument. This rule is usually qualified, however, by requiring in addition that an extension of this equitable reformation, carries the result further by requiring less compelling evidence to justify the presumption of mistake.

12. Atkinson v. Atkinson, 157 Md. 648, 147 Atl. 662 (1929) (S might revoke deed of trust where power of revocation was omitted through mistake as to legal effect of instrument); Price v. Price, 162 Md. 656, 161 Atl. 2 (1932), (1933) 17 MINN. L. REV. 231 (circumstances strikingly similar to Atkinson v. Atkinson, and equities seemingly more favorable for termination, yet court held, without attempting to distinguish Atkinson case, that S could not cancel parol declaration of trust regardless of his understanding as to effect of his act at time thereof); Lambdun v. Dantzebecker, 169 Md. 240, 181 Atl. 353 (1935) (absence of a power of revocation in a voluntary trust is to be viewed with suspicion, and only very slight evidence of mistake or misunderstanding will justify setting deed aside).

13. Aylesworth v. Whitcombe, 12 R. I. 298 (1879). This doctrine was accorded even greater effect in Atkinson v. Atkinson, 157 Md. 648, 147 Atl. 662 (1929), where the court allowed a power thus created by presumption to be exercised by strangers to the deed.


15. 19 Del. Ch. 131, 164 Atl. 238 (1933).

all parties beneficially interested consent. Typical holdings under the doctrine are that a trust to protect a gift to a wife from her drunken husband will terminate upon her divorce; that a trust to continue a specific person in the management of a corporation will terminate on dissolution of the corporation; that a trust to protect the settlor's property while in ill health will terminate on his regaining his health; and that a trust created for the sole purpose of protecting the corpus for the remainderman will terminate upon a union in one person of the equitable life estate and the legal remainder.

Termination will be refused under this rule only where some definite, substantial purpose, such as the protection of a spendthrift, remains unfulfilled. The majority of courts, however, following a doctrine first brought into prominence in the Massachusetts case of Claflin v. Claflin, have refused to sanction termination under this exception. The Claflin doctrine, most frequently applied to testamentary trusts, declares that even where the beneficiaries have an indefeasible interest in the entire corpus and income, if the trust contains a provision postponing payment for a stated term, it will not be terminated before the end of that term. This rule is usually explained

\[\text{op. cit. supra note 2, § 920 a. The category of trusts considered under the "purpose" rule should not be confused with the dry, or passive trust. In the latter type the trust fails because no duties have been imposed on the trustee sufficient to prevent an execution of the trust by the Statute of Uses or its modern successor. The cases under consideration in this section deal with attempts to terminate admittedly active trusts. See Bogert, op. cit. supra note 1, §§ 206-208.}\]


23. In Fidelity and Columbia Trust Co. v. Gwynn, 206 Ky. 823, 268 S. W. 537 (1925), the trust instrument contained no hint as to what purpose induced the creation of the trust, but the settlor-beneficiary was allowed to show by parol evidence both an inducing purpose and the accomplishment of that purpose. Contra: Anderson v. Kemper, 116 Ky. 339, 76 S. W. 122 (1903).


25. The rule may on occasion be applied to inter vivos trusts. Martin v. Martin, 106 N. J. Eq. 258, 150 Atl. 338 (Ch. 1930).

26. Shelton v. King, 229 U. S. 90 (1913); De Ladson v. Crawford, 93 Conn. 402, 106 Atl. 326 (1919); Rhoads v. Rhoads, 43 Ill. 239 (1857); Young v. Snow, 167 Mass. 287, 45 N. E. 686 (1897); 2 Perry, op. cit. supra note 2, § 622. For general
on grounds which do not conflict directly with the proposition that a trust may be terminated where its purposes have been accomplished; the theory apparently is that the trustor intended the trust to continue until its natural expiration, and that the accomplishment of this purpose in and of itself justifies continuing the trust, regardless of what reasons underlay the trustor's desire to have the trust continue. Illustrations are plentiful which demonstrate that termination will be denied even though no substantial, independent purpose remains unfulfilled. It has been held, for example, that the sole life tenant who receives the legal remainder by survivorship may not obtain a termination although the trustee had power to terminate in his discretion, on the ground that such a result would defeat the testatrix' intention. Again, where the trust directed payment of the principal to the sole beneficiary when he attained the age of thirty, the Claflin doctrine was applied to prevent termination before he reached thirty, even though there were no contingent remainders, no spendthrift terms, no restriction against alienation, and the beneficiary had in fact sold his interest, the explanation again being that the testatrix' intention to protect the corpus had to be carried out. Perhaps the most extreme example is that of a recent Maryland case where the sole beneficiary had the complete equitable present interest and the complete legal remainder, yet because the testator had provided that the trust was not to terminate until twenty years after the beneficiary's death, the court decided in the name of the Claflin doctrine that the beneficiary could not enjoy the principal until then.

While there appears to be no noticeable trend of decisions either toward or away from the Claflin doctrine, there are persuasive reasons for abandoning it in favor of the minority rule. It seems far from consistent to profess concern about the trustor's intention and then to hold that a trust created to comment on the Claflin doctrine, see Evans, Termination of Trusts (1928) 37 Yale L. J. 1070, 1076-1081; Scott, Control of Property by the Dead (1917) 65 U. of Pa. L. Rev. 527, 632, 647-650; Comment (1936) 34 Mich. L. Rev. 553; Kales, Estates (2d ed. 1920) §§ 732-741; Gray, Perpetuities (3d ed. 1915) §§ 120-121; Cleary, Indestructible Testamentary Trusts (1934) 43 Yale L. J. 393.

For the contrary English rule, see Saunders v. Vautier, 4 Beav. 115 (Rolls Ct. 1841), aff'd, Cr. & Ph. 240 (Ch. 1841); Re Jacobs, 29 Beav. 402 (Rolls Ct. 1861); Wharton v. Masterman [1895] A. C. 186 (H. L.).

27. Evans v. Rankin, 329 Mo. 411, 44 S. W. (2d) 644 (1931); In re Slater's Estate, 316 Pa. 56, 173 Atl. 399 (1934); Lent v. Title & Trust Co., 137 Ore. 511, 3 P. (2d) 755 (1931); see Restatement, Trusts (1935) § 337, Comment j.


29. Evans v. Rankin, 329 Mo. 411, 44 S. W. (2d) 644 (1931). That the testatrix was not too averse to a termination seems to follow from the provision allowing the trustee to terminate.


TERMINATION OF TRUSTS

...continue during a term must ipso facto be preserved during that period without further analysis of the trustor's underlying motives. Such a holding is particularly artificial because of a practical factor present in many and potentially existant in most cases. Vested interests in almost every jurisdiction, and contingent interests in a substantial number, are alienable. If the beneficiaries under a trust have assigned their interests, it is more than likely that the original purposes of the trustor will thereby have been defeated. In such a situation, it is absurd to refuse termination, as has often been done, for fear of frustrating the trustor's intent, when the net result of the refusal is to continue the trust for the sole benefit of the trustee. Insofar, moreover, as the comparatively flexible minority rule allows the courts a measure of discretion in determining the necessity or desirability of continuing the trust, it offers a technique much better calculated to preserve a reasonable balance between the various interests in the trust relationship than the rigid Claflin doctrine, with its undue deference to the "dead hand."

It should be borne in mind throughout the ensuing discussion that the influence of the Claflin doctrine may be felt in some of the situations which arise under each of the categories used in this analysis, and that the question may then become one of determining whether the particular facts fall more nearly within that doctrine or one of the "exceptional" rules.

Impossibility of Performance. It is a well established maxim that a trust will be terminated when its continued performance has become impossible or illegal. Instances of illegality are rare and readily recognizable, and termination for this reason is largely a matter of course. The rule permitting termination of a trust because continuance has become impossible admits of considerable flexibility in application, owing to the vague idea content in the term "impossible." Termination may be allowed where the corpus has been destroyed or is so unproductive as to render a continuance of the trust futile. Most courts are reluctant to find continuation impossible.

32. Perry, op. cit. supra note 2, §§ 385, 385 a.  
33. Griswold, SPENDTHrift Trusts (1936) §§ 10, 14, 514; Perry, op. cit. supra note 2, § 88; see Restatement, Trusts (1933) §§ 151-159.  
34. Consider, for example, the case of a trust to preserve the corpus for the remainderman.  
35. Stier v. Nashville Trust Co., 158 Fed. 601 (C.C.A. 6th, 1903); In re Grazier's Estate, 301 P. 422, 152 Atl. 390 (1930); In re Hamburger's Will, 185 Wis. 270, 201 N. W. 267 (1924). The court's position might be rationalized as an attempt to penalize the assignee of such interests on the assumption that most of them have driven hard bargains.  
36. 4 BOGERT, op. cit. supra note 1, §§ 997, 999; Restatement, Trusts (1935) § 335; 2 Perry, op. cit. supra note 2, § 920a.  
37. Restatement, Trusts (1935) § 335, Comment d; Perry, op. cit. supra note 2, § 99.  
38. Black v. Bailey, 142 Ark. 201, 218 S. W. 210 (1920); Thorne v. Thorne, 25 Md. 119, 93 Atl. 406 (1915); Donaldson v. Allen, 182 Mo. 626, 81 S. W. 1151 (1904); Brooklyn Trust Co. v. Lester, 239 App. Div. 422, 267 N. Y. Supp. 827 (2d Dep't 1933); 4 BOGERT, op. cit. supra note 1, § 999; see Trust Co. of N. J. v. Glunz,
however, where there is any hope of restoring the corpus. Thus, a termination urged on this ground has been refused although the corpus was at the time of the action so depleted as to be incapable of producing sufficient income to pay its own cost of maintenance.

Many attempts have been made to expand the coverage of the term "impossibility" to include cases where a continuance of the trust will result in great hardship to the beneficiaries of the postponed interests. Such attempts for the most part have been fruitless. Likewise, the courts are extremely reluctant to break into the trust scheme merely because the beneficiaries are otherwise unable to support themselves, but proof that a minor's necessities of life are at stake will aid in extending the scope of "impossibility" to permit a termination, as will a provision in the trust instrument permitting an advancement of principal on certain conditions.

A theory closely related to impossibility was recently promulgated in *Reuther v. Fidelity Union Trust Co.* The donor had placed nearly all his savings into an insurance trust, not expressly irrevocable, and by whose terms his wife and children, some of them minors, took vested interests. Thereafter the settlor became destitute, and he, together with all the beneficiaries of age, consented to and sought a termination of the trust. The court, apparently impressed with the immediate needs of the beneficiaries, found that the donor had been persuaded to create the trust when economic prospects were bright, that he had not realized how permanent an institution a trust is, that the execution thereof had proved to be "unwise and improvident" with respect to the interests of the donor's minor children, and for those reasons decreed a termination. By utilizing hindsight to classify the creation of the trust as improvident, and recognizing such improvidence as a basis for subsequent termination, the *Reuther* case, if generally followed, will provide a broad foundation for attacking any irrevocable trust.

**Merger.** Where the equitable interest of the beneficiary and the legal interest of the trustee are acquired by the same person, a merger is said to occur, the effect of which is to terminate the trust.

---

119 N. J. Eq. 73, 181 Atl. 27 (Ch. 1935); Cuthbert v. Chauvet, 136 N. Y. 326, 328, 32 N. E. 1088, 1089 (1893).

39. See note 36, supra.

40. *Re Estate of Stack*, 214 Wis. 98, 251 N. W. 470 (1933); s. c., 217 Wis. 94, 258 N. W. 324 (1935); *Stout v. Stout*, 192 Ky. 504, 233 S. W. 1057 (1921) *seem*; see Comment (1930) 78 U. of Pa. L. Rev. 1000.


44. *Hedges v. Hopper*, 118 N. J. Eq. 359, 179 Atl. 261 (Ch. 1935).

45. 116 N. J. Eq. 81, 172 Atl. 386 (1934), (1934) 44 YALE L. J. 176.

46. *In re Selous*, [1901] 1 Ch. 92; *Newman v. Newman*, 28 Ch. D. 674 (1885); *Parker v. Converse*, 5 Gray 336 (Mass. 1855); *Evans, Termination of Trusts* (1928), 37 YALE L. J. 1070, 1077-1079, 1094; 4 *Bogert, op. cit. supra* note 1, § 998; *Perry,*
plation usually advanced in the cases is that a person cannot be trustee for himself of an estate co-extensive with his legal estate.\(^4\) Probably the real reason is the futility of regarding a person as a fiduciary when his only duties in that capacity would be owed to himself.

According to strictly technical notions, merger results only if there is a complete coalescence of the interests.\(^4\) Consequently, a merger is not recognized when one of several cestuis becomes a trustee,\(^4\) or the cestui becomes one of several trustees.\(^6\) But occasionally the courts will find that a merger has occurred merely because the equitable life estate and the legal remainder are united in one person or group of persons.\(^6\) This unorthodox result has been reached on the basis of quite vague reasoning and frequently involves considerable doctrinal confusion. The facts of the cases often suggest that they would normally fall within the category dealt with in the preceding section, concerning accomplishment of purpose;\(^6\) it is therefore not altogether surprising to find that although a technical merger has been held to justify termination whether or not the trustor's purposes have been accomplished,\(^5\) in the line of cases in question, the courts supplement their discussion of merger with a consideration of whether any substantial purpose of the trust remains unfulfilled,\(^6\) one court going so far as to infuse the principles of merger into a discussion of the Clafflin doctrine.\(^5\)

\(^{47}\) In re Selous, [1901] 1 Ch. 921, 922; Perry, op. cit. supra note 2, §347.

\(^{48}\) See note 46, supra.


\(^{50}\) Story v. Palmer, 46 N. J. Eq. 1, 18 Atl. 363 (Ch. 1889).

\(^{51}\) White v. Weed, 87 N. H. 153, 175 Atl. 814 (1934); Brooks v. Davis, 82 N. J. Eq. 118, 83 Atl. 178 (1913); In re Stafford's Estate, 238 Pa. 595, 102 Atl. 222 (1917); In re Fitton's Will, 218 Wis. 63, 259 N. W. 718 (1935).

\(^{52}\) It has been suggested that the cases are explainable on the ground that the only purpose of the particular trusts involved was to preserve the remainder or protect the life tenant [see, e.g., In re Mowinkel's Estate, 130 Neb. 10, 263 N. W. 488 (1935); Equitable Trust Co. v. Snader, 17 Del. Ch. 308, 154 Atl. 15 (Ch. 1931)], and that the purpose could no longer be accomplished. See Evans, *Termination of Trusts* (1928) 37 Yale L. J. 1070, 1079.

\(^{53}\) Evans, *Termination of Trusts* (1928) 37 Yale L. J. 1070, 1093. Even spendthrift provisions in the trust will not prevent a termination unless the beneficiaries request a continuance. Restatement, Trusts (1935) §341, Comment c.

\(^{54}\) Bowlin v. Citizen's Bank and Trust Co., 131 Ark. 97, 198 S. W. 263 (1917) (spendthrift provisions a sufficient purpose to prevent merger); Equitable Trust Co. v. Snader, 17 Del. Ch. 203, 151 Atl. 712 (Ch. 1930), s. c., 17 Del. Ch. 308, 154 Atl. 15 (Ch. 1931) (termination allowed where no purpose extant); In re Mowinkel's Estate, 130 Neb. 10, 263 N. W. 488 (1935) (termination would violate testator's intent); In re Fitton's Will, 218 Wis. 63, 259 N. W. 718 (1935) (idem). Technically speaking, the question of merger should have been dismissed in all these cases for lack of coalescence in the interests united.

\(^{55}\) Re Will of Hamburger, 185 Wis. 270, 201 N. W. 267 (1924); Sutton v. Safe Dep. & Trust Co., 155 Md. 483, 142 Atl. 627 (1928) resemble.
This unorthodox type of merger offers a beneficiary a ready escape from the burdensome restrictions of the trust, since he can assign the present beneficial interest to the legal remainderman or take an assignment of the latter's interest. The former course is not open, however, in those jurisdictions which prohibit the alienation of equitable interests; and the utility of the device is further limited in that the presence of spendthrift provisions in the trust instrument will usually prevent this form of merger.

Consent. One of the most widely adopted exceptions to the general rule is that where all the parties beneficially interested in trust property are in existence and sui juris, they may together put an end to the trust, in whole or in part. A limitation commonly imposed on this exception, however, is that spendthrift provisions in the trust instrument will usually prevent this form of merger. Furthermore, some jurisdictions have added the requirement that all the settlor's purposes must have been fulfilled. Aside from the spendthrift cases, it seems questionable to insist on a fulfillment of trust purpose. This factor should certainly be given scant attention in the case of an inter vivos trust where the settlor has consented and is seeking a termination, for

61. Maher v. Maher, 207 Ky. 360, 269 S. W. 287 (1924); Rose v. Southern Mich. Nat. Bank, 255 Mich. 275, 238 N. W. 284 (1931); 4 BOGER, op. cit. supra note 1, § 1002; Restatement, Trusts (1935) § 337, Comment l. The Restatement indicates that in the spendthrift cases a distinction is to be drawn between the cases where the settlor consents to a termination and those where he does not. Compare § 337, Comment l, with § 338, Comment d; cf. King v. York Trust Co., 278 Pa. 141, 122 Atl. 227 (1923) (indicating that if the consents of all parties beneficially interested had been obtained, termination would have been allowed at settlor's request).
it follows from his consent that his original purpose has been accomplished or is no longer material. And even a testamentary trust should be terminable simply by consent unless the purpose which would be fulfilled by its continuance is of a substantial nature, something more than the empty purpose of preserving the trust term so anxiously guarded under the Claflin doctrine.

It would be expected, as a part of the consent doctrine, that a sole beneficiary could terminate the trust upon his own application. Where the sole beneficiary is also the settlor of the trust, it is usually held that he may terminate at will. But if the trust is testamentary, the sole beneficiary may be refused a termination on the ground that the testator’s intention would thereby be defeated. This distinction raises an inference that the consent of the creator may be necessary, to settle doubts as to his purpose, even in the case of an inter vivos trust, although he has retained no beneficial interest. The power of the sole beneficiary to terminate was further limited in Rehr v. Fidelity-Philadelphia Trust Co. It was there held that even though the sole beneficiary was also the settlor, the fact that he had included spendthrift provisions in the trust deprived him of his power to obtain a termination. However orthodox this result may be where the settlor is not the sole beneficiary, it seems futile in this instance; for, since transferees and creditors can generally reach the corpus of a spendthrift trust created by the settlor for his own benefit, the settlor can avoid the effect of the Rehr case by assigning or borrowing on his interest in the trust.

Thus far it has been assumed that all the requisite parties had consented and were before the court. But in many cases preliminary problems arise as to what parties must consent to a termination, and how their consent may be obtained. As a broad proposition, it is usually stated that the consent of all persons “beneficially interested” must be procured. A trustee is not

---


64. The Massachusetts cases are typical of the confusion instilled in this situation by the Claflin doctrine. Sears v. Choate, 146 Mass. 395, 15 N. E. 756 (1899) (sole beneficiary of testamentary trust providing for annuity to be paid him for life allowed termination); Claflin v. Claflin, 149 Mass. 19, 20 N. E. 454 (1889) (sole beneficiary refused termination where payments of principal were postponed to stated intervals); cf. Young v. Snow, 167 Mass. 287, 45 N. E. 686 (1897); Welch v. Trustees of Episcopal Theological School, 189 Mass. 108, 75 N. E. 139 (1905).

65. No cases have been found determining this precise point. Compare Restatement, Trusts (1935) § 337 with id. § 338, especially Comment a.


67. Griswold, op. cit. supra note 33, §§ 474, 497; Griswold, Spendthrift Trusts Created in Whole or in Part for the Benefit of the Settlor (1930) 44 Harv. L. Rev. 203; Restatement, Trusts (1935) 156; 2 Perry, op. cit. supra note 2, §§ 815a; Evans, Termination of Trusts (1928) 37 Yale L. J. 1070, 1071.

beneficially interested within the meaning of this rule. On the other hand, all persons presently entitled to the income or use of the trust property are of course beneficially interested. The chief difficulty is to determine the status of the persons to whom a future interest is given by the terms of the trust.

If the court can be persuaded that the particular future interest involved is a reversion rather than a remainder, the consent of the persons presumptively entitled to take need not be obtained. The theory is that a reversionary interest passes by descent rather than by purchase through the trust instrument, and that since the grantor retains complete control over transfer by descent, those presumptively entitled to the reversionary interest are not beneficially interested, at least for the purposes of the consent doctrine. The future interests are clearly reversionary within the meaning of this rule if, after the expiration of the particular estate, no disposition is made of the corpus, or it is limited to the settlor's estate or his personal representatives.

But if the terms of the trust instrument are interpreted as creating a remainder, the remaindermen take by purchase through the trust instrument, a fact which is thought to compel the conclusion that however contingent the remaindermen's interest, the trust may not be terminated under the consent doctrine without their acquiescence. And this is true although the likelihood of a particular class of contingent remaindermen ever taking an actual interest is beyond the scope of reasonable probability. Nor are remaindermen any the less "beneficially interested" for the purposes of the consent doctrine because they are unborn at the time of the adjudication. Thus, a limitation over to "the children of A" creates an interest in an indeterminate class, sub-

---

69. Restatement, Trusts (1935) § 337, Comment b.
71. See note 68, supra; Perry, op. cit. supra note 2, § 188; Tiffany, op. cit. supra note 70, § 131.
73. See DuPont v. DuPont, 19 Del. Ch. 131, 139, 142, 164 Atl. 238, 241, 242 (Ch. 1932); Doctor v. Hughes, 225 N. Y. 305, 312, 122 N. E. 221, 222 (1919); Pomroy v. Hincks, 180 N. Y. 73, 72 N. E. 628 (1904).
75. See DuPont v. DuPont, 18 Del. Ch. 316, 317, 159 Atl. 841, 842 (Ch. 1932); cf. Evans, Termination of Trusts (1928) 37 Yale L. J. 1070, 1071, 1090.
76. Underhill v. U. S. Trust Co., 227 Ky. 444, 13 S. W. (2d) 502 (1929); see DuPont v. DuPont, 18 Del. Ch. 316, 317, 159 Atl. 841, 842 (Ch. 1932); Tiffany, op. cit. supra note 70, § 136; Restatement, Trusts (1935) § 340, Comment d.
ject to be opened up by the birth of another child before A's death or the expiration of the trust, and the interest of the unborn children cannot be cut off without their consent. The effect of this doctrine is the more sweeping because of the irrebuttable presumption indulged in by the American courts that every person, male or female, of every age, status, or condition of health, is capable of having issue. Finally, it should be noted that a remainderman's consent must generally be obtained although his interest is subject to being cut off by the exercise of a power of appointment. Hence a trust "with remainder to such persons as A shall appoint by will, and in default of appointment, to B," cannot be terminated without B's consent, even though A has already executed a will appointing a third party, and A and the third party have consented. This is explained on the ground that A's will might be revoked before death. In this situation, however, the supposed reason for the distinction between reversions and remainders is no longer applicable. It is said that those presumptively entitled to a reversion need not consent to a termination because of the settlor's control over the transfer of the property at his death; yet in the situation in question, A's control over the transfer of the property at his death is equally great, and the similarity is merely more noticeable if A also happens to be settlor. The purely verbal difference that B is considered as taking by purchase hardly justifies the application of a different rule.

As a result of the requirement that unascertainable remaindermen consent to a termination, together with the widely accepted rule that minors are incapable of giving their consent, the consent doctrine has become virtually unavailable in a substantial number of cases as a technique for obtaining termination. To overcome these difficulties, two arguments have been made which seem to deserve more consideration than they have yet received. Occasionally it has been contended that the only persons beneficially interested are those who would take an interest if the trust were to terminate at the time of

---

77. A contrary result would be reached if the limitation were to named children of A or to those children in being at creation of the trust. *Tiffany, op. cit. supra* note 70, § 137.


the adjudication. This argument disregards precedent and historical background and, wherever accepted, amounts to the adoption of a new property concept, to the effect that no interest vests by purchase in unborn or unascertainable remaindermen. It apparently has not been allowed in those jurisdictions having no statutory method of revocation and will, therefore, be treated more fully hereafter.\footnote{81}

A possible escape lies in a more extensive recognition of the doctrine of representation. Advantage may be taken of this principle in one of three ways. The trustee may be allowed to represent all interests under the trust;\footnote{82} the presently existing, \textit{sui juris} members in a given class of remaindermen may be allowed to represent all future members of this class with whom they have an identity of interest;\footnote{83} or a guardian \textit{ad litem} may be appointed for those remaindermen not \textit{sui juris} or in a wholly unascertainable class.\footnote{84} The usefulness of a representative thus far has been limited to actions for termination on grounds other than consent\footnote{85} in which the principal purpose of his appearance is to prevent subsequently ascertained interests from attacking the decree. It is unlikely that in the absence of a statute\footnote{86} the consent of a representative would justify termination solely on the basis of the consent doctrine. While this device of representation seems on its face to be rather artificial, it is hardly more so than the accepted doctrine which allows an unborn person to take an interest by purchase under a trust instrument.

\textit{Termination According to Statute.} A few jurisdictions have enacted statutes facilitating the termination of trusts where no provision has been made therefor in the instrument.\footnote{87} As there has been comparatively little litigation resulting from such legislation outside New York, this discussion will be confined to the statute and cases of that state.

In order to abrogate the former New York rule that a trust could not be terminated by consent,\footnote{88} Section 23 of the Personal Property Law was enact-
ed, providing that: "Upon the written consent of all the persons beneficially interested in a trust in personal property or any part thereof heretofore or hereafter created, the creator of such trust may revoke the same as to the whole or such part thereof, and thereupon the estate of the trustee shall cease in the whole or such part thereof." 89

As might have been anticipated from the experience at common law, the chief problem raised by this Section is to determine who is "beneficially interested" within the meaning of the statute. In the statement of general rules, the courts are completely in accord, and reiterate the same principles that appear in the cases where a termination is sought by consent in the absence of a statute. 90 If the corpus is disposed of as a remainder, the remaindermen take an interest by purchase, are "beneficially interested," and must consent to a termination; 91 if the right to the corpus remains in the settlor as a reversion, the only consents necessary are those of the settlor and the beneficiaries of the particular estates. 92 But while there is substantial agreement as to these general propositions, the case law on more specific issues has become extremely confused, especially as between the several appellate divisions. 93


89. By an amendment added in 1932, trusts of real property may be revoked in substantially the same manner, the major difference being the requirement of a greater degree of formality in the revoking instrument. N. Y. REAL PROP. LAW § 118. Before 1932 there was a noticeable tendency to assimilate the treatment of trusts of personal and realty. Cruger v. Union Trust Co., 173 App. Div. 797, 160 N. Y. Supp. 489 (1st Dep't 1916); see National Park Bank v. Billings, 144 App. Div. 535, 541, 129 N. Y. Supp. 846, 850 (1st Dep't 1911), aff'd, 203 N. Y. 556, 95 N. E. 1122 (1911); Davies v. City Bank Farmers Trust Co., 248 App. Div. 389, 390, 223 N. Y. Supp. 398, 400 (1st Dep't 1936).


One of the most troublesome questions is that of construing the words of limitation involved in the particular trust instrument under consideration in order to determine whether they create a reversion or a remainder. In the famous case of Doctor v. Hughes, a trust was created to pay the income to the grantor for life and on his death to convey the corpus to the grantor's heirs at law. By applying the doctrine of worthier title, it was held that the grantor had retained a reversion which the heirs took by descent and had not invested them with a remainder by purchase. The court stated that "to transform into a remainder what would ordinarily be a reversion, the intention to work the transformation must be clearly expressed," and that no such intention had been made evident.

The problem was considerably complicated in 1929 by the case of Whittemore v. Equitable Trust Co. of N. Y. There a trust was created to pay the income to C for life and then to H. On the death of C and H, the property was to be returned to the settlors. But if one of the latter died before the termination of the particular estates, then his interest was to go to such persons as he appointed by will; or in default of such appointment to such persons and in such shares as "would have been distributable if such deceased Settlor had been the owner thereof at the time of his or her death and had died intestate." All the adult parties interested consented to a termination of the trust, but two of the three settlors had minor children living who were incapable of consenting. The court again declared that in determining whether the settlor's children were remaindermen or were merely presumptively entitled to a reversionary interest, it would look to the settlor's intention as expressed in the instrument. But since the words used in the "rather full and formal disposition of the principal" indicated an "intention to give a remainder to the spouse and children," it was found that there was a remainder despite the fact that the words of the dispositive clause did no more than spell out the process by which an absolute owner of property may dispose of it.

248 App. Div. 182, 288 N. Y. Supp. 403 (1st Dep't 1936) (decided same day by same court).

94. 225 N. Y. 305, 122 N. E. 221 (1919).
97. 250 N. Y. 298, 303, 165 N. E. 454, 456 (1929); cf. Beam v. Central Hanover Bank & Trust Co., 248 App. Div. 182, 288 N. Y. Supp. 403 (1st Dep't 1936) (income to grantor for life and principal as he appoints, by will; and in default of appointment, to the "heirs at law of the grantor." Held that the grantor made so "full and formal a disposition" as to create a remainder in his heirs.)
In many of the subsequent cases arising under Section 23, the decision, or the ground for the dissent, has been based on a comparison made between the qualitative content of the dispositive clause in the case at bar and that in the Whittemore trust. But several of the decisions have held that the latter case can be a precedent for nothing more than the rule that the settlor's intention is to govern in the construction of any trust document and that therefore each case must be confined to its individual facts. The result of this view, as becomes apparent from an examination of the many subsequent cases, is to make the outcome of a particular case uncertain until the highest court has determined the settlor's intent.

A second problem has arisen as to whether the courts will follow the common law rule that the consent of all remaindermen must be obtained, no matter how contingent their interests. Some of the appellate division decisions have recognized the doctrine that the only persons "beneficially interested" in the trust within the meaning of Section 23 are those who would be entitled to the property if the particular estate should fall in at the time the action is brought. The Court of Appeals has not expressly sanctioned this doctrine, but has impliedly approved it. This result seems both plausible and desirable. While it may be contended that Section 23 is merely an enactment of the common law rule existing in other states, it may be argued with equal force that the legislature intended to provide an effective method of terminating an otherwise irrevocable trust, an intent which would to a large extent be defeated if the requirement is imposed that unascertainable or unborn remaindermen of the particular estate, the principal had been directed to be paid over to the "settlor or his next of kin," these words would in all probability not have created a remainder.


men must consent to a termination. The objection may be made that such an interpretation results in destroying interests which, when they vest, will have vested by purchase and therefore, according to well established legal doctrines, cannot be divested without the beneficiary's consent. But the courts have no scruples about divesting a vested remainder without the consent of the remainderman where the settlor has reserved a power of revocation. If Section 23 be considered as a statutory power of revocation which is impliedly incorporated in every trust instrument, there should be no objection to divesting the interests of unascertainable remaindermen by an exercise of that power.

But pending a more definite recognition of this principle by the Court of Appeals, the possibility of terminating a trust involving presently unascertainable remaindermen is exceedingly dubious. Also it is clear under the Whittemore case that the existence of minors beneficially interested in the trust will bar any attempt to terminate. Nevertheless, there remains one method of obtaining a revocation under Section 23 in certain instances despite these obstacles. In the recent case of Meyer v. Bank of Manhattan, a trust was created, irrevocable by its terms, under which certain persons were beneficially interested who refused to consent to a termination. However, the settlor had reserved the power to alter or modify the terms of the trust so far as they affected distributions of principal and income by changing proportions or substituting beneficiaries. The settlor exercised his power by providing that the entire net income should be paid to his wife for life, and on her death the trust should terminate and the principal be paid over to himself. The settlor and his wife thereafter delivered to the trustee properly executed consents to termination which the court held to be effective, since the settlor and his wife had become the only persons beneficially interested.

The Court of Appeals has not as yet passed on the precise issue involved, but there has been adverse criticism of this device. While there is no question that after the exercise of the power of alteration the trust fell within the purview of Section 23, the objection seems to be that the power was not exerci-

104. See notes 68, 74, supra.
105. Little use seems to have been made of the doctrine of representation. Some indication has been given that it might succeed in a proper case. See McKnight v. Bank of N. Y. & Trust Co., 254 N. Y. 417, 421, 173 N. E. 568, 570 (1930); O'Leary v. Grant, 155 Misc. 98, 100, 278 N. Y. Supp. 839, 841 (Sup. Ct. 1935).
106. The Whittemore case has been limited to apply only to minors as contrasted with unborn remaindermen. Beam v. Central Hanover Bank & Trust Co., 248 App. Div. 182, 185, 288 N. Y. Supp. 403, 406 (1st Dep't 1936).
108. An inference that such a transaction will be disfavored may be drawn from the opinion in Guaranty Trust Co. v. Harris, 267 N. Y. 1, 195 N. E. 529 (1935), (1935) 44 Yale L. J. 901. (appointment to unborn grandchildren ineffective divestment of interest of minor children who would take on default of appointment).