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SOME OBSERVATIONS ON LIVING TRUSTS

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IT will be the object of this article to make some general observations with reference to so-called "Living Trusts". No attempt will be made to comprehensively treat even of fundamentals, but rather only to comment or perhaps speculate in a desultory way on some matters of interest.

The development of trust companies, thoroughly organized and efficient, has given such an impetus to trust arrangements of almost illimitable variety, that one might wonder a bit if we were returning to so general a practice of having legal title in one person, and use and enjoyment in another, as caused Lord Bacon to observe:

... "By this course of putting lands into uses there were many inconveniences, as this use, which grew first from a reasonable cause, namely, to give men the power and liberty to dispose of their own, was turned to deceive many of their just and reasonable rights, as namely, a man that had cause to sue for his land knew not against whom to bring his action nor who was the owner of it. The wife was defrauded of her thirds, the husband of being tenant by curtesy, the lord of his wardship, relief, heriot, and escheat, the creditor of his extent for debt, the poor tenant of his lease; . . ."

The situation then resulted in 27 Hen. VIII C. 10, converting the beneficial into legal ownership, until equity intervened with certain well-known exceptions. It would be interesting to speculate as to the possible future legislative result of the present marvelous growth of trusts, and particularly "Living Trusts," but that is not within the purview of this article. Suffice it to say that possible legislative experiment, as well as judicial declarations deserve careful consideration by the settlor of a trust.

Many arrangements popularly deemed trusts, are clearly only agencies. Then we have the polarity of unequivocal trusts. Midway is the borderland where the settlor retains rather complete supervision (although divesting himself of legal title), right of revocation, change of present and future *cestui que trust,* etc. As affects rights, not only *inter partes,* but as to third persons, the exact relationship is very important.

In case of clear agency of course, wherever the principal's general directions are followed the conduct of the agent is that of the principal, with certain well-known exceptions. A trustee, as an administrator or executor, is, in law, individually and not officially, liable for tort or negligence.

In *Louisville Trust Co. v. Morgan,* 180 Ky. 609, 203 S. W. 555, reported in 7 A. L. R. 396, with a complete annotation at 408, it is stated that

> "the general rule is that the trustee is liable in his individual, and not in his official, capacity, and this, for the sound reason that the trustee should not be allowed, by his tort or negligence, to impair the trust fund."

In the Morgan case, suit was dismissed against the trustee, officially, and sustained, individually. The cases also hold trustees liable for negligence of their employees and for violation of statutes. An illustrative decision is *Bannigan v. Woodbury,* 158 Mich. 206, where the court baldly said that the estate could not be held where the cause of action arose after decease of the intestate.

In passing, reference is made to a comprehensive article in 28 *Harvard Law Review* 725 under the caption, "Liabilities Incurred in the Administration of Trusts." In that article, it is shown how equity has in some instances, altho admitting legal liability, relieved the administrative officer.

However, generally in law, the administrative officer is liable, in absence of express contrary stipulation, under contracts made for the benefit of the estate, even under authority of court, for torts, and in absence of exempting statute, for unpaid stock subscriptions, stockholders liability, etc.

Of course, in Colorado, Sec. 2272, Comp. Laws, 1921, gives specific exemption to the trustee, but subjects the estate to liability. Query what the result would be if the trustee, without authority, invested in stock not fully paid up, or in bank stock?

Since a true trustee cannot be the agent of the *cestui que trust,* the latter cannot be held, whereas of course the principal would be liable for the acts of his agent.

Enough has been noted to illustrate the importance of knowing whether an agency or trust exists.

It were a hopeless task to attempt to draw that distinction in this brief article, but what was, at least in the inception of trust law, a fundamental, might well be borne in mind, namely, that "The *cestui que trust* has *no remedy except by subpoena in chancery.*" *Perry on Trusts,* p. 12, 5th Ed.

Our own Supreme Court has said in *Bowes v. Cannon,* 50 C. 262, 266:

> "In its technical sense, a trust is the right, *enforceable only in equity,* to the beneficial enjoyment of property, the legal title of which is in another."

Undoubtedly, this doctrine has been much modified, but in its essential, that relief lies solely in equity, it remains. If this be right, and the settlor, whether as settlor or *cestui que trust,* retains the right to revoke, to control investments, change beneficiaries, etc., it seems quite clear that during the lifetime of the maker-*cestui que trust,* he has retained abundant remedy other than by subpoena in chancery. After his death, quite certainly there is a trust, for then the beneficiary may have relief, only by process in equity, but up to that time, with complete remedies reserved to him by the creating instrument, the existence of a trust seems open to question.

Many people are unwilling to have their trust arrangements made matter of public record. They therefore make conveyance to a trustee, sometimes with nothing but a secret declaration of trust from such trustee, with nothing in the conveyance of real estate or in the grant of personalty to indicate the trust. Manifestly such a situation is hazardous, both for the trustee and the *cestui que trust.*

Obviously the *cestui que trust* may lose his property to judgment creditors of the trustee, particularly if it be real estate, standing in the trustee's name. Then the trustee also risks liability for unpaid stock, stockholders' liability, etc., where trust property is carried in his own name. 1 *Machen, Corporations, Sec.* 709; 28 *Harvard Law Review,* 726.

In 39 *Cyc.* 409 it is said that investment in the name of the trustee makes him absolutely liable for loss, irrespective of the question of good faith and in 26 *R. C. L., p.* 1313, *Sec.* 170, the rule of liability is baldly stated as the same for investments in the trustee's name in good faith, as for willful conversion.

Of course acquiescence or ratification relieves the trustee from liability, 168 *Ill.* 589, *at* 604, and under the more liberal rule of New York, a trustee may safely consolidate trust funds in the purchase of securities, so long as he keeps a clear record of the various trust funds, (so that each separate fund can be clearly traced) reports to beneficiaries fully the facts, and receives no objection, *In re Union Trust Co.,* 219 N. Y. 514. However, in that decision there is a dissent which forcefully says the general principles declared in the majority opinion required an opposite conclusion.

On this point, then, the trustee should have the most specific authority in the event titles or securities are carried in the individual name of the trustee, without disclosure of the trust; but if such practice is sufficiently sanctioned to protect the trustee, the trust fund itself may be endangered. This is, perhaps more the case as to real estate than personal property, for the record title may not be contradicted as to judgment creditors. However, even as to personalty, the beneficial owner may be confronted in equity with certain equitable maxims which might cause loss of his property to the trustee's creditors.

Neither will it suffice to follow the individual name of the trustee with the mere word "trustee" or "trustee for" so and so. Manifestly stock or bond registrars will require definite showing of the trust on any transfer and as to real estate such statements are merely descriptive of the person.

As to personalty, the situation must also be considered from the standpoint not only of the registrar of stocks or bonds, but also the transferee. The C. C. A. for the Eighth Circuit in *Geyser-Marion Co. v. Stark,* 106 Fed. 558, says the term "trustee" in stock books gives notice of a trust and there is no presumption of authority in the trustee to sell or transfer. There the registrar was forced to compensate the *cestui* for loss sustained. Transferees also may be required to compensate *cestuis* for loss, where they take title without investigation under such circumstances, *Shaw v. Spencer,* 100 Mass. 382; *Duket v. Natl. Mech. Bank,* 86 Md. 400; *Marbury v. Ehlen,* 72 Md. 206.

The public policy for Colorado as to real estate records is rather definitely settled by Sec. 4877 Comp. Laws, 1921. Under that section, relating to conveyance of real estate, not only must the trustee be described as such for certain beneficiaries, naming them, but the conveyance must either

> "define the trust or other agreement under which the grantee is acting . . . [or] refer by proper description to book, page, document number or file, to an instrument, order, decree or other writing, *which is of public record in the county in which the land so conveyed is located,** in which such matters shall appear."

Lacking any of these essentials, the partial description is to be considered of the person only, and not as notice of a trust. Note that the trust must be "defined", or otherwise there must be reference to some instrument otherwise of record, which is the basis of the trust.

Then, of course, there are spendthrift trusts, sometimes settled by the maker for himself as *cestui,* and upon his death for the benefit of other *cestuis,* or for others from the beginning. These cases raise some interesting questions. Manifestly a settlor should not be permitted to create a spendthrift trust for himself as beneficiary, reserving the right of revocation, and thus defeat creditors. Indeed, *Brown v. McGill,* 39 Atl. 613, goes further and holds for Maryland (where spendthrift trusts are approved), that a *feme sole,* in contemplation of marriage, cannot settle her own property upon a trustee in trust for herself for life, for her separate use, without power of anticipation. The court said she could not thus place her own property beyond the reach of those who should subsequently become her creditors.

Therefore, Maryland, approving spendthrift trusts, disapproves them where the settlor is to be *cestui.* It is anomalous that England, hostile to restraint on alienation, nevertheless permits such arrangements, while here, where spendthrift trusts are more favorably regarded, they are disapproved. See 12 *Harvard Law Review* 54.

The case of *Benedict v. Benedict,* 104 Atl. 581, is a Pennsylvania decision involving property conveyed by the settlor to a trustee in trust for the settlor for life with remainder in

*EDITOR'S NOTE: Unless otherwise indicated all italics herein are the author's.

trust for his wife and children subject to the settlor's right to shift this remainder by will. It is to be noted therein that the settlor reserved the right to change, not the terms as to the present beneficiary, but as to the beneficiaries by remainder only. The court held the property subject to claims of the settlor's creditors. This seems then to be the test: has the settlor reserved the right to change either present or remaindermen beneficiaries. If so, then he is deemed to have retained such rights of ownership, that the transfer is fraudulent as to *subsequent* creditors, as an attempt to free it from liabilities of ownership. *Scott v. Keane,* 87 Md. 709; *Ghormley v. Smith,* 139 Pa. St. 584. But where the donor has definitely and conclusively given away the remainder while creating the trust, the courts allow subsequent creditors to proceed merely against the life interest, the property of the donor-beneficiary. *Jackson v. Sezdlitz,* 134 Mass. 342; *Schenck v. Barnes,* 156 N. Y. 36, 50 N. E. 967. This view seems logical, for a man without present debts, can give away all his property directly or by a trust arrangement, and subsequent creditors can reach his property, which is his beneficial life estate, but should not be permitted to touch that which is no longer his.

Of course, where the trustee of a spendthrift trust is the sole *cestui,* the legal and equitable titles merge. *Rose v. Hatch,* 125 N. Y. 427, 431. But not where *one of several* trustees is beneficiary for life, *Story v. Palmer,* 46 N. J. Eq. 1, or where one of several beneficiaries is sole trustee, 33 *Harvard Law Review* 483.

No doubt there are many attempts by living trusts to avoid inheritance taxes or death duties. These attempts will in most cases prove unsuccessful because the settlor does not make an absolute and irrevocable transfer, but endeavors to retain almost as much control as a principal over his agent; see *New England Trust Co. v. Abbott,* 205 Mass. 279, wherein A settled the income from a certain principal fund on B for five years, with a five year extension in absence of termination by the settlor, the beneficiary to receive the principal in event of the settlor's death without revocation. On A's decease with the trust still in effect, it was held that the principal was a gift intended to take effect at death and so was subject to inheritance tax. The decision rested largely on the settlor's right of revocation.

But *State Street Tr. Co. v. Treas. etc.,* 209 Mass. 374, involved $100,000 placed in trust by A with income to be paid to B and C during A's lifetime, and at her death the principal to be paid to the survivor of B and C, with right of appointment by B and C, should A survive them. The trust was for a consideration, and irrevocable. At A's death, B and C contended that the principal was not subject to inheritance tax, but the court ruled, at page 378:

"It is the first contention of the defendants in the second appeal, who are the beneficiaries under the trust, that they are exempt, as the transfer of the property in question became complete in the lifetime of the donor or settlor. By the terms of the instrument creating the trust no power of revocation is reserved. The test, however, by which the exemption is to be ascertained does not depend upon whether a power to revoke has or has not been inserted, but *upon the passing of the property with all the attributes of ownership independently of the death of the transferror. It is the absence of the power of control with the unrestricted right of the recipient to dispose of the property and to receive and make use of the proceeds, which by the express language of the statute subjects it to the tax.*"

It should be noted that in both of the Massachusetts cases referred to the settlor was not the *cestui,* and in one there was no right of revocation. See also *Matter of Bostwick,* 160 N. Y. 489, and *Lamb v. Monav,* 140 Iowa 89, the latter of which contains a very helpful discussion of the subject, and this broad generalization (p. 95):

It is no doubt true that the owner of an estate cannot defeat the tax by any device which secures to him for life the income, profits, or enjoyment thereof. The conveyance must be such as passes the possession, the title, and the enjoyment of the property in the grantor's lifetime."

Reference is sometimes made to the New Jersey case of *Wolf v. Comptroller,* 105 Atl. 871, as authority for the proposition that the donor may make an absolute, irrevocable transfer, and take back a declaration from the grantee as trustee, whereby life income is secured to him, and thus escape the death duty. The court's decision, it should be remarked, seems to be specifically bottomed on the conclusion that the case involved no trust at all. However, *In re Wilmarth's Estate,* 174 N. Y. 5, 885, is definite authority for escape from an estate tax by an absolute and irrevocable transfer from A to B with a subsequent declaration of trust back from B to A for the income for A's life.

But 26 *Ruling Case Law* 223, unqualifiedly states the rule that reservation of income for life, by whatever means, renders the property subject to death duty.

Finally we will consider the endeavor of one spouse to defeat the right of the surviving spouse to receive fifty per cent. of the estate of the deceased spouse.

Personally, I believe when our Supreme Court has finally spoken to the point, that any living trust, whether revocable or irrevocable, which assures the grantor all the benefits of ownership, during the grantor's lifetime, free from the burdens of ownership, will not serve to cut off the surviving spouse's right to one-half of the property. In this, I apprehend that many readers may disagree. Such, however, is my view of the several leading Colorado decisions on the point.

The first of these was the case of *Smith v. Smith,* 22 Colo. 480, decided by Judge Hayt in 1896. There Smith secretly conveyed to his children by deeds not recorded until four years after execution and on the eve of his death. There was no declaration of trust back but the surviving spouse showed retention of all income by the grantor, during his lifetime. At page 484, after setting out our statutes, the Court says:

"It is the obvious intent and purpose of the foregoing acts to provide the widow with the necessary means for her support in case of the death of the husband, whenever his property is sufficient for that purpose. Under these statutes appellee contends that where the husband during coverture secretly makes conveyance of all his property and keeps the knowledge thereof from his wife, thereafter retaining control and management of the same, that such conveyance should be treated and considered as testamentary in character and not as a deed, and in so far as the wife is deprived thereby of more than one half the real property it should be held void as to her."

After an analysis of decisions by other jurisdictions and much mixture of law and sentiment, the Court reasons at pages 488 and 489, as follows:

"It is not necessary in this case, and is not our intention to say anything that will prevent the husband, during his lifetime, from selling his personal property, or transferring his real estate for such consideration as he may be willing to accept, or without consideration, provided always that the transaction shall be absolute and bona fide, and not colorable merely, but what we do say is, where, as here, the complaint charges, and the evidence shows, that the transaction complained of is colorable only and resorted to by the husband for the purpose of defeating his wife's right as his heir, *he hoping thereby to obtain the full benefit of the property to the last hour of his life,* and at the same time being able to deprive her of all interest therein as his heir, is as much of a fraud on the part of the husband as it is for a debtor, having in contemplation the incurring of an indebtedness, to put his property beyond his control, and the courts have universally declared the latter to be in violation of the statute of frauds. The same principle should govern in this case. The transaction is shown to have had its inception in a desire on the part of both the grantor and grantees to deprive the wife and stepmother of the benefits conferred upon her as an heir of her husband under our statutes, and the action of the district court in characterizing the transaction a fraud upon the rights of the wife as an heir is founded upon the plainest principles of justice and equity and must be sustained."

The decision seems to pivot on the fact that the grantor hoped by his arrangement "to obtain full benefit of the property to the last hour of his life," in other words to retain the equitable interest during life and to have the legal title and the equitable merge to defeat his wife's rights, upon his death.

The second case was that of *Phillips v. Phillips,* 30 Colo. 576, decided by Justice Steele in 1903, on a different state of facts. There Phillips conveyed to his daughters by deeds placed by him in a safe box for a time, and later delivered the deeds to the daughters, who recorded them. Phillips' wife was advised of the existence of the deeds. At *nisi prius* it was found that the grantor intended, when he made the deeds, that they should be testamentary in character, but later changed his mind and delivered the deeds; further that he collected rents and treated the property after the conveyance, as his own. The finding as to the retention of income was particularly questioned by Judge Steele, and apparently had he agreed with the lower court he would not have felt justified in sustaining the conveyance as against the widow, as he did, for at pages 521 and 522, we read:

"The testimony wholly fails to establish a fraudulent agreement. It is said that the fact that the daughters allowed the father to retain the general supervision of the property, collect the rents, pay the taxes, etc., is evidence of such fraudulent agreement. Mr. Phillips did not collect all the rents and did not pay all the taxes. The daughters collected a part of the rent, and gave receipts in their own names. When a grantor is permitted by his grantee to retain the possession of real estate and collect and retain the rents, the transaction presents some suspicious features; but when the transaction is between parent and child, the suspicious circumstances may be explained. It was perfectly natural for the daughters to authorize their father to take the general supervision of this property, and it was natural for him, as their father, to care for the property and to desire to have over it a general supervision; and we cannot assent to the assertion of counsel that there was a fraudulent or collusive compact between the father and his daughters."

In other words, Judge Steele felt impelled to make quite clear that there was no retention of income by the grantor. The court further says as to the Smith case:

"In the Smith case, as we read it, it is decided that a husband may dispose of his property for the purpose of defeating the right of the wife, and unless the transaction is colorable merely, or is attended with circumstances indicating fraud, it will be good as against the wife; and the fact that the husband intended to defeat her right is not in itself sufficient to invalidate the conveyance—there must be participation in fraudulent conduct by the grantee."

The decisions, thus far, make much of the matter of income to the grantor for life from the property conveyed, apparently making that matter largely determinative.

Then in 1918 we come to the third case, that of *Grover v. Clover,* 69 Colo. 72. There Grover executed a deed to a trustee for the use of his son, with the following condition:

"That all the rents, income and profit of the said property, as the same accrue after deducting taxes and other proper expenses, be paid to me during my natural life, and upon my death the said trust shall thereupon at once cease and determine and the said premises hereby conveyed shall thereupon become vested in my son, Charles Glenn Grover, and I direct that a deed so conveying the same to him shall at once by said trustee be made, executed and delivered to my said son."

The Supreme Court, at page 75, in sustaining the lower court in its decision that the transaction was colorable only and a fraud on the rights of the wife, reasoned as follows:

"We think the case comes clearly within the principle announced in Smith v. Smith, 22 Colo. 480, 46 Pac. 128, 34 L. R. A. 49, 55 Am. St. Rep. 142. In that case and under a similar state of facts, Chief Justice Hayt, in a very able opinion held that *notwithstanding that there exists in this state no right of dower,* yet the spirit and letter of our statutes impose the duty upon the husband having property, to provide for the support and comfort of his widow after his demise, and that where the husband disposed of his property both real and personal, the transaction was colorably merely, and resorted to by him for the purpose of defeating his wife's right, but with the intent to reserve the benefit of the property to himself for life, it is a fraud upon the rights of his wife, from which she may be relieved after death. . . . *Again, it has long been held that the policy of the law will not permit property to be* *so limited as to remain in the grantor for life, free from the incidents of property and not subject to his debts.* 4 Kent. Com. 311; Bump on Fraudulent Conveyance, Sec. 189; Ghormley v. Smith, 139 Pa. St. 584, 21 Atl. 135, 11 L. R. A. 565, 23 Am. St. Rep. 215."

The fourth decision is *Ellis v. Jones,* 73 Colo. 516. There Justice Denison sustained a deed given by a mother to her daughter, a few days before the mother's death, thereby defeating the husband's one-half interest at death. At page 517 we read:

"The proof in this case, however, does not bring it within the scope of that decision the ground of which was that the deed there in question was merely colorable—that is, counterfeit, feigned, having the appearance of truth (Webster)—not really intended as a deed. Phillips V. Phillips, 30 Colo. 516, 71 Pac. 363, 258.

One cannot give away land without depriving his heirs of it. He is presumed to intend the obvious consequences of his own acts. He must therefore be regarded as intending to deprive his heirs of what he gives away; but all agree that he may give. Is it not, then, evident that the intent is irrelevant, that if the deed is genuine, it is valid, but that if it is a mere pretense it is invalid? In other words, if colorable it is invalid, otherwise valid.

It is not the purpose, then, of a deed of a husband or wife that invalidates it as against the other, but the fact, if it be a fact, that the deed is a pretense. The mere fact, therefore, that Mrs. Jones' deed was intended to deprive her husband of his inheritance is not sufficient to render it invalid. Phillips v. Phillips, supra."

Also at page 518 the Court says:

It is suggested in the cases cited above that if the deed of one spouse is fraudulent as against the other it is invalid, but no case makes it clear what constitutes fraud in such a case. There can be no fraud in doing a lawful thing. If, therefore, one spouse may lawfully give away his or her property, as all agree either of them may, such gift is not fraudulent per se, and the fact that it deprives the other of his or her inheritance therein, since, of course, it always does and must do so, cannot make it fraudulent. How can one fraudulently deprive another of that of which he may lawfully deprive him? However this question may be answered it is clear from what we have said that the decision below was wrong."

Returning to page 517, we find the Court recognizing the necessity of negativing retention of income for life in the grantor, in order to defeat at death the one-half interest in the surviving spouse, for the decision says:

"It is urged that it is shown that the deed herein questioned was not genuine but a pretense by the evidence that the grantor continued in possession,

but it also appeared that the grantee resided there with her mother before and continued to reside there after the execution of the deed and until the latter's death. Moreover the undisputed testimony of the plaintiff and Mr. King, the attorney who drew the deed in question, shows that one purpose of the conveyance was to reward the plaintiff for her care of her mother for several years next *before* its execution. Under such evidence the court could not find the deed to be colorable, and, indeed, did not expressly so find."

In a fifth case, *Taylor vs. Taylor,* 79 Colorado 487, a case involving deeds to a mistress, with actual control retained by the grantor, our Supreme Court in setting aside the deeds made this positive statement at pages 489-90:

"The rule in this State is that deeds so given are lawfully delivered if with the intent to *really and actually* take effect, but not if they are merely colorable, that is, a mere pretense or intent to take effect at death."

Therefore it would seem safe to conclude that where a grantor-settlor retains control of property conveyed to his trustee and with right of revocation during his lifetime, if the effect of the trust at the grantor-settlor's death is to deprive a surviving spouse of one-half of the property, such surviving spouse may set aside the trust, at least to the extent of taking her one-half of the property. Of course the rule would apply either to personalty or to realty.

Another recent case of possible application and interest even in case of a genuine living trust without right of revocation and with a more sweeping authority to the trustee, is the decision of our Supreme Court in *Mulcahy vs. Johnson,* 80 Colorado 499. While there the beneficiary appealed to the court to exercise its powers as chancellor, it would seem that almost to the same degree a settlor-grantor-beneficiary of a living trust could do so, and at page 514 the court said:

"Unquestionably the testator intended to give to his trustees in the management of the trust estate the largest and fullest powers which one may confer by deed or will. The modern tendency of the courts is not to interfere with the exercise of such discretionary power. This, however, does not prevent the Courts from exercising the powers of a chancellor, upon the complaint of an aggrieved party, to determine whether or not there has been an abuse or perversion by the trustees of their discretionary power. *The right of an aggrieved party to apply to the courts for relief cannot be divested however sweeping may be the powers which have been conferred upon trustees."*

Turning again to jurisdictions other than Colorado we find an interesting case in New Jersey where on April 8, 1925, the Court of Chancery decided *National Newark & Essex Banking Company v. Rosahl,* 128 Atl. 586, which apparently was a more or less ex parte proceeding wherein the trustee asked for directions of the court in administering a trust.

In that case, Rosahl conveyed to the trust company certain securities, upon trust to pay the net income to him for life, thence to his widow for life, and the corpus to his lawful issue; if no widow or issue, then to pay the net income to his mother, and upon her death to his three sisters, and thereafter the corpus as appointed by the grantor's will or in default of appointment to his next of kin. Right of revocation was reserved by the settlor. This reservation was of the right to "revoke as an entirety this deed of trust."

Shortly before his death, the settlor executed an instrument called an "amendment" to his deed of trust wherein he attempted certain modifications. The court held that the trust was complete and not testamentary for the reason that the property passed out of the control of the grantor and vested in the trustee to the beneficial use of the *cestuis que trustent.* As to the right of revocation the court said: "If the power of revocation is not exercised, the interest remains vested as though such power had not been reserved." 1 Perry on Trusts, 137. The court further says, (page 587):

"The distinction between trusts thus created and transfers of property to take effect after death, as in Stevenson v. Earl, 65 N. J. Eq. 721, 55 A. 1091 Am. St. Rep. 790, 1 Ann. Cas. 49, upon which the administrator relies, *is that in the one the property immediately passes out of the donor, while in the other it remains in him and passes at death.* The doctrine of that case, as pointed out by Chancellor Walker in Robeson v. Duncan, 74 N. J. Eq. 745, 70 A. 685, applies to the disposition in his lifetime of property which will be in the donor at the time of his death, the tradition to take place at or after death . . . It can have no application to a case where the grantor has by his conveyance divested himself of his property in his lifetime."

"*The courts have frequently upheld such trusts as against attacks that they were testamentary.* Green v. Tulane, 52 N. J. Eq. 169, 28 A. 9. See, also, New Jersey Title Guarantee Trust Co. v. Archibald, 91 N. J. Eq. 82, 108, A. 434; Kaufman v. Edwards, 92 N. J. Eq. 554, 113 A. 598; Dunn v. Houghton (N. J. Ch.) 51 A. 71."

The decision thus far would seem to indicate that the right of inheritance might thus be defeated. However, the court unqualifiedly holds otherwise in this statement.

"When, however, it plainly appears that a revocable trust to take effect in enjoyment at the death of the trustor was created in evasion of the statute of wills, equity will decline to enforce it. Kelley v. Snow, 185 Mass. 288, 70 N. E. 89; Seaman v. Harmon, 192 Mass. 5, 78 N. E. 301; McEvoy v. Boston Five Cent Savings Bank, 201 Mass. 50, 87 N. E. 465; Brown v. Crafts, 98 Me. 4, 56 A. 213. There is no evidence in this case indicating such a purpose."

The court then went on to hold that the settlor had not disturbed the rights of the *cestuis* by the "amendment"; that the settlor could have destroyed the trust altogether but could not modify it.

It is interesting to review the authorities cited in the Rosahl case.

Seaman v. Harmon, 192 Mass. 5, involved a mortgage, which one Seaman caused to be placed on land which he had conveyed by its previous owners to his sister, in trust to pay to Seaman the rents and profits during his life and also at his request to sell and convey and pay the proceeds to him, or to mortgage the same, also to convey the same to whomsoever he might appoint in his will or in default thereof to *convey the same to his heirs at law.* At the request of Seaman, the trustee placed a mortgage on the land for $3200.00 and plaintiff who was the wife but separated from her husband, the settlor, at the time the trust was made, and who was later divorced, attempted to restrain foreclosure of the mortgage on the theory that the trust arrangement had for its purpose the defeat of her dower rights.

The court took great pains to show that Seaman, the settlor, never had legal title, that he had only an equitable title to which dower does not attach in Massachusetts. The court further carefully points out that the mortgagee paid a valuable consideration for the mortgage which he sought to foreclose. While the court specifically found that the power of revocation was not inconsistent with the creation of a valid trust yet it is to be noted that the very trust arrangement provided that in the absence of appointment by will the property was to go to the settlor's "heirs at law." The wife by her divorce put herself out of that category and since there was never any seisin in the settlor during coverture, dower did not attach, since in Massachusetts dower does not attach to an equitable interest.

For the purpose of the question of defeating the right of inheritance, this case is not particularly helpful, and is of greatest interest in its holding that the right of revocation is consistent with a valid trust.

Without analyzing all of the facts therein stated, *Kelley v. Snow,* 70 N. E. 89, also cited in the Rosahl case, may be said to be definite authority for the proposition that a revocable trust created to evade the Inheritance or Will Statutes, will not be enforced by Courts of Equity.

McEvoy vs. Boston Five Cents Savings Bank, 201 Mass. 50, involved a grant of moneys to a trustee for the benefit of the settlor and at her death, to certain *cestuis.* There was a right of revocation reserved. The court held that this was a trust during the lifetime of the settlor but, as to the balance of the trust, effective at her death; it was testamentary and not being executed in accordance with the Will Statutes, could not be enforced.

Brown v. Crafts, 56 Atl. 213, involved an attempted gift of securities to the daughter of a testator. These securities were subject of a bill of sale or assignment by which the testator sought to transfer the property to his daughter, taking back a power of attorney under which he was to receive the property, manage and control it, have the use and income of it, the right to pledge it for his personal debts, or to sell it and to use the same as though it were his own property. A bill of sale was executed to the daughter, who checked each item of the securities with the schedule in the bill of sale, received the securities, and then in turn signed the power of attorney and redelivered the securities to the donor for handling by him in accordance with the terms of the power of attorney. In holding that this was not a completed gift, the court said (at page 214):

> "What was done by the donor and donee was one and the same transaction. We think the delivery of the property was incomplete. It was colorable, not real. This attempted transfer, having the semblance of a gift, but the substance of a will, was nugatory. The dominion which the donor retained over the property during his life was as full as if the disposition had been by will, and the rights and enjoyment of the donee were postponed until his death. It appears that subsequently to the date of the bill of sale, in pursuance of legal advice received by John H. Eveleth on the subject of the gift to his daughter, she received the key to the safe in which the property was de-

posited, and temporarily took it into her possession; but this does not, in our view, change the nature of the original transaction. It tended rather to disclose its character as not being bona fide. The letter of the donor to the donee, advising this course, and reiterating the fact that the property was hers, was simply artificial evidence created for the purpose of proving the execution of the original gift."

Having thus determined, the Court said it was unnecessary to determine the second proposition advanced, namely, that this disposition of personal property had for its purpose the deprivation of the wife of her distributive share and was therefore void.

And yet we find the Supreme Court of Pennsylvania in *Windolph v. Girard Trust Co. et al.,* 91 Atl., sustaining a trust by a married woman wherein she reserved the beneficial interest during her life with the power of revocation. For the reason that this article is already too long the interesting facts in the Windolph case will not be analyzed, but the following quotation, at page 638, is given:

"We do not agree with the appellant that the deed was a fraud upon his marital rights. It is the settled law in this state, as was the common law, that during his life a man may dispose of his personal estate, by voluntary gift or otherwise, as he pleases, and it is not a fraud upon the rights of his widow or children. Ellmaker v. Ellmaker, 4 Watts, 89; Pringle v. Pringle, 59 Pa. 281; Dickerson's App., 115 Pa. 198, 8 Atl. 64, 2 Am. St. Rep. 547. This power arises from the fact that he is the absolute owner, and hence may make a gift, declare a trust, or otherwise dispose of his personal property at his pleasure. During his life his wife and children have no vested interest in his personal estate, and hence they cannot complain of any disposition he sees fit to make of it. Their right to his property attaches only at his death." . . . "In Lines v. Lines, 142 Pa. 149, 21 Atl. 809, 24 Am. St. Rep. 487, we held that the good faith required of the donor or settlor in making a valid disposition of his property during life does not refer to the purpose to affect his wife, but to the intent to divest himself of the ownership of the property. *It is therefore apparent that the fraudulent intent which will defeat a gift inter vivos cannot be predicated of the husband's intent to deprive the wife of her distributive share in his estate as widow."*

However, the court on appeal bottomed its decision in large part on the following finding by the referee as stated by the lower court (page 637):

"There was no evidence before the referee that would justify a finding that the deed of trust in this case was gotten up as a mere subterfuge to permit

Annie Windolph in her lifetime to possess and control her estate and at the same time to be free of the post mortem claims of her husband. She fully intended to and actually did assign and deliver to the trustee the property in question for the purposes set forth in the deed and under the advice of counsel she endeavored to effectuate her intention by fully complying with the requirements of law."

It is quite apparent that the Pennsylvania cases go much further than any of the other decisions in sustaining, as against the claims of heirs at law, a trust wherein the settlor reserves the income from the estate for life and the beneficial enjoyment of the *cestuis* other than the settlor-*cestui* is postponed until the death of the maker of the instrument.