is for the exclusive benefit of the decedent's next of kin; and, while the decedent's administrator alone may sue, his relation to any fund recovered is not that of the decedent's representative, but that of trustee for the next of kin. It would, therefore, seem the thing to do to admit any defense against him which would be a defense against them."

The possibility of now joining the beneficiary with the decedent in the release, in many cases, does not help to counteract the unfortunate result of Ohio's position on the effect of a release by the decedent alone. There are still problems presented where the beneficiaries are minors and cannot release, or where the tort-feasor overlooks or does not know of one or more of the beneficiaries (especially if he be a non-resident of the state), and thus a necessary signature is missing from the release.

JAMES M. GORMAN

TRUSTS

THE RIGHT OF CREDITORS TO REACH THE CESTUI'S INTEREST

The defendant and his wife conveyed certain property to trustees under a trust device, naming themselves and their five children, or their heirs as beneficiaries. It was provided that the defendant was to receive one thousand dollars a year from the income of the fund so long as he acted as the manager of a business enterprise and thereafter he was to receive five hundred dollars per year for life in the form of a pension, but in the event the business were unprofitable for three years the trustee was authorized to sell the property and distribute the proceeds as therein provided, in which event the defendant was not to participate in the distribution. The plaintiffs subsequently recovered a judgment against the defendant and execution was returned unsatisfied. They then sought, by proceedings in aid of execution, to subject his interest in the trust to the payment of their claim. The defendant's salary account was overdrawn at the time these proceedings were instituted. The court denied recovery to the plaintiffs, saying that the defendant's interest in the fund "is too uncertain as to duration to be subject of an order in aid, except as to definite sums as they accrue to him."* This

* *Kuhn, et al.*, v. *Wolf*, 59 Ohio App. 15 (1938).

case is illustrative of the problem facing the creditor whose debtor is the *cestui* of trust having no other property subject to the payment of his obligations.

In undertaking to set forth the principles governing creditors' procedure in reaching such interests, the first part of this paper will be given

over to a discussion of the ordinary active trust in which the *cestui's* interest is free from all conditions, restraints or other contingencies, and the latter part will be devoted to a consideration of some of the exceptions to the general rule, arising by reason of the inclusion of such clauses in the instrument.

"At Common Law judgments could not be levied upon estates merely equitable, because courts of law did not recognize any such titles and could not deal with them."[1] Statutes have in some respect served to alter this rule, but by and large it must be said that the equitable interest of a *cestui que trust* is immune to legal levy and execution yet today. One of the first attempts to change the rule is found in the tenth section of the Statute of Frauds[2] which provided that such interests in lands could be levied upon in the same manner as legal estates. However, this attempt fell short of giving truly adequate relief to creditors who found that their debtors' interests were equitable only for two reasons; first, it extended only to realty, and second, the statute was early construed to cover cases where the *cestuis'* interest was a "fee simple," and was ultimately limited to those cases where a dry or passive trust existed.[3]

It is now clearly established that equitable interests are not available to legal execution under the Ohio statute.[4] In discussing the history of that section[5] Mauck, J., said, "Section 11655, General Code fixes the power to levy and sell under an execution. For many years this section provided only for a levy and sale of lands and tenements and goods and chattels not exempt by law. Under that reading it was uniformly held that only a legal title in property could be reached by execution. In 1880 the General Assembly added, after the words 'lands and tenements,' the phrase 'including vested interests therein.' In *First National Bank* v. *Logue, Trustee*, 89 O.S. 288, 106 N.E. 21, L.R.A. 1915 B 340 (1914) it was held that, as vested interests included equitable as well as legal interests, an equitable interest in lands and tenements could be reached by execution. Since the decision in *Bank* v. *Logue*, the section in question has again been amended by confining the vested interests subject to execution to 'vested legal interests,' 111 O.L. 366. *First National Bank* v. *Logue*, consequently is no longer authority for interpreting Section 11655. There is therefore, no power under that

[1] *Freedmans Savings Etc. Co.* v. *Earle*, 110 U.S. 710, 4 S. Ct. 226 (1884).
[2] St. 29 Carl. II c. 3 (1676).
[3] *King* v. *Ballett*, 2 Vern. 248 (1691).
[4] Section 11655, G.C. reads as follows: "Lands and tenements, including vested legal interests therein, permanent leasehold estates renewable forever, and goods and chattels not exempt by law, shall be subject to the payment of debts, and liable to be taken on execution and sold as hereinafter provided."
[5] *Haelsen* v. *Szalay*, 33 Ohio App. 350, 169 N.E. 602 (1929).

section now to reach equitable interests in real estate, and there never has been any power to make execution sale thereunder of equitable interest in personal property."

However, in spite of what has been said thus far, it has long been recognized as a general rule of the law of trusts that the equitable interest of the beneficiary of an active trust may be subjected to meet the claims of his creditors. In Ohio, the law on this subject has been well summarized by Welch, J., in *Hobbs* v. *Smith*:[6] "The law makes what a man *owns*, whether by legal or equitable title, liable to the payments of his debts, unless it be property specially exempted. No legal acumen or skill can evade this policy of the law, and as often as it is attempted it must result in one of two things, either in the devisee taking *nothing* by the will, or in leaving what he does take liable for the payment of his debts. The *liability* attaches to the *ownership*, and it is beyond the power of any draftsman to invent a form of devise or conveyance that shall separate them."

In order to reconcile this apparent anomaly it is necessary to look briefly into the history of the court of chancery. Equity, relieving against the rigors of common law, was quick to come to the aid of a creditor who found himself without other adequate relief, and early in its jurisdiction provided a method by means of which such interests could be reached. As Glenn has said,[7] "It was natural that the Court of Chancery should extend its aid to the creditor who would otherwise have suffered in such cases. This impulse the court recognized almost as soon as the public began to seek its aid, as finally happened in course of time. The ancillary[8] jurisdiction which thus started was invoked by what is known as the judgment creditor's bill. The creditor, who . . . had failed to obtain seizure of his debtor's property under execution, filed in the Court of Chancery a bill asking that court to compel the debtor to turn over to a receiver his interest in the property in question, so that the court could sell it and pay the proceeds thereof to the complaining creditor."

The early equity courts of Ohio, recognizing the inadequacy of the legal remedy in this respect, granted the creditor a remedy through the medium of the creditor's bill.[9] While it is believed that such a bill may

[6] 15 Ohio St. 419 (1864).

[7] Glenn, "Creditors' Rights and Remedies," p. 8.

[8] 1 Bogert, TRUSTS AND TRUSTEES, 546, raises the question at this point: Is the creditor's procedure to reach the *cestui's* interest *truly* within an ancillary jurisdiction of equity, or is it but one phase of trust enforcement, which is one of Chancery's exclusive jurisdictions?

[9] *Parish* v. *Rhodes, et al.*, Wright (Ohio) 339 (1833); *Edgington* v. *Williams, et al.*, Wright (Ohio) 439 (1833); *Shorten, et al.* v. *Woodrow*, 34 Ohio St. 645 (1878); *Hubble* v. *Perrin*, 3 Ohio 287 (1827).

still be maintained under the inherent equitable jurisdiction of our courts,[10] Ohio has enacted a statute, G.C. 11760, which provides that equitable interests shall be reached by proceedings thereunder by the usual code "civil action."[11] This section has been construed as providing the statutory equivalent of a judgment creditor's bill.[12] It is interesting to note at this point that similar statutes in Illinois and New Jersey have been construed as extending only to those trust interests which have been declared by the *cestui*, and a creditor will be turned away in those cases where the trust was established by third parties.[13]

With the exception of Massachusetts and Connecticut,[14] it is universally required, as a condition precedent to the maintenance of the creditor's bill, that the complainant must have first secured a judgment at law. This requirement is consistent with the age-old equity principle that a complainant must first have exhausted his legal remedy before applying to the ancillary jurisdiction of the Court of Chancery. This is the Ohio rule under section 11760, and was also a requirement under the former chancery procedure.[15] Although it was sometimes required, under the old equity practice, that the complainant show both a judgment at law and a return of execution unsatisfied, section 11760 so far modifies that rule that it is only necessary to show that the judgment debtor does not have personal or real property subject to levy on execution sufficient to satisfy the judgment.[16] It will be observed that in the principal case the plaintiffs had met both these requirements.

As is the case with most rules of law, the requirement that the complainant first reduce his claim to a judgment prior to proceeding toward

[10] Ohio Jurisprudence, Vol. 40, Trusts, Sec. 211.

[11] This section provides: "When a judgment debtor has not personal or real property subject to levy on execution sufficient to satisfy the judgment, any equitable interest which he has in real estate, as mortgagor, mortgagee or otherwise, or any interest he has in banking, turnpike, bridge or joint stock company, or in a money contract, claim or chose in action, due or to become due to him, or in a judgment or order, or money, goods or effects which he has in the possession of any person, or body politic or corporate, shall be subject to the payment of the judgment, by action."

[12] *Dunbar* v. *Harrison*, 18 Ohio St. 24 (1868); *Trust Co.* v. *Burkhart*, 17 Ohio N.P. (N.S.) 401 (1914).

[13] Cahill's Ill. Rev. Stats. (1929) Chap. 22, sec. 49; 191 Ill. 598 (1901); 141 U.S. 296, 11 S. Ct. 1005 (1890); N.J. Comp. Stats. (1910) p. 435, sec. 70; 30 N.J.E. 645 (1879); 69 N.J.E. 337 (1905); 73 N.J.E. 590 (1908); 58 N.J.L. 29 (1895).

[14] *Wilson* v. *Martin-Wilson Co.*, 151 Mass. 515, 24 N.E. 784 (1890); *Barry* v. *Abbott*, 100 Mass. 396 (1868); *Huntington* v. *JaJcobs, et al.*, 72 Conn. 45 (1899), where it is said: "It is not necessary in this state for a creditor to obtain judgment before he can maintain a creditor's bill, since the judgment may be rendered in the very action in which the equitable relief is asked."

[15] *Hegler* v. *Grove*, 63 Ohio St. 404 (1900); *Hays* v. *Turnpike Co.*, 1 (H) C.S.C.R. 281 (1885); *Swihart* v. *Shaum*, 24 Ohio St. 432 (1873); *Clark* v. *Strong*, 16 Ohio 317 (1847).

[16] *Card* v. *Walbridge*, 18 Ohio 411 (1849).

a creditor's bill has some exceptions. These exceptions may be classified into three general groups, as follows:

1. Where the creditor is entitled to payment out of a special or trust fund.[17]
2. Where the debtor is deceased or out of the jurisdiction so that a personal judgment cannot be obtained.[18]
3. Where the creditor, by reason of some positive rule of law cannot obtain a judgment and execution, as in the case of married women and minors.[19]

An Ohio case illustrating the first exception is *Darst* v. *Pittsburgh etc. R. Co.*[20] In that case the railroad issued bonds and to secure the payment of principal and interest, executed a deed of trust giving the trustee the right to take possession of the debtor's property in case of default. To provide for this payment the directors of the railroad established a sinking fund, with directions that contributions were to be made to this fund after payment of the expenses of operating and maintaining the road. The plaintiff furnished materials to the railroad, and then brought a bill in equity asking that one of the company's agents be directed to pay over to him certain cash which he had received in the conduct of the business. In granting relief, notwithstanding the fact there had been no prior judgment at law, the court said "the petition is in fact more properly in the nature of a bill to administer a trust or enforce specific performance of a trust duty, or a charge or lien upon a fund, all of which belong to the equity jurisdiction of courts."

Of cases falling within the second and third classes set out above it may be said that the only remedy the creditor has is in equity and consequently he cannot be expected to attempt to secure a judgment at law.

Another question which arises in creditors' suits against a *cestui's* interest is that of parties to the action. It has been held by the Massachusetts court[21] that "if it be made to appear that the . . . property . . . is held by a trustee, it will be necessary for the plaintiff, in order to entitle himself to a decree, to amend his bill by making the trustee a party." Although Ohio has never had occasion to pass on this point, a study of our code provisions would seem to make such a joinder essential to the maintenance of the action,[22] since the trustee holds legal

[17] *Marion Deposit Bank* v. *McWilliams*, 2 Ohio Dec. Rep. 142 (1859); *Darst* v. *Pittsburgh, Ft. W. & C. R. Co.*, 3 Ohio Dec. Rep. 199 (1859).

[18] *Seth-Grosvenor & Co., Adm.* v. *Austin, et al.*, 6 Ohio 104 (1833); *Heaton* v. *Dickson & Trust Co.*, 153 Mo. App. 312 (1910).

[19] *Elliott* v. *Lawhead*, 43 Ohio St. 171 (1885).

[20] 3 Ohio Dec. Rep. 199 (1859).

[21] *Rogers* v. *Ward*, 8 Allen (Mass.) 387 (1864).

[22] G.C. 11255 provides: "Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of a question involved therein."

title. Where the order directs the trustee to pay the creditor the amount of the claim, it is clearly established that the trustee is entitled to indemnity, and may charge the estate with the amount of such payment. It is clear that such charges are properly credited as an expense of administration, and "the expenses of a trustee in the execution of the trust, are a lien upon the estate; and he will not be compelled to part with the property until his disbursements are paid."[23] However, the procedure most likely to be pursued by the trustee in such a case is that of exoneration. Under this procedure the trustee is entitled to demand that the estate assume the burden that has been directed against him, thus relieving him of liability in the matter. Since the creditor's right is derivative and not absolute in this respect (being dependent upon the *cestui's* right to claim the fund) unlike the claim of a party injured by a tort of the trustee, the trustee will be permitted to claim exoneration, thus avoiding any responsibility or risk of loss in the matter through the insolvency of the *cestui.*

Still a further problem may arise in connection with the creditor's right to subject the *cestui's* interest to payment of his claim: namely, what extent or amount of the *cestui's* interest will be taken, the income only, or the entire trust fund including the capital? This will in part depend upon the nature of the *cestui's* interest, *i.e.,* life tenant or remainderman, for in no event will the creditor be entitled to more than the *cestui* could claim. But assuming a case where the *cestui* is to ultimately receive the entire fund, which at the time of the proceeding is being held in trust, it is intimated by Mr. Bogert[24] that this question would be decided by the court in its discretion.

A Kentucky case which supports that position is *Marshall's Trustee* v. *Rash, et al.,*[25] in which it was apparent that the rents and profits from the trust *res,* a farm, would not meet the claim of the creditor within a reasonable time and, consequently, the court ordered a sale of the premises. In many cases, however, a sale of the premises is not advisable as it may result in an unjust loss being thrown upon the *cestui.* This is due to the fact that in many cases the *cestui* will have but a life estate, or an interest conditioned upon some remote or contingent event and it is a difficult, if not impossible task, to place a fair value on that interest without working a sacrifice on the beneficiary. In such a case the court will, upon application, appoint a receiver, who, as an officer of the court, manages the property and turns the rents and profits over to the court to be paid to the creditor, thus avoiding such hardships.[26]

[23] *Rensellaer & S. R. Co.* v. *Miller,* 47 Vt. 146 (1874).
[24] I. Bogert, TRUSTS AND TRUSTEES, 544.
[25] 87 Ky. 116 (1888).
[26] *Showalter, et al.* v. *G. H. Nunnelley Co., et al.,* 201 Ky. 595 (1924).

Up to this point we have been dealing with the ordinary active trust in which the *cestui* has a valid enforceable interest, together with the right to institute proceedings to recover the same in the event the trustee fails or refuses to make regular payments of earnings or principal according to the directions contained in the trust instrument. Mr. Perry, in summarizing the problem of the creditor of the *cestui que trust*, says, "As a rule creditors or persons who have rendered service to the *cestui* may, by proceedings in equity, reach the beneficial interest including the right to future income, unless there is a valid restraint upon alienation or anticipation."[27]

The latter part of this comment will be devoted to a brief outline of those classes of trusts of which Mr. Perry speaks, as imposing some restraint on alienation or anticipation.

Those types of interests wherein the nature of the trust prevents their subjection to payment of the *cestui's* debts may be classified into five general groups as follows:

1. Where the *cestui's* interest is remote, uncertain, or contingent,[28]
2. Where the trustee's power of distribution is dicretionary,[29]
3. Where the trust is designed for maintenance and support of the *cestui*,[30]
4. Where the particular debtor-*cestui* is one of a group of *cestuis* whose interests are inseparable,[31]
5. Where there is a spendthrift trust.[32]

The cases in the first class divide themselves into three groups;

[27] 2 Perry, TRUSTS AND TRUSTEES, Sec. 815a, page 1378.

[28] *Russell* v. *Milton*, 133 Mass. 180 (1882); *Hill* v. *Fulmer et al.*, 39 So. 53 (Miss.) (1905); *Myer* v. *Thompson et al.*, 35 Hun. (N.Y.) 561 (1885); *First National Bank of Spartanburg, S. C. et al.* v. *Dougan et al.*, 250 F. 510 (1918).

[29] *Morris* v. *Daiker Admr. et al.*, 35 Ohio App. 394, 172 N.E. 540 (1929); *Brown* v. *Lumbert, trustee*, 221 Mass. 419 (1915); *Hall* v. *Williams et al.*, 120 Mass. 344 (1876); *Hinckley* v. *Williams et al.*, 1 Cush. (Mass.) 490 (1848; *Wemyss* v. *White, et al.*, 159 Mass. 484 (1893); *Keyser* v. *Mitchell*, 67 Pa. 473 (1871); *Banfield* v. *Wiggin and Trustee*, 58 N.H. 155 (1877); *Wolfman* v. *Webster and Trustee*, 77 N.H. 24 (1913); *Parker, trustee* v. *Carpenter, et al*, 77 N.H. 453 (1915); *Raymond* v. *Tiffany, et al*, 112 N.Y.S. 252 (1908).

[30] *Fortner* v. *Phillips*, 124 Ark. 395 (1916); *Holmes, et al.* v. *Bushnell, et al.*, 80 Conn. 233 (1907); *Baker* v. *Brown, et al.*, 146 Mass 369 (1888); *Mitchell* v. *Choctaw Bank*, 107 Miss. 314, 65 So. 278 (1914); *Chase* v. *Currier*, 63 N.H. 90 (1884).

[31] *Brooks* v. *Raynolds*, 59 F. 923 (1893); *Bell* v. *Watkins*, 82 Ala. 512 (1886); *St. John, Admr.* v. *Dann, et al.*, 66 Conn. 401 (1895); *The Tolland County Mutual Fire Insurance Co.* v. *Underwood, et al.*, 50 Conn. 493 (1883); *McCann* v. *Taylor, et al.*, 10 Md. 418 (1857); *Brown* v. *Postell*, 4 Rich. Eq. (S.C.) 71 (1851); *Roberts, et al.* v. *Gall*, 35 Vt. 28 (1861); *Damhoff* v. *Shambaugh, et al.*, 200 Iowa 1155 (1925); *Russell, et al.* v. *Meyers, trustee*, 202 Ky. 593 (1924); *Rudd* v. *Hagan*, 86 Ky. 159 (1887); *Talley, et al.* v. *Ferguson, trustee, et al.*, 64 W. Va. 328 (1908).

[32] *Congress Hotel Co.* v. *Martin*, 312 Ill. 318, 143 N.E. 838 (1924); *Rose* v. *Southern Mich. Nat. Bank*, 255 Mich. 275, 238 N.W. 284 (1931); *Flanagan* v. *Olderog*, 226 N.W. 316, 118 Neb. 745 (1929); *L'Hommedieu* v. *L'Hommedieu*, 98 N.J. Eq. 554, 131 A. 302 (1926); *Keating* v. *Keating*, 182 Iowa 1056, 165 N.W. 74 (1917).

(a) those where the *cestui's* interest is dependent upon the fulfillment of a condition precedent, (b) those involving mere future or contingent interests, and (c) those which are apt to be defeated by a condition subsequent. In cases involving a condition precedent the courts invariably deny the creditor relief; thus where a testator left his property in trust for his son who was to have the principal of the fund "when he shall become financially solvent and able to pay his just debts and liabilities," relief was denied.[33] There is some split of authority with regard to mere future or contingent interests with the majority denying relief on the theory that it is inequitable for the creditor to seize and destroy the property of the *cestui* which is so uncertain and contingent that it cannot be fairly appraised or sold. In a typical case[34] where there was a direction to hold a fund in trust for the testator's widow for life, and on her death to divide the fund into as many parts as there were children of their marriage then living, or having died, who had issue then living, and to hold such parts in trust for them, it was held that during the life time of the widow, a creditor of one of the testator's sons could not subject his interest to payment of the debt, the court saying, "his (the son's) interest, if vested, is uncertain and contingent," and not therefore subject to payment of his debts.[35] Of this class of cases Perry says, "A remote, uncertain, contingent, beneficial interest cannot be reached."[36] The principal case is an illustration of the attitude of the courts with respect to cases where the *cestui's* interest is subject to the fulfillment of a condition subsequent. Where, as in that case, the interest may be wholly divested by the occurrence of the future event (unprofitable business for three years), the courts will deny relief. But where the happening of the event operates merely to decrease the *cestui's* interest the courts will grant the creditor relief and subject the interest to the payment of the claim. Such a case was presented in the Federal Court[37] where the testatrix devised her property to her daughter in trust "for herself and her children, born and to be born," and a creditor sought to reach the daughter's interest. It was held there that "the possibility of after born children lessening the interest of each beneficiary does not convert the *cestui's* estate into a bare contingency."

Of the cases falling within the second class Mr. Bogert says,[38] "If

[33] *Hull* v. *Farmers Loan and Trust Co.*, 245 U.S. 312, 38 S. Ct. 103 (1917).

[34] *Russell* v. *Milton*, *supra*, note 28.

[35] Creditors were successful in *Thompson* v. *Zurich State Bank*, 124 Kans. 425, 260 Pac. 658 (1927), contingent on living until brother comes of age. *Dickison* v. *Ogden's Ex'r.*, 89 Ky. 162, 12 S.W. 191 (1889), contingent on surviving parent. *Reilly* v. *Mackenzie*, 151 Md. 216, 134 Atl. 502 (1926), son's interest dependent upon surviving mother.

[36] 2 Perry, TRUSTS, Sec. 815a, page 1380.

[37] *First National Bank of Spartanburg, S. C., et al.* v. *Dougan, et al.*, *supra*, note 28.

[38] Bogert, TRUSTS AND TRUSTEES, 550.

the trust is for the purpose of enabling the trustee to apply the income of the trust *res* to the use of the beneficiary and is wholly discretionary, so that the *cestui* may receive nothing at all, the creditors of the *cestui* have no rights in the trust property or trust income prior to application by the trustee." An Ohio case illustrating this principle is *Morris* v. *Daiker*[39] in which the settlor devised her property in trust for her children "to be paid at convenient intervals in the trustee's discretion and in such amounts as he may deem proper." It was held that a "trust of income and capital payable within the trustee's discretion does not pass a vested interest to the beneficiary that may be reached by a judgment creditor."

The rule seems to be logically sound since the fundamental principle behind the creditor's subjecting the *cestui's* interest is the alienability of that interest and if the power of the trustee is discretionary, so that the *cestui* may get nothing, he has nothing which he may alienate. There is the further cogent reason for the rule, as stated in *Keyser* v. *Mitchell*,[40] "To subject the income to an execution would end the trustee's discretion and defeat the testator's intent." Maryland has held in connection with such cases, that where it is made to appear that the trustee unreasonably withholds payment with the purpose of defeating the creditor's claim, the court will permit the creditor to maintain a bill to reach the fund.[41] A few states have allowed the creditor relief in spite of discretionary clauses in the trust instrument.[42]

The courts will deny relief to the *cestui's* creditors in the third class of cases on the theory that a trust for the support or maintenance of the *cestui* is one which is personal in character and cannot be made the subject of a creditor's bill. It has been held that the *cestui* of such a trust has no interest which he can alienate and consequently there is nothing for the creditor to receive.[43] A case which aptly states the rule is *Holmes, et al.* v. *Bushnell, et al.*[44] where it is said, "The beneficiary of a testamentary trust fund which is to be expended by the trustee only for his personal comfort and support cannot pledge the future income of the fund to the payment of his business losses; and therefore, if such a pledge be attempted by him, a court of equity will not enforce it, nor in any other way undertake to divert to business creditors of the beneficiary what was clearly intended and is needed to secure him the necessaries of life."

[39] 35 Ohio App. 394, 172 N.E. 540 (1929).
[40] 67 Pa. 473 (1871).
[41] *Pole* v. *Pietsch, et al.*, 61 Md. 570 (1883).
[42] *Marshall's Trustee* v. *Rash, et al.*, 87 Ky. 116 (1888).
[43] *Fortner* v. *Phillips*, 124 Ark. 395 (1916).
[44] 80 Conn. 233 (1907).

Cases falling within the fourth class refuse to give the creditor relief on the ground that the interest of the *cestui*, being one of a group, is inseparable; and in the absence of a provision in the trust instrument permitting partition will hold that it would be violative of the settlor's intent to impose a lien on the entire estate for the benefit of a creditor of a single *cestui*. Of course this rule has no application where the debt was undertaken for the benefit of the entire group; consequently trusts for the benefit of one person and his family may be subjected to payment of such obligations. It might be noted in this connection that the most common cases involving this point are those in which trusts have been created for some designated person "and his family."

The cases falling within the fifth class, namely, spendthrift trusts, are those in which the settlor has anticipated the problem of creditors of the *cestui* and has sought to protect the estate against their claims. Since the subject of spendthrift trusts constitutes a large field of the law of trusts it is not feasible in this comment to do more than indicate some of the characteristics and problems surrounding them. For an admirable treatment of the subject, the reader is referred to Professor Griswold's work[45] where he sets forth the subject in detail together with the case history of this type of trust in each of the states.

A spendthrift trust may be briefly defined as an equitable interest, usually for life (though it may be created for a term), the alienability of which is restrained. No definite wording is necessary for their creation, but as a general rule there is usually a provision directing the trustee to pay the income "into the hands" of the *cestui*. The *cestui* of such a trust may enjoy all the benefits of the ordinary active trust, since his interest is absolute, but at the same time his interest is immune from the claims of his creditors.

The most serious question concerning this type of trust is that of its validity. They have never been recognized in England[46], and the American jurisdictions have divided on the issue. Those jurisdictions refusing to sustain them do so because of the alienability restraint; those which uphold them do so on the theory that the settlor is entitled to do that which he wishes with his property.[47]

As indicated by Professor Griswold, the Ohio cases are in confusion, and the problem has never been squarely presented in our courts. The

[45] Erwin N. Griswold, "Spendthrift Trusts" (1936); See also an article by White, "Restraints on Alienation and Indestructible Trusts in Ohio" 2 U. of Cin. L. Rev. 333 (1928).

[46] The English Courts have recognized an exception in those cases where a married woman is the *cestui* of such a trust.

[47] A factor which is never considered when a devise conflicts with the rule against perpetuities, etc.

strong language used by Welch, J., in *Hobbs* v. *Smith*[48] would seem to reject them, and a still greater obstacle opposed to them would seem to be the wording of the Code provision 11760 discussed above, which makes *any* equitable interest of a judgment debtor subject to the claims of his creditors.

The distinctions should be noted at this point between the spendthrift trust (where recognized), the trust for support and the discretionary trust. In all three cases the interest of the *cestuis* is immune to the claims of creditors, but for different reasons. In the case of the spendthrift trust immunity is the result of an express provision in the instrument which prevents alienation; the *cestui's* interest in a trust for support is, by its nature, incapable of being subjected to creditors' claims; and the discretionary trust affords the creditor no relief because the beneficiary has no property in the fund which he could compel the trustee to pay to him. For a detailed discussion of these distinctions the reader is referred to the *Restatement of Trusts.*[49]

Professor Griswold points out, as has been indicated in the foregoing part of this comment, that the Ohio courts have refused relief to the creditor in those cases involving discretionary trusts, but this must not be taken as indicating a favorable attitude toward spendthrift trusts because of the distinctions observed above. The following quotation from *Ohio Jurisprudence*[50] serves also to support the contention advanced above: "As to the right of a creditor to subject the income of a trust established for the benefit of the judgment debtor, it seems to be definitely established by the Ohio decisions that if the beneficiary of the trust has any vested separable interest therein, so that he could by action compel the payment to himself by the trustee of any portion of the income, such interest or portion would be within the reach of his creditors in a creditors' suit. *In other words, the creditors of the beneficiary have such rights, but only such, against the trust estate as the beneficiary himself might exercise.*"

In light of what has been said in this comment it appears that the principal case was properly decided on its facts. The interest there created in the defendant was not such an absolute, certain and unconditional one as to justify the court's granting the plaintiffs their requested aid in execution. The interest of the defendant was subject to the operation of a condition subsequent and apt to be totally defeated by the trustee's exercise of the power to liquidate the business following three year's unprofitable operation. Of course, had there been an amount due

[48] 15 Ohio St. 419 (1864).
[49] RESTATEMENT, TRUSTS, secs. 154, 155.
[50] Vol. 11., Creditors' Suits, Sec. 23, page 1002.

and owing the defendant by the trustee at the time of the proceeding the court would have been justified in awarding that sum to the plaintiffs. In such a case the defendant would have had a vested separable interest. However, the facts indicated that at the date of filing the petition the defendant's salary account was overdrawn, and there was no assurance that the trust would continue in the future.

CHARLES A. REYNARD

WORKMEN'S COMPENSATION

COURSE OF EMPLOYMENT—DEATH OF AGGRESSOR IN AN AFFRAY

The Lick Run and Clay Company, a mining corporation in Athens county, was involved in a miner's strike due to its "open shop" policy. The decedent, Peter J. Merz, although owner of one-fifth of the stock of the company and president of its board of directors, worked in the mine as an ordinary employee, "filling coal." That he was an employee of the company is admitted by both parties. During the strike the company had placed the decedent in charge of men to protect its property. While off duty but on his way to the office of the company to make a report, decedent was killed in a fight with his son-in-law, James McManaway. It appears that the trouble between the two men was a result of the labor dispute at the mine, McManaway being a supporter of the union. It also appears that the decedent had been under the influence of liquor and had engaged in an argument with, and had threatened, McManaway at his home before the two men encountered each other on the road where the killing took place, one and a half miles from the mine. The application of the decedent's widow for compensation was denied by the Industrial Commission. On appeal to the common pleas and court of appeals her application was upheld. The Supreme Court, however, reversed the decision saying, "such death was not compensable, there being no direct causal connection between the employment and death." *Merz* v. *Industrial Comm.*, 134 Ohio St. 36, 15 N.E. (2d) 632, 11 Ohio Op. 414 (1938).

The Constitution of Ohio, Art. II, Sec. 35, provides as follows: "For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, *occasioned in the course of such workmen's employment*, laws may be passed establishing a state fund. . . . " The Ohio General Code, Sec. 1465-68, provides: "Every employee . . . who is injured, and the dependents of such as