THE YALE LAW JOURNAL

VOLUME 73 MARCH 1964 NUMBER 4

THE DYNASTIC TRUST

LAWRENCE M. FRIEDMAN*

THE importance of the modern, private trust is an obvious fact. The value of assets held in trust comes to many billions of dollars, even if we consider only private trusts;[1] charitable trusts, pension and profit-sharing trusts account for billions more. From every indication, the use of trusts is growing, and will continue to grow. Clearly, the trust device, with its long and rich history,[2] is one of the great success stories of Anglo-American law. That a medieval legal institution should flourish in the 20th century is not in itself very surprising; the trust shares its age and importance with other legal devices and institutions, of which the mortgage and the jury are two examples. The general reasons why the trust has survived and grown are clear, but the particulars are in many ways obscure. Even the bare legal facts have not been exhaustively treated. The historians get us a century or two past the Statute of Uses and then leave us hanging in mid-air. The specifically American chapter of trust history is unwritten.

Certain external influences on the history of trust law are readily apparent —the growth of the national economy, the rise of the trust company, the business cycle. But the history of the trust in the United States reflects the interaction of social, psychological, legal, and economic sources in ways which demand more precise explanation.

Private express trusts can be conveniently divided into two polar types, corresponding to two underlying purposes. The first, the most common type, can be called the *caretaker trust*. Trusts for the benefit of minor children, or incompetents, or old people, or people with little or no business experience are all caretaker trusts. The caretaker trust is usually short-term, spanning one life-time or less. It exists to protect and serve the interests or needs of one or more particular beneficiaries.

Much less common is the *dynastic trust*. In its extreme forms it is rare indeed. The dynastic trust, as the phrase is here used, is a trust set up primarily to perpetuate the trust estate for as long a period as possible. Its

*Associate Professor of Law, University of Wisconsin Law School.

1. Figures supplied by the Comptroller of the Currency give some rough indication of the magnitude of funds held in trust. As of Dec. 31, 1960, national banks alone held $25,752,547,514 in 324,928 separate trusts. 98 COMPTROLLER CURRENCY ANN. RPT. 194, 196 (1960). These figures do not include trust funds administered by private trustees and by state banks.

2. On the earliest examples of the "use," ancestor of the trust, see 2 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW 228-39 (2d ed. 1911); for a comprehensive treatment of the development of uses and trusts in their most formative period, see 4 HOLDSWORTH, HISTORY OF ENGLISH LAW 407-80 (1924).

furthest limit fixed by law—most notably by the Rule against Perpetuities. One extreme form of dynastic trust would be a trust which directed the accumulation of all income until the period of perpetuities runs out—with luck, about a century after its creation. In some states such a trust would be illegal; in all states it would be unusual.[3] A trust of this sort would be dynastic in the sense that it seeks to preserve and indeed to aggrandize the "estate" of the settlor—to prevent the break-up of the settlor's fortune by scattering it among his relatives or descendants. But the dynastic impulse more usually springs from a desire to maintain the power and wealth of a family. Thus it is more common for a dynastic trust to consist of a chain of life interests, enjoying current income rights, while enjoyment of principal is postponed until the Rule against Perpetuities forces distribution to relatively remote descendants. Usually, the private dynastic trust also has elements of the caretaker trust. For example, a trust whose first beneficiary is the settlor's wife, then his children, continuing on for some period measured by the Rule against Perpetuities, is a dynastic trust; but the wife's interest probably arises out of caretaker motives, perhaps the interests of the children as well. In addition, for most purposes, the perpetual or long-term charitable trust can be considered a dynastic trust. A charitable trust sets up no "dynasty" in the family sense, but often it serves to perpetuate the family name. More important, it has many traits in common with the private dynastic trust — *e.g.*, its long life-span, its jealousy of the integrity of its principal, its need for administrative flexibility — and these common traits give rise to common legal needs.

The psychology of the private dynastic trust is less obvious than that of the caretaker trust. Why should the settlor prefer unseen and unborn great-grandchildren to his closest blood relations? Most people would rather hold property outright than in trust, if only for the right to control its ultimate disposition. Money is power; and principal more so than income. The settlor of the dynastic trust denies full power to his closest kin. But in so doing he extends his own power by projecting his wishes into a period that lasts long after his death, thus satisfying some sort of hunger for vicarious immortality.

The dynastic trust is apparently more common today than a century ago. The great increase in national wealth has made its growth possible,[4] though

3. There is a large literature on the accumulating trust. The so-called common law rule allows accumulations for the entire period of the Rule against Perpetuities. Gertman v. Burdick, 123 F.2d 924 (D.C. Cir. 1941). Some states have had statutes limiting the period of accumulation more severely—influenced by the celebrated English case of Thellusson v. Woodford, 4 Ves. 227 (1799) and the act of Parliament which followed it, 39 & 40 Geo. 3, c. 98 (1800). KEETON, SOCIAL CHANGE IN THE LAW OF TRUSTS 39-48 (1958); Simes, *Statutory Restrictions on the Accumulation of Income*, 7 U. CHI. L. REV. 409 (1940). In recent years, there has been a decided return to the common law rule, or even more extreme permissiveness. WIS. STAT. ANN. tit. 20, § 230.37 (Supp. 1963): "Income from real and personal property may be accumulated for the benefit of any person or persons for such periods as may be directed by will or other written instrument sufficient to pass such property." Of course, it is primarily the dynastic trust which benefits from this permissiveness.

4. But if we include in our concept of dynasty the tenure system of the plantation South, and if that system was as dynastic as it has been pictured in literature and loose

national wealth does not fully explain the prevalence of this form of trust. Modern tax laws have also had a great influence on long-term trusts. A well-drafted testamentary trust lasting several generations is subject to only one estate tax, upon the death of the settlor.[5] The intervening deaths of life beneficiaries do not constitute taxable events. But none of the tax savings accrues to the estate of the settlor himself. These savings redound to the benefit of later generations, while the immediate family gives up the right to enjoy unrestricted use of principal. In short, the dynastic trust saves taxes, but for itself, as an entity, rather than for the immediate income beneficiaries. It is commonplace to explain the modern long-term trust in terms of "tax motives"; but these "tax motives" are probably secondary, after the fact: the dynastic impulse comes first.[6] A tax system which taxed an estate at the death of each beneficiary or set of beneficiaries, would undoubtedly discourage the dynastic trust. It would probably not eliminate it entirely. Similarly, repeal of tax

historical writing, then perhaps the number of dynastic arrangements has not been increasing quite so obviously over the past century.

5. See Eisenstein, *The Rise and Decline of the Estate Tax* in JOINT COMMITTEE ON THE ECONOMIC REPORT, 84TH CONG., 1ST. SESS., FEDERAL TAX POLICY FOR ECONOMIC GROWTH AND STABILITY 819, 836-37 (Joint Comm. Print 1956).

6. Frank H. Detweiler has written: "But how many times does a lawyer of our generation encounter a man with the supreme urge to keep his dead hand perpetually at the wheel of an existing or potential dynasty? . . . [M]ost of us would feel sure . . . that people of wealth in our day are far less likely than were their counterparts of a few generations ago to have their eyes fixed on providing a fortune for generations to come." Detweiler sees a real "decline of the dynastic impulse." Long-term trusts are set up, he asserts, to avoid the crushing impact of taxes; and he gives as an example the horrible case of a New York lady with three children, two "solid citizens" and one "old-fashioned, dyed-in-the-wool spendthrift." The old woman left outright shares to the good children; the share of the third was locked up in a spendthrift trust. Now, ironically, the children of the "good" children, as their parents die, "stand with their noses pressed to the window pane watching the tax man count off his 65 per cent. Not so the already spoiled son of the spendthrift son. The men of the estate tax division will never cause him any suffering. . . . Junior will pocket more millions than all his good little cousins will, put together." Detweiler, *The Owner's Control over Property Use and Disposition after his Death*, U. CHI. LAW SCHOOL CONF. ON USE AND DISPOSITION OF PRIVATE PROPERTY 15, 21-22 (Conference Series, No. 12, 1953). But Detweiler's reasoning is circular; long-term trusts are not set up for "dynastic" reasons, but to save taxes in the long run. But why save taxes? It is probably more accurate to say that in addition to those who truly wish to found a dynasty (and of course this wish is not absent simply because a client does not articulate it baldly), there are many settlors today who, in the light of their financial circumstances, *prefer* having their estate pass relatively intact to grandchildren and great-grandchildren to seeing most of it go to the government, and that this preference is stronger than the desire to give financial autonomy (as opposed to security) to children. Also, Detweiler may be misled by the fact that the overwhelming majority of all trusts are either entirely caretaker in function, or consist of a one-generation caretaker trust to which a dynastic remainder is appended. And since Detweiler suggests that once upon a time, true dynastic trusts were created, but no longer, to what does he attribute the psychological change?

laws which favor gifts to charity would discourage but not eliminate all charitable gifts. Human behavior is even more complicated than the Internal Revenue Code.

The tax laws do, however, show how much the law has done to make the dynastic trust feasible and profitable. At the opposite pole is the Rule against Perpetuities, legal arch-enemy of the dynastic trust. It sets an arbitrary but very real limit to the duration of the long-term trust. Yet here too we must be cautious in assessing the impact of purely legal devices on the growth and form of the dynastic trust. Abandonment of the Rule against Perpetuities probably would not mean a wholesale creation of very long-term trusts, any more than change in the tax laws would extinguish such trusts. In Wisconsin there are apparently no real barriers to the creation of trusts lasting far longer than the common-law period of perpetuities.[7] Yet settlors in Wisconsin do not seem to want to create private trusts in perpetuity. There may be psychological limits to the dynastic urge, which correspond very roughly with the period of the Rule against Perpetuities.

Between the tax laws which subsidize the dynastic trust and the rules of future interests which limit their duration, lies the body of substantive trust law. Its attitude can best be described as ambivalent. Some aspects of trust law favor the dynastic trust; others do the opposite. Some of this ambivalence may be the product of imperfect legal analysis. American jurisprudence has never quite come to grips with the dynastic trust, as a distinct trust type; its rules attempt to straddle long and short term trusts, just as corporation law, sometimes to its detriment, has treated closed and public corporations as identical institutions requiring identical legal treatment. Yet it is clear that the same rules could hardly apply to the dynastic and the caretaker trust at the same time. The two types, since they differ in function, differ in their legal

7. The situation in Wisconsin is roughly this: the basic statute (ultimately borrowed from New York but since amended) restricts only "suspension of the power of alienation," not remoteness of vesting. It has been held that a trust does not suspend the power of alienation if the trustee has an express or implied power of sale (almost all trusts do). Except for trivial exceptions, therefore, there is no Rule against Perpetuities in Wisconsin. GRAY, RULE AGAINST PERPETUITIES 690-91 (4th ed. 1942) and cases there cited; WIS. STAT. ANN. § 230.14 (1957); Will of Walker, 258 Wis. 65, 45 N.W.2d 94 (1950). The Wisconsin rules have been arrived at, technically speaking, through some very quaint turns of statutory construction. Thus the "law" is only as stable as the court wants it to be. In other jurisdictions, once in a great while a true perpetuity case comes up, *e.g.*, Williams v. Herrick, 19 R.I. 197, 32 Atl. 913 (1895); but the Wisconsin cases are mostly cases in which the violation of the (common-law) Rule against Perpetuities would be technical or slight. What the Wisconsin court would do with a perpetual private trust or a 200-year trust is anybody's guess. Still, it is significant that the case of a perpetual or 200-year trust has *not* come up in Wisconsin.

On the other hand, one should hesitate to draw too great social-psychological conclusions from the Wisconsin experience without knowing (a) how many lawyers in Wisconsin are truly *aware* of the current state of the authorities, and (b) to what extent the geographical mobility of clients and the existence of Rules against Perpetuities in other states limit the freedom of Wisconsin draftsmen.

needs. The dynastic trust, its eye fixed on the long run, must be managed under very flexible rules. Rigid rules of investment policy could cripple the trust, for it must carry on in fair business weather and foul; it must be able to change the forms of its investments as the economy changes over the years. Yet the dynastic trust must at the same time remain relatively secure from the interference of current beneficiaries. Trust assets must not prematurely leak out of the trust; it should therefore be relatively indestructible. By way of contrast the short-term caretaker trust, being much more concerned with the welfare of particular beneficiaries, can tolerate greater rigidity of management. Flexibility of investment policy is not as pressing a need as in the dynastic trust; arguably what the caretaker trust needs most is not free discretion for the trustees, but elaborate safeguards to prevent abuse and imprudence. Potential gains from a bold administrative policy are not worth the risk that the beneficiary's inheritance will be dissipated. On the other hand, the caretaker trust should not be inviolable and indestructible. It would be absurd to coddle the principal for some hypothetical remainderman, while current widows and orphans starve. In short, the dynastic trust needs administrative flexibility; the caretaker trust, flexibility in its beneficial provisions. Indeed, the two trust types may imply rules of trust law diametrically opposed to each other. At least this is so if one assumes that public policy treats both trust-types as of equal value.[8]

The major trends in American trust law, then, must be explained not only in terms of external social and economic forces, but in terms of the two major purposes for which trusts are created. Recognition of the often conflicting demands of the caretaker trust and the dynastic trust, against the proper social and economic backdrop, may contribute greatly to explanation of some of the puzzling paths taken by American trust law. What follows is an analysis of the historical interaction of these various factors in the formation of the modern law of trusts—at least as evidenced in three important aspects of that law: (a) the investment powers of the trustee; (b) the power of creditors and beneficiaries to reach trust assets; and (c) the power of beneficiaries to cause termination of the trust.

I. The Investment Powers of the Trustee

One of the constant tasks of the law of trusts has been to provide legal rules and a legal mechanism for governing trust investment policy, at least where the settlor has not done so himself. Theoretically, the problem could be handled in many ways; but in modern trust law, two basic approaches have been used: the so-called "prudent investor" rule and the stricter theory which

8. This assumption may not be entirely correct. The caretaker trust (whose beneficiaries are the proverbial widows and orphans) has engendered little controversy in recent history, but the dynastic trust has not always been so fortunate. The Rule against Perpetuities and various rules against unlimited accumulation of income reflect judicial uneasiness about the propriety of the dynastic motive.

underlies the so-called "legal lists."[9] The "prudent investor" rule allows the trustee to select any prudent investments, and refuses to lay down hard and fast rules. "Legal lists" specify what kinds of investment are permissible; when the list is mandatory, the trustee must choose only statutory investments. These two approaches correspond, roughly, with the respective needs of the dynastic and the caretaker trust. The dynastic trust requires flexibility of investment, and is principal-minded rather than income-minded. The legal lists are too torpid and cautious for its purposes. On the other hand, given its short duration, a caretaker trust can tolerate a very conservative portfolio, particularly if its trustees are amateurs; under certain economic circumstances, the legal list may be its best and safest course.

The "prudent investor" rule originated, practically speaking, in the famous Massachusetts case of *Harvard College v. Amory*,[10] decided in 1830. The facts of the case are significant. John M'Lean died in 1823, leaving an estate of a quarter of a million dollars, the bulk of it in corporate stock. One clause of the will left $50,000 to Jonathan and Francis Amory, as trustees; they were instructed to lend the money out "upon ample and sufficient security," or to invest it "in sage and productive stock, either in the public funds, bank shares or other stock, according to their best judgment and discretion."[11] Mrs. M'Lean was to enjoy a life interest in the income. After her death, one-half of the fund was given to the President and Fellows of Harvard College, to be "exclusively and forever appropriated to the support of a professor of ancient and modern history"; the other half was given to the Massachusetts General Hospital to be used for the "general charitable objects of that institution."[12] The trust was, in effect, dynastic. The will spoke the language of permanence: after one life interest, the money was to be "exclusively and forever appropriated" for charitable purposes.[13] To establish the fund, the trustees selected from the estate certain bank and insurance stocks, and shares of the Boston Manufacturing Co. and the Merrimack Manufacturing Co. In 1828, Francis Amory, the surviving trustee, presented his accounts and tendered his resignation; the trust had not yet come to an end, but the remaindermen chose this moment to attack Amory's investment policy, which had

9. The literature on trust investment rules is enormous. LORING, A TRUSTEE'S HANDBOOK, Appendix II (Farr rev., 6th ed., 1962), gives a short state-by-state survey of the current situation. Comparison with earlier editions of this book shows graphically how rapidly the legal list is vanishing.

10. 26 Mass. (9 Pick.) 446 (1830).

11. According to present-day habits of interpretation, a court would have no difficulty reading the phrase "other stock" to include common stocks of corporations. As of 1830, however, the word "stock" did not have so clear-cut a meaning; as the context shows, the term "stock" was applied to government bonds as well as to corporate securities. It would not be entirely certain that "public funds, bank shares or other stock" necessarily empowered the trustees to purchase corporate securities. At any rate, the court treated the investment question as one of law rather than one of interpretation of the will.

12. *Id.* at 447.

13. *Ibid.*

cost them money (at least on paper), since the market value of the insurance and manufacturing stocks had seriously declined.

Counsel for Harvard argued that insurance and manufacturing stocks were "not safe."[14] The established English rule on trust investment was admittedly quite narrow and courts did not allow trustees to invest in "trading companies" without specific authorization from settlors.[15] Under English law, trustees were required to invest trust money in "public funds," that is, in government securities.[16] But conditions in the United States, according to Judge Putnam, who wrote the decision, were very different from those of England. The "public funds" of the United States were "exceedingly limited in amount, compared with the amount of trust funds to be invested."[17] Furthermore, "it may well be doubted, if more confidence should be reposed in the engagements of the public, than in the promises and conduct of private corporations which are managed by substantial and prudent directors."[18] In fact, the court noted, private corporations were more amenable to control by investors than the government: the security-holder "may pursue his legal remedy and compel them or their officers to do justice. But the government can only be supplicated."[19] Unquestionably, investors in manufacturing and insurance stocks ran risks. This was equally true of bank stock: "the value of . . . [bank] capital depends upon the solvency of its debtors."[20] Banks lend to merchants who may become "bankrupt from unavoidable and unforeseen mercantile hazards."[21] "Do what you will," the court concluded ruefully, in a fine burst of New England gloom, "the capital is at hazard."[22] Absolute safety was unattainable; insofar as human power could provide security for the trust, safety depended on the honesty and good judgment of the trustees. The court then proceeded to lay down its famous guide for the trustee:

> [He] shall conduct himself faithfully and exercise a sound discretion. He is to observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested.[23]

Under all the circumstances of the case, the trustees had measured up to this standard, and they were not responsible for any loss.

---

14. *Id.* at 451.
15. *Id.* at 459.
16. LEWIN, PRACTICAL TREATISE ON THE LAW OF TRUSTS AND TRUSTEES 305-11 (1839). Even investment in landed security was questionable: "at the present day, when there is such a facility of investing upon government security through the medium of the public funds, a trustee or executor could scarcely be advised to make an investment upon mortgage where no authority was expressly given him." *Id.* at 309.
17. 26 Mass. (9 Pick.) at 459.
18. *Id.* at 460.
19. *Ibid.*
20. *Ibid.*
21. *Ibid.*
22. *Ibid.*
23. *Id.* at 461.

The test laid down was carefully stated, for all its apparent vagueness. The "prudent investor" rule has been so often quoted, cited, and repeated, that the eye is apt to pass over it without noticing the precision of its phrasing. The ideal trustee must "observe how men of prudence, discretion and intelligence manage their own affairs."[24] This presupposes a certain class of trustees: men of business ability, whose social and economic position allows them easily to observe how their peers manage large estates for themselves or others. The test was more appropriate to the professional than to the amateur trustee who assumed trusteeship out of friendship or blood ties with the settlor. The court also spoke of a "permanent disposition of funds."[25] This might mean nothing more than the trustee's duty to avoid speculative investment; but in another sense, "permanent disposition" implied investment for the long run. This phrasing was more appropriate to the dynastic than the caretaker trust.

The prudent investor standard is now more than 130 years old; but only in the last twenty years has it become generally accepted in the majority of jurisdictions.[26] The Massachusetts court was not clairvoyant or supernaturally wise; its opinion was appropriate to its time and place, though premature for other parts of the country. Massachusetts was a fertile breeding ground for the dynastic trust. The state had its metropolis, Boston, whose emergent elite was recognized as subtly different from the "society" of other cities. The Boston aristocracy was famous for gentility and wealth, for its frugality, temperance, dynasticism, its hostility to ostentation and waste. The upper classes were characterized by strong "family" consciousness, and a sense of historical tradition. Boston's was a mercantile aristocracy, its fortunes more closely connected with business and trade, and less with land than was true of the upper classes elsewhere, for example, in the South. Moreover, in Boston a special institution was developing, the so-called Boston trustee, a professional manager of other people's fortunes — the living embodiment of the prudent investor.[27] The rise of the Boston trustee, the prudent investor rule, and the Boston habit of creating long-term, iron-clad trusts occurred at

24. *Ibid.*

25. *Ibid.*

26. See note 84 *infra.*

27. LORING, NATHANIEL BOWDITCH (1773-1838) OF SALEM AND BOSTON 17-18 (1950), credits Bowditch with being the first professional trustee, dates his first trusteeship from 1817, and suggests that Bowditch's "experience as supercargo was the foundation for setting up of modern trusteeship because the supercargoes managed their finances by maintaining separate entities." See also WHITE, HISTORY OF THE MASSACHUSETTS HOSPITAL LIFE INSURANCE CO. 60-61 (1955). With the rise of the private trustee, Massachusetts Hospital Life declined as an instrument of private trusteeship, about 1830. The facts suggest a division of labor in Massachusetts: private trustees for dynastic trusts, and corporate trustees and savings banks for small depositors (roughly equivalent to caretaker trusts). See also HOLBROOK, THE BOSTON TRUSTEE (1937); HOLBROOK OFFICE, YOUR PRIVATE TRUSTEE (1951); Harriman, Investment Management of Trust Funds by Corporate Trustees in Massachusetts (1932) 40-42 (unpublished thesis in Harvard Business School Library).

about the same time; probably the three events were intimately related to each other.[28]

The legal lists — the antithesis of *Harvard College* — did not assume mature form until the very end of the 19th century.[29] Their underlying philosophy was apparent, however, in the English rule, which was followed in some states.[30] *King v. Talbot*,[31] decided in New York in 1869, was a particularly important and much cited case standing for a stricter investment rule than *Harvard Col-*

28. A different kind of dynastic arrangement was characteristic of the plantation South. In a landed aristocracy, prudent management of an estate need not mean prudent investment in the *Harvard College* sense, since corpus consisted of a specific "estate" (usually land and ancillary capital assets such as slaves) rather than a "portfolio." The trustee of a dynastic trust was expected to maintain the specific form of the trust as well as its value. One example will illustrate the legal response to the problems of Southern dynasticism. In 1813, Christopher Williman of South Carolina devised land and slaves to three trustees, including

> two plantations on Combahee, known by the names of Boston Bottom and Walnut Hill; also one moiety or half of all those two islands, situate between the Combahee and Bull rivers, both known by the name of Williman Islands, and one undivided moiety of thirteen hundred acres of marsh land adjoining them.

The will gave testator's daughter Eliza and her husband an equitable life interest in the property; the remainder was to be appointed by Eliza among testator's lineal descendants. In 1817, Eliza secured from the court permission for the trustees to sell some "unproductive" land and to buy a certain new tract called "Jenny's plantation." In 1823, Eliza appeared in court again, praying for sale of "Jenny's plantation" and other "unproductive" tracts. The court allowed the sale, and decreed that the trustees invest the proceeds "in well secured and productive private or public securities." Here residual control over the estate was in the hands of the court. The estate plan had some dynastic features; but the caretaker provisions for Eliza, and the vicissitudes of life, made it necessary to vest power to alter the corpus in some agency even though the trust was tied to specific tracts of land. It would have been dangerous (and inimical to the settlor's dynastic intent) to allow the trustees to decide themselves when and if to change the form of the corpus. The 1823 decree in effect converted the trust into a prudent investor trust; once necessity set the trust free from its tie to specific lands, the trustees might logically be granted discretion to invest in "well secured and productive private or public securities."

American family structure centers around a small "family unit of parents and children," rather than a larger kinship group. But for certain upper class elements, in which "elite status is closely bound up with the status of ancestry," there is an added element of "kinship solidarity in a —mainly patrilineal—line of descent, in 'lineages,'" with a tendency for the kinship structure to be bound up "with family property, especially an ancestral home, and continuity of status in a particular local community." Parsons, *The Kinship System of the Contemporary United States*, 45 Amer. Anthrop. 22, 29 (1943). It is this system which is reflected in the Southern cases. The Boston type of dynastic trust can be viewed as an adaptation of the upper-class kinship system in an economic and social setting lacking significant ancestral land holdings. Given ancestral land, the Massachusetts court would no doubt have reacted much the same as a Southern court. See Davis, 96 Mass. (14 Allen) 24 (1867).

29. See text at note 72 *infra.*

30. *E.g.*, Pennsylvania. See note 38 *infra.*

31. 40 N.Y. 76, 77 (1869). Almost certainly the case reflects a stiffening of attitudes. See Higgins v. Whitson, 20 Barb. 141 (N.Y. Sup. Ct. 1855) (approving an investment in a second mortgage).

lege. Charles W. King, the testator, died in 1845, on a voyage from Ceylon to Suez, survived by a widow and three minor children. His will, executed in Macao, left to each child $15,000, "the interest on the same, so far as required, to be applied to their maintenance and education, and the principal, with any accumulations thereon, to be paid to them severally on their majority."[32] King gave his executors "discretion" in "the investment of my estate for the benefit of my heirs."[33] These executors (in effect, trustees) were King's business partners. The trustees in 1848 and 1849 disposed of approximately $45,000 of United States Treasury notes and Ohio state bonds, and invested most of the money in canal, railroad, and bank stocks. These investments were attacked as improper by the beneficiaries.

The opinion of the court was announced by Woodruff, J. After characterizing the office of trustee as a "thankless burden," he proceeded to lay down a rule which, superficially, closely resembled the Massachusetts rule: "the trustee is bound to employ such diligence and such prudence . . . as in general, prudent men of discretion and intelligence in such matters, employ in their own like affairs."[34] Trustees, he added, had three basic investment duties: first, to place the money in a "state of security"; second, to make it "productive of interest"; and third, "so to keep the fund, that it should always be subject to future recall for the benefit of the cestui que trust."[35] The nature of the trust required a constant, unremitting, regular flow of income, "without exposure to the uncertainties or fluctuations of adventures of any kind."[36] Under all the circumstances, the investments made by King's trustees did not measure up to these standards and the trustees had to suffer the consequences.

The trust in *King v. Talbot* was not a dynastic trust but an ordinary caretaker trust. This colored the court's approach to the whole problem of investment. The standard of prudence laid down in *King* was qualified by the phrase, "their own *like* affairs," which subtly destroyed the point of the Massachusetts rule since "like affairs" implies that there are two kinds of prudence, one for businessmen generally, and one for managers of trust funds. The court stressed that the fund should be always "subject to future recall" for the sake of the beneficiary, in other words, as liquid as possible. Although not inappropriate to the dynastic trust, liquidity is a much more important goal of the caretaker trust, which is subject to short-run, unpredictable calls on principal. The same point can be made, though less forcefully, about the importance of regularity of income. *King* and *Harvard College* differed in attitude at least in part because the underlying trust types differed. True, *King v. Talbot* was decided in New York, which, if it lacked a "society" in the Boston sense, was the seat of the country's largest city, the home of Wall Street and the richest American dynasts. But by 1869, government bonds,

32. 40 N.Y. at 77-78.
33. *Id.* at 78.
34. *Id.* at 85-86.
35. *Id.* at 88.
36. *Id.* at 87.

state bonds, and good mortgages were available in greater quantities than in 1830, when the *Harvard College* decision was rendered. The federal government floated an unprecedented number of bond issues during the Civil War; before the war and after, states and cities indulged in a burst of flotation, a "*mania* for running in debt."[37] Just as the state of the earlier investment market made it easier for the Massachusetts court to lay down a rule most appropriate to the dynastic trust, the market in the late 1860's, in particular the availability of public securities, made it easier for *King v. Talbot* to lay down a rule most appropriate to the caretaker trust.

Attitudes as well as market facts had changed between the dates of *Harvard College* and *King v. Talbot*. *Hemphill's Appeal*,[38] decided in 1852, arose out of the will of Stephen Girard, whose dead hand has enlivened legal history for more than a century. The trust in *Hemphill* concerned only a minor corner of Girard's famous will; it was essentially a caretaker trust. Fifty thousand dollars was left in trust, the income to be paid to Mrs. Hemphill, during her lifetime, the remainder outright to her issue. In 1837, the trustees invested some $4,500 in stock in the Bank of the United States, and the case turned on the propriety of this investment. The Chief Justice of the Pennsylvania Supreme Court, Jeremiah Sullivan Black, minced no words. At the time of the investment

> [the] character of the bank had been blown upon; the public funds had been removed from it; the general government had refused it a charter; it had bought one from the state at an enormous price; it was then in a state of suspension; and the prudence of its management was fiercely denied by very many persons.[39]

Black himself was probably one of the "very many persons" who opposed the bank. He was an ardent Democrat, and he headed a court composed, with one exception, of Democrats elected in an 1851 Pennsylvania landslide.[40] Black thought the investment in bank stock was imprudent *per se*; but he deliberately chose to rest his opinion on "a broader ground," the English rule. The question of trustee investments, said Black, was "an open one" in Pennsylvania, but "the time has come when the interests and rights of trustees, as well as orphans, married women, and insane persons, demand the settling of it." He added:

> A plain path, though it may be a narrow one, is safer to walk in than a trackless waste. . . . If the occasion had arisen twenty years ago for laying down the true rule, the present loss would not have occurred. Then the trustees would certainly not have stood by and seen the stock going down gradually, from $122 a share to nothing, without making an effort to save at least a part of it. But, unfortunately, they believed they had

37. DILLON, THE LAW OF MUNICIPAL BONDS 5 (1876).

38. 18 Pa. 303 (1852). On the drafting of the famous Girard will, the residuary clause of which established Girard College, see HERRICK, STEPHEN GIRARD, FOUNDER 141-43 (1945).

39. *Id.* at 305.

40. BRIGANCE, JEREMIAH SULLIVAN BLACK 27-28 (1934).

> done their whole duty in the purchase of the stock, and were by the act absolved from all further obligations . . . .[41]

Black's language was most apposite to caretaker trusts and amateur trustees unequipped by training and habit to handle a portfolio. Whatever the jurisdiction, a trustee who merely selected investments without constant review of the market, was better off treading a "plain though narrow path." No professional trustee would have behaved as the trustees did in *Hemphill.* Black was aghast at the dangers to the widows and orphans of caretaker trusts; he chose his "broader ground" as the best way for the average trustee. Thus *Hemphill's Appeal* reinforces the hypothesis derived from *Harvard College* and *King v. Talbot* that the development of 19th century trust investment rules reflected three key factors: trust-type, the state of the investment market, and the availability and use of particular forms of trust management.

Of course Black was influenced by his own political bent. Bank investments had not always been controversial. In *Harvard College,* the remainder interests had not chosen even to criticize investment in bank stock as improper. A clear distinction usually was drawn between bank stock and stock in trade or manufacturing corporations. In this tradition the Court of Equity of South Carolina, in 1851, took a sharply opposing view on the question of investment in the Bank of the United States:

> Much denunciation was uttered, in the course of this case, against the Bank of the United States, as a foreign, political and speculating institution. The only question . . . is whether investment in the stock of this bank . . . can be regarded as judicious . . . . In England, trust funds are usually required to be invested in *consols*; but we have no rule prescribing the securities on which trust funds shall be lent or invested. . . . [T]his bank was in high credit in this State, and its stock eagerly sought for investments by capitalists, trustees and bodies corporate, until the fall of 1839, when the price of the stock sank suddenly and greatly in the

41. 18 Pa. at 306 (1852). See also Pray's Appeals, 34 Pa. 100 (1859). Although Judge Black referred to the question as an open one in Pennsylvania, Nyce's Estate, 5 Watts & Serg. 254 (Pa. 1843) was an important straw in the wind. *Nyce's Estate* also concerned an investment in stock of the Bank of the United States; and while the decision (contrary to the fiduciaries) can be distinguished from *Hemphill,* the court quoted and adopted the opinion of the Orphan's Court of Chester County, containing this language: "The recent history of banking in this country . . . almost compels us to the conclusion that . . . the capital stock of a bank is little, if any better than the mere personal security of an individual." *Id.* at 256. But in Twaddell's Appeal, 5 Pa. 15 (1846), the guardian of a minor bought, without court approval, $3200 worth of the Lehigh Navigation Company 6 per cent loan. Chief Justice Gibson refused to surcharge: the investment was not "on personal security, but in the loans of a great and flourishing corporation. . . ." *Id.* at 17. He doubted the wisdom of the "unbending" English rule. The company had large land-holdings, so that the investment was "in substance, though not in form, on real security." *Ibid. Nyce's Appeal* was distinguished because the "history of banking" taught that bank investments were "hazardous." *Id.* at 18. Note the testimony of the transfer clerk of the company that "there were on the books upwards of one hundred accounts of trustees, executors, and guardians holding the loan." *Id.* at 16. Thus in Pennsylvania, at least until *Hemphill,* the legal attitude toward trust investment showed considerable fluctuation.

> market. Long after this time the hope was entertained by astute and practical men, that the stockholders would be finally re-imbursed; and few persons acted upon the policy of selling out at the prices so suddenly reduced.[42]

The trustee was absolved; he had "managed the funds of his ward as prudent men in the State managed their own affairs."[43] Similarly, in a Mississippi case, decided in 1853, an investment in bank stock was approved, on a showing that "prudent and cautious men" eagerly made such investments.[44] *Hemphill* and *King* had distinguished between the standard applicable to the trustee's own affairs and his standards *qua* trustee; these Southern cases made no such distinction even though the trusts were caretaker trusts — in fact the epitome of caretaker trusts, trusts for minors.

This Southern latitude was related to the practice of Southern courts in passing on investments for orphans, other wards of the court, and estates. The English cases, too, showed a certain confusion between "court" trusts and trusts set up by and for persons *sui juris*. The judicial standard for court trusts and the trustee standard naturally tended to coincide. In 1825, Chancellor Bland of Maryland, construing the term "good security" in a trust instrument, said:

> I feel that my discretion must be limited to a selection among securities of that description; that is, government stock, or a mortgage on unincumbered real estate, or good bank stock.[45]

He was speaking, of course, of his *own* discretion. At about the time of *Harvard College*, both Pennsylvania and Maryland had statutes on the subject of judicial control of fiduciary investment. The two states are neighbors, but their statutes were very different in philosophy. Pennsylvania in 1832 authorized any "executor, administrator, guardian or trustee" who had surplus money to invest, to "present a petition to the Orphan's Court"; the court could thereupon direct the money to be invested in "the stocks or public debt of the United States, or . . . this commonwealth, or . . . the city of Philadelphia, or on real securities."[46] Maryland in 1831 gave its Orphans' Court the right,

42. Wardlaw, Ch. J., in Boggs v. Adger, 4 Rich. Eq. 408, 410 (So. Car. Ct. App. 1851).

43. *Id.* at 411.

44. Smyth v. Burn's Adm'rs, 25 Miss. 422, 427 (1853); see Washington v. Emery, 57 No. Car. 32 (1858), approving a purchase of railroad stock by a fiduciary after he "consulted with persons whose opinions were entitled to respect. . . ." *Id.* at 36.

45. Jones v. Stockett, 2 Bland 409, 413 (Md. H. Ct. Chanc. 1825).

46. Pa. Laws 1831-32, No. 99, § 14, 193. See, for example, Estate of Adam Hoffman, 42 Orphans' Ct. Docket 129 (Phila. Cnty., Oct. 5, 1849), petition of executors that "they have in their hands the sum of $7,000 part of the assets of said Estate, that they are desirous of investing the said sums . . . for the use of the Estate in such manner under the order of the Court that they shall be exempted from all liability for loss on the same should loss happen." The court "granted the Prayer of the Petitioners and ordered the investment to be made in Pennsylvania five per cent loans."

With the Pennsylvania provision compare N.J. Stats. 1847, tit. VII, ch. 5, § 14, at 209 (fiduciaries may "by leave and direction of the orphans' court put out to interest all

"either ex officio or upon application," to order any administrator or guardian to "invest in bank or other incorporated stock, or any other good security, any money or funds received by such administrator or guardian; and the court shall direct the manner and form in which such money or funds shall be . . . invested; and the same shall at all times be subject to the order and control of the court."[47] The Maryland statute did not mention trustees; but since the court could apparently order even minors' funds to be invested in common stocks, it could hardly be wrong for trustees of long-term trusts to do so, at least on court order. The Maryland statute, in effect, set up a "prudent court" rule. Statute or not, Southern courts seem to have executed this power. Prior to the Civil War it was a "matter of notoriety" that trust funds in the "lower division" of South Carolina were "commonly invested in stocks of the Charleston banks, and bonds of the Southern Carolina Railroad Company."[48] And in Mississippi the "probate court of Adams county authorized guardians to invest, in the stocks of the banks of this state, the funds of their wards."[49] In these Southern States the Massachusetts rule was unnecessary. How could it be imprudent to invest in securities which the courts themselves habitually authorized? By 1869, however, the full implications of the *Harvard College* doctrine in a changing social system became apparent. South Carolina had approved investment in bank stock in 1851; in 1869, investment in bonds of the Greenville and Columbia Railroad Company was declared improper. Counsel argued that these bonds, in 1859 and 1860, were "a favorite investment with capitalists. . . . Their coupons were taken by the merchants as so much money."[50] But the court was no longer interested in the behavior of "capitalists." The "bonds of a railroad corporation are personal securities," said the court; only "under special circumstances" could a trustee invest in them.[51]

In the South, the Civil War had ended many of the dynasties, ruined land values, destroyed the worth of public securities and slaves, interfered with

moneys in their hands which they are or may be lawfully required to retain . . . upon such security, and for such length of time as the said court shall allow of . . ."). The kinds of investment allowable were not specified, but the phrasing suggests that the legislature had in mind primarily mortgage securities. On the court's interpretation, see Gray v. Fox, 1 N.J. Eq. 259 (1831). See also Quick's Ex'rs v. Fisher, 9 N.J. Eq. 802, 805 (1852), disapproving of the purchase of real estate by the trustee of a caretaker trust. The "trustee has no power to change the character of the trust fund . . . of converting real estate into personal, or personal into real. . . . If a change in the character of the fund be deemed necessary . . . it should be made only with the permission and by the sanction of a court of equity." Compare this emphasis on the "character" of the fund with the attitude of the Southern courts.

47. 1 Md. Pub. Gen'l Laws (Scott & M'Cullough 1860), art. 93, § 237, at 670; see Murray v. Feinour, 2 Md. Ch. 418, 422 (1851), stressing the lack of safe and stable "court" investments in Maryland as opposed to England.

48. Allen v. Gaillard, 1 Rich. N.S. 279, 280 (So. Car. 1869).

49. Argument of counsel for defendant (J. T. McMurran), in Smyth v. Burn's Adm'rs, 25 Miss. 422, 425 (1853).

50. Allen v. Gaillard, 1 Rich. N.S. 279, 281 (So. Car. 1869).

51. *Id.* at 282; see also Nance v. Nance, 1 Rich. N.S. 209 (So. Car. 1869).

the access of fiduciaries to the courts, in short, buried the assumptions of pre-war trust law under an avalanche of social change.[52] In the North, trust law responded to the impact of successive crises in the banking structure, the vulgarization of capital investment, the increasing complexity of the investment market, and the political overtones of capital formation. *Hemphill* may have been prophetic; *King v. Talbot* was a simple creature of its time. It was a bad year for the public image of common stocks. The Erie Railroad scandals were news of the day. A noisome stench arose out of Wall Street. Ironically, the most biting indictment of the Erie scandal, the revelation of the stock market as a cockpit of intrigue, was written by the Adams brothers, members of a noble Massachusetts dynasty.[53] In any event, Black Friday and the Erie raid were worlds away from the image of the shrewd and sound New England gentleman, prudently picking and choosing among the textile mills, banks, and factories of his region. Sound investment in equities took more than wisdom and experience in the days of *King v. Talbot*; only insiders could really know enough to invest well, and the economy was outstripping the channels of market information. Certainly widows and orphans were best off avoiding the equity market altogether. Thus the spread of *King v. Talbot* to the South, and the confinement (or even decline) of *Harvard College* reflected changes in the three critical factors mentioned: trust-type, investment market, and institutional forms of the management of trusts.

It is no surprise then, that one dominant theme in the law, after the Civil War, was the search for Black's plain but narrow path. *Harvard College* had laid down a rule which fit the dynastic trust. Most states, however, lacking dynastic trusts in any significant numbers, lacking Boston's institution of professional trust-managers, and face to face with a wide, dangerous, and complicated investment market, were not ready for *Harvard College*. Three general methods of allocating decision-making power over trust investment might have been tried: (1) close control over particular investments by appropriate courts of first instance; (2) specific lists of investments or types of investments, the lists to be evolved through case-law; and (3) specific lists, to be laid down by statute. Each method suffered from certain defects. As probate courts grew less likely to be staffed by sagacious gentlemen, the technique of court control—dubious at best in a wide and volatile investment market—lost what appeal it once had. Judge-made lists were torpid, inflexible, at the mercy of the chance flow of case-law. But statutory lists, in the Gilded Age,

52. For a provocative treatment of trust law in the South, see Alford, *The Influence of the American Civil War upon the Growth of the Law of Decedents' Estates and Trusts*, 4 AM. J. LEGAL HIST. 299, 327-54 (1960). But one may question the extent to which the "prudent investor" rule (in the *Harvard College* sense) really obtained in the ante-bellum South. Alford speaks of old Southern trust law as subject to "benign and paternalistic" rule by the court; he mentions an "antebellum hostility to fiduciaries," and the role played in law by the South's "remarkable consensus concerning the ethical values in human relationships." These are subjective judgments which seem to ignore the strong role played by prevailing trust forms and institutional forms of trusteeship in the South.

53. ADAMS, HENRY & ADAMS, CHARLES FRANCIS, CHAPTERS OF ERIE (1886).

were no perfect solution. Legislators could control investment policy, but who would control the legislators? In 1870, for example, the Pennsylvania legislature specifically authorized trustees to invest in bonds of the Pennsylvania Railroad Company; an act of 1872 did the same favor for bonds of the Philadelphia and Reading Railroad Company.[54] It must have been clear to all where the impetus for these laws arose. This was not a plain and narrow path but an invitation to corruption. The power to prescribe "legals" was a power to control or at least influence the flow of investment money. The Pennsylvania statutes showed the dangers of legislative control over investment.

From the 1840's on, state constitutions tended to be amended along the lines of restricting legislative power in ways which, it was hoped, would operate to curb some of the worst abuses. Pennsylvania, adopting a new constitution in 1873, forbade the legislature from ever authorizing "investment of trust funds by executors, administrators, guardians or other trustees in the bonds or stock of any private corporation."[55] This form of the plain and narrow path remained the supreme law of Pennsylvania, until finally removed in 1933. The Pennsylvania clause was not a legal list. It was in a way a reverse legal list, specifying a no without a yes. Although the clause never won widespread adoption, Alabama and the new western state of Colorado copied

54. Pa. Laws 1870, No. 25, at 45. The act "extended" the provisions of the Act relating to Orphans' Courts (see note 46 *supra*) to "include the bonds of the Pennsylvania Railroad Company, secured by . . . general mortgage. . . ."; Pa. Laws 1872, No. 19, at 31 (bonds of the Pennsylvania & Reading R. Co., secured "by the general mortgage of said company," of 1871); Pa. Laws 1872, No. 799, at 833 (bonds of the Lehigh Coal Navigation Company); see Pa. Laws 1871, No. 315, at 339; ". . . all savings institutions and trust companies in this state, which, by their charter of incorporation, are limited in their investments in public securities and stock, or loans on real estate, [are] . . . hereby authorized to invest any portion of their surplus funds in the purchase of the bonds of the American Steamship Company of Philadelphia."

55. Pa. Const., art. III, § 22 (1873).

The Pennsylvania clause was proposed by George W. Biddle, a Philadelphia lawyer who served as a delegate to the Constitutional convention. Biddle's original proposal would have gone further, and stricken down all existing laws which authorized the investment of trust funds in corporate securities. Another delegate wished to prohibit investment "in any other securities than those of the United States, and of this State," without court approval. During the debates, some very dirty linen was washed in public; strong accusations against the legislature were made. According to Biddle, an act passed in indecent haste while the convention was sitting had the effect of making legal trust fund investment in fourth mortgage bonds of the Pennsylvania Railroad. Another delegate told of a "gentleman" with "great influence with the legislature," who "packed his carpet-bag and came down to Harrisburg and secured the passage of an act of Assembly authorizing the investment of trust funds in the securities of the city of Williamsport"; and asserted that these bonds now "would not bring in the market eighty cents on the dollar." The delegates voted down the most extreme proposals, but adopted the clause forbidding the legislature to authorize trust fund investment in corporate securities. 5 DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSLYVANIA 293-308 (1873).

it; and then, from Colorado, it later passed to two other new states, Montana and Wyoming.[56] In these frontier mining and grazing states, the Massachusetts rule and the needs of the dynastic trust had no relevance. But these adoptions probably show little more than the habit of states engaged in making or remaking organic law to look to recent or neighboring models.

The failure of the Pennsylvania clause to win general adoption did not mean that the Massachusetts rule was widely accepted. Most jurisdictions which had tangible law on the subject neither adhered to the Massachusetts rule, nor possessed a rigid, mandatory legal list generally applicable to fiduciaries. The case-law, such as it was, probably leaned more to *King v. Talbot* than to *Harvard College*. Most jurisdictions, however, had very little either in the way of case-law or statute law directly bearing on the propriety of particular kinds of investment. Much of the "law" was concentrated in those few Eastern states where trusts of a fairly formal type were most common. But summaries of the current state of the law, in treatises and periodicals, had a vague and unsatisfying quality.[57] The dynastic trust, in the Gilded Age, was extending its domain, but the general law of trust investment was firmly gripped by the search for the plain and narrow path.

It may have been the rise of the trust company which broke this firm grip; at any rate, the trust company became a significant, although at first subtle, factor in molding the direction of trust law. Trust companies, in rudimentary forms, were known before the Civil War, but their great growth took place toward the end of the century. Outside of Boston, the trust company played the role of the Boston trustee—it provided a rational, institutional base for legal and business experience in drafting, forming, managing and perpetuating long-term trusts.[58] Ultimately, too, the trust companies provided for the first time a strong interest group which could exert pressure on legislatures for general liberalization of trust investment rules. Clear legal movement in this direction had no immediate urgency, however. After all, investment rules were stop-gap, to be applied only to a silent or ambiguous will or trust, and major trusts often gave the trustee as much discretion as was needed. Caretaker trusts were more likely to be silent or ambiguous on the investment power; for these trusts, the existing rules were perhaps tolerable. Moreover, the early

---

56. ALA. CONST. art. IV, § 35 (1875); see JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ALABAMA 92 (1875); COLO. CONST. art. V, § 36 (1876); MONT. CONST. art. V, § 37 (1889); WYO. CONST. art. III, § 38 (1889).

57. For an example, see *Investments by Trustees*, 22 AM. LAW REG. 201 (1874).

58. SMITH, THE DEVELOPMENT OF TRUST COMPANIES IN THE UNITED STATES (1928) is by far the best account of the rise and early history of trust companies in this country. For a description of New York's trust companies at the turn of the century, see 14 BANKING L.J. 125 (1904). The trust companies appeared first as rivals of the banks, but in the 20th century the two types of institution have tended to fuse, partly by merger, partly by the assumption of trust powers by banks. See SMITH, *op. cit. supra* at 344-58. Beginning in 1913, federal law made provision for the authorization of national banks to exercise trust powers. See Levitt, *The Trust Powers of National Banks*, 77 U. PA. L. REV. 835 (1929), for an account of some early legal difficulties.

trust business of corporate fiduciaries was not strictly comparable to modern trust management. Trust funds were simply deposited with the companies; the company guaranteed a fixed return, much like a savings bank or an insurance company handling the proceeds of a policy under a settlement option.[59] Investment policy, therefore, meant general bank investment policy—the same policy applicable to savings deposits and the bank's own capital. True fiduciary business in the modern sense, which combined the roles of fiduciary and investment counsellor, was not common before the Civil War, and developed slowly until about 1890. These facts suggest why the trust companies did not exert much influence on the general law of trust investment until relatively late, and also why the legislative legal list—a specific statutory catalog of approved forms of investment for trustees—developed slowly.

As a matter of fact, however, legal lists of a special sort, appropriate to their times, antedated by many years more general legal lists. In Massachusetts, a general trust company act was first passed in 1888. Trust companies were authorized to act as court-appointed trustees or to "hold money or property in trust . . . upon such terms and conditions as may be agreed upon." But investment was limited to specific classes of securities. The list included government securities, qualified real estate mortgages, certain railroad bonds; money could also be loaned against "notes with two sureties of domestic manufacturing corporations or of individuals," if supported by collateral composed of authorized securities. Funds could also be placed in "any securities in which savings banks may invest." Savings banks, in turn, were allowed to choose from a long and complex list of investments, including bonds of the soundest railroads (particularly in New England) but with certain investment safeguards.[60] In addition, savings banks had the privilege of investing up to one-third of their deposits in non-legals—a privilege which went back to the first regulation of savings banks in Massachusetts. In the 1880's private Boston trustees probably invested no higher proportion of the trusts they managed in "non-legals" than savings banks might have done.[61] Nonetheless, even though the corporate "legal lists" were broader than those of most states,

59. "[B]efore 1850 personal trusts, both testamentary and voluntary, were confused with time deposits. . . . As a rule . . . trust funds before 1850 seem to have meant funds upon which the trust company paid a contractual rate of interest and retained for its service the amount it could earn on the funds in excess of that contractual rate." SMITH, *op. cit. supra* note 58, at 316.

60. See 2 Rev. L. Mass. 1902, ch. 113 (Savings Banks) § 26, at 1070-75; ch. 116 (Trust Companies) §§ 16, 17 at 1111, 1112.

In Laws Mass. Gen. Sess. 1834, ch. 190, § 8, banks were allowed, if deposits could not be "conveniently invested in any or all of the modes of investment herein before prescribed," to lend "not exceeding one fourth part of the amount thereof, on bonds or other personal securities with at least one principal, and two surety promissors: *provided*, that all such parties shall be citizens of this commonwealth."

61. See the testimony of William Minot, Jr., in the Report of the single judge, Charles Allen, in the case of Dickinson, 152 Mass. 184, 25 N.E. 99 (1890) (Social Law Library, Boston), at 25. Minot and his father were private trustees who handled "several

the odd fact remains that Massachusetts, home of the prudent investor, subscribed to a peculiar double standard. Private fiduciaries had, at least in theory, the free discretion of the prudent investor; corporate fiduciaries were subjected to a kind of legal list.[62]

New York law harbored a surprise of its own. Here, the prudent investor can be found on the very doorstep of *King v. Talbot*. For example, in 1871, two years after the decision in *King*, the legislature chartered the "Westchester County Trust Company." The charter provided:

> The trustees shall have a discretionary power of investing the money received by them in trust, in public stocks of the United States, or of this State or in the bonds or stocks of any incorporated city, or of any town or county in this State authorized by the Legislature, or in such real or personal security as they may deem proper, but the said company shall not hold stock in any incorporated company beyond $10,000.[63]

Other special charters issued to trust companies, even before *King v. Talbot*, contained similar provisions.[64] Indeed, in the general incorporation law for trust companies (1887) all New York trust companies were granted a limited power to buy common stock, not available to private fiduciaries.[65] The explanation for this strange divergence between New York and Massachusetts

---

millions of dollars in trust funds." Minot said: "Our rule is not to invest more than 5% of trust funds in any one fluctuating security. I think that rule is generally followed in Boston. All stocks are covered by the term 'fluctuating securities.' It is considered, by trustees, that only 1/3 in all of a trust fund should be in fluctuating securities. That is a sort of unwritten law among professional trustees in Boston."

62. The text necessarily simplifies a very complicated development. The charter of the New England Trust Company of Boston (1869), authorized investment of "all the moneys entrusted to it, or in any way received by it," in a list of securities, which included along with the usual components of a legal list (government bonds and real securities and certain railroad bonds), certain qualified stocks of "railroad companies incorporated in this State." 12 Priv. & Spec. Laws Mass. 1866-1870, 1869 ch. 182, § 5, at 683. Other trust companies of 1869 and 1870 contained similar provisions, 12 Priv. & Spec. Laws Mass. 1866-70, 1870, ch. 323, § 2, at 1028 (Northampton Loan & Trust Co.); 12 Priv. & Spec. Laws Mass. 1866-70, 1869, ch. 296, § 2, at 761 (Worcester Safe Deposit & Trust Co.). In 1871, the New England Trust Company charter was amended to include "any other securities in which savings banks now are or hereafter may be allowed to invest," Priv. & Spec. Laws Mass. 1871-75, 1871, ch. 142, § 2, at 67. Subsequently, new charters contained similar provisions, but usually omitted the provision relating to Massachusetts railroad stocks. See Fall River Banking & Trust Co., Priv. & Spec. Laws Mass. 1871-1875, 1873, ch. 347, § 3, at 713; American Loan & Trust Co., Priv. & Spec. Laws Mass. 1876-1881, 1881, ch. 80, § 3, at 644; Bay State Trust Co., Priv. & Spec. Laws Mass. 1882-1888, 1887, ch. 150, § 2, at 1068. Thus an apparent liberalization took place approximately in 1871, for reasons which are not clear.

63. N.Y. Sess. Laws 1871, ch. 341, § 17 at 669.

64. *E.g.*, N.Y. Sess. Laws 1866, ch. 718, § 18 at 1535 (Trust Co. of Rochester); N.Y. Sess. Laws 1869, ch. 719, § 18 at 1743 (German Loan and Trust Company of Brooklyn). *But see* N.Y. Sess. Laws 1869, ch. 872, § 18 at 2107 (American Trust Company of the City of New York), omitting the stock power.

65. N.Y. Sess. Laws 1887, ch. 546, § 27 at 711 (but the dollar limitation was now $20,000).

may lie in their different institutional backgrounds. In Massachusetts, the private trustee had been managing the state's dynastic trusts for two generations with a free hand under the *Harvard College* rule. New York had no comparable group of private professional trustees. The most responsible trust institutions were corporate, not private; and the freer hand was naturally accorded to the corporate fiduciaries. The discrepancy between the powers of individual and corporate fiduciaries was not finally eliminated in New York until 1914. The investment power of the trust companies was at that point restricted to investments "proper when made by an individual acting as trustee, executor, administrator [or] guardian."[66] Only in 1914, then, was New York truly and exclusively a legal list state.

The strong influence of institutional factors on trust investment rules is corroborated by *Simmons v. Oliver*,[67] a Wisconsin case which, in 1889, adopted a form of the English rule. Simmons, a successor trustee, lent a portion of the trust (which was small) to the McDonald Manufacturing Company, on a note indorsed by the president and secretary of the firm. The company, at the time of the loan, "was in good financial standing, and the indorsers were reputed to be perfectly responsible and men of ample means";[68] the company failed, however, and the indorsements proved inadequate security. Simmons recovered only about 50 cents on the dollar. The Wisconsin court surcharged the trustee; only investments in government securities and "loans made upon adequate real estate security"[69] were proper. This strict rule, said the court, was justified "in view of the hazards of other investments, of which this case furnishes a good illustration."[70]

The trial record in *Simmons v. Oliver* reveals some additional facts. The trust had been created in 1857 for the benefit of Oliver's widow and children.

66. N.Y. Sess. Laws 1914, ch. 369, § 188(7) at 1346-47. The New York legal list for private fiduciaries, replacing the narrow case-law list, began to evolve about the turn of the century. See N.Y. Sess. Laws 1897, ch. 417, § 9 at 510, under which an executor, administrator, guardian or trustee was authorized to invest in lawful obligations of cities in New York State. N.Y. Sess. Laws 1902, ch. 295, § 1 at 852, extended the authorization to "the same kind of securities as those in which savings banks of this state are by law authorized to invest the money deposited therein, and the income derived therefrom, and in bonds and mortgages on unincumbered real property in this state worth 50 per centum more than the amount loaned thereon." The savings bank list was a fairly conventional legal list, see N.Y. Sess. Laws 1882, ch. X, § 260 at 679-80 (later railroad bonds of certain types were added), and did not contain the catchall which the Massachusetts law did.

As in Massachusetts, however, the whole history is quite complex. And as in Pennsylvania, the statutes show some tendency, in the period before general laws, to grant specific authorizations for favored investments. N.Y. Sess. Laws 1869, ch. 108, § 1 at 191 authorized any trust company in the counties of Orange, New York, or Kings to invest up to 5% of their deposits in waterworks bonds of the village of Middleton (Orange County).

67. 74 Wis. 633 (1889).

68. *Id.* at 634.

69. *Id.* at 636.

70. *Id.* at 637.

The original trustee resigned, and Mrs. Oliver entered into a written agreement with Simmons. Simmons agreed to pay Mrs. Oliver 8 per cent on her investment, keeping any additional trust income as his own compensation. He testified that he acted as trustee "in a good many trust estates." His counsel filed a most interesting and intelligent brief on his behalf; in small towns, went the argument, "trouble and difficulty of giving bonds, and the small compensation allowed trustees," made it impossible to obtain "the shrewdest and best businessmen" as trustees; only "a class of men, with but little experience in business, and generally those, who from friendship, are induced to accept such trusts, can be obtained."[71] The court took notice of the situation in small towns, but its conclusion was the opposite of what Simmons hoped for. Strict rules were laid down to govern the investment policy of trustees. This was a caretaker trust; but the agreement between Simmons and Mrs. Oliver tempted the trustee to search out investments with high yields, usually risky ones. The trustee's guarantee of a fixed rate of interest looks like an imitation of the practice of savings banks and the early trust companies, which also guaranteed fixed yields on money entrusted to them. The corporate fiduciaries, at least, were governed by statutes which attempted to guarantee some measure of solvency and integrity. Against Simmons, there were no such safeguards. The court, thinking primarily of the caretaker trust, improvised its own standards, using legal matter readily at hand.

By the end of the 19th century, then, there were two types of professional trust managers capable of managing dynastic trusts under the law regulating trust investment. The Boston trustee operated under the rule of *Harvard College* in theory; in practice, perhaps with somewhat less latitude. The rising trust companies were governed in some states by specific statutory rules which directed them to invest their capital in certain classes of securities. These rules bound the companies more tightly than *Harvard College*, but were looser than the case-law rules imposed on non-professional trustees in many states (which approved only government bonds and real estate first mortgages). Until the turn of the century, the trust-management function of these companies was not too clearly set off from other deposit-management functions. Thus "investment" rules might apply to all the capital held by the trust company; and *Harvard College* was much too broad to serve as a guide for the investment of trust funds, capital reserves, and deposits of customers at the same time. The case-law, thin as it was, was not directed toward dynastic trusts and professional managers, but caretaker trusts, amateurs, and half-amateurs like Simmons.

From about 1900 on, statutory legal lists, both mandatory and permissive, commonly replaced the case-law lists. The contents of these lists naturally varied from state to state; but some general trends were discernible. There were no fresh experiments of the Pennsylvania sort. Nor were the legal lists necessarily opposed by corporate trustees. In an increasingly complex economic system, large-scale business strove constantly for methods (technolog-

71. Appellant's Brief, at 9; for agreement, see Record at 72-75; for Simm's comment, see Record at 35.

ical and institutional) to rationalize costs and make risks financially predictable. It was an age of innovation in accounting, in the development of marketing methods, and in insurance. The professional trustee was therefore interested in the shaping of trust law and trust agreements so as to eliminate excessive substantive uncertainty. Very likely, the notion of a plain and narrow path, limiting the risks of surcharge, was not totally offensive to the trust companies; they were accustomed to lists of this sort, as we have seen. For dynastic trusts, particularly inter vivos trusts, draftsmanship could assure satisfactory results; a sound stopgap set of rules was also desirable. Where the case-law was too restrictive, the trust companies, which by 1900 had achieved respectability and some measure of organization, were likely to press for some broadening of the list of permitted investments. For example, although Illinois had adhered to the English rule, its first legal list liberalized investment law by authorizing investment in sound corporate bonds.[72]

Once enacted, the statutory legal lists tended to become patchworks. Investments were added for a number of reasons, sometimes simply because the legislature wanted to encourage investment in specific issues of securities. Unlike Pennsylvania in the 70's, there is no need to suspect corruption. A statute permitting trust investment in a state university's dormitory bonds seemed a cheap and painless way to encourage sales of such bonds.[73] The trust

72. Ill. Laws 1905, at 1 (trustees "may" invest in United States bonds and first mortgages on real estate in any state; or "in the first mortgage bonds of any corporation of any state upon which no default in payment of interest shall have occurred, for a period of five years"); White v. Sherman, 168 Ill. 589, 48 N.E. 128, 131 (1897), had approved of the English rule, interpreted by the court to include only real estate securities or government securities.

73. Laws Wis. 1925, ch. 139 at 200-01 ("bonds issued for the construction of dormitories or commons or a field house at the state university"); N.J. Rev. Stat. tit. 58, §§ 15-64 (1937) (Hackensack River Sewerage District bonds). A very frequent and less controversial type: "all bonds issued under . . . the Federal Farm Loan Act . . . [of] July 17, 1916 . . . shall hereafter be lawful investments for all fiduciary and trust funds in this State," Tex. Laws Gen. & Spec. 1917, ch. 63, § 1 at 122.

Business pressure was a factor in the expansion of the legal lists. For example, in New York the railroads actively and successfully lobbied for the inclusion of certain railroad securities on the New York list of securities eligible for investment by savings banks, and the story was later repeated for utility bonds. Colton, Regulation of N.Y. Savings Bank and Trust Investments In Gas and Electric Corporation Securities 1928-50, 11, 60-61 (unpublished thesis in Columbia University Library, 1952). Whyte, *Should the Prudent-Man Rule for Trust Investment be Adopted in Wisconsin?*, 1945 Wis. L. Rev. 499, 507-08, blamed the Wisconsin legal list for causing "more trust losses in Wisconsin than all the losses attributable to the faithlessness of trustees during the same period"; in his view, politically motivated changes in the legal list had turned out disastrously for investors.

During the Civil War, some Southern states, as a war finance measure, passed acts requiring trust funds to be invested in state securities; any other investment (unless specifically authorized by court) would be at the trustee's risk. See Brown v. Wright, 39 Ga. 96 (1869).

See also 4 & 5 Will. 4, c. 29 (1834), where Parliament, by statute, eased the way for trust investment in landed securities in Ireland.

companies, too, as time went on, took a more active role in pressing for legislative change. Mandatory lists seemed far too inflexible; even permissive lists were treated by cautious trustees as if mandatory.[74] The competition of other financial agencies played a part in shaping trust company opinion. An article in 1929 in the trust companies' trade journal spoke of competition from the rapidly growing investment trusts; consequently, at "almost every . . . national and regional trust conference . . . the subject of common stocks as advisable investments for trust funds has received animated discussion."[75] This intellectual ferment was ascribed by the writer to "the restiveness of trust beneficiaries receiving fixed income from 'legals' as contrasted with profits in a constantly rising stock market."[76] The boom market of the 20's may have frustrated trust beneficiaries who helplessly watched more autonomous members of the same social class get richer and richer. Yet in the 20's, few corporate fiduciaries advocated a rule as broad as that of Massachusetts; it was too hard to administer, too risky. They still preferred a plain and narrow path, only not quite so narrow.

The depression presumably proved the value of narrow investment powers. The stock market crashed, but not the U.S. bond market. Yet dissatisfaction with the legal lists did not cease. Available legals shrank pitifully in quantity; a great deal of trust money fought for a reduced amount of legal investment. Good stocks, on the other hand, were cheap, and (if they yielded anything at all) paid handsomely. The legal lists themselves became obsolete. Statutes, for example, frequently authorized investment in railroad bonds which met

74. Cooper, The Development of Trust Company Business (with an Application to the State of Colorado), 1927, 108 (unpublished Master's Essay in Columbia University Library), analyzing trust company behavior in Colorado, reported that even where the trust instrument allowed a greater latitude than the Colorado statute, "trust officers prefer to stay within the statutory limitation." See Buffington, Northumberland County, Pennsylvania, as a Trust Field, 1939, 6 (thesis prepared for American Bankers' Association), reporting that trust institutions in the county "have adhered to the investment requirements of the original law," despite liberalization of the list in 1935 and 1937. See Fugate, *The Liability of Trustees under the West Virginia Trust Investment Statute*, 47 W. VA. L. REV. 127, 129 (1941), referring to an apparently permissive list: "trustees have been uncertain as to their duty to follow the legal list . . . and have, for the most part, rigidly adhered to it." If the law and the typical provisions of trust instruments prescribed investment in a narrow range of securities, the overhead costs to a trust company for departing from the list in the exceptional case would be relatively high, since internal business practices would be geared to the needs of the normal case.

75. *Uniform Trust for Diversified Investments*, 48 TRUST COMPANIES 321 (March, 1929).

76. *Id.* In September it was reported that "Beneficiaries . . . clamor for larger incomes to be derived from investment in equities as compared with the declining purchasing power of the dollar obtained from fixed-income bearing legal investments." *Speculative Hazards in Investment of Trust Funds*, 49 TRUST COMPANIES 434 (1929). In November, after the crash, cold comfort was derived from the fact that "trust offcers will have a respite from importuning and complaining beneficiaries," since the crash showed the need for conservatism in investment, *Stocks as Trust Investments*, 49 TRUST COMPANIES 624 (1929).

rigorous qualifications—*e.g.*, the bonds should have suffered no default in principal and interest for five years and yielded income equal to at least one and one half times the company's fixed charges in a given period.[77] At the low point of the depression many railroad securities which had once been qualified investments ceased to meet statutory requirements. This placed trustees in a terrible dilemma. To sell the disqualified bonds would further depress the bond market; and of course the trusts which held these bonds would realize on them at very unfavorable prices.[78] New York, for example, passed a series of statutes authorizing the retention of railroad bonds which had been legal when acquired.[79] The problem was very real. According to one authority, the face value of New York's legals shrank from $7,600,000,000 in 1931 to $2,580,000,000 in 1939.[80] Statutes also had to be passed authorizing the exchange of real estate obligations for Federal Home Loan Bonds, to prevent wholesale foreclosures by trustees who were caught in another cruel dilemma: trust law forbade them to be kind to their debtors, while public opinion would not tolerate a wave of foreclosures.[81] The depression in general put tremendous pressures on classical trust law; strict adherence to traditional rules might have ruined trust companies who had technically breached their trusts, thus laying themselves open to surcharge measured by huge losses in market values.[82] One might seriously question, also, the social utility of rules

77. PA. STAT. ANN. tit. 20, § 801(8)(5-6)(1936); N.J. REV. STAT. 3A, § 15-1(h)(2) (1951).

78. White & Lawres, *The Modernization of Legal Lists*, 5 LAW & CONTEMP. PROB. 386, 391-92 (1938); Riddle, *Trust Investments: Their Extent and Some Related Economic Problems*, 5 LAW & CONTEMP. PROB. 339, 349 (1938). See Woodruff, *Legal and Investment Standards of Trustees*, 4 FORDHAM L. REV. 391, 412 (1935): "And here is a fundamental flaw in the statutory prescription of investment standards. An incentive is given for selling out at a low price but no incentive is given for selling out at a high price. . . . [The rules are] conducive to buying at the top and selling at the bottom. An investment manager tries to do exactly the opposite." See Edwards, *New Standards for Railroad Securities*, 64 TRUST COMPANIES 174 (1939) for an analysis of the effect of the depression on the legal requirements for railroad securities.

79. Margraf, *Laws Relating to the Investment of Trust Funds, 1930-1937*, 5 LAW & CONTEMP. PROB. 399, 413 (1938). See N.Y. Sess. Laws 1938, ch. 352, § 235(7-b), at 1016. Many states passed statutes allowing the retention of investments legal when made by the trustee but which later ceased to meet the requirements of the legal list. Margraf, *supra* at 428.

80. 69 TRUSTS & ESTATES 37 (1939). Almost one billion dollars in railroad securities "have been removed from the list of legal investments for New York savings banks because of failure to meet earnings requirements." *Ibid.* See the testimony of William R. White (New York State Superintendent of Banks), *Hearings Before the TNEC*, 76th Cong., 1st Sess., pt. 9, at 3795 (1939). See also Note, *Inadequacy of the Iowa Legal List of Trust Investments*, 36 IOWA L. REV. 341 (1951).

81. See, *e.g.*, WYO. STAT. tit. 13, § 105 (1957), authorizing financial institutions and fiduciaries to exchange "delinquent real estate mortgages" for bonds "of the Home Owners Loan Corporation. . . ."

82. An example is the rule requiring trustees to earmark investments or bear any losses. In Chapter House Circle of the King's Daughters v. Hartford Nat'l Bank & Trust

which kept funds out of channels which might conceivably restore business confidence, enhance stock prices, and help get the country back on its feet.[83]

The triumph of the prudent investor was particularly marked after 1940. State after state repealed or modified its legal list. Indeed, in some states[84] the statute enacted Putnam's language in *Harvard College v. Amory* more than a century after its first formulation. The depression was the spur; but the long and continuing boom time which began in the '40's proved equally congenial to the Massachusetts rule. The dynastic trust had by no means replaced the caretaker trust as the dominant trust type. But the caretaker trust no longer so earnestly desired a plain and narrow path. In a long inflationary period, the erosion of the dollar affected the small, short-term trust as well as the large long-term trust. During the depression, the yield on fixed-income securities compared very badly with the yields on those common stocks which paid dividends; in the post-war inflation, though blue-chip stocks might yield, in the short-run, less than other investments (for example, savings and loan deposits), the capacity of good stocks to appreciate in value and to increase their dividend rates more than made up for a low income yield. The securities markets had also radically changed in character, as stringent regulation eliminated the worst excesses of the era of the robber barons. In the age of "people's capitalism" there was no need to insulate the people from the capitalist stock market.

Even more significant, perhaps, trust companies had developed techniques of handling small trust funds relatively cheaply and efficiently, to meet the competition of mutual funds, savings and loan associations and various investment syndicates. The common trust fund is one such device.[85] Trust com-

Co., 121 Conn. 558, 186 Atl. 543 (1936), evidence showed that banks and trust companies had systematically been violating the rule. Strict adherence to the earmarking rule might have ruined the corporate fiduciaries of the state; undoubtedly influenced by this fact, the court modified the rule to allow recovery only for losses causally connected with the breach, and not losses "due to general business conditions." *Id.* at 578. Many other cases took the same approach, some of them, *e.g.*, Buckle v. Marshall, 176 Va. 139, 10 S.E.2d 506 (1940), involving individual trustees.

83. See testimony of Mr. White, note 80 *supra*, at 3800: "it is important that our laws permit trustees to invest in all . . . sound securities. . . . Otherwise, we cannot keep open the channels by which the savings flow into the capital investments of the country"; this point was further discussed at 3806-08.

84. ILL. REV. STAT. ch. 148, § 32 (1957); UTAH CODE ANN. § 33-2-1 (1953), and others. Another variant is MINN. STAT. ANN. § 501.125 (1946) (trustee may acquire "every kind of property . . . which an ordinarily prudent person of discretion and intelligence, who is a trustee of the property of others, would acquire"). Shattuck, *An Important Development in the Field of Fiduciary Administration*, 24 B.U.L. REV. 80, 85 (1944): "The Trust Division of the American Bankers Association in February 1942 devoted a part of its annual meeting to the subject and ended by instructing its Legislative Committee to prepare a model statute designed to enact the Massachusetts rule. The present writer prepared the statute. . . . The governing words were those of Mr. Justice Putnam, in *Harvard College v. Amory*. No way was found to improve them."

85. Ohio had an enabling act in 1919; significant legislative activity took place in the '30's. Bogue, *Common Trust Fund Legislation*, 5 LAW & CONTEMP. PROB. 430 (1938).

panies advertise (sincerely or not) that they are ready to handle any trust, of any size.[86] In a broad, fairly honest, but highly technical market, all trusts (not simply large ones) seem to need professional management and protection against inflation. It is not the triumph of the dynastic trust so much as the blurring of the economic distinction between the two trust types, coupled with widespread availability of professional or corporate trustees, which has led to the eclipse of the legal list and the victory of the Massachusetts rule. Still, modern trust law may not have solved the trust investment problem for all trusts and for all time. Some states distinguish in their investment rules between guardianship and express trusts — rules for the former being more stringent. Should a distinction now be made between small caretaker trusts, managed by amateurs, and trusts of other types? Has the pendulum swung too far? The small caretaker trust lives in legal shadows: there are no statistics, no data, no clear picture of abuse or lack of it. Even the rules of law which once attempted, however futilely, to protect beneficiaries of such trusts have now disappeared or are disappearing. The law, in so doing, has responded in its historic manner to circumstances: it has shaped its rules to suit *most* trusts, without making the more sophisticated effort of creating as many rules as there are needs and situations.

II. THE POWERS OF CREDITORS AND BENEFICIARIES TO REACH TRUST ASSETS: THE SPENDTHRIFT TRUST

Legal attitudes toward the dynastic and caretaker trust shed light on a peculiarity of American trust law, the spendthrift trust doctrine. Validation of the spendthrift trust was primarily a response to the spread of the dynastic trust. The dynastic trust, as we have seen, must be secure from destructive market conditions; hence the need for flexibility in investment. But it must also be secure from destruction at the hands of particular beneficiaries and this need has been met by the spendthrift trust

A spendthrift trust is defined by Griswold as a trust which provides in "express terms that the interest of the beneficiary shall be inalienable by him, and that his creditors cannot reach it in satisfaction of their claims."[87] Griswold extends the term also to "similar trusts in which the restraint on alienation is the handiwork of statute rather than a consequence of the settlor's

86. See Trenary, *"Middle-Mass" Market for Trust Services*, 95 TRUST & ESTATES 220 (1956), reporting the results of a survey of trust companies. According to the survey, 366 trust companies accepted small estates while only 43 of the respondents did not; of the 366, 307 "stated they actually solicit[ed] small estates." A surprising number (over 200) claimed they accepted trusts under $10,000. One hundred and eighteen of the reporting banks had common trust funds.

The development of the "middle-mass" market may be playing a role in the (relative) decline of the Boston trustee. See HOLBROOK OFFICE, YOUR PRIVATE TRUSTEE 15 (1951) ("The smallest trust which we believe feasible for this office to handle is $100,000 in value.").

87. GRISWOLD, SPENDTHRIFT TRUSTS § 1, at 3 (1st ed. 1936).

intent as expressed in the trust."[88] One or another form of the spendthrift trust has been recognized as valid in almost every state. Since restraints on alienation run counter to a supposed public policy favoring free alienation, the spendthrift trust seems anomalous. The social utility of such trusts is not obvious. Griswold saw a "useful and legitimate purpose" to some spendthrift trusts, but felt that in their "extreme forms they represent a legal discrimination in favor of wealth which runs counter to many of our professed notions."[89]

Griswold traced the prevailing doctrine to a number of sources, but of these, dictum in *Nichols v. Eaton*, decided in 1876,[90] was "the greatest single factor in the establishment of spendthrift trusts in the United States."[91] *Nichols v. Eaton* was decided by the United States Supreme Court, on appeal from the Circuit Court for the District of Rhode Island. The trust in question was not strictly speaking a spendthrift trust; rather it provided that the income rights of a bankrupt beneficiary would terminate upon bankruptcy; the trustees were then to pay the income to the wife or children of the bankrupt beneficiary, or (if there were no wife or children) accumulate the income. In the course of the opinion, Justice Miller said:

> the doctrine that the owner of property, in the free exercise of his will in disposing of it, cannot so dispose of it, but that the object of his bounty, who parts with nothing in return, must hold it subject to the debts due his creditors, though that may soon deprive him of all the benefits sought to be conferred by the testator's affection or generosity, is one which we are not prepared to announce as the doctrine of this court.[92]

Griswold ascribed the dictum in *Nichols v. Eaton* to two main causes. It rested mainly on Pennsylvania cases. But these, Griswold argued, were atypical. Pennsylvania in the 19th century lacked fully developed courts of equity. Creditor's rights against equitable interests in property could be enforced only imperfectly. Hence the courts became "accustomed to interests owned by beneficiaries which could not be reached by their creditors."[93] Second, the "spirit of the times," the spirit "of individualism, at least of individualism for the man of property," influenced Miller's opinion.[94] What a man owned was his own; he could do with it as he liked. This philosophy was "attractive" to judges who grew up in a "pioneer period," while the "broader implications" and "unfortunate results" of the doctrine escaped attention.[95]

88. *Ibid.*

89. GRISWOLD, *op. cit. supra* note 87, at iv (preface).

90. 91 U.S. 716 (1876); GRISWOLD, *op. cit. supra* note 87, § 29, at 25.

91. GRISWOLD, *op. cit. supra* note 87, § 26(1), at 22; § 29(3), at 25.

92. 91 U.S. at 725.

93. GRISWOLD, *op. cit. supra* note 87, § 26(1), at 21.

94. *Id.*, § 29(3), at 25.

95. GRISWOLD, *op. cit. supra* note 87, § 29, at 25-26. In the first edition, Griswold made the curious error of ascribing the opinion in *Nichols v. Eaton* to Mr. Justice Field, "one of the foremost of the pioneers." In fact, the opinion was written by Justice Miller. The mistake was corrected in the second edition; and since, happily, Miller himself quali-

Much of Griswold's historical analysis appears to be second-hand. His source was John Chipman Gray's little book *Restraints on the Alienation of Property*, first published in 1883, in which Gray bitterly denounced the spendthrift trust.[96] Gray's treatise was an elaborate attempt to destroy the spendthrift trust doctrine by denying its existence, through a showing that few states (on close analysis) really adhered to it. In fact, the whole book was a product of the trauma Gray suffered upon reading *Nichols v. Eaton*, a case containing "much that was contrary to what, both in teaching and practice, . . . [was] hitherto supposed to be settled law."[97] By the time Gray's book appeared in print, however, his sensibilities suffered a further shock. The famous Massachusetts case of *Broadway Bank v. Adams*[98] flatly upheld the validity of the spendthrift trust. As the second edition (1895) came to light, the situation was rapidly deteriorating: "State after state has given in its adhesion to the new doctrine."[99] Mournfully, Gray ticked them off: Maine, Maryland, Illinois, Vermont, Delaware, Indiana, Virginia, Missouri, Tennessee. Yet, he said, "I cannot recant."[100] Now the success of the spendthrift trust evoked, as it later did for Griswold, belated need for some social explanation. Gray found it not in the spirit of individualism but in a very different phenomenon: the "spirit" of "paternalism, which is the fundamental essence alike of spendthrift trusts and of socialism."[101] If all of us are to be "cared for" and have "our wants supplied, without regard to our mental and moral failings, in the socialistic Utopia," why should not a father "in the meantime," while waiting for socialism, "do for his son what the State is then to do for us all."[102] Gray saw

fied as a pioneer, no other substantial changes needed to be made in the text. See GRISWOLD, SPENDTHRIFT TRUSTS § 29, at 25 (2d ed. 1947). See FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT, 1862-1890, 321-23 (1939).

96. It was from Gray that Griswold derived the notion that the rise of the spendthrift trust was attributable to the lack of equity courts in Pennsylvania. GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY 195 (2d ed. 1895):

> When, therefore, spendthrift trusts made their appearance in Pennsylvania, the interests of the cestuis que trust could not be reached in equity, because there was no court of chancery, and the only way they could be reached was by taking them on execution at law. Now it had been a great stretch to allow executions to operate against equitable interests of any kind, and the courts may well have [been reluctant about] . . . extending executions to the case of the complicated interests and rights of a *cestui que trust* under a spendthrift trust. Afterwards the courts of Pennsylvania gradually acquired equity jurisdiction . . . but the hold of spendthrift trusts was too strong to be shaken off, though there are not wanting signs of regret on the part of Pennsylvania judges that they were ever established.

97. GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY iii (1883).

98. 133 Mass. 170 (1882).

99. GRAY, *op. cit. supra* note 97, iv (preface to 2d ed. 1895).

100. *Id.* at v.

101. *Id.* at ix.

102. *Ibid.* Not all early commentators on the spendthrift trust were hostile. See Bartelme, *Spendthrift Trusts*, 50 ALBANY L.J. 6 (1894); Brown, *Spendthrift Trusts*, 54 CENT. L.J. 382, 387 (1902) (pointing to "sociological" factors such as the legislative tendency "to ameliorate the condition of the unfortunate, to provide protection for the improvident and

no hope of reversing the trend, however, and what began as a polemic ended as a treatise. There was no third edition. The spendthrift trust carried the day. But the question remains open: was the doctrine simply an error, was it "paternalism" run riot, or individualism run riot; or all or none of these things?

Some light is shed on the problem by a curious mistake made by Frederick J. Stimson in his autobiography, written in 1931.[103] Stimson, bewailing the decline of Boston, made the following remarks:

> The most notable cause of Boston's commercial . . . decline is the "spendthrift trust" decision of Massachusetts courts. . . . Somewhere about 1830, they decided that a man could tie his children's inheritance up, either by deed or will, so that they could not spend or risk the principal. . . . Immense wealth had been accumulated in Boston in the first sixty years of the republic; instead of trusting their sons and sending them out at their own risks . . . they distrusted their ability . . . and had them all trusteed. No new enterprise could be undertaken by them, for under the court decision they had no capital to risk. Perforce they became coupon-cutters—parasites, not promoters . . . .[104]

The consequences, says Stimson, were disastrous. Commercial supremacy passed to New York, where men were men and no spendthrift trusts existed. Stimson, of course, was doubly wrong: New York had long recognized a form of the spendthrift trust; while the leading case in Massachusetts, *Broadway Bank v. Adams*, was not decided until 1882. Apparently Stimson had confused *Harvard College v. Amory* with *Broadway Bank v. Adams*, decided 50 years later. The case decided "somewhere about 1830" must be *Harvard College*, which, of course, had nothing to do with spendthrift trusts. But it had a great deal to do with the dynastic trust. Substitute "dynastic" for

lessen the burden of the debtor class," and referring to eight-hour laws and exemption laws). See also Lehigh v. Harrison, 69 Miss. 923, 931, 11 So. 604 (1892), criticizing the English rule and its American followers for not "sufficiently appreciating the radical difference wrought by . . . the broad public policy disclosed by the homestead and exemption laws. . . ." Mr. Justice Miller in Nichols v. Eaton, 91 U.S. 716, 726 (1876), also had mentioned the fact that state statutes exempted homesteads and other classes of property from execution for debts. This tends to show that *Nichols v. Eaton* indeed emanated from the "pioneer" frame of mind, but that Griswold overestimates the extent to which the rugged pioneer was a believer in *laissez faire.*

Many years later, on the far left, Mitchell Franklin described the trust (meaning primarily the dynastic sort) as capitalism tottering on its last legs. "The trust is an effort to escape from the ever-deepening and ever-recurrent crises in capitalism. . . . [by] the upper middle class—the class that has most used the trust. . . . The risks of capitalism . . . must be minimized . . . through . . . an astute, intelligent, ever-watchful class of professional managers of capital who are placed, because they are *elite*, beyond the control of the owner for consumption. But American lawyers do not have to be reminded that capitalism is so sick that even this device to protect the only class that benefits from capitalism has failed pathetically." Franklin, Book Review, 8 TUL. L. REV. 473, 475 (1934).

103. STIMSON, MY UNITED STATES (1931).

104. *Id.* at 76-77. Stimson's notion was echoed in Fortune, Feb. 1933, p. 35.

"spendthrift" in Stimson's passage, and its sense is improved. Stimson felt the connection between the prudent investor rule, the spendthrift trust doctrine, and the dynastic trust. The connection in fact exists: the rule and the doctrine are legal prerequisites for the effective functioning of the dynastic trust. Stimson's true complaint is not so much with the rules as with what the rules imply, the long-term, ironclad trust. The dynastic trust requires both flexible management and rigid protection against interference by or on account of current beneficiaries. The prudent investor rule provided flexible management, the spendthrift trust doctrine, rigid protection against the trust's own beneficiaries. It may be that the spendthrift trust was no historical or logical error, but a natural outgrowth of the desire for the dynastic trust. That one of the leading cases, *Broadway Bank v. Adams*, should have been decided in Massachusetts, the spiritual home of the dynastic trust, fits such a conclusion.

Stimson was wrong by a good half century in dating the case which upheld the spendthrift trust in Massachusetts. But the device was certainly that old. In *Sargent v. Bourne*, the following language appeared in a codicil dated 1836:

> [My son George] is not to have power to alienate or assign [his interests] . . . or any right to the same before payment, and that the same are not to be liable to be taken or held for payment of his debts, before the same are actually paid to him, . . . and I hereby empower [the trustees] . . . to withhold payment altogether, in case the right to said annuity should be assigned by [George] . . . or be seized or taken by any of his creditors, and to reserve the same for the benefit of his children.[105]

The language is somewhat ambiguous. Did the testator mean that attempted alienation or seizure for debts caused George's interest to pass to his children, or was a spendthrift clause in the modern sense intended? Perhaps the draftsman was not sure in his own mind. Though the English courts did not consider spendthrift provisions valid they would enforce, for example, a provision in a trust instrument calling for a gift over in the event the beneficiary went bankrupt.[106] A logical distinction can be made between a pure and simple

105. Sargent v. Bourne, 47 Mass. (6 Met.) 32, 36 (1843). See also Fisher v. Taylor, 2 Rawle 33 (Pa. 1829) ("in trust for my son, Sample Taylor . . . but the same not to be liable to any debts contracted . . . by . . . Sample"; will executed in 1821). Except for the special case of arrangements for married women, spendthrift clauses and clauses resembling spendthrift clauses do not seem to have been common before the Civil War. But it is not difficult to find examples, *e.g.*, the will of Jacob Appley, "gentleman," Surr. Ct. N.Y. Will Bk. No. 88, p. 7, 11, will dated Sept. 6, 1842, and proved Aug. 4, 1843, gift of income to Jacob Alexander Appley for life, "for the support of himself and family"; the gift to be null and void if Jacob should "sell assign transfer make over or in any manner part with the income herein given unto him."

106. "A provision in the gift of a life estate or interest that the estate or interest shall go over to a third person upon alienation, voluntary or involuntary, by the life tenant, is good." GRAY, *op. cit. supra* note 97, § 78. "There is no doubt, that property may be given to a man, until he shall become bankrupt. . . . [A] disposition to a man, until he shall become bankrupt, and after his bankruptcy over, is quite different from an attempt to

spendthrift provision and a discretionary trust or a forfeiture upon attempted assignment or levy; but these devices are similar in function, and some such device is a necessary adjunct of any dynastic trust. Massachusetts, with its early development of "first families" and dynastic trusts, naturally harbored spendthrift clauses and related devices at an early period. In the Gilded Age, the rise of great fortunes and the national flowering of the dynastic impulse increased the pressure on courts to validate the clause. Unlike that other great need of the dynastic trust, investment flexibility, the spendthrift clause could not simply be drafted into a trust, and be honored by the courts as an expression of the settlor's intent. The clause affected the rights of third parties; and prior case-law (the "English rule") and general principles were against it. Specific legal approval was necessary; in the late 19th century this approval was finally attained on a wholesale basis.[107]

The spendthrift clause is not exclusively appropriate to the dynastic trust. The clause has been and is used in caretaker trusts; not least of all in trusts for spendthrifts in the literal sense.[108] Before the clause became a standard feature of professionally-drafted trusts, it was particularly used to protect the trust against destruction through the bankruptcy of a beneficiary. In *Smith v. Towers*,[109] the first Maryland case to approve the spendthrift trust, land was devised in trust for the testator's son Robert; the plaintiff was a creditor of Robert and his business partner Millington. Chief Justice Alvey, peppering an angry dissent with liberal quotations from John Chipman Gray, spoke of the "encouragement of idleness, and of a lack of enterprise," and the fostering of a "class who become habitually reckless and indifferent to their honest obligations."[110] But this language was very inappropriate to the case at hand, where creditors were trying to collect business debts, not the debts of a high-flying playboy. In *Lampert v. Haydel*,[111] a leading Missouri case, the will announced its intent "to secure to my children a certain annual in-

give it to him for his life, with a proviso that he shall not sell or alien it." Eldon, Ch., in Brandon v. Robinson, 18 Ves. Jr. 429, 433-34, 34 Eng. Rep. 379, 381 (Ch. 1811).

107. GRAY, *op. cit. supra* note 97, iv (preface to 2d ed. 1895).

108. On the use of the term "spendthrift trust" see GRISWOLD, *op. cit. supra* note 87, § 33, tracing it back to 1875.

Notice the curious turn taken by Georgia law. GA. CIVIL CODE § 3149 (1895) limited trusts to minors, incompetents, and persons of profligate and intemperate habits. In Sinnott v. Moore, 113 Ga. 908, 39 S.E. 415 (1901), the court held that a spendthrift trust raised the presumption that the beneficiary was a spendthrift and that therefore the trust was within the statute. In Moore v. Sinnott, 117 Ga. 1010, 44 S.E. 810 (1903), the court refused to allow termination of a trust because of the technical failure of one party to allege he was *not* incompetent or profligate.

109. 69 Md. 77, 14 Atl. 497, 15 Atl. 92 (1888).

110. *Id.* at 100, 15 Atl. at 96.

111. 96 Mo. 439, 9 S.W. 780 (1888). See Easterly v. Keney, 36 Conn. 18 (1869). The beneficiary was heavily indebted, and testatrix "intended that whatever property she should leave for his benefit should be enjoyed by him in person, and should never be liable to attachment and execution at the hands of his creditors. To this end she sought by the aid of counsel to devise a mode whereby this object could be accomplished." *Id.* at 19.

come beyond the accident of fortune and bad management."[112] There is no reason to be skeptical of such motives. Nineteenth century business was extremely precarious, subjected to violent swings of the business cycle. Draftsmen strained their ingenuity to safeguard the families of a trust beneficiary from the consequences of those crashes, panics, and crises which swept the country from time to time like so many medieval plagues, striking down the cautious as well as the reckless. Business risks were perhaps most severe for the unincorporated small businessman; yet it was he who conformed most closely to the image of the sturdy individual entrepreneur so appealing to men like Gray. A spendthrift trust for his or his family's benefit protected virtue against undeserved misfortune. Quite a few nineteenth century trust cases embody devices, ingenious and ingenuous, for preventing the small proprietor's economic ruin or mitigating the consequences of business reverses.[113] The spendthrift trust was only one of these; the discretionary trust, the blended trust, the support trust, were related devices significant enough to bear special names;[114] still other devices occasionally appear in the cases, all designed to insure beneficiaries against "the accident of fortune and bad management." The modern spendthrift trust no doubt owes much to these devices. It seems also to be related historically to the common English and American habit of making provisions for the sole and separate use of married women. Settlors often created trusts for married women "free from the control and interference of" husbands. These women were deemed "in danger of parting with their property under the influence or threats of their hus-

112. 96 Mo. 439, 442, 9 S.W. 780 (1888).

113. See Holdship v. Patterson, 7 Watts 547 (Pa. 1838). Robert Patterson was partner in a bookselling and stationer's firm which failed in 1823. Friends of his entered into an ingenious agreement in 1824, which recited that Patterson had been "unfortunate in trade," and "left without means for the support of his family, and under a load of debt which he cannot reasonably expect ever to be able to pay." The friends contributed money which Patterson was to use in trade, but exclusively for the benefit of his family for whom he would act as "guardian and trustee," allowing himself "only a reasonable support for his services rendered." The business prospered. Gibson, C.J., held that the business was not liable to Patterson's personal creditors.

In Ashhurst v. Given, 5 Watts & Serg. 323 (Pa. 1843), testator left to his son Samuel Given, an "undivided half part of the Kidderminster estate, including the factory buildings, dwelling-house, water-powers . . . machinery and fixtures," to carry on the business for the benefit of his children, paying himself "a reasonable support out of the trust fund for his personal service rendered." The motive for the form of the gift was not "want of confidence" in Samuel, but a desire to provide for his family without testator's "bounty" being appropriated to "those debts which he [Samuel] contracted in an unfortunate business." *Id.* at 324. See also Clark v. Maguire, 16 Mo. 302 (1852).

114. In a "blended trust . . . the interests of the beneficiaries [are] . . . so inseparable that none of them [can] . . . be aliened during the existence of that trust," Talley v. Ferguson, 64 W. Va. 328, 333, 62 S.E. 456, 457 (1908). A trust for X and his family may constitute a blended trust. See RESTATEMENT (SECOND), TRUSTS § 161 (1959) ("Inseparable Interests"). On "Trusts for Support," see *id.* at § 154; on "Discretionary Trusts," *id.* at § 155.

bands."[115] The reason seems somewhat childish; it certainly paints a dismal picture of the marital relationship. But a father's trust for his married daughter, free of her husband's control *and* free from her power to vest control in her husband, has the same double purpose as the dynastic spendthrift clause; it protects the beneficiary from third persons and at the same time protects the trust from the beneficiary. The power of a childless or doting wife to transfer ownership or control of her assets to her husband is the power to assign those assets out of the bloodline, into the hands of a "stranger." This would run quite contrary to the settlor's dynastic intentions.

Common-law dower, in essence a transient interest, performed something of the function of the spendthrift trust. The widow was provided for during her lifetime, but she had no power to direct the ultimate disposition of her share of the estate. Dower lost its point when land ceased to be the primary form of wealth—an economic development which occurred unevenly in the United States, spreading slowly from East to West. Dower was gradually replaced in many states by the widow's forced share in her husband's estate, real and personal.[116] As this legal change took place, wealthy families with large holdings of all sorts of property (not simply land) had more and more need for the spendthrift clause and the dynastic trust—and not simply for the first generation (including the settlor's wife) but for succeeding generations as well. Otherwise, any marriage would endanger the dynasty, and a childless marriage would be an utter disaster. How much changes in the rights of widows influenced the spendthrift trust is hard to say. In the years following *Broadway National Bank v. Adams*, a number of cases raised the question

115. GRAY, *op. cit. supra* note 97, § 141. Spot checks of mid-19th century will records indicate that clauses creating trusts for women with a proviso of this sort were quite frequent, *e.g.*, Will Bk. No. 88, Surr. N.Y. Cnty, p. 26, will of John Morrison, "gentleman," creating annuities for his sisters, "for their sole and separate use, without the control of any future husband."

The relationship between dynastic concern for the blood-line and the institution of the marriage settlement is almost too obvious for documentation. Notice that when a wealthy woman married, the common law rules made it necessary for her to trustee her property if she wished to keep it in her own family in all events. In Hext v. Porcher, 1 Strob. Eq. 170 (So. Car. Ct. App. 1846), we read that Sarah C. Porcher and Lawrence Hext in 1806, "on the eve of their intermarriage," entered into a "deed of indenture" with James Porcher, "whereby the said Sarah C. conveyed all her individual interest in the estate of her deceased father, Peter Porcher, and of her deceased uncle, William Young, to the said James Porcher, in trust, after the marriage, for the joint use of herself and her intended husband, during their joint lives, and to the survivor of them, with remainders in fee, to the issue of the said Sarah C. by that or any subsequent marriage." *Id.* at 170.

116. On the origin of dower, see SIMPSON, INTRODUCTION TO THE HISTORY OF THE LAND LAW 65-66 (1961); for the United States, see SIMES, PUBLIC POLICY AND THE DEAD HAND 8-17 (1955). The attitude of American law toward the protection of a surviving spouse is as ambivalent and ambiguous as we have found the law of trusts to be. Its complexity may be gauged in such a study as MACDONALD, FRAUD ON THE WIDOW'S SHARE (1960). Perhaps the complexity is due to tension between the law's sometime urge to protect the surviving spouse and its sometime passion for the blood-line.

whether the clause could be used or implied in trusts for married women.[117]

The close tie between the dynastic trust and the spendthrift clause helps to explain some of the twists and turns of spendthrift doctrine. This tie seems particularly close in a trust which makes its spendthrift clause applicable to all trust beneficiaries, present and future, in a trust spanning several generations. Draftsmen now insert the clause and make it generally applicable as a matter of course; but originally this use of the clause must have meant something more. A settlor is hardly likely to worry about the financial stability of unborn great grandchildren. The clause must have been meant to preserve the integrity of the trust from internal and external attack. The arguments used in the early spendthrift cases reveal that the struggle over the validity of the clause was in part a judicial dialogue over the legitimacy of the dynastic motive. Disapproval of the spendthrift trust (on the basis of English precedents) was voiced in the important Rhode Island case of *Tillinghast v. Bradford*,[118] decided in 1858. The beneficiary (of a devise of land in trust) had a life income interest, coupled with a power of appointment over the remainder. An assignee of the beneficiary brought suit. The trust, said the court, was designed to give "all the advantages of an estate in fee, without the legal incidents of such an estate," contrary to "the nature of property" and the "honest policy of the law." No man, said the court, "*should* have an estate to live on, but not an estate to pay his debts with. Certainly, property available for the purposes of pleasure or profit, should be also amenable to the demands of justice."[119] By way of contrast, the Massachusetts court, in *Broadway National Bank v. Adams*,[120] had this to say:

> The founder of this trust was the absolute owner of his property. He had the entire right to dispose of it, either by an absolute gift . . . or by a gift with such restrictions or limitations, not repugnant to law, as he saw fit to impose. His clear intention . . . was . . . to give . . . only the right to receive semi-annually the income of the fund, which upon its payment . . . and not before, was to become [the beneficiary's] . . . absolute property. His intentions ought to be carried out, unless they are against public policy. . . .
>
> Under our system, creditors . . . cannot enlarge the gift of the founder of a trust, and take more than he has given. . . .
>
> The rule of public policy which subjects a debtor's property to the payment of his debts, does not subject the property of a donor to the debts of his beneficiary.[121]

Both arguments are circular. The "legal incidents" of property are what a court says they are; and that no man "should" enjoy property free from

117. See, *e.g.*, Reid v. Safe Deposit & Trust Co., 86 Md. 464, 38 Atl. 899 (1897).

118. 5 R.I. 205 (1858). See also Heath v. Bishop, 4 Rich. Eq. 46 (So. Car. Ct. App. 1851), though here there was no express spendthrift clause, and the court carefully mapped out what it considered proper methods of attaining spendthrift objects—*e.g.*, discretionary trusts, blended trusts, automatic gifts over on insolvency, and so on.

119. 5 R.I. at 212.

120. 133 Mass. 170 (1882).

121. *Id.* at 173-74.

debts is not an argument, but a conclusion. The logic of *Broadway Bank* was no better: of course, the intentions of the testator should be carried out, unless contrary to public policy; the policy issue was the very question to be decided. But the Rhode Island court looked to the beneficiary, his conduct, his position; the Massachusetts court looked to the donor, his conduct, his intention. Rhode Island measured the respective rights of creditor and beneficiary, and chose the creditor; Massachusetts measured the respective rights of creditor and settlor, and chose the settlor. Of the two, the Massachusetts approach favored the ends of the dynastic trust; the Rhode Island approach did not.

This same distinction in point of view pervades the cases on whether the spendthrift clause defeats claims against a beneficiary for child support and alimony. This question has been troublesome. The current of authority now runs in favor of these family creditors; and some states have specifically so provided by statute. Minnesota, in *Erickson v. Erickson*,[122] upheld the spendthrift clause:

> When unrestrained by statute, it is the intent of the donor, not the character of the donee's obligation, which controls the availability and disposition of his gift. The donee's obligation to pay alimony or support money . . . should not . . . transcend the right of the donor to do as he pleases with his own property and to choose the object of his bounty. Our conclusion does not arise out of any anxiety for the protection of the beneficiary. . . . [A] donor may dispose of his property as he sees fit . . . .[123]

The Supreme Court of Oregon, in *Shelley v. Shelley*,[124] disagreed:

> If we give effect to the spendthrift provision to bar the claims for support, we have the spectacle of a man enjoying the benefits of a trust immune from claims which are justly due, while the community pays for the support of his children. . . . We do not believe that it is sound policy to use the welfare funds of this state in support of the beneficiary's children, while he stands behind the shield of immunity created by a spendthrift trust provision.[125]

The difference in approach between these two cases parallels the difference between *Bradford* and *Broadway*. *Erickson* emphasized the dynastic impulse of the donor; *Shelley*, the needs and behavior of the beneficiary.

Another rule, that a spendthrift trust cannot be created for the settlor's own benefit, was settled at an early date and has gone almost without challenge. If a settlor could set up a spendthrift trust for himself, one court has said,

> It would revolutionize the credit system entirely, destroy all faith in the apparent ownership of property. . . . Every man about to engage in

122. 197 Minn. 71, 266 N.W. 161 (1936).

123. *Id.* at 78, 266 N.W. at 164.

124. 223 Ore. 328, 354 P.2d 282 (1960).

125. *Id.* at 337, 354 P.2d at 286.

> business where there was a chance of loss, would place himself under the pupilage of trustees. . . .[126]

But this explanation would fit *all* spendthrift trusts; they all undermine "faith in the apparent ownership of property." Nor is there any uniform legal policy against limiting future liability for debts. Exemption laws, homestead laws, insolvency laws, and bankruptcy laws allow individuals to protect themselves in one way or another against creditors. Men about to engage in business may place themselves under the "pupilage" of corporate limited liability. Some authorities have wondered why a man should not, by means of a personal spendthrift trust, achieve "immunity" for "his interest in property which he has accumulated by his own effort."[127] Social security laws and many private pension plans create a fund which cannot be reached by the settlor or his creditors before retirement or death. But if the validity of the spendthrift trust depends, consciously or unconsciously, on a favorable attitude toward the dynastic trust, then there is no reason why a settlor should set up a spendthrift trust for himself. No man can be his own dynasty. The reason for the spendthrift trust doctrine does not apply to the settlor himself.

Thus, a definite connection exists between the spendthrift trust doctrine and the dynastic trust. The decisive cases validating the clause fall into a relatively narrow time-span, beginning about 1880, following in rapid succession for about 25 years, then tapering off, since most jurisdictions had by then settled the major issue. Roughly, the spread of the spendthrift trust coincided with an increase in the spread of the dynastic trust; and ultimately therefore depended on changes in family structure, the distribution of wealth, and the climate of public opinion. But why did the courts so generally accept the spendthrift trust after 1880? Of course, the very fact that such trusts may have been spreading rapidly was a reason; judges do not normally like to reject patterns of behavior popular among members of their own social class. But deeper causes must have initiated and sustained the trend. The age (1880-1900) was an age of crisis; crisis engendered by the full impact of industrialism, the stresses and strains of a maturing, technical, organized mass economy. In the psychology of the period's social movements, some historians have detected a feeling of uneasiness which gripped large classes of the population.[128] Consolidation of economic and social position was a dominant political motive; caste and class were hardening. The industrial "trust," the big union, the farmer's movements, the national grief over the passing of a symbolic frontier: these may suggest a social urge for rule and safety in an economic order increasingly beyond the individual's grasp. The dynastic trust and the spendthrift trust were "conservative" in the sense that they protected

126. Mackason's Appeal, 42 Pa. 330, 338 (1882); Brown v. MacGill, 87 Md. 161 (1898).

127. GRISWOLD, *op. cit. supra* note 87, at 405; Costigan, *Those Protective Trusts Which are Miscalled 'Spendthrift Trusts' Reexamined*, in LEGAL ESSAYS IN TRIBUTE TO ORRIN KIP MCMURRAY, 85, 100-01 (Radin & Kidd ed. 1935).

128. See, *e.g.*, HOFSTADTER, THE AGE OF REFORM (1955).

estate-entities against social change. That courts could, by their say-so, make secure a long-term "estate" against changing fortunes, may have been particularly pleasing at a time when so many values were called into question.

The body of law validating the spendthrift trust was essentially judge-made. But the spendthrift doctrine is limited and defined in an important group of states by statute. One type of statute restricts the force of a spendthrift clause to trust income measured by those amounts necessary for the care, support and education of the beneficiary. This reverses the dynastic emphasis of the spendthrift clause by making it serve only caretaker ends. The basic statute was New York's, adopted as part of New York's revision of its property laws in 1828. The laws of 1828 restricted the creation of trusts in land to a few specified types. The most important type was a trust "to receive the rents and profits of lands, and apply them to the education and support" of a beneficiary during the beneficiary's life or a lesser period.[129] In addition, "where a trust is created to receive the rents and profits of lands, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum . . . necessary for the [beneficiary's] education and support" was liable "in equity, to the claims of the creditors of such person."[130] The beneficiary could not assign or "in any manner" dispose of his interest. In general, New York abolished private trusts in land except for support trusts; but these trusts were then strengthened by granting them a form of statutory, automatic protection against creditors. This statutory plan was obscured in 1830, when the words "education and support" were dropped from the second section quoted.[131] By design or accident, no change was made in the section on the rights of creditors. As a result, New York allowed the creation of trusts that were not strictly caretaker in structure; but even these trusts enjoyed the benefits of a mandatory spendthrift provision.[132]

129. 1 REV. STATS. N.Y. (1829), Part II, ch. 1, art. II, § 55(3) at 728.

130. *Id.*, § 57 at 729.

131. See 1 REV. STATS. N.Y. (1835), Part II, ch. 1, § 55(3) at 723.

132. GRISWOLD, *op. cit. supra* note 87, at 48-52; N.Y. LAW REVISION COMM. REP. 313, 321-22 (1938). See 4 KENT, COMMENTARIES 309-13 (2d ed. 1832). Kent predicted that the New York revision would open "a wide door for future forensic discussion," that the legislation would not "check the enterprising spirit of gain, the pride of families, the anxieties of parents, the importunities of luxury, the fixedness of habits, the subtleties of intellect," but that society would rather "undermine" the "fairest and proudest models of legislation that can be matured in the closet." *Id.* at 313. These predictions proved correct in every regard.

Notions similar to those of the New York revisors were expressed in 1842 by H. M. Brackenridge:

> In England, [there is] distinction of ranks . . . [here] as wealth increases and inequality of conditions prevail, the desire will probably grow up to make artificial settlements of estates, for the purpose of retaining them in families . . . at variance with our present habits, institutions, and democratic feelings. . . .
>
> In England it is of the first importance to preserve power in aristocratic families. . . . But with us the policy is to permit real estate to circulate freely, and without restraint, placing it within the reach of those who have the means and desire to acquire it like any other property; and this must be done by giving every

Basically, however, the New York revision was hardly compatible with the dynastic trust. The property revision of 1828 was designed to promote rationality and simplicity in real property law, to eliminate feudal archaism, to create a reformed system suitable for an active, broadly-based land market. Hostility toward the more rarefied future interests; the abolition of resulting trusts; the restrictions on trusts in general; the adoption of a very severe version of the rule against perpetuities—these were steps in the same direction; and also weapons in the struggle against the kind of dynasticism uppermost in the minds of the New York reformers, a dynasticism of landed family estates, with its visible symbol in the great New York manors held by the spiritual and physical heirs of the patroons.[133] It was natural for New York trust law to take a very different turn from that of Massachusetts; in Massachusetts the law's eye was directed primarily toward forward-looking mercantile fortunes, in New York on backward-looking manorial wealth. The *Harvard College* case and the New York property revision were uneasy contemporaries.

New York law was carried into the old Northwest by its emigrants and by its prestige. Michigan, Wisconsin, and Minnesota[134] welcomed a relatively simple and easily digestible statutory system of land law; later, a Western group of states also borrowed some or all of the New York plan.[135] New states carved out of raw frontier had no experience with the Boston type of dynasty and the long-term, impregnable trust. The states which borrowed New York's law were not consciously looking for ways to tame the spendthrift trust, which was unknown to them until much later. They did not deliberately choose to remake spendthrift trust law in the image of the caretaker trust. But this was the actual result of the statutes borrowed by them from New York.

In a number of other states, there are, or were, statutes affecting the validity or scope of the spendthrift trust in a different manner. Delaware enacted a statute in 1933 giving creditors of a beneficiary "only such rights" to "the trust property or the income therefrom as shall not be denied to them by the terms of the instrument"; spendthrift trusts were exempted from legal or equitable process, and attempted assignments by beneficiaries were declared void.[136] This statute goes all the way in validating the spendthrift trust; and it does so from the standpoint of what is granted or denied by the settlor. Shortly afterwards, Nevada passed an equally extreme statute.[137] In both

> possible right of ownership to the present beneficial tenant of the estate for life. . . .
> We should not encourage the accumulation of land in families. . . .

BRACKENRIDGE, AN ESSAY ON TRUSTS AND TRUSTEES xix-xxiii (Washington ed. 1842).

133. For a brief survey of background and consequences, see Cheyney, *The Anti-Rent Movement and the Constitution of 1846*, 6 HISTORY OF THE STATE OF NEW YORK 281 (1934).

134. MICH. REV. STATS., ch. 63, § 13, at 255 (1846); 83a WISC. REV. STATS., ch. 57, § 13, at 319 (1849); 83b MINN. REV. STAT., ch. 44, § 13, at 203 (1851).

135. GRISWOLD, *op. cit. supra* note 87, at 61.

136. Del. Laws 1933, ch. 186, at 652.

137. Nev. Stats. 1939, ch. 86, at 85; Note, *The Spendthrift's Progress Since 1936*, 55 HARV. L. REV. 296 (1939).

states prior law was silent; the great depression, a terrible crisis-time for trusts, may have led to a desire to settle the matter favorably to dynastic trusts and their beneficiaries in these two small states responsive to the claims of the well-to-do. Griswold was unhappy about the Delaware statute; in 1936, when he wrote, such phrases as "first families of the state" and "entrenchment of wealth" came naturally to his mouth.[138] Of course, the New York statutory form of spendthrift trust, although caretaker oriented, was not above criticism either, since the beneficiary's safe share depended on his social class, standard of living, and habits. Gray himself had said of New York's rule that it descended "to a depth of as shameless snobbishness as any into which the justice of a country was ever plunged."[139] A few statutes limited the protective power of the spendthrift clause to a fixed yearly dollar amount, thereby avoiding Gray's kind of criticism while, at the same time, serving the needs of the caretaker trust.[140] Griswold's proposed model statute was of this type; it seemed to him to take a position midway between the extremes represented by Gray and the Delaware statute. Actually, however, there was no middle ground; but a recasting of the spendthrift clause so that it met the requirements of the caretaker trust without showing undue favor to dynasticism.[141] The statute has been adopted in a few jurisdictions.[142]

The spendthrift's progress in the case law is relatively unimpaired. No state has clearly repudiated the spendthrift trust in recent years,[143] although some states reject its underlying point, namely the protection of dynastic

138. GRISWOLD, *op. cit. supra* note 87, at iv.

139. GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY xi (2d ed. 1895).

140. *E.g.*, a New Jersey statute limiting spendthrift protection to $4,000 a year, GRISWOLD, *op. cit. supra* note 87, at 190. The Virginia statute of 1918, GRISWOLD, *op. cit. supra* note 87, at 218, took a slightly different tack, limiting spendthrift protection to an estate "not exceeding one hundred thousand dollars in actual value." North Carolina in 1872 made it "lawful" to convey in trust "any property, which does not yield at the time of the conveyance a clear annual income exceeding five hundred dollars" for the support and maintenance for life "of any child, grandchild or other relation of the grantor," free from liability for his debts. No. Car. Pub. Laws 1871-72, ch. 204, at 368. This statute aimed, to a limited extent, to protect the beneficiaries of the caretaker trust.

141. GRISWOLD, *op. cit. supra* note 87, app. A, at 477-80 (Income "in excess of $5000 per annum shall be subject to attachment . . . and . . . freely alienable"; where the income from the trust exceeds $12 a week, creditors may "in addition, reach by attachment an aggregate amount of ten per cent of the income due or to accrue in the future to the beneficiary").

142. LA. REV. STAT. tit. 9, § 1923 (1951); OKLA. STAT. ANN. tit. 60, § 175.25 (1963) (with certain changes).

143. On the contrary, in the post-war years, a few jurisdictions have clarified their positions in favor of validity of a spendthrift trust, *e.g.*, Hawaii, in Welsh v. Campbell, 41 Haw. 106 (1955) and Florida, in Waterbury v. Munn, 159 Fla. 754, 32 So. 2d 603 (1947). But there is today rather less inclination to imply spendthrift clauses than was true at the turn of the century. *Compare* Cronquist v. Utah State Agr. College, 114 Utah 426, 201 P.2d 280 (1949), *with* Barnes v. Dow, 59 Vt. 530, 10 Atl. 258 (1887); *and* Seymour v. McAvoy, 121 Cal. 438, 53 Pac. 946 (1898); *and* Stambaugh's Estate, 135 Pa. 585, 19 Atl. 1058 (1890).

trusts from premature harm. The debate over whether "excesses" in spendthrift clauses ought to be curbed has failed to take account of one of the fundamental issues: should the dynastic trust be favored or disfavored by the law?

III. THE POWER OF BENEFICIARIES TO CAUSE TERMINATION OF THE TRUST — THE CLAFLIN DOCTRINE AND SOME COROLLARIES

Claflin v. Claflin[144] was decided in Massachusetts in 1889; widely followed, it has given its name to a doctrine which resembles the spendthrift trust doctrine in its divergence from English doctrine and its relationship to the dynastic trust. In *Claflin*, the testator had established a trust for his son, Adelbert. The will directed the trustee to pay $10,000 of principal to Adelbert at age 21, $10,000 more at 25, and the balance at 30. Adelbert was the sole beneficiary of the trust. At the time of the case, he was over 21 but not yet 30. He demanded that the trust be terminated and the corpus paid over to him forthwith. This the court refused to do. "We see no good reason," said the court, "why the intention of the testator should not be carried out."[145] Adelbert's arguments, the court pointed out, were inconsistent with *Broadway National Bank v. Adams*. The Claflin trust was by rights indestructible. It would terminate at the point fixed by the testator, but not a moment sooner.

The trust in *Claflin* was not a dynastic trust at all; but the court borrowed from the dynastic trust cases the idea that the settlor's plan was sacred and the beneficiary's wishes irrelevant. Only Adelbert had any interest, direct or remote, in the trust. Had the trustee done as Adelbert requested, no challenge could have been made of the trustee's action. The *Claflin* rule therefore vests the power of termination, in trusts of this type, in the hands of the trustee rather than the beneficiary. The trustee wields that power as the earthly representative of the dead settlor. The rule has practical significance only if the trustee out of respect for the dead or some other motive, refuses the beneficiary's request. Insofar as *Claflin* favors the settlor's wishes over those of the beneficiary, it reflects the attitude of the dynastic trust.

Adelbert's trust did not have a spendthrift clause. To hold the trust indestructible, said Adelbert, was pointless; he could assign his interest or subject it to his debts, thereby terminating it in fact if not in theory. The court rejected this line of argument; and, in truth, the very existence of the trust somewhat curbed Adelbert's power to manipulate his interest. An interest in trust, even an assignable one, is certainly not as liquid as cash, and can be sold, if at all, only at a considerable discount. In any event, the *Claflin* rule was the best approximation to a spendthrift clause in a trust which unfortunately lacked one.

The *Claflin* rule has come to mean that a trustee can be forced to allow premature termination only when two conditions are fulfilled: (a) all possible beneficiaries consent to termination; and (b) the "purpose" of the trust

144. 149 Mass. 19, 20 N.E. 454 (1889).

145. *Id.* at 24, 20 N.E. at 456.

has been fulfilled.[146] These two conditions are difficult to meet in a dynastic trust. Consent of the beneficiaries is impossible if the trust has contingent, minor, or unborn beneficiaries. Many courts are willing to forego the consent of such ghostly people as the unborn and the contingent; but the longer the trust is to last and the more complicated its provisions, the less likely that even the flesh-and-blood beneficiaries are all *sui juris*. To some extent, the caretaker trust shares this problem, since many are established for beneficiaries who are legally incompetent, not spry young adults like Adelbert Claflin. But the caretaker trust has a much easier time with the second condition, fulfillment of the "purpose" of the trust. For the dynastic trust, on the other hand, this is a very serious stumbling-block. Most trusts do not specify any "purpose." The trust plan is carefully laid out; but the settlor rarely takes the time and trouble to chat cozily about his conscious or unconscious motivations. The trust in *Claflin* was typical; it said nothing at all about its purpose. In such situations, the scheme explains the purpose. Making Adelbert wait for his 30th birthday was not a means to an end, but an end in itself. The case equates the structure of the trust with its "purpose." Thus *Claflin* illustrates the tendency of the 19th century Massachusetts courts to look at trust law from the standpoint of the settlor, a perspective favorable to the dynastic trust. The spread of the *Claflin* doctrine corresponds in time and feeling to the spread of the spendthrift doctrine and the national acceptance of the dynastic trust.

An "exception" to the *Claflin* rule allows a trust to be terminated if the settlor joins in requesting termination even though the purpose of the trust has not been fulfilled.[147] This is analogous to the rule that a settlor cannot create a spendthrift trust for himself. Under the *Claflin* doctrine trusts are presumed to be ends in themselves unless the contrary is shown. The settlor's expressed desire rebuts this presumption. Actually, the settlor is simply allowed to change his mind—to exercise the power which, under *Claflin*, passes at death to his trustee. This exception, of course, can apply only to an inter vivos trust. And a testamentary trust, other things being equal, is more likely to be dynastic than an inter vivos trust.

The recent Connecticut case of *Adams v. Link* [148] reveals a legal philosophy much like that of *Claflin*. In a testamentary trust, Mayes M. Foeppel enjoyed a life income interest; the remainder was to pass outright to the New York Association for the Blind. The testatrix's heirs-at-law contested the will. A settlement was reached, under which, in essence, the heirs were bought off with a promise of 15 per cent of the corpus; the rest was divided between Foeppel and the Association, free of trust, in certain proportions. This arrangement presumably satisfied all the parties; but the "compromise," exclaimed the court in horror, would "abolish the trust."[149] The will had estab-

146. RESTATEMENT (SECOND), TRUSTS § 337 (1959).

147. See Fowler v. Lanpher, 193 Wash. 308, 75 P.2d 132 (1938).

148. 145 Conn. 634, 145 A.2d 753 (1958).

149. *Id.* at 637, 145 A.2d at 755.

lished a trust "in admittedly clear and unambiguous language"; now the "trust beneficiaries and the heirs at law have joined in a plan to set aside the trust and substitute a distribution of the testatrix's estate more to their liking."[150] The testatrix had two "obvious objectives" which the plan would frustrate: an assured life income for Mayes M. Foeppel, and an "intact corpus" for the Association. "To abolish the trust and turn over a fraction of the corpus outright to the life beneficiary would be to enable her [Foeppel] in a moment to lose the protection of the practically assured life income provided by the testatrix."[151] Of course, Mayes M. Foeppel, a competent adult, was perfectly willing to lose this protection; and the Association was also satisfied with present enjoyment of corpus, even if not "intact." Ordinarily the courts favor settlement of a will contest. No question would have arisen if the legatees had all been given outright testamentary gifts. It was the magical quality of the trust which prevented the compromise from being enforced. As in *Claflin*, the will had no spendthrift clause; and all the beneficiaries were *sui juris* and consenting. Only the dead settlor (as it were) objected; and the court treated his supposed wishes as sacred, taking the form of the estate plan as an end in itself. This is an attitude which suits the dynastic trust; and, to be sure, the trust in *Adams v. Link* had elements of dynasticism. To apply such an attitude to *all* testamentary trusts would, however, be an extreme and unwarranted step. Perhaps for this reason the rule of *Adams v. Link* has considerable judicial opposition.[152] But the result of *Adams v. Link* almost invariably follows if the testamentary trust contains a spendthrift clause.[153] Such a trust is treated as if dynastic—by definition, although it certainly cannot be said that all spendthrift trusts are dynastic, especially now that the spendthrift clause is little more than a customary formality of the well-drafted trust.

In the literature, the problems of *Claflin* and *Adams v. Link* are treated as problems of "termination"; such problems are distinguished from problems of "deviation," that is, the extent to which a court may authorize trustees to deviate from the express provisions of a trust. Deviations, broadly speaking,

150. *Id.* at 638, 145 A.2d at 755.

151. *Id.* at 639, 145 A.2d at 756.

152. See National Shawmut Bank v. Fitzpatrick, 256 Mass. 125, 152 N.E. 328 (1926), where the compromise agreement in fact deliberately eliminated spendthrift provisions from the testamentary plan. Scott quite understandably calls this decision "rather extraordinary" as a product of Massachusetts, which had "gone to such lengths in upholding spendthrift trusts." SCOTT, TRUSTS § 337.6 (2d ed. 1956). In defense of the purity of Massachusetts law, one might point out, however, that the settlement was a *fait accompli*; still, the case is startling.

153. See Hay v. LeBous, 317 Mich. 698, 27 N.W.2d 309 (1947). The relationship between termination rules and the spendthrift trust is, of course, quite close. For example, in Bowlin v. Citizens Bank & Trust Co., 131 Ark. 97, 198 S.W. 288 (1917) (validating the spendthrift trust in Arkansas) beneficiaries who had acquired the remainder interest attempted to terminate the trust, arguing that the life interest and the remainder interest had merged. The court refused to allow termination. See also Moore v. Sinnott, 117 Ga. 1010, 44 S.E. 810 (1903).

may be of two sorts, administrative or substantive—relating either to the mode of managing the trust, or to the identity and share of particular beneficiaries. Sometimes a dissatisfied beneficiary might request either or both types of deviation. Suppose a trust of the *Claflin* type, with the added proviso that the corpus must be invested in government bonds. The beneficiary, if he felt income was insufficient, might ask for an administrative deviation (broadening the investment power) or a substantive deviation (invasion of corpus on his behalf) or termination. A neat coincidence of this type would be rare; but it serves to illustrate that "deviation" and "termination" are sisters under the skin. Furthermore, any requested deviation is a request to the court to look for the "purpose" of the trust, in order to decide whether the deviation should be granted. The case-law on deviation is relatively heavy; but the courts have never developed any but the vaguest criteria for determining when it is proper to permit deviation.[154] This is probably due to the failure of the courts to analyze trust types explicitly. In the *Claflin* situation, on the other hand, the courts have developed general formulae of somewhat greater precision, and they have done so in a way which presumes that every trust is or should be treated as if dynastic. Two facts probably account for this: first, the strength of the Massachusetts tradition, and second, the fact that "termination" seems so much more a radical tampering with the intention of the settlor than "deviation."

Termination-deviation rules have been worked out most carefully of all for charitable trusts. Here the right to adapt charitable trusts to new circumstances is well established. The doctrine has a name (*cy pres*) and a wealth of principles and cases. Charitable trusts, as we have mentioned, are often dynastic in impulse; they are frequently long-term or perpetual. Such trusts allow a childless settlor to found a bloodless dynasty.[155] The doctrine of *cy pres* allows deviation for a charitable trust that cannot literally be carried out. In *cy pres* cases, the charitable trust has reached an impasse; it must either deviate or terminate. The doctrine thus necessarily must go one step beyond *Claflin*, and not only prevent termination but also take positive steps to insure substantial fulfillment of the settlor's intent.

154. Probably the chances of persuading a court to allow some kinds of deviation are greater today than in past generations. See, in general, Note, *Deviation from the Distributive Terms of the Trust*, 53 Nw. U.L. Rev. 268 (1958). But fairly recent cases taking a dim view of deviation can be found, *e.g.*, *In re* Cosgrave's Will, 225 Minn. 443, 465, 31 N.W.2d 20, 33 (1948).

155. Today, the tax laws encourage charitable gifts and the creation of charitable foundations and corporations. Charitable foundations can also, for example, preserve family control of a closely held corporation at the death of its founder, avoiding the danger that the stock must be sold to outsiders to pay the estate tax. But even this use of charitable trusts may imply a dynastic motive. The flowering of the charitable foundation may also owe something to the modern conscience of the rich. Whether this is so or not, the objective manifestations of conscience often take a dynastic form. Conscience can be eased just as much by anonymous gifts to existing charities as by gifts to foundations operating in the settlor's name.

Since the law permits (and even favors) perpetual charitable trusts, the necessity of some such doctrine as *cy pres* is quite apparent.[156] The doctrine is accepted almost everywhere and the courts seem less and less hesitant to use it. In the United States, the doctrine owes much of its impetus to the famous case of *Jackson v. Phillips*[157] (another of the ubiquitous Massachusetts cases), decided shortly after the Civil War. But the doctrine would probably have made its way in any event. *Cy pres* is critically important for the dynastic charitable trust: it prevents the destruction of the trust, scattering fragments of the corpus among unintended beneficiaries.[158] The same post-Civil War period in which *cy pres* made its way was the period in which the spendthrift trust doctrine and the *Claflin* doctrine won wide acceptance. Clearly, the dynastic shadow was falling over the body of substantive trust law.

* * * *

156. American law at one time had a distinct aversion to the charitable trust. This was most true in the early 19th century; but the aversion persisted for many years and has left considerable scar tissue behind. The aversion flowed, apparently, from prejudice against vested charitable institutions, primarily churches. A number of states either refused to recognize charitable trusts, or subjected them to the Rule against Perpetuities. In New York, the most serious barrier to a long-term charitable foundation was removed by statute only in the 1890's, after the failure of the famous Tilden trust. See Ames, *The Failure of the 'Tilden Trust'*, 5 HARV. L. REV. 389 (1892); Tilden v. Green, 130 N.Y. 29, 28 N.E. 880 (1891). The "Tilden law" had a precise, immediate cause; but it was passed, significantly, in the period during which the spendthrift trust and the *Claflin* rule were rapidly spreading. Some states still forbid testamentary gifts to charity of more than a set percentage of a testator's estate, provided he was survived by close blood relatives; others refuse to recognize testamentary gifts to charity made too soon before death. The first type of statute protects the blood-line; both types owed much to the fantasy of the evil priest, extorting deathbed promises of charitable gifts in exchange for immortality. *E.g.*, CAL. PROB. CODE § 41; N.Y. DEC. EST. LAW § 17; see Friedman, *The Role of the Wills Course in the Modern Curriculum*, 13 J. LEGAL ED. 196, 204-05 (1960). But the statutes were not specifically confined to religious gifts; the rise of the family foundation coincided with the decline of anti-clericalism in the United States, and these statutes are now pointless. All jurisdictions now allow charitable trusts. Restrictions on testamentary gifts to charity exist in only a few jurisdictions; these restrictions are listlessly enforced and are riddled with judicial loopholes. See Linkins v. Protestant Episcopal Cathedral Foundation, 187 F.2d 357 (D.C. Cir. 1950); Bickley's Estate, 270 Pa. 101, 113 Atl. 68 (1921).

157. 96 Mass. (14 Allen) 539 (1867).

158. *Cy pres* also keeps these charitable trusts going in charitable form, which benefits the public. In today's social-minded society this is probably an even more important factor working in the doctrine's favor. See Fisch, *The Cy Pres Doctrine and Changing Philosophies*, 51 MICH. L. REV. 375 (1953). The courts have been willing to go far in allowing deviations in the name of *cy pres*; first, because in today's scale of values the iron will of the settlor weighs less and the "public interest" more than formerly; second, because twentieth-century courts are not afraid of legal rules which imply broad use of judicial discretion; and third, because in *cy pres* cases, the settlor's dynastic interest has no real champion—the settlor is dead, the family often hostile, and the Attorney-General indifferent. Yet the dynastic element undoubtedly played a real part in the formative years of the *cy pres* doctrine in the United States.

In the main, the story of American trust law has been one of accommodation—fitting inherited concepts and traditions to new needs, institutions, and functions. The accommodation has not been unsuccessful, though groping, unplanned, and at times belated. There have been problems of selecting appropriate means to serve the ends of varying trust-types;[159] and failure of

159. This article has dealt with the influence of the two trust-types on three main areas in the development of the law of trusts. This does not mean that only these three areas were influenced. Even some of the most recondite and technical alleys of trust law have reflected the two trust-types and their divergent claims on the law. One example is the troublesome problem of allocating stock dividends between life tenant and remaindermen. There have been three basic rules. See Powell v. Madison Safe Deposit & Trust Co., 208 Ind. 432, 441, 196 N.E. 324, 328 (1935). The obsolete Kentucky rule gave these dividends to the life tenant. This rule, never important, has been rejected as grossly unfair. Its unfairness, however, was one-sided, in favor of current income beneficiaries. It was suitable only for some caretaker trusts. The Pennsylvania rule, now in gradual eclipse, attempted to preserve equality between income and principal by using stock dividends to maintain something called the "intact value" of the principal; any surplus was assigned to income. See Lueder's Estate, 337 Pa. 155, 10 A.2d 415 (1940). The leading case is Earp's Appeal, 28 Pa. 368 (1857), where the testator left 540 shares of Lehigh Crane Iron Works, valued at $67,500. Later, the value of the stock increased to $108,000; the company cancelled the old shares and issued 1350 shares of new stock. Treating the difference in values as "income," the court gave 844 shares (worth $67,500) to principal, and distributed the rest of the shares as "income" to the beneficiaries.

The Pennsylvania rule was extremely difficult to apply. Its crude computations probably go back to a concept of par value which has become obsolete in modern corporate finance. The prevailing rule now is the Massachusetts rule (Massachusetts again!) which assigns stock dividends to principal—a rule more favorable to the dynastic trust. The Massachusetts rule depends on the important case of Minot v. Paine, 99 Mass. (3 Brown) 101 (1868). Minot was a Boston trustee of a dynastic trust. Apparently, the result of the case changed what was formerly the practice of trustees. It was bitterly attacked in three pamphlets written by John O. Sargent, COMMON SENSE VERSUS JUDICIAL LEGISLATION, BEING THE REVIEW OF A LAW RECENTLY ENACTED BY THE SUPREME COURT OF MASSACHUSETTS (1871); THE RULE IN MINOT'S CASE AGAIN (1871); A THIRD CHAPTER ON THE RULE IN MINOT'S CASE (1874). Sargent recounted the plight of a "widow lady of my acquaintance," who depended for income on "a legacy of Reading stock," paying only stock dividends. "Down to January, 1868, the trustee, as a matter of course, cashed the stock dividends, and paid over the proceeds to the beneficiary of the income." COMMON SENSE VERSUS JUDICIAL LEGISLATION 13-14. The rule of *Minot* can be defended on the ground of convenience, but its dynastic thrust (as compared to *Earp's Appeal*) is unmistakable.

In general, the whole subject of principal-income allocation, muddled and obscure though it is, is shot through with considerations of policy and preference. For example, some cases treat as income a portion of the capital realized in salvage operations, or from the sale of unproductive assets. Bailey & Rice, *The Duties of a Trustee with Respect to Defaulted Mortgage Investments*, 84 U. PA. L. REV. 157 (1935); see Nirdlinger's Estate, 327 Pa. 171, 193 Atl. 30 (1937). A similar approach can be and has been taken with respect to unproductive property sold after a lapse of time. See Edwards v. Edwards, 183 Mass. 581, 67 N.E. 658 (1903); RESTATEMENT (SECOND), TRUSTS § 241 (1959). *Contra*, Lang v. Mississippi Valley Trust Co., 359 Mo. 688, 223 S.W.2d 404 (1949). See Uniform Principal & Income Act § 11 (1931), § 12 (1962).

Neither abstract legal logic nor the logic of accounting demand any rule of apportionment, such as was found in *Nirdlinger's Estate*. The rule simply reflected a prefer-

the law to make clear distinctions between dynastic and caretaker trusts has sometimes made these problems unduly acute.

Beyond this, there is the problem of ultimate ends, in particular, the real value of the dynastic trust. Basically, the law of trusts is a diffused and decentralized method of social control over the forms of transmission of wealth, particularly those forms in which beneficial enjoyment is separated from management. The trust raises, therefore, in a modified form, questions concerning the nature of property which have been asked (perhaps needlessly) since Berle and Means wrote their famous book in 1932.[160] For special kinds of trust—pension trusts and charitable trusts—the institutional forms are stark and discrete; consequently, it has been possible to attempt to examine their problems of internal management and the role they play in the country's economic system.[161] Private noncharitable trusts may be economically quite important, in the aggregate; but they differ greatly in size, type, and function, and they run all the way from great dynastic estates to pitiful sums set aside for orphans. It is no more likely that there is one optimal policy for "trusts" than that there is one such policy for "corporations." In any event, before we decide what princesses to rescue and what dragons to slay, we must take into account trusts as they are, as flesh-and-blood institutions. We must count them and classify them, and study their nature.

ence for current income beneficiaries, which suits the caretaker trust much more than the dynastic trust. Some of the confusion over capital-income allocations may come from improper analysis of trust types. There is no "true" way to allocate funds between principal and income, except in the light of principles which depend on the intent of the settlor —not a specific intent, but the broad intent implicit in the type of trust the settlor chose to create. One might also question the attempt, through "uniform" statutes, to impose one method of principal-income allocation on all trusts, regardless of type.

160. BERLE & MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1933).

161. *E.g.*, HARBRECHT, PENSION FUNDS AND ECONOMIC POWER (1959).